

**BEFORE THE
FEDERAL MARITIME COMMISSION
DOCKET NO. 13-05**

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

ADVANCE 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 Advance Notice of Proposed Rulemaking (ANPRM) regarding Regulations Governing 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.

IT IS UNCLEAR WHAT “CHANGES IN INDUSTRY CONDITIONS” THIS ADVANCE NOTICE OF PROPOSED RULEMAKING IS INTENDED TO ADDRESS

TIA is concerned that the Commission is putting forward this ANPRM without adequately considering whether the regulation of Ocean Transportation Intermediaries (OTIs) needs any change at all. Compliance with the new requirements in the ANPRM will cost TIA’s OTI members both time and money, and it is unclear why this additional regulatory burden is necessary.

Prior to the ANPRM being published, TIA was invited to meet with Commission staff to discuss this rulemaking. In January of this year, TIA sent four representatives to meet with Commission staff. That meeting lasted over an hour, during which time TIA raised concerns about several proposed regulatory changes the Commission planned to include in the ANPRM. In addition to the specific issues addressed below, the concerns that TIA raised during that meeting focused on the stovepipe manner in which the Commission was proposing to regulate OTIs, without regard to other agencies regulating transportation. Today's 3PL company is integrated and operates in a multimodal fashion in both domestic and international commerce. TIA expressed concern that the Commission's proposed regulatory changes were not being harmonized with other similar regulations affecting other modes of transportation.

TIA's reservations were reiterated by letter to Chairman Lidinsky in February of this year. In that letter, TIA repeated its request that the Commission consider how these regulations fit into the overall transportation regulatory environment. To develop an integrated approach, TIA requested that the Commission organize an inter-agency meeting of the Commission, the Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA), the Department of Defense, and the trade associations involved in household goods movements. The Commission did not organize that meeting and, despite the repeated feedback from TIA that the ANPRM was out of touch with the business realities of TIA members, the Commission has pressed on. The result is regulation ill-suited to assist the industry it regulates.

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, 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.*

46 USC § 40101 (emphasis added). That policy statement reflects a hard won public consensus culminating in an Act of Congress.

Regrettably, based on the proposals in the ANPRM, it appears the Commission has lost sight of its mandate to promote competition and U.S. exports “with a minimum of government intervention and regulatory costs.” Instead, the Commission seeks to increase regulation of the industry while simultaneously decreasing private sector participation in the rulemaking process.

In regard to this ANPRM, TIA repeatedly asked the Commission and staff to explain which members of the public were demanding these changes to the regulation of OTIs. It has become clear that the justification for this ANPRM is not that industry or the public deem it appropriate but rather that the FMC *feels* it is necessary. TIA is extremely disappointed that its feedback and concerns were not incorporated into the ANPRM, and now TIA must once again rehash these

issues. The ANPRM reflects an unwillingness to govern by consensus and inclusion and reflects an agency that is losing touch with the public it is meant to serve.

**THE COMMERCIAL INDUSTRY REQUIRES A DIFFERENT APPROACH THAN THE CONSUMER
HOUSEHOLD GOODS MOVING INDUSTRY**

Much of the discussion and justification in the ANPRM for the Commission to take action relates to the consumer segment of the household goods industry, not the commercial industry which will be most affected by the proposed rules. Indeed problems in the household goods moving industry are well documented and being addressed by the FMCSA and the Department of Defense. TIA urges the Commission not to act in a vacuum, but to work with its sister agencies to adopt a unified, government-wide approach to problems in the consumer household goods moving industry.

TIA also urges the Commission to separate these two industries in the ANPRM. TIA is not aware of any commercial shippers complaining to the Commission about commercial-oriented OTIs and their advertising practices. Indeed, Fact Finding Investigation No. 27 (FF 27) was solely focused on consumer household goods movements. It was only after FF 27 that the Commission's staff appears to have broadened the findings to include the commercial industry and commodities other than household goods.

As pointed out earlier in these comments, through the OSRA, Congress instructed the Commission to take a deregulatory approach to the industry. Instead of a "minimum of government intervention and regulatory costs," the Commission is proposing to increase its regulation of the commercial industry based on the unique problems of the consumer household goods moving industry.

**AN INTEGRATED TRANSPORTATION INDUSTRY REQUIRES CONSISTENT REGULATION ACROSS
DIFFERENT MODES OF TRANSPORTATION**

While earlier debates over the role of government regulation in the ocean transportation sector and the extent to which market forces should be relied upon are still relevant, the ANPRM raises a new area of debate in an ever integrating industry. The ANPRM continues to govern a 21st century industry with a 20th century mindset. The ANPRM ignores the fact that 3PLs are quickly becoming one-stop-shops, breaking down silos, and integrating services. As the global economy becomes even more competitive, 3PL's will routinely offer door-to-door service, using licenses and permits from several government agencies, wherever those doors may be located.

Congress recognized this integrated logistics system when it harmonized the regulation of domestic 3PL's (property brokers and freight forwarders licensed by the FMCSA) with the regulation of OTIs. Specifically, Congress raised the financial security requirement for domestic 3PL's to equal the minimum financial security required by NVOCCs (from \$10,000 to \$75,000). And the House Transportation and Infrastructure Committee has established a special Freight Subcommittee in recognition of the need to have government policy look beyond regulatory silos and look to the way American companies move their freight in import, export, and domestic transportation. While Congress and the private sector are working together to address the challenges of tomorrow, the FMC is fighting the battles of yesterday, rather than dealing with the challenges of the 21st century logistics industry. To serve the public interest, the FMC needs to adopt goals consistent with the Shipping Act's statement of policy. Additionally, the FMC should adopt policies and regulations consistent with recent Congressional recognition of the integration of the logistics industry across modes and government agencies. Congress recognized that American businesses need more streamlined, consistent regulation to encourage

growth—not burdensome, agency-specific regulations. Specifically, TIA suggests the FMC undertake the following recommendations:

1. The Commission should focus on real world, practical problems. The problems should be clearly identified based on facts not beliefs and opinions. Solutions should then be targeted at the problems and take into account the FMCSA, the Shipping Act and recent acts of Congress as references. For example, many of the “barrel trade” consumer protection and fraud issues are also being addressed by the FMCSA, and a coordinated government response to these problems would be more effective than dealing with them piecemeal.
2. The Commission should design internal administration to be externally focused on identifying these problems and developing solutions “with a minimum of government intervention and regulatory costs.” Concerns internal to the FMC should not be driving either the policy setting or the rulemaking process.

Specific Concerns

TIA remains uncertain as to the rationale for these new regulations, and urges the Commission to reconsider the decision to go forward with them. The comments that follow address some flaws in the proposed rule that absolutely must be corrected. The specific concerns below highlight examples where the ANPRM seeks to fix problems that, from the industry’s perspective, don’t need to be fixed. In particular, TIA is concerned about the following specific regulatory changes proposed in the ANPRM:

Financial Responsibility: The ANPRM seeks to increase the minimum financial responsibility requirement for OTIs. The revised section 515.21 would increase the minimum financial responsibility for ocean freight forwarders from \$50,000 to \$75,000; from \$75,000 to \$100,000 for licensed NVOCCs; from \$150,000 to \$200,000 for registered, unlicensed NVOCCs; and from \$3,000,000 to \$4,000,000 for group financial responsibility. Last year, the President signed into law P.L. 112-141 (MAP-21, the current two-year transportation bill). One of the components of that law increases the minimum financial security requirements for domestic

brokers and freight forwarders, the surface transportation counterparts to OTIs, to \$75,000. (These entities are subject to regulation by the FMCSA.) That requirement will take effect on October 1, 2013. One of Congress's rationales for settling on \$75,000 for domestic brokers and freight forwarders was to harmonize the FMCSA's financial security levels with the levels currently required by the Commission. If the Commission allows these proposed increased responsibility levels to go into effect, it will frustrate Congressional intent to create unified, financial responsibility levels across government agencies.

Moreover, the Commission's stated rationale for these increases is that the current "levels have proven inadequate to provide security sufficient to cover claims against OTI bonds." In support of that, the Commission cites two (2) cases over the past fourteen years since the OSRA went into effect in which the current financial responsibility levels have been inadequate. The purpose of these financial responsibility requirements has never been to cover 100% of claims, and the citation to two examples is a dubious rationale for increasing the minimum financial responsibility for all of the over 5,000 regulated OTIs, at great additional cost to the industry and ultimately to users of ocean transportation services and the consumer.

Registration Renewals: The ANPRM adds a new requirement related to registration at 515.14, mandating OTIs submit renewal applications every two (2) years. The Commission states that "this feature provides ongoing certainty to the licensee as to its status." However, the Commission does not provide information indicating that this "ongoing certainty" is something that licensees actually desire or that there is real public confusion regarding OTI status necessitating the every-other-year registration. Instead, this biennial renewal injects unnecessary and additional bureaucracy into a system that has been serving the industry just fine. Renewal can also be expensive and time-consuming, especially if there is any change from the original

application and if submission of supporting documentation in the same detail as the original application is required. *See* 515.14 (proposed).

License Number on Communications: The ANPRM also adds a requirement that an OTI include its name and FMC license number on all communications. This new requirement is especially problematic for larger firms that may operate an OTI as one division of a much larger operation. The proposed regulation states “[a]n OTI shall include its name and license or registration number on all shipping documents and in all communications (including all written, printed and electronic communications).” For small firms that have businesses focused exclusively on providing OTI services, this requirement may be more manageable. However, larger, more diverse firms have a number of business divisions and employees that deal with these matters on a sporadic basis because their primary duties do not involve OTI services. Requiring OTIs to adopt internal systems to ensure that anytime an employee is communicating on behalf of the OTI they comply with this new requirement is unnecessary and expensive. This proposed requirement is a prime example of a “solution” that does not address a clearly defined problem brought to the Commission by the public it is meant to serve.

Payment of Claims Against OTIs: The ANPRM seeks to amend section 515.23 to create a priority system for claims made against OTI bonds. The proposal would require bond issuers to pay shippers and consignees before paying common carriers and commercial creditors when claims are made. This proposal will complicate the claims process, slow down the claims payment process, and create uncertainty and confusion among claimants. Indeed, since a typical claims scenario involving 100% depletion of the bond arises from an OTI bankruptcy, TIA questions whether the FMC can, by regulation, override the priority of claims among secured and unsecured creditors under the bankruptcy law. The Commission cites one (1) example where a

claimant was paid in full, leaving a large number of other creditors to squabble over the remainder of the bond. This is typically the kind of dispute that bankruptcy courts resolve.

Notably, the ANPRM seeks information from financial responsibility providers regarding their experience with the current claims process and whether there are other examples of inadequate payments. TIA is concerned that the Commission did not already have that information before proposing this new regulation. This lack of data suggests that the Commission issued the ANPRM without fully considering whether this new regulation is even necessary.

The proposed regulation would require financial responsibility providers to provide notice to the Commission when claims or lawsuits are filed and, before the payment of claims could go forward, the provider would be required to consult the Commission's website regarding pending claims. This places significant responsibility on the Commission to ensure its records are constantly updated and accurate, and increases administrative costs to the surety—costs that they will almost certainly pass on to the OTIs in the form of increased premiums.

As noted, these claims often arise in connection with bankruptcies. TIA is concerned about the Commission's attempt to introduce additional red tape into an already complicated process. TIA believes that claims prioritization should be left to the expertise of the bankruptcy courts instead of the Commission's proposed administrative regime. 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.

This ANPRM increases government regulation and its related costs, burdens U.S. foreign commerce and small businesses, and is inconsistent with the Commission's statutory mandate.

To serve the public interest, the FMC needs to limit its regulations to those needed to meet the goals of the Shipping Act's statement of policy. Additionally, the FMC should implement policies and goals consistent with recent Congressional recognition of the integration of the logistics industry across modes and government agencies. Congress recognized that American businesses need more streamlined, consistent regulation to encourage growth, not burdensome, agency-specific regulations. Because no clear public need has been identified, TIA is concerned that the Commission has failed to consider whether these proposed regulations serve the purposes set forth in the Shipping Act's statement of policy. To proceed with a rulemaking without such consideration will result in the promulgation of unnecessary regulations that will stymie industry growth and efficiency. By spending more on unnecessary regulatory requirements, TIA members will have less to spend on expanding their businesses, increasing exports and creating the jobs so sorely needed in today's economy.

TIA urges the Commission to take a step back and reconsider whether a comprehensive revision to its OTI regulations, a rewrite that adds many new and onerous requirements to an industry made up mainly of small businesses, serves the public interest or the policy of the Shipping Act to promote U.S. maritime trade "by placing a greater reliance on the marketplace" and "with a minimum of government intervention and regulatory costs."

COMMENTS OF THE TRANSPORTATION INTERMEDIARIES ASSOCIATION

Respectfully submitted,

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