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**BEFORE THE
FEDERAL MARITIME COMMISSION**

DOCKET NO. 13-05

**Comments on
Amendments to Regulations Governing 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 Advance Notice of Proposed Rulemaking under Docket No. 13-05. 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 28 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.

While we applaud the Federal Maritime Commission's ("Commission") recognition that industry conditions have changed, processes can be streamlined and regulatory burdens can be removed, many of the proposed regulations will not accomplish that goal. Instead, the proposed regulations will add additional costs and inefficiencies to an already highly regulated industry that is trying to survive in a very cost competitive world economy.

Definitions

We do not see the need to add a definition of the word “advertisement” or the related new provisions requiring an OTI’s name and license or registration on all advertisements. In today’s world, the form and delivery of communications are changing rapidly with new technologies. For the Commission to define an advertisement so broadly could lead to unintended consequences by including almost any public mention of an OTI in ways that cannot be foreseen. For example, wouldn’t third party Twitter feeds highlighting an OTI’s services with the aim of increasing its sales be considered a “written or electronic communication” and thus must include full OTI details? Under the Commission’s definition almost every mention of an OTI can be interpreted as an advertisement. Compliant OTIs providing true information of their services can be at fault for not including their name and license or registration number on any single communication or that of its agents deemed to be promotional. The Commission is involving itself in commercial issues that are outside its jurisdiction.

Nor is there a need to define the term “qualifying individual.” The requirements for a qualifying individual (“QI”) are already set out in Part 515.11. This section requires the qualifying individual to be more than an employee and to be either an owner or active corporate officer with a minimum of three years of experience and sufficient character.

Licensing Requirements and Eligibility

The Commission states that the proposed changes are only to clarify section 515.11 (a) and reflect current practice. It is not clear that this is the case. The proposed regulations seem to treat the owners and officers as separate from the qualifying individual by adding that the QI be “responsible for general supervision” of the OTI operations. In the current regulations, the qualifying individual must be an active owner, partner, or officer. This means that individual has the authority to commit the corporation and act in its name. Corporate liability rests with the qualifying individual. As an officer of the corporation the QI is responsible to ensure that the OTI is compliant. Hands-off management will put the company at risk. To start defining the degree of supervision in a QI’s job description is to micro-manage the OTI and raise questions of what constitutes “general supervision.” Would an experienced and knowledgeable compliance officer that sets procedures but is not operationally involved on a daily basis be allowed to act as a qualifying individual? We believe the additional suggested regulation is unnecessary and will lead to more confusion.

We do not understand why the Commission is declaring a 5% ownership threshold defining a principal shareholder. Is it just to make certain that the character of those with more than 5% ownership is unblemished? Is the issue is the extent to which an equity owner can influence operations? It would seem that any equity owner or combination of owners could influence operations. There should be no exceptions. If exceptions are allowed for equity owners such as mutual funds than it should also be extended to non-operationally active shareholders in smaller privately-held companies. Equity owners such as mutual funds can exert undue influence by threatening to withhold financial support or setting growth and profit targets that would encourage companies to cut corners. We suggest that the concept of principal shareholders be removed.

Adding “relevant and diverse” to the type of experience required for the qualifying individual is unnecessary. The Commission has indicated that it looks at the corporate applicant “as a whole.” The application for the license will include the full experience of the qualifying individual from which the Commission will determine regulatory understanding and operational competency. To define further the type of experience is unnecessary and will lead to further questions concerning the degrees of relevancy and diversity.

We are concerned by the list of information to be considered in determining the character of an OTI and ask that the Commission carefully evaluate all circumstances related to issues of concern. Individuals and OTIs may, for example, be the subject of unwarranted liens, court or administrative judgments that take time to correct. The Commission has indicated it is interested to consider “all information relevant to the determination of whether the applicant has the necessary character to render OTI services.” This should include explanations or evidence that can allow areas of apparent concern to be put in proper perspective.

With the suggested addition of 515.14 (c) and (d), licenses shall be issued and renewed for only two years. Currently, licenses once issued are considered valid until revoked or voluntarily returned. The present regulations require that OTIs timely file or inform the Commission of changes to the information on record. There is no need to establish a new comprehensive system of license renewal and to charge a yet-to be-determined fee for the process. The following is further pertinent.

The information to be provided on the new form “APPLICATION FOR RENEWAL OF AN OCEAN TRANSPORTATION INTERMEDIARY LICENSE” is basic. The requirement to update the Commission already exists. If the reason for a license renewal process is to assist the Commission in maintaining accurate records of licensed OTI’s, this can be accomplished in a simple way that will be

more costs-effective for the Commission. We suggest that the Commission allow the OTI to access a profile summary online and check either “no change” or submit the information to be changed. In reality, the information should be accurate as the OTI should have submitted any changes as they took place. We would suggest that once every three years would be sufficient.

There should not be a need to provide a recent Certificate of Good Standing. It takes additional time to produce and involves payment of fees. Commission resources are better spent elsewhere than in maintaining these records. Compliant OTIs should not have to prove they are in good standing with their state governments and certainly not every two years. It is an unnecessary bureaucratic burden. Furthermore, if for some reason they are not in compliance with requirements of other government entities, they must answer to those authorities. The Commission has not demonstrated the need to require the periodic submission of a Certificate of Good Standing for purposes of fulfilling an OTIs responsibilities.

Although the Commission states that the “renewal process is not intended to result in a re-evaluation of a licensee’s character” the specific mention that such a review can occur at time of renewal suggests that it could be used as just such a vehicle. We are disturbed that an OTI without a record of complaints against it or with an otherwise good history could perhaps have its license renewal denied as a result of undue importance placed on one of the criteria used in the subjective determination of good character. This opens the door to potential abuse.

The proposed regulations would have foreign-based NVOCCs wishing to be licensed establish a physical presence in the U.S. and hire employees. This should be considered carefully. If one of the goals of the regulations is to encourage compliance it is in the interests of the industry to encourage more foreign based NVOCCs to obtain licenses. A foreign based licensed NVOCC can carry out its obligations just as effectively without a physical office as with one. The costs to establish such an office plus possible home country tax implications could be a barrier to some, particularly the smaller, OTIs. If this becomes a requirement, other countries might follow and insist that U.S. OTIs establish their own offices overseas with their own employees. We would suggest the removal of the requirement that the U.S. based legal corporate entity needs to have their own employees. This would increase the costs for U.S. OTIs attempting to expand their activity. We agree that any agent which a foreign NVOCC uses to provide OTI services in the U.S. must be licensed.

In 515.12 (c) when a portion of documentation for a license application is deemed to be incomplete, we suggest that the Commission provide the applicant with sufficient time to provide it.

There may be some documents that take a long time and the application should not be closed due to circumstances beyond the control of the applicant. To terminate an application automatically because documents are not provided by an arbitrary date would be counterproductive. The Commission would lose all the time spent in reviewing that application. It would have to spend that time again when the application is re-submitted. We would hope the Commission would amend this section to add that the applicant could provide the Commission with a reasonable alternative date. Thus, it would read "Failure of the applicant to submit the identified materials by the established date or to provide for a reasonable alternative date when the requested documentation could be obtained and submitted will result in the closing of its applications without further processing."

The proposed regulations covering the revocation or suspension of a license has been expanded to include some new reasons which seem excessive, vague or subject to arbitrary interpretation. We do not see the purpose for expanding the reasons for revoking a license. It is a very serious matter to revoke or suspend a license, which can threaten a company's very existence. The reasons for revocation should remain as currently listed in 515.16 as they address the critical responsibilities of an OTI. Proposed additions 515.16 (a) (5), (7), (9) and (10) should not be added as the Commission has not provided a justification that is related to the critical responsibility of an OTI throughout the transportation industry, which is largely involved with the movement of commercial cargo.

Is the revocation or suspension of a license commensurate with the failure to renew on time? Notwithstanding that licenses should not have to be renewed, the seriousness of a revocation does not make sense in terms of an administrative infraction of missing a deadline, if it is properly corrected thereafter.

Item 7 makes licensed NVOCCs responsible for vetting all other NVOCCs that tender it cargo. An NVOCC would have to obtain proof that the tendering NVO is licensed or registered, has a bond in place and publishes a tariff. First this will be extremely time-consuming for the receiving NVOCC. It would have to re-verify the information with every shipment as the status could change from day to day. This would be completely impractical and add an unbearable cost both for the NVOCC requesting the information and the NVOCC providing it. There is a presumption that if an NVOCC accepts cargo from an unlicensed NVOCC that it does so willingly and knowingly. Given the tremendous volume that is moved by OTIs it is possible that an NVOCC may unknowingly move cargo from unlicensed NVOCCs who appear to be legitimate. NVOCCs should not be subject to

losing their license because they believed the shipper is compliant. Under the proposed regulations, it seems the burden of proof will be for the NVOCC to demonstrate that a shipper is compliant and not that the shipper just appeared compliant so the freight was accepted and processed according to the regulations. The Commission needs only to show that a shipment was handled for an unlicensed NVOCC and it is presumed that the receiving NVOCC did so knowingly. For this, an NVOCC could lose its license without any preliminary attempt to educate, fine or penalize an NVOCC to bring them in to compliance. An NVOCC should not have to be responsible for the lack of compliance of its customers. The Commission already has the regulatory tools to declare a person in violation if it is operating without being properly licensed or registered, bonded, or with a tariff in place

Item 9 is unnecessary, because if it becomes a regulation that foreign based licensed NVOCCs must maintain offices, this violation would be covered under 515.16 (1).

Item 10 is extremely disturbing because it will allow licenses to be denied to new applicants for “any act, omission or matter.” This is far too vague and suggests that the Commission is looking to expand its authority for any reason that cannot otherwise be defended or explained.

In addition, 515.16 (a) (9) should also be modified to remove the requirement of a “ bona fide” employee for the reasons stated earlier in these comments.

Proposed changes to streamline appeal procedures for denial of OTI license applications and revocation or suspension of OTI licenses grant too much decision-making power to one hearing officer and risks compromising an OTI's right to a full review and due process. At present, the rules for the appeal procedure are complete and provide for a full hearing including oral arguments and questioning. The process described in 515.17 provides only for written arguments to be submitted in response to a notice. The hearing officer will make a determination based on the written response to the notice and supporting documentation. There is no opportunity to ask or answer questions that may arise from review of the materials or opportunity to appeal the decision that rests with one hearing officer. When the serious issue of revocation of a license, which can threaten a company's existence, is at stake the OTI should have full legal rights to defend itself. The streamlined procedures being proposed could lead to a rush to judgment and perhaps a wrong decision with severely damaging consequences.

Changes in organization

Under the proposed regulations, the time period within which to notify the Commission of changes in the qualifying individual due to retirement, resignation or death is reduced from 30 to 15 days. It may not be possible to replace a qualifying individual on such short notice and particularly if the circumstances requiring the change are the result of sudden unplanned events such as death. We suggest that at a minimum the 30 day time allowance remain unchanged.

Financial Responsibility Requirements

The need for a suggested increase in the minimum financial responsibility amounts from \$50,000 to \$75,000 for an ocean freight forwarder; from \$75,000 to \$ 100,000 for an NVOCC; from \$150,000 to \$200,000 for a registered NVOCC is based on two instances when large claims far exceeded the amount of the bonds. Documentation of the incidence and amount of claims against all NVOCCs and forwarders in relation to the total freight moved by nearly 6,000 licensed and registered OTIs was not disclosed. It would be useful to know what that incidence and amount is in order to understand the true risk for all industry participants and to determine if there is a real need to raise the financial responsibility requirements. We believe that only a very small portion of all bonded NVOCCs and forwarders have ever had a claim presented to the bonding company. We believe the reason for this is that legitimate claims against OTIs are normally handled and resolved through commercial business practices, the way any dispute is resolved between customers and vendors. More documentation is needed to understand if the risk has truly increased and thus the bond amounts should be raised. The two examples cited showed such a high amount of claims that the proposed increase would have been meaningless to help provide additional financial relieve to those damaged claimants. We recommend that the financial responsibility amounts not be changed until more research is conducted to clearly demonstrate the widespread usefulness of such a change.

The potential for negative consequences arising from the increased bond amount is greater than the possible benefits. The higher bond requirements could act as a barrier for new OTI entrants into the industry. Financial market credit standards have tightened over the past five years. Institutions are less willing to lend and are demanding more security. This means that the financial strength of an OTI must now be higher than ever before even at the present bond levels. Leaving the current levels unchanged actually represents an increase, particularly for new entrants. Experienced and responsible individuals who would otherwise qualify to obtain an OTI license may be discouraged

or denied the opportunity to start new companies and provide additional healthy competition which would benefit the shipping public.

The new proposed requirement to restore financial amounts within 60 days or have an OTI license revoked when claims have been paid or a bond is terminated does not take in to consideration circumstances where an OTI is creditworthy but needs more time to restore financial amounts. The proposed language states that “No new OTI business shall be accepted until such time as the full amount of the financial responsibility has been restored” means that a responsible OTI with a good history would be forced to stop accepting any new business if a bonding company imposes additional security. Since this proposed regulation has severe consequences for the continued operation of an OTI, we suggest further study be done before any change is considered. The Commission will always have the option to revoke a license if the OTI’s financial obligations are not honored.

Claims Against an Ocean Transportation Intermediary

We do not believe that a system establishing priority of claims by type of claimant made against OTI bonds is fair to all industry participants. The Commission has not provided sufficient justification for this. The entire argument for treating shippers ahead of carriers rests on an assumption that carriers are in a better position to limit their losses. We do not understand nor agree with this and find it discriminatory. Every participant in the commercial market accepts a degree of risk when they extend credit or choose a service provider. The decisions they make determine the extent to which they knowingly expose themselves to loss. If shippers are given preferential treatment they will actually be less inclined to exercise as much diligence in choosing an OTI.

The proposed requirement for common carriers, marine terminal operators and financial responsibility providers to submit notice of court actions or claims for publishing on the Commission’s website is very dangerous and could lead to the posting of misinformation that will cause economic harm to those OTIs. It appears that the Commission feels the very involvement of an OTI in any court action suggests a problem that should be known by shippers. OTIs can easily be dragged in to court actions because their name appears on many documents and are added to the defendant list, only to be removed at a later time when it becomes apparent that they are not involved. Furthermore, it is possible that companies are sued as a strategy to extract payment even when it is not warranted.

Such disputes are complex and should remain and be resolved in the courts. A mere notice with no further explanation will be wrongfully interpreted on the Commission's website. If the purpose of this informational listing is to provide advance notice that a claim may be brought against the bond of an OTI, it suggests that there is a high correlation between all court cases involving all OTIs and subsequent claims against OTI bonds. This defies logic and we suggest that this reporting requirement be dropped.

Concerning the system for a pro-ration of claims payouts, we believe that the Commission should complete its fact finding and review of hard data before proceeding with proposed regulations.

Agency Relationship

Under the proposed regulations, an OTI must ensure that its name, licensee or registration number would now have to be indicated on the shipping documents issued by its agent when acting on its behalf. This is impractical and unnecessary. For one shipment, an OTI can legitimately subcontract with multiple parties, such as truckers, warehouses, container freight stations, breakbulk agents, steamship lines, stevedores, terminal operators, rail roads, etc. These companies work on behalf of numerous other OTIs. It is unlikely that when they issue their documents on behalf of one OTI they will include the required information. When, for example, a warehouse receipt is issued, would the receiving warehouse have to show the OTI's license number and name on their own document issued on behalf of the OTI? The computer systems of the various sub-contractors might not even be able to accommodate this additional information. Nor is it necessary. The customer of the OTI contracts with the OTI. They rely upon it to fulfill its agreed service. The customer is usually not interested in even receiving a copy of all the documents and communications used to move their freight. The OTI is responsible under agency law to its customer for the actions of its agents. Thus, it is not necessary for the Commission to dictate the form and documentary detail required to validate this.

The Commission made reference to problems discussed in its Fact Finding 27 related to a specific segment of the industry handling consumer household freight movements. These problems should be addressed separately and not solved by changes in regulations for the majority of commercial goods constituting most of the freight moved by OTIs. Due to the multitude of agents involved, the proposed changes would be nearly impossible to implement with full participation and add to the time and cost in moving freight. The Commission should insure that the requirement does

not apply to independent contractors performing services for OTIs, and that at most it would only apply to situations where agents are acting exclusively for a specific OTI.

Forwarder and Carrier Compensation

We do not believe that there is a necessity for electronic verification by forwarders to carriers that forwarding services have been provided. This information is provided when the freight is booked. Any corrections that need to be made are handled in the normal course of business between the OTI and the carrier. To impose an additional bureaucratic requirement on the industry would simply add another layer of time and costs. Current regulations are in place to remedy any wrongful payment of steamship line or OTI compensation.

In conclusion, the NYNJFFF&BA believes that the proposed regulations as discussed above should be dropped or at the very least modified to take in to consideration the points raised herein. They will add unnecessary requirements and costs and do nothing to make the U.S. and its transportation sector more competitive in the world economy. The regulations now in place provide sufficient public protection for the majority of the cargo that is moving. It is not necessary to re-write the OTI's responsibilities to attack isolated problems. The comments in this submission reflect the view of our membership and are submitted in recognition of the importance of industry participants becoming and remaining in compliance.

Executed on August 29, 2013

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



President
NY/NJ Foreign Freight Forwarders & Brokers Association, Inc.