

Before the  
FEDERAL MARITIME COMMISSION

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Amendments to Regulations Governing Ocean  
Transportation Intermediary Licensing and  
Financial Responsibility Requirements, and General Duties

FMC Docket No. 13-05

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Comments of Ocean Carrier Agreements

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The ocean carrier agreements listed in Attachment A hereto and their member lines (collectively, the “Ocean Carrier Agreements”) hereby submit these comments on the Advanced Notice of Proposed Rulemaking (“ANPR”) issued by the Federal Maritime Commission (“FMC” or “Commission”) in the above-captioned docket.<sup>1</sup>

As ocean common carriers, the members of the Ocean Carrier Agreements have a direct and substantial interest in certain aspects of the regulations governing their customers. Accordingly, they welcome this opportunity to comment on the ANPR. As set forth in greater detail below, the Ocean Carrier Agreements have concerns about those aspects of the ANPR relating to financial responsibility requirements.

**1. The Authority Of The Commission To Adopt The Proposed Priority System Is Questionable**

If adopted, the ANPR would adopt a priority system for claims against the financial responsibility instruments posted by ocean transportation intermediaries. This system, as proposed, would require that all claims by shippers and consignees be paid before any claims by an ocean carrier, marine terminal operator or other creditor are paid. The Ocean Carrier

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<sup>1</sup> Many of the carriers participating in these comments are also members of the World Shipping Council (“WSC”), and support the comments filed by the WSC in this docket.

Agreements believe that the establishment of this priority system exceeds the Commission's authority.

It is well-established that an administrative agency such as the Commission has only that authority which is granted to it by Congress. See, e.g., *Lyng v. Payne*, 476 U.S. 926, 933 (1986) (“an agency’s power is no greater than that delegated to it by Congress”); *Agro Dutch Industries Ltd. v. U.S.*, 508 F.3d 1024, 1033 (Fed. Cir. 2007) (“an agency literally has no power to act...unless and until Congress confers power upon it”), citing *La. Public Service Commission v. FCC*, 476 U.S. 355 (1986).

Under 46 U.S.C. §40902(c), the Commission:

shall prescribe regulations for the purpose of protecting the interests of claimants, ocean transportation intermediaries and surety companies *with respect to the process* of pursuing claims against ocean transportation intermediary bonds, insurance or sureties through court judgments.

(emphasis added). The proposed tier system goes well beyond the process of pursuing claims against OTI bonds as authorized by the statute. It would regulate the substantive ability of claimants to pursue claims against such bonds, and establishes substantive conditions for various claimants, for which no statutory authority exists.

That the ANPR exceeds the Commission's statutory authority is supported by the legislative history of the law which imposed the financial security requirements on OTIs. In adopting that law, Congress noted that the object of the legislation was to “compel NVOCCs to comply with the applicable law to the benefit of all who deal with them.” H.R. Rep. No. 101-785 (1990), p. 3 (emphasis added), cited in *Axess International, Ltd. v. Intercargo Insurance Company*, 183 F.3d 935 (9<sup>th</sup> Cir. 1999). Giving priority to some at the expense of others does not benefit all who deal with an OTI. In fact, it harms those in the second tier.

In light of the foregoing, whatever the merits of the priority system (which, as noted below, the Ocean Carrier Agreements believe to be non-existent), the FMC has no authority to pursue this change in its regulations, which is *ultra vires* and unlawful.

## **2. The Priority System Is Not Necessary Or Appropriate**

Even assuming *arguendo* that the Commission had authority to adopt a priority system for the payment of claims, there is no reason for it to do so. The justification for the priority system offered in the ANPR consists of two cases (Pacific Atlantic Lines, Inc. and Global Ocean Freight, Inc.) in which not all claimants asserting claims against the bonds of two specific OTIs were paid. If these are the only two cases in which such a problem was presented, then the tiered priority system must be considered an overreaction to an infrequent problem and is not necessary. If the problem is more common (and the Commission offers no evidence to this effect), then the proposed priority system would not solve the problem and is inappropriate.

In the Pacific Atlantic and Global Ocean cases, the total amount of claims exceeded the amount of the bond by approximately \$474,000 and \$597,000, respectively. Even under the proposed priority system, a substantial number of claimants would have received little or no payment. Thus, in addition to being beyond the Commission's statutory authority, adoption of a priority system appears to be unlikely to address the problem identified by the Commission.<sup>2</sup>

## **3. The Proposed Priority System Is Unfair To Ocean Carriers And Presents Practical Problems**

The Ocean Carrier Agreements have reviewed the comments of the World Shipping Council in this proceeding and endorse those comments in their entirety. However, there are

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<sup>2</sup> In addition, the ANPR would eliminate the requirement that additional financial security be maintained for each unincorporated branch office of an OTI. This requirement is dismissed as "burdensome" without any explanation. In fact, this requirement provides additional protection for claimants that would help ameliorate the issues raised by the two cited cases.

some additional practical concerns presented by the ANPR's proposed tiered system of claim priorities which the Ocean Carrier Agreements wish to highlight.

Before addressing those practical concerns, it must be noted that the proposal is fundamentally unfair to ocean carriers. The only justification offered by the Commission for placing ocean carriers in a less advantageous position than any other creditor of an OTI is that carriers are in a better position to protect themselves through the credit terms they offer. This rationale is contrary to the Shipping Act requirement that the financial security posted by OTIs be available to protect all who deal with such entities. See 46 U.S.C. § 40904(b)(1) and (b)(3)(requiring that the financial security "shall be available to pay any penalty assessed under section 41109 of this title or any order for reparation issued under section 41305 of this title" and to pay "any judgment for damages against on ocean transportation intermediary arising from its transportation related activities"). Moreover, the Commission offers no evidence to support its contention that carriers are better able to protect themselves through credit terms than other entities. Even if this statement were correct, adoption of the proposed tier system would create an incentive for ocean carriers to offer less favorable credit terms to their NVOCC customers, thus increasing the cost of doing business for those customers. This increase in cost could hamper the ability of NVOCCs to create U.S. jobs and could also increase the costs of shipping for U.S. exporters. More generally, it improperly injects the Commission into the commercial relationship between carriers and their NVOCC customers.

Having said this, the first practical problem arises under proposed 46 C.F.R. § 515.23(f)(2), which would prohibit the surety from paying any claim within the five month period from the date it receives a claim if two or more claims are made or noticed. It is not clear why the Commission has chosen five months as the waiting period to which a surety is subject

prior to paying any claims. This would add an element of delay to the present claims process to the detriment of claimants, sureties and OTIs, all of whom have an interest in seeing claims resolved as promptly as possible. At the same time, this period appears to be too short for a potential claimant to complete litigation against an OTI and obtain a judgment. In other words, there is nothing in the ANPR that provides any justification or rationale for why this period of time is appropriate or in the interest of any party.

Moreover, the interaction between the aforementioned waiting period and the proposed priority system creates further delay and unfairness. As noted above, under proposed 46 C.F.R. § 515.23(f)(2) and (f)(3), no claim can be paid for five months once multiple claims have been made (or a single claim exceeding 20% of the bond has been made). Because the ANPR would require that priority be given to claims by shippers and consignees (proposed 46 C.F.R. § 515.23(c)(1)), a surety would appear to be precluded from paying a valid court judgment obtained by a tier 2 creditor (e.g., an ocean carrier) while litigation of a claim by a tier 1 claimant (e.g., a shipper) is on-going. In other words, if an ocean carrier and a shipper both file claims against the same OTI on or about the same date and the ocean carrier obtains a judgment shortly thereafter but the shipper does not, the ANPR would apparently require the surety to refrain from satisfying the final judgment of the ocean carrier while the litigation involving the shipper is pending. This is neither equitable nor sensible.

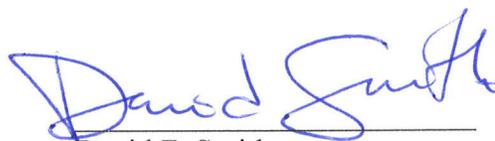
#### **4. Other Concerns**

The Ocean Carrier Agreements have two other concerns about the ANPR. First, certain changes to the regulations are not reflected in the terms of the financial security instruments. More specifically, proposed 46 C.F.R. §515.21(a)(4) would require an OTI to restore its financial security to the full amount within a specified time after that security has been drawn down.

While this is a commendable improvement on existing regulations, this requirement is not reflected in the bond form. If the regulations require OTIs to “top up” their financial security after it has been drawn upon to satisfy a claim but the surety contract as embodied in the bond does not contain that requirement, which governs? This could raise issues under surety law. The Ocean Carrier Agreements urge the Commission to revise the various financial security forms to reflect any changes in the regulations in order to avoid future disputes arising out of differences between the regulations and those forms.

Second, while proposed 46 C.F.R. §515.21(a)(4) would require an individual OTI to restore its financial security to the full amount within a specified time after that security has been drawn down, that same requirement does not appear to apply to OTIs covered by group financial responsibility. See proposed 46 C.F.R. §515.21(b). The Ocean Carrier Agreements assume this was an oversight, and urge the Commission to make any “topping up” obligation applicable to group financial responsibility instruments in the same manner as it applies to the financial security instruments of individual OTIs.

Respectfully submitted,



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August 29, 2013

ATTACHMENT A

Transpacific Stabilization Agreement

American President Lines, Ltd. and APL Co. PTE Ltd. (operating as a single carrier)  
COSCO Container Lines Company Ltd.  
Evergreen Line Joint Service Agreement, FMC No. 011982  
Hanjin Shipping Co., Ltd.  
Hapag-Lloyd A.G.  
Hyundai Merchant Marine Co., Ltd.  
Kawasaki Kisen Kaisha, Ltd.  
A.P. Moller-Maersk A/S  
Nippon Yusen Kaisha  
Orient Overseas Container Line Limited  
Yangming Marine Transport Corp.  
CMA CGM S.A.  
Mediterranean Shipping Company S.A.  
Zim Integrated Shipping Services, Ltd.  
China Shipping Container Lines (Hong Kong) Company Limited and  
China Shipping Container Lines Company Limited (operating as a single carrier)

Caribbean Shipowners' Association

Seafreight Line, Ltd.  
CMA CGM SA and CMA-CGM The French Line  
Seaboard Marine, Ltd.  
Zim Integrated Shipping Services, Ltd.  
Tropical Shipping and Construction Company Limited  
Crowley Caribbean Services LLC  
King Ocean Services Limited  
Hybur Ltd.

Australia and New Zealand-United States Discussion Agreement

Hamburg-Sudamerikanische Dampfschiffahrts-Gesellschaft KG  
Hapag-Lloyd AG  
ANL Singapore PTE Ltd. and CMA CGM S.A. (acting as a single party)  
MSC Mediterranean Shipping Company S.A.  
A P Moller Maersk AS trading under the name of Maersk Line

Central America Discussion Agreement

King Ocean Services Limited  
Crowley Latin America Services, LLC  
Seaboard Marine, Ltd.  
Dole Ocean Cargo Express  
Great White Fleet Liner Service Ltd.

ATTACHMENT A (Cont'd)

West Coast of South America Discussion Agreement

Compania Chilena De Navegacion

Compania Sud Americana De Vapores, S.A.

Hamburg-Südamerikanische Dampfschiffahrtsgesellschaft KG

Seaboard Marine Ltd.

Trinity Shipping Line, S.A.

Mediterranean Shipping Company, SA

South Pacific Shipping Company, Ltd. d/b/a Ecuadorian Line

Frontier Liner Services, Inc.

King Ocean Services Limited, Inc.

Interocean Lines, Inc.

CMA CGM S.A.