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OFFICE OF THE SECRETARY  
FEDERAL MARITIME COMM

August 12, 2013

Karen V. Gregory, Secretary  
Federal Maritime Commission  
800 North Capital Street NW  
Washington, DC 20573-0001

**Re:** Docket No. 13-05, Comment on Amendments to Regulations Governing Ocean Transportation Intermediary Licensing and Financial Responsibility Requirements, and General Duties.

Dear Madame Secretary:

Enclosed please find the comments of Falcon Global Edge, Inc. to the above-referenced Advanced Notice of Proposed Rulemaking.

Very truly yours,

Jacob R. Fisher  
General Counsel & Secretary

 ORIGINAL

BEFORE THE  
FEDERAL MARITIME COMMISSION

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OFFICE OF THE SECRETARY  
FEDERAL MARITIME COMM

DOCKET NO. 13-05

AMENDMENTS TO REGULATIONS GOVERNING OCEAN TRANSPORTATION  
INTERMEDIARY LICENSING AND FINANCIAL RESPONSIBILITY  
REQUIREMENTS, AND GENERAL DUTIES

COMMENTS OF FALCON GLOBAL EDGE, INC.

COMES NOW, Falcon Global Edge, Inc. (“Falcon”), Ocean Freight Forwarder, OTI Number 022165F, via its General Counsel and Secretary Jacob R. Fisher, to offer comments the above-referenced Advanced Notice of Proposed Rulemaking (ANPRM). Falcon is a multi-modal logistics company that has been in business since 1987. It is a member of the National Customs Brokers and Forwarders Association of America (NCBFAA), the Air Forwarders Association (AFA), the Coalition of New England Companies for Trade (CONNECT) and other trade associations. As a smaller business facing continuing strong economic headwinds in the already extremely competitive and heavily regulated logistics and transportation industry, we have serious concerns about the above-referenced regulatory revisions proposed by the Commission. We offer the following comments on certain of the proposed revisions.

**1. New definition of “Qualifying Individual” and revised §515.11(a)(2) and (b)(3).**

Comments:

(1) (§515.11(a)(2)): A major barrier to entry into becoming an OTI is the acquisition of the required Qualifying Individual (“QI”). As per the application process, the applicant must have acquired a QI candidate prior to actually submitting the application. Even after submitting the application, it is up to the Commission’s discretion in determining whether the proposed QI

is acceptable. For a small company, this is a tremendous commitment of monetary resources: it has to have hired a new employee who has at least facially the minimum required experience, and is capable of being made a corporate officer (*see* §515.11(b)(3)). This is a major gamble for a small company, particularly if the proposed QI has not been qualified as a QI previously but otherwise *appears* to have the appropriate character. The applicant is essentially “rolling the dice.”

This proposed requirement will exacerbate this difficulty by reducing the “universe” of available QI candidates to those who are currently working for, or who have worked for in the past, an operating, licensed OTI. Falcon is concerned that this “universe” is already small, and that this proposed change will inadvertently encourage the “poaching” of QIs from one OTI to another, to the disadvantage of smaller, less well funded OTIs. Even without such a “poaching” scenario, it could have the effect of increasing the salary and benefit premiums these QIs could attain in the marketplace (simple supply and demand), to the disadvantage of smaller OTI applicants, who could not keep up with such an “arms race.” Falcon recommends that the Commission keep the QI’s qualification factors more broad and inclusive of relevant experience, of course ultimately subject to the Commission’s discretion.

(2) (§515.11(b)(3)): Falcon does not see the correlation between the QI being a corporate officer (or equivalent for other business organization types) and that person functioning as an effective manager and overseer of OTI operations. The Commission should provide any data, findings or reports showing that the QI also being a corporate officer (or functional equivalent in another business organization type) makes a quantifiable difference in their ability to effectively manage and oversee OTI operations.

**2. License Renewal, §515.14(c) and (d).**

Comment: The new proposed license renewal process is unnecessary. The Commission states that this new requirement is “intended to ensure that information essential to the Commission’s oversight of OTIs is verified periodically.” However, OTIs are already under a legal duty to update the Commission in the event of material changes as set forth in §515.20. Requiring a renewal process unnecessarily duplicative and is yet a further disproportionate burden on OTIs, in exchange for the Commission obtaining a mere change of address or change of email point of contact. Falcon recommends that the burden remain on the OTI to periodically review its internal compliance with the Commission’s requirements, and update the Commission (as it is already under a duty to do) in accordance with §515.20. With due respect, Falcon does not feel that a *mechanical* renewal process, which in any event does not “trigger a detailed Commission review,” is a wise allocation of the Commission’s resources.

**3. Hearing Procedures, §515.17.**

Comment: Falcon is concerned that the “streamlining” of the hearing process for denials, revocations or suspensions will eviscerate the due process appropriate and necessary for OTIs to thoroughly vindicate their arguments on appeal. The proposed expedited appeal process, with the entire decision being based on written submissions, provides precious little opportunity for the OTI at issue to respond to the BCL’s action. In addition, there appears to be no ability for the OTI to challenge the Commission’s claims of legal privilege or other evidentiary claims. Further, it appears that the hearing officer’s discretion itself is being severely curtailed with respect to his or her ability to query the parties in a meaningful way (i.e. no oral argument, either in person or telephonically).

#### **4. Increased Bond Requirements, §515.21**

Comments:

(1) The Commission has not demonstrated that the increase in bond amounts will in any significant way relieve the shipping community of a perceived “problem.” As the Commission submits in the ANPRM, there are approximately 5,900 OTIs – each handling hundreds if not thousands of shipments per year. The two occurrences cited in the ANPRM where the bond was insufficient do not provide a strong factual justification for a blanket increase in the bond amount requirements. The Commission should at minimum release statistical based figures for all claims against OTI bonds, per year, where the bond amount was insufficient to pay claims. Only such an analysis would provide firm evidence of a “need” for the blanket increase. Indeed, it appears that the Commission has not in fact engaged in any such analysis: in the narrative to the proposed changes to §515.23, the Commission requests that bond sureties themselves provide data on claims made against bonds over the past several years, and the degree of which a claim or claims may have exhausted the bond. Falcon believes that such an analysis will show that the two matters highlighted by the Commission are isolated instances. In fact, Falcon consulted with an insurance industry representative who stated that, in 16 years in the industry, he had seen only two claims against OTI bonds. Both were made by ocean carriers (not aggrieved shippers) and both resulted from clerical errors made by the OTI, ultimately resulting in those bond claims being withdrawn. This industry representative has approximately 50 OTI clients, ranging from small 3-4 person operations all the way to those with \$100 million or more in revenues per year.

(2) The specific mention of two instances where claims against the bond were only satisfied to, for example 6.1% in the Global Ocean case, offers the public facts presented in a vacuum without context. In reality, with the exception perhaps of Household Goods shippers,

most shippers who engage OTIs are sophisticated commercial operations. As such, it is their responsibility to obtain adequate cargo insurance to cover loss or damage to their goods in transit. By increasing the bond requirements, the Commission is – by rulemaking – interfering with the normal allocation of risk necessary to the ordered dealings between commercial parties in the marketplace. A bond is not a form of insurance. If a sophisticated commercial operation fails to obtain adequate insurance for its products, it is their negligence for assuming such risk.

In addition, the bond increases proposed would make no meaningful difference to the claimants in the two matters cited. For example, in the Global Ocean Freight matter, the proposed increase would have made the amount available to the excess 69 claimants from \$38,829.88 to \$63,829.88, increasing their pro rata share from 6.1% to 10% (from \$562.75 to \$925.07, a difference of merely \$362.32).

(3) With regards to §515.21(a)(4), Falcon believes that the Commission’s logic is faulty with respect to its position that the requirement that the bond automatically replenish following a claim would not increase costs to OTIs. What the Commission is proposing is increasing the risk exposure of all bond sureties over the long run. This will cause the number of sureties to decrease if it is perceived that the exposure risk is rising. Simple market economics dictate that fewer sureties in the market, coupled with greater risk, will make the cost of such bonds increase. Contrary to the Commission’s conclusion, this will increase the barrier to entry for OTIs.

**5. Publishing of Claims by Carriers and Sureties to the Commission, §515.23(e)**

Comment: Falcon disagrees that the publication of adverse actions against an OTI would have the desired effect of being informational only. On the contrary, it would be highly commercially damaging to an OTI particularly where the merits of the action may be spurious or frivolous. The Commission, as an agency of the federal government, brings an imprimatur of

legitimacy to anything it chooses to publish – quite likely swaying shippers away from OTIs even where the claims or actions have no merit. Publishing of this sort of information creates “shades of gray” that detract from the Commission’s mission of certifying OTIs to the shipping public as one of two things: licensed or unlicensed.

Valid claims are addressed and paid by Falcon itself or via its insurance program. Indeed, there have never been any claims against Falcon’s bond. Thus it would not appear that any information relevant to Falcon as an OTI would be published and/or would be of any use to the shipping public or in furthering the Commission’s purpose.

**6. Paperwork Requirements, §515.31(j)(1) & (2).**

Comment: Falcon agrees that it is fundamental to proper ocean transportation that OTIs not publish false or misleading information about their services. However, the proposed §515(j)(1) & (2) are seemingly without substantive justification. The Commission cites as justification its own conclusions in the Fact Finding 27 Final Report, which by its own admission applied narrowly to its findings with respect to unlicensed OTIs who move household goods. The conclusions contained in the Fact Finding 27 report are based addressing the needs of aggrieved “[c]onsumers, particularly inexperienced international shippers, [being] easily deceived by these advertisements into using the services of unlicensed, unbonded operators.”

First, Falcon questions whether requiring existing licensed, bonded and otherwise compliant OTIs to have an additional paperwork requirement (or, indeed any new requirement) would somehow address the issue of unlicensed, unbonded and unscrupulous operators preying on unsophisticated household goods shippers. Logically, the former would seem to have nothing to do with the latter.

Second, the Commission acknowledges that the issues addressed by Fact Finding 27 (i.e. unsophisticated international household goods shippers being preyed on by unlicensed and unbonded operators) are limited to that aggrieved subgroup, but then makes the remarkable and wholly unsupported statement that, “these problems are *common* with respect to OTIs transporting general cargo and consolidated shipments that may include household goods. Therefore, the proposed rule would apply this requirement to all OTIs (emphasis added).” The Commission offers not a shred of evidence that these problems are in fact “common;” indeed, if the Commission has undertaken such an analysis, it must provide some factual proof for this new requirement. In the absence, any new requirements in this section that are based on Fact Finding 27 Final Report must be narrowly defined and limited solely to OTIs that handle household goods, in particular and perhaps exclusively those OTIs engaged in the “barrel trade.”

Respectfully submitted:



Jacob R. Fisher  
General Counsel & Secretary

August 12, 2013