

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 13-05

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

Notice of Proposed Rulemaking

COMMENTS

SUBMITTED BY THE

TRANSPORTATION INTERMEDIARIES ASSOCIATION

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The Transportation Intermediaries Association (TIA) submits these comments on the Commission's Notice of Proposed Rulemaking (ANPRM) regarding Ocean Transportation Intermediary Licensing and Financial Responsibility Requirements, and General Duties.

IDENTITY AND INTEREST OF THE TRANSPORTATION INTERMEDIARIES ASSOCIATION

TIA is the professional organization of the \$162 billion third party logistics industry. TIA is the only U.S. organization exclusively representing transportation intermediaries of all disciplines doing business in domestic and international commerce. TIA is the voice of transportation intermediaries to shippers, carriers, government officials, and international organizations.

TIA members include approximately 1300 motor carrier property brokers, surface freight forwarders, international ocean transportation intermediaries (ocean freight forwarders and NVOCCs), air forwarders, customs brokers, warehouse operators, logistics management companies, intermodal marketing companies, and motor carriers.

TIA is also the U.S. member of the International Federation of Freight Forwarders Associations (FIATA), the worldwide trade association of transportation intermediaries representing more than 40,000 companies in virtually every trading country.

THE ROLE OF TRANSPORTATION INTERMEDIARIES

Transportation intermediaries or third party logistics professionals act as the "travel agents" for freight. They serve tens of thousands of shippers and carriers, bringing together the transportation needs of the cargo interests with the corresponding capacity and special equipment

offered by rail, motor, air, and ocean carriers. Transportation intermediaries play a key role in cross border transportation.

Transportation intermediaries are primarily non-asset based companies whose expertise is providing mode and carrier neutral transportation arrangements for shippers with the underlying asset owning and operating carriers. They get to know the details of a shipper's business, then tailor a package of transportation services, sometimes by various modes of transportation, to meet those needs. Transportation intermediaries bring a targeted expertise to meet the shippers' transportation needs.

Many shippers in recent years have streamlined their acquisition and distribution operations. They have reduced their in-house transportation departments, and have chosen to deal directly with only a few "core carriers." Increasingly, they have contracted out the function of arranging transportation to intermediaries or third party experts. Every Fortune 100 Company now has at least one third party logistics company ("3PL") as one of its core carriers. Since the intermediary or 3PL, in turn, may have relationships with dozens, or even thousands, of underlying carriers, the shipper has many service options available to it from a single source by employing an intermediary.

Although intermediaries are described in the business and trade literature as "non-asset-based," many intermediaries in fact own some assets, broadly defined. These include local pickup and delivery vehicles, over the road trucks, warehouses and cargo consolidation centers, complex computer and telecommunications systems, dispatching centers and sales offices.

Past studies have shown that there are thousands of companies in the intermediary industry. Despite this fragmentation and intense competition, approximately 80% of the NVOCC

business is controlled by 20% of the companies. Most of those 20% are very large companies that move many thousands of containers annually. The rest are small to medium size companies, many owned and run by their founders, who aspire to the success of their larger counterparts, and compete head-to-head with the majors in niche or specialized markets where they can gain a competitive edge.

SHIPPERS AND CARRIERS RELY ON TRANSPORTATION INTERMEDIARIES

Shippers rely upon transportation intermediaries to arrange for the smooth and uninterrupted flow of goods from origin to destination, and many carriers rely upon them to keep their equipment filled and moving. It is, therefore, difficult to describe a typical intermediary, or to divide them into fixed categories. Most in international trade offer a mix of land, sea, and air services, customs brokerage (either directly or through subcontractors), warehousing, consolidation and deconsolidation, electronic tracking and tracing and trade advisory services (advice on letters of credit, commercial shipping terms, export administration requirements, transportation security and the like) adapted to the needs of their specific customer base or market niche.

PROPOSED RULEMAKINGS ON OCEAN TRANSPORTATION INTERMEDIARIES LICENSING AND FINANCIAL RESPONSIBILITY REQUIREMENTS

As the Commission is aware, the TIA filed comments related to the Advanced Notice of Proposed Rulemaking that was released on May 21, 2013. The TIA had strong feelings regarding several aspects of the proposal, and is grateful that the Commission chose to reconsider their proposal which would have been both unnecessary and burdensome to the

industry. Specifically, the proposals would have been costly to TIA's Ocean Transportation Intermediaries (OTI) members.

The Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 (OSRA), the statute under which the FMC operates, was the outcome of four years of public debate that centered around, among other things, what the FMC's function should be in a largely deregulated transportation industry. With the passage of OSRA (46 USC § 40101), Congress gave the FMC a new policy mandate:

(1) establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs;

(2) provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices;

(3) encourage the development of an economically sound and efficient liner fleet of vessels of the United States capable of meeting national security needs; and

(4) promote the growth and development of United States exports through competitive and efficient ocean transportation by placing a greater reliance on the marketplace.

The Commission's decision not to proceed with the most problematic proposals from the ANPRM, and the proposals included in the current NPRM, are a welcome step in the right direction and are more consistent with the mission laid out in OSRA. The current NPRM is a marked improvement over its predecessor in providing clearer guidance on issues affecting OTI licensing and reducing some costs to small business. However, the current NPRM could be improved by removing or amending several proposals which increase the regulatory burden on the private sector for minimal public benefit. The most pressing issues in the NPRM relate to

license renewal and the requirement that information on claims against OTIs be reported to the FMC.

LICENSE RENEWAL

The NPRM carries over from the previous ANPRM a provision that would require the renewal of licenses and registrations, but reduces the proposed frequency of the renewal from every two years to every three. TIA remains concerned with the proposal in the ANPRM, that the Commission's effort to create a database to provide "ongoing certainty to the licensee as to its status" addresses neither a real public confusion nor an existing need for current licensees.

However, the TIA agrees with other industry groups that the Commission should have current information about the companies it regulates. At the very least, the Agency should have accurate information concerning the identity of a licensee's (or a foreign based registered NVOCC's) officers and directors, as well as concerning the surety that is providing the required financial security. Any such license renewal must be made to be user-friendly, so that collecting information on the industry that is useful to both the FMC and to the licensees is not a burdensome or time-consuming process.

The Moving Ahead for Progress in the 21st Century Act (MAP-21) laid out a five-year renewal schedule for FMCSA to license motor carrier property brokers and domestic surface freight forwarders. FMCSA also currently requires domestic transportation intermediaries to renew their information biennially on the Form MCS-150, which can be completed online in less than an hour. Such a process for the FMC would allow both the FMC and FMCSA to have a relevant database of active domestic truck brokers, customs brokers, and OTIs. TIA strongly

encourages the Commission to work to harmonize their proposals with existing law to streamline regulations for the transportation intermediary sector as a whole. As suggested by other commenting parties, it may be simpler, easier and less expensive to require biannual updating of essential information rather than a formal license renewal process.

FILING OF CLAIMS AGAINST OTIS

The TIA agrees with the elimination of the ANPRM proposal that would have required the sureties, vessel carriers, and marine terminal operators to report any claims or court actions against OTIs to the Commission for publication on its website. Nonetheless, the current NPRM from the Commission still seeks to require information from financial responsibility providers regarding their experience with current and resolved claims. Such claims often arise in connection with bankruptcies. TIA remains concerned about the Commission's attempt to introduce additional red tape into an already complicated process. TIA believes that by inserting the Commission into this process, the door is opened to endless disputes regarding whether the proper claimants were paid and whether the Commission had accurate information. TIA does not believe this is a well-developed or practical proposal.

TIA agrees with other industry groups that additional questions must be answered before moving forward with this proposal. Those questions include: What is the reason for this requirement? What does the Commission intend to do with that information? Will the information remain confidential, even if there would be no immediate transparency through any public website? Does the existence of a claim or even payment of a claim by the surety have any relevance to the fitness of an OTI?

Even assuming there is some basis for the agency to have this data, there is nothing in the NPRM to indicate whether this will be protected from public disclosure. As transportation industry groups pointed out to the Commission in comments on the ANPRM there is no necessary correlation between the mere filing of a claim with a surety and the character of an OTI, so that the publication or other release of this information may cause inappropriate competitive injury to the subject of any claim. Without additional justification, and answers to these important questions, TIA opposes the provision.

RESTRICTIONS ON AGENTS OF OTIs

Notwithstanding limitations placed upon the Commission's jurisdiction to impose licensing and other restrictions on agents of licensed OTIs in *Landstar Express America Inc. v. Federal Maritime Commission* (D.C. Cir. 2009), in several places the Commission continues to attempt to regulate the activities of such agents without clearly defining what activities they may, or may not, perform without a separate license. For example, proposed section 515.3 states that in the United States "only licensed OTIs may act as agents to provide OTI services for [foreign] registered NVOCCs." The regulations contain no definition of "OTI services" that would specify what services would trigger this requirement. Moreover, since OTIs are defined in section 515.2(m) to include both export ocean freight forwarders and NVOCCs, the proposed rule could be read to require foreign registered NVOCCs dispatching cargo into the United States to use licensed U.S. export freight forwarders (or licensed NVOCCs) to provide destination services on import shipments—for at least some unspecified services. It is unclear how the Commission plans to enforce this rule, and what legal authority it has to require foreign registered OTIs to employ licensed OTIs in the United States.

The proposed restrictions on advertising in section 515.31(j) suffer from a similar lack of clarity in the use of the undefined term “OTI services.” The proposed rule could be read to prohibit *any* advertising of OTI services, even as an agent, unless the advertiser has a license from the FMC. In other words, the proposed rule would presume that any entity advertising to provide undefined “NVOCC services” must have a valid license, even if it is acting as agent for a licensed NVOCC, despite the clear holding in *Landstar* that “The Shipping Act imposes licensing on OFFs and NVOCCs, and on OFFs and NVOCCs alone. Agents providing NVOCC services for licensed NVOCC principals are not NVOCCs (or OFFs) solely by virtue of being agents of NVOCCs.” If the Commission’s concern is to prohibit advertising by unlicensed NVOCCs providing NVOCC services in their own name, then it should say so and the wording of the rule should be amended accordingly. The proposed rules would also benefit from addition of “OTI services” as a defined term.

CONCLUSION

The TIA appreciates the Commission’s willingness to reconsider the comprehensive revisions to OTI regulations which were set forth in the 2013 ANPRM. When Congress passed MAP-21 in 2012, it recognized the horizontal, integrated nature of our global supply chain, and the need to avoid stovepipe regulations. As the Commission works to update and modernize its own regulations, TIA strongly encourages that any changes ensure harmony with existing regulations for domestic transportation intermediaries.

While TIA still has concerns about specific provisions in the currently pending NPRM, many of the most problematic proposals that created onerous requirements for an industry made

up mainly of small businesses have been dropped. As a result, TIA hopes to address the remaining issues with the NPRM by making small revisions as suggested in these comments, promoting U.S. maritime trade with streamlined, consistent regulations that encourage small businesses and economic growth.

Respectfully submitted,

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