BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 13-05

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

COMMENTS OF THE NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC. IN RESPONSE TO AMENDMENTS TO REGULATIONS GOVERNING OCEAN TRANSPORTATION INTERMEDIARY LICENSING AND FINANCIAL RESPONSIBILITY REQUIREMENTS, AND GENERAL DUTIES

The National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA") submits these comments in response to the Advanced Notice of Proposed Rulemaking ("ANPRM") published in this docket May 31, 2013 (78 Fed. Reg. 32946).

As the Commission is aware, the NCBFAA is the national trade association representing the interests of freight forwarders, non-vessel operating common carriers ("NVOCCs") and customs brokers in the ocean shipping industry. The NCBFAA's 800 regular members and 28 affiliated regional associations are accordingly directly affected by the proposed changes to the existing regulations that are set forth in the ANPRM.

The NCBFAA assumes that the Commission is aware that most OTIs engaged in the movement of commercial international trade are highly regulated by a number of government agencies. For example, a majority of the regular members are both OTIs and licensed brokers, the latter of which are of course subject to regulation by U.S. Customs & Border Protection. And, many of these brokers have also been approved by CBP to own or manage bonded

warehouses and container freight stations. Many are certified by CBP as participants in its Customs-Trade Partnership Against Terrorism ("C-TPAT") and participate with a number agencies in developing practices and regulations intended to secure the integrity of the supply chain.

In addition, most members also act as international air forwarders and so are approved by the Transportation Security Administration ("TSA") as indirect air carriers. And, many others are registered with the Federal Motor Carrier Safety Administration ("FMCSA") to operate as motor carrier property brokers, domestic surface freight forwarders and even as motor carriers.

These OTIs have compliance programs in order to train their employees and ensure that they are able to comport their activities in compliance with the myriad of government agencies that oversee their operations. In addition to the FMC, CBP, FMCSA and TSA, OTIs are necessarily involved on a daily basis with the Food and Drug Administration ("FDA") registration and reporting requirements, the licensing and sanction lists of the Office of Foreign Assets Controls ("OFAC"), the Bureau of Industry and Security ("BIS"), the State Department's Directorate of Defense Trade Controls ("DDTC"), the Office of Antiboycott Compliance, as well as the Coast Guard, the Department of Transportation, the Bureau of Alcohol, Tobacco and Firearms and other agencies that have a role to play on security and export controls.

Many of these companies are active in various trade/governmental working groups that are intended to ensure that legitimate governmental regulatory needs are harmonized as much as possible to both avoid unnecessary burdens on trade and maximize the efficiencies and processes of both government and the trade; these groups include the Advisory Committee on Commercial Operations ("COAC"), the Customs Electronic Systems Action Committee ("CESAC"), the President's Export Council, Subcommittee on Export Administration, and the Trade Supply

Network. The NCBFAA and its members routinely provide educational outreach in conjunction with agencies such as the Census Bureau, BIS, and CBP, to enhance the compliance of the industry and to more quickly ensure that governmental regulatory and security changes and advances are passed along.

This brief recitation is intended to make sure the Commission is aware that licensed OTIs engaged in mainstream commercial activities are responsible companies that discharge significant regulatory and commercial obligations, and do so while often working with multiple government agencies to enhance those agencies' ability to carry out their respective missions. Contrary to the Commission's experience with rogue companies engaged in the movement of household goods, licensed OTIs involved in the international movement of commercial cargo are bonded, have significant assets in offices, IT systems, warehouses, and employees and typically have outstanding working relationships with government agencies, the underlying carriers and their customers. Even though most licensed OTIs are sophisticated companies that are able to adjust to changing regulatory requirements, it is to be hoped that such regulation changes are made only when necessary.

For the reasons stated below, the NCBFAA believes that the changes suggested in this ANPRM are not truly relevant to the Commission's oversight responsibilities, do nothing to enhance the efficiency or reliability of the commercial shipping industry, and add unnecessary regulatory burdens. The Association accordingly urges the Commission not to pursue the proposed changes and instead focus on the issues and traffic addressed by Commissioner Khouri in the report issued in Fact-Finding Investigation No. 27, dated April 15, 2011 ("FF 27 Report"), which is appropriately limited to a specific trade with concrete problems worthy of the Commission's attention.

I. INTRODUCTION

Since the enactment of the Ocean Shipping Reform Act of 1998, the Commission has implemented a number of regulatory changes that have helped facilitate the movement of international trade, while at the same time easing unnecessarily restrictive regulations and burdensome costs on the members of the Ocean Transportation Intermediary ("OTI") community. As one example, the Commission was able to represent the interests of U.S. NVOCCs by entering into negotiations with the People's Republic of China ("PRC") so as to minimize the adverse impact of the PRC's regulations pertaining to the requirements for registering bills of lading on trade moving into or out of that country. Due to the Commission's efforts, U.S. NVOCCs are not required to post significant cash deposits in Chinese banks, and are instead able to satisfy PRC financial responsibility requirements through the use of the PRC supplemental bond procedures in 46 C.F.R. Part 515, Appendices E & F.

Similarly, the Commission considered and implemented proposals from the NCBFAA and others in the OTI community to both authorize their participation in confidential contract arrangements with customers and to significantly reduce the cost and burden of unnecessary rate tariff publication through the NVOCC Service Arrangement ("NSA") and NVOCC Rate Agreement ("NRA") processes that are now embodied in the agency's regulations. And, in response to President Obama's Executive Order 13563 (dated January 18, 2011; 76 Fed. Reg. 3821), the Commission requested comments, on November 4, 2011, from the industry on how to improve the existing regulations and reduce unnecessary regulatory costs and burdens.

Regrettably, the Commission appears to have largely taken a step back toward unnecessary and burdensome regulation by considering and proposing the regulations that have been published in Docket No. 13-05. In the Association's view, the statements in the Background section of the ANPRM that purport to explain and justify a need for the proposed

modifications to Part 515 have little merit. While it is true that the FF 27 Report addressed significant problems in the trades of individual household goods and personal effects for individual consumers, nothing in that investigation reflected any need for tightening regulations on the mainstream ocean forwarders and NVOCCs involved in the movement of commercial cargo in international trade. The NCBFAA is not aware of any changes in industry conditions pertaining to the movement of international commercial cargo that warrant adding any, let alone significant, requirements on the OTIs engaged in that trade. To the contrary, the easing of regulatory controls over OTIs and vessel operators in the post-Ocean Shipping Reform Act environment has resulted in more efficient and competitive shipping in international trade, all to the benefit of U.S. importers and exporters.

The proposed regulations will, if implemented, complicate rather than "streamline" the agency's internal processes. The requirement for license and registration renewal will create thousands of new regulatory filings each year, creating significant burdens for the OTI industry. Moreover, the Commission's own staff, who would presumably be tasked with reviewing, analyzing, and ultimately approving (or rejecting) the license and registration renewals of thousands of forwarders and NVOCCs are hard pressed to keep up with existing workloads. There are far less obtrusive methods to ensure that the Commission obtains the information it needs. And, certain of the "streamlining" proposals raise significant due process and confidentiality concerns.

The proposals in the ANPRM are inconsistent with both Executive Order 13563 and OSRA, as they impose, rather than reduce, unnecessary regulatory requirements and costs. Whether it is the (as yet unstated) filing fees or the work necessary to prepare and make redundant license renewal filings, the proposals would require the dedication of scarce resources

and manpower that cannot help but reduce the efficiency and increase the costs of every ocean freight forwarder and NVOCC. And, no cogent justification has been provided for any priority system by which claims against OTI bonds would be processed. Nor does the ANPRM appear to recognize that a number of the proposals would create significant barriers to entry and, perhaps, drive some OTIs out of the business. (*See*, for example, the comments filed by Econoshippers on June 7, 2013.)

In the NCBFAA's view, the proposals in the ANPRM should either not go forward or should be significantly refocused.

II. CHANGES IN DEFINITIONS

It appears that, by and large, the Commission is proposing relatively few changes in the section of the regulations pertaining to definitions. Several of the changes that are proposed, particularly the definitions of "freight forwarding services" and "non-vessel-operating common carrier services" do properly reflect current practices and terminology and could be adopted. The NCBFAA also agrees that the definitions of "brokerage", "ocean freight broker" and "small shipment" do not have much relevance any longer, and accordingly could be dropped without causing any problems.

On the other hand, several of the new definitions do raise questions. First, as discussed in greater detail below, it is not clear why it is necessary for the Commission to define the term "advertisement", at least with respect to mainstream operations involving the movement of commercial cargo. (Proposed Section 515.2(a).) Given the specialized nature of the movement of household goods and personal effects for individual consumers, there may well be a reason to define that term when and if the Commission determines to consider consumer-oriented regulations for that specialized trade. Commercial shippers, on the other hand, do not require

government supervision over the selection of their service providers. Most of them carefully select their business partners, negotiate their shipping needs with OTIs and VOCCs, obtain cargo insurance and demand (and receive) quality service. As they are not likely to be misled by online advertising by unknown vendors, there does not appear to be a need for the Commission to seek to regulate how commercial cargo service providers advertise their services. Hence, any regulations of this nature should be carefully crafted and limited solely to those parties that provide (or advertise to provide) for the transportation of household goods for individual consumers.

With respect to the "qualifying individual" ("QI") (new 515.2(q)), the use of the term "general supervision" raises some questions. The Association agrees that a QI should be actively involved in the operations of a licensee to ensure that the functions are properly carried out. But does this new definition mean that the Commission intends to hold the QI personally liable for any actions that might contravene the Act? Is the QI is required to regularly visit and supervise all of a licensee's various branch offices? If the Commission intends to impose specific requirements, the agency should at least suggest general guidelines, so the industry can understand what responsibility QIs will actually have if these regulations are adopted.

III. LICENSE RENEWAL

As a prefatory statement, the NCBFAA agrees that the Commission should have current and accurate information about the companies it regulates. Both the Commission, the shipping public and other participants in this industry should be entitled to know whether an OTI's listed information is accurate, whether its bond and tariff are current and the names of its officers and directors are correct. Respectfully, however, the Association believes that the ANPRM proposal

– *viz*., license renewals rather than periodic updates – will cause significant problems for the OTI industry and complicate, rather than streamline, the agency's functions.

Proposed Section 515.14(c) provides that OTI licenses would need to be renewed every two years, that licensees would be required to submit an application to initiate this process and pay an unspecified application fee for this purpose,[1] but that the license renewal process "is not intended to result in a re-evaluation of a licensee's character . . . ." However, the Commission has provided little explanation or justification for this significant change, one which will affect every ocean forwarder and NVOCC.

While the degree of burden will depend on the size of the company, adding this procedure and cost will be particularly disruptive and costly to smaller companies that do not have spare manpower available to prepare and file responsive applications. In that regard, 499 (over 60%) of the NCBFAA's regular members operate out of a single office. And, another 152 (or 20%) have only two or three branch offices. Despite the nature of their ownership, management stability and limited offices, these smaller companies would now be required to seek periodic license renewals, deal with the Commission staff processing these filings and divert their attention from serving their customer base

Nor does the need for license renewals appear to be a problem that needs to be addressed on an industry-wide basis. The Commission already has an existing regulation requiring that all licensed OTIs provide prompt notice of changes in their business structure, officers or directors, and/or office locations. (49 C.F.R. §515.18.) To the extent the Commission perceives that a company has not complied with this obligation, it has the ability to redress that shortcoming by outreach or, if necessary, by imposing sanctions on the offending company. Alternatively, if the

[1] The proposed regulation relating to the fee appears in proposed Section 515.5(c)(iii).

Commission believed that the lack of timely information is truly a significant problem for the entire OTI community, and there is no indication in the ANPRM that this is the case, the agency could fashion a less intrusive mechanism. For example, the Commission could require that all licensees and foreign registered companies provide annual (or, like CBP, triennial) updates of relevant identifying information; this could be filed electronically, without charge, and without unduly burdening either the OTIs or the Commission's staff.

It is fair to ask at this juncture whether the Commission has the statutory authority to require such license and registration renewals. If the Commission is relying on the fact that Federal Motor Carrier Safety Administration ("FMSCA") now requires domestic surface freight forwarders and property brokers to periodically renew their registrations, that reliance appears to be misplaced. Until the recent enactment of the legislation called the "Moving Ahead for Progress in the 21st Century Act" ("MAP-21"), neither the FMCSA nor its predecessor (the Interstate Commerce Commission) had required that their constituents seek or obtain registration renewals. This was true even though the FMCSA had the explicit statutory authority to require license renewals (*see* 49 U.S.C. §13905(c)).[2] Now, as a result of Section 32917 of MAP-21, the amendments to 49 U.S.C. 13905(c) specifically require FMCSA to require the renewal of registrations of freight forwarders and property brokers. The Shipping Act contains no analogous provision.

In addition, Congress enacted the renewal and enhanced bonding requirements for domestic freight forwarders and motor carrier property brokers in MAP-21 as part of what is commonly referred to as the Fighting Fraud in Transportation Act ("FFIT"). These new licensing and bonding regulations (namely, Sections 32915-32919 of MAP-21) were enacted due

[2] Prior to MAP-21, Section 13905 provided that any registration issued by the FMCSA "shall remain in effect for such period as the Secretary determines appropriate by regulation." Although the Secretary had the authority to do so, no term-limiting regulations were ever issued.

to well-documented Congressional concerns about widespread fraud in the trucking industry that was damaging to shippers, motor carriers and, particularly, the owner-operators of trucking equipment.[3] In contrast, while the Commission does have a record of abuses in the household goods barrel trade, there is no such experience with respect to the mainstream OTI industry that engage in the movement of commercial cargo.

If this proposal was based upon the practices of CBP and the triennial licensing reports required of customs brokers as a model for this new requirement, that reliance would also be misplaced. While CBP does require licensed brokers to submit triennial reports of whether they are still actively engaged in that business and the name and location in which that business is conducted, that agency does not require formal applications seeking renewals of licenses. Moreover, Congress specifically provided for the submission of these triennial reports by statute, not by CBP regulation, in 19 U.S.C. §1641. Again, there is no comparable Congressional mandate for the FMC to do likewise.[4]

Even assuming the Commission has the authority to require license renewals, the question becomes: Why should it do so and require ***all*** OTIs to submit to periodic license renewals?[5] Returning to President Obama's Executive Order 13563, among other things the President there stressed the need to promote "economic growth, innovation, competitiveness and job creation." He added that agencies should:

[3] A group of independent property brokers recently filed suit to enjoin enforcement of the FFIT provisions of MAP-21 and any regulations FMCSA might promulgate. *See Association of Independent Property Brokers and Agents v. Anthony Foxx et al.*, Case No. 5:2013-CV-00342 (M.D. Fl.; filed July 16, 2013.)

[4] The burden on the industry would be ameliorated somewhat if the renewal process was moved from every two years to every fourth or fifth year. Nonetheless, that would still not answer why a renewal application, as opposed to a simple update notice, should be required.

[5] There may well be a basis to require periodic renewals of licenses that specifically relate to those companies providing household goods transportation services for private consumers in the event the Commission determines that special licensing for this trade is appropriate.

- ". . . identify and use the best, most innovative, and *least burdensome* tools for achieving regulatory ends."
- "Propose or adopt a regulation only upon a reasoned determination that its *benefits justify its costs*."
- "Tailor its regulations to impose the *least burden* on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, *the costs of cumulative regulations*."

(Emphasis added.)

With this in mind, it is difficult to see how the burden and costs imposed by the license renewal requirement are justified. Since the proposal does not contemplate any re-evaluation of a licensee's character (*see* proposed Section 515.14(d)(3)), the purpose of submitting an application (which connotes that it will evaluated) rather than just updating information is elusive. Unless the Commission intends to actually re-evaluate the fitness of every licensee every two years (which the NCBFAA does not suggest or support), the proposal appears to be a singularly burdensome way for the Commission to satisfy itself that its records are accurate.[6]

The NCBFAA assumes that the Commission staff would require all licensees to provide a recent corporate certificate of good standing as part of the license renewal process, since that procedure is required for all new applications that the Commission currently processes. That would require – for every renewal – each company to separately apply for this certificate with the state regulatory authority where its principal place of business is located, unless that state happens to send such a certificate as part of its annual registration process. While it can be done,

[6] Another potential drawback to the proposal is that the PRC authorities, which have often copied U.S. regulatory procedures, might do the same here. Currently, once an NVOCC's bill of lading is registered in the PRC, no further regulatory filings are necessary. If the PRC's Ministry of Transport required biennial registration renewals for the U.S. NVOCC bills of lading, U.S. NVOCCs would be confronted with significant new burdens.

this highlights the burdensome and unnecessary nature of the proposed process. To obtain these certifications takes time and costs money, employee time and money that has nothing to do with servicing customers. Each licensee is likely to still be doing business in compliance with its state regulatory requirements; otherwise, its corporate charter would be suspended and revoked, thus subjecting each of its officers and directors to possible individual liability for any acts of the company. In the NCBFAA's experience, few licensees would risk this.

So, while the renewal process may seem to some to be a relatively innocuous process, it likely will be more costly, time consuming and burdensome than the language in proposed section 5115(d) implies. If the Commission staff has occasion, in a particular circumstance, to inquire as to the corporate bona fides of a particular licensee, it can request such a certification or other information from that party. Or, it can contact the state regulatory authority itself, as this is all public information. But requiring all licensees (and foreign registered companies) to go through this renewal process and to periodically assemble information and file documents that then presumably need to be reviewed and approved is an exercise of form over function and should not be countenance by this agency. On the other hand, if they are not to be reviewed, why should any of this be required?

It also appears to be particularly inappropriate for the Commission to assess filing or user fees for this process when it is the agency, not the constituent members of the industry, that would be demanding the data. Nor has the Commission apparently yet done an analysis of the cost or burden this would impose on OTIs, contrary to the requirements of the Regulatory Flexibility Act ("RFA").

Assuming it decides to go forward with these proposals, the Commission also seeks comments as to the form of notification that would be appropriate to be sent to each licensee (or

registrant) when time to submit the renewal application. The Association believes that something more formal than email notification is appropriate. While email notices are fine for most purposes, the ANPRM purposes to impose significant sanctions on any OTI failing to timely seek renewal, which sanctions include possibly suspending or canceling the company's license. (*See* proposed Section 515.16(a)(5).) Clearly, the cancellation of a company's license is sufficiently serious that some process more formal than email would be appropriate – such as a certified mail notice to the QI and/or President of the company.

IV. QUALIFYING INDIVIDUAL ISSUES

In proposed Section 515.11(a)(2), the Commission would no longer accept, as a qualification for approval as the QI, any OTI experience acquired by the applicant while working for an unlicensed, unbonded or unregistered OTI. This is a significant change in the Commission's practice, as previous applicants for QI positions were not automatically disqualified for this reason. Assuming the prohibition is not to be read so broadly as to also exclude OTI-type experience gained while working in any lawful capacity, and not just licensed OTI or shipper experience, the proposal has the benefit of not rewarding an individual for past violations of law. As the NCBFAA has been a longtime and consistent supporter of initiatives designed to improve the professionalism and integrity of the OTI industry, the proposal does not seem unreasonable.

That is not to say that someone who has worked for an unlicensed entity should be barred from the industry forever. Rather, the Association just believes that the illicit experience should not be used as the basis for approval of a QI.

The Association is concerned about what appear to be potentially automatic disqualification criteria for prospective licensees. With respect to proposed Section 515.11(a)(3),

it is not clear why the possible denial, revocation or suspension of a Transportation Worker Identification Credential ("TWIC") or a customs broker license is necessarily relevant to the qualifications of a QI. As there are many reasons why a TWIC or a broker's license may be suspended, and since neither has any direct relevance to the activities of any OTI, this should not serve as an automatic disqualification for a QI application or an OTI license.

Proposed Section 515.20(c) would require OTIs to report changes, such as the death or retirement of a QI, within 15 business days and to provide a replacement. This is a significant reduction from the existing 30-day period, which in and of itself is often an insufficient period of time to replace a QI when an individual unexpectedly leaves the employ of the company. The Association believes that this artificial deadline is impractical and unnecessarily short, as the process of locating, interviewing, vetting and hiring replacement QIs – each of whom must become an officer of the company – typically takes longer than 15 days, unless the company already has a competent replacement on staff. But that may not be a valid assumption for small companies. The Association suggests that the existing 30-day period for such notifications and filings be retained, if not lengthened.

V. OTHER PROCEDURAL LICENSING ISSUES

There are several other procedural issues enunciated in the ANPRM that give reason for the OTI community to be concerned. First, and with respect to the procedure for submitting applications, proposed Section 515.12(c) literally states that an applicant's failure to submit materials responsive to the reviewing official's request "by the established date will result in the closing of its application without further processing." Taken literally, this seems unduly restrictive. The Association is aware of the need for the Commission to use its resources efficiently and not waste time processing applications in which substantive questions never seem

to get resolved. The Association believes that Commission staff has been flexible and worked well with the industry in the past in order to give applicants sufficient time to respond to any data requests made in the course of reviewing applications. The NCBFAA accordingly hopes that the wording of this new section does not suggest that the response deadlines will be either unduly short or inflexible, as there are occasions when it is difficult for an applicant to obtain information that is necessary.[7]

Second, proposed Section 515.16 has added to the list of items for which a license can be suspended or revoked. New to the list (from existing §515.15) are: (1) the failure to timely renew a license, (2) doing business in any manner with an NVOCC that is not properly licensed, registered, bonded or tariffed, (3) if the Commission somehow deems the licensee "not qualified" to provide service, and (4) "any act, omission or matter that would provide the basis for denial of a license to a new applicant . . . ." The tenor of these proposed additions strike a rigid, strident tone suggesting that the Commission does contemplate terminating licenses in a summary fashion. With respect, the NCBFAA believes that the Commission is overreaching if the purpose of this is to short-circuit a licensee's due process rights.

It is not always easy to determine whether a particular entity is acting in the capacity of an NVOCC; hence, it is entirely possible that a licensed OTI might in some way be innocently involved in "processing, booking or accepting cargo" from an entity that should be but hasn't been licensed.[8] Or, perhaps the entity was not subject to FMC jurisdiction after all.[9] As the

[7] One example of this arises when applicants are providing FMC staff with information concerning litigation involving the applicant or its officers and directors. In many instances, either the information indicating that there is or was such litigation is erroneous or it is often difficult, given the nature or age of the data request being made, to locate and obtain copies of the relevant court documents.

[8] This is especially a problem since the ANPRM also proposes to dispense with publishing suspension or revocations in the Federal Register, relying instead on the Commission's website for official notice. But the website does not provide the public with a historical record.

requirement of "knowingly and willfully" has been significantly watered down from the original notion that someone must have specifically intended to violate the law to one where the government now need only establish that the respondent engaged in the conduct in question, this criterion puts the entire OTI industry at undue risk for possible suspension and/or revocation of licenses.

The Commission has not articulated the harm – with respect to the transportation of commercial cargo – that would justify license revocation, rather than the imposition of penalties, even in situations where there has been some demonstrable shortcoming on the part of a licensed OTI. Similarly, the ambiguous grounds for revocation as appear in proposed Section 515.16(8) and (10) (*viz*., revocation if someone is "not qualified" or where an initial license would have been denied) again raise concerns about the Commission's ability to unduly interfere with a company's existence.

The NCBFAA fully supports the goal of establishing a level playing field where all members of the industry, OTIs and VOCCs alike, act properly, ethically, efficiently and competitively. And, where there has been some demonstrable shortcoming, there is already a system in place to impose significant financial penalties, something the Commission has not been reticent to do. Those penalties are normally sufficient to get the message across concerning the need for compliance with the provisions of the Shipping Act. Going further and summarily threatening the survival of a company is an inappropriate extension of the Commission's enforcement weapons.

Third, and in a related vein, proposed Section 515.17, concerning the hearing procedures for denial, revocation or suspension of OTI licenses, raise due process concerns that may well

[9] Anecdotally, the Association is aware of a situation where one of the Commission's area representatives took the position (incorrectly) that the mere presence of the word "Shipping" in a company's name necessarily meant that the company was an NVOCC.

contravene both the U.S. Constitution and Administrative Procedure Act ("APA"). The ANPRM appears not to recognize either the importance of a company's license or the Supreme Court precedent regarding the due process that must be provided to entities being deprived of property interests by the government. *See, e.g.*, *Matthews v. Eldredge*, 424 U.S. 319 (1976). As drafted, proposed Section 515.17 essentially would establish a "streamlined" procedure by which the only hearing to which a licensee is entitled is that conducted by a hearing officer designated for that purpose by the Commission's Office of General Counsel. There is no specification of who might be designated to be the hearing officer, no right of discovery (other than being given a copy of the materials the Commission staff may be relying upon to support their action), no apparent right to an hearing and no right to cross-examine witnesses or test the veracity of the record other than the filing of written statements. Nor does there appear to be any right of appeal from the decision of the designated hearing officer.

In addition to raising due process concerns under the Fifth Amendment to the U.S. Constitution, the procedures set forth here run afoul of the Administrative Procedure Act. While OTIs may properly be subject to license suspension or revocation, the proposed regulations omit any reference to some of the APA's most significant protections, such as the so-called "right to cure." According to 5 U.S.C. §558(c)(2), a licensee threatened with revocation is entitled to an "opportunity to demonstrate or achieve compliance with all lawful requirements." The proposal, however, appears to short-circuit this and instead proceed directly to revocation without giving an OTI the right to cure.

While the NCBFAA recognizes that the barrel trade problem does raise significant challenges for the Commission and its staff, these proposals are directed at all licensed (or registered) OTIs. By and large, these are reputable, well-established and financed entities that

provide efficient, competitive service to their customers. In its zeal to address the "bandits" in the barrel trade, the Commission should not weaken the processes that affect mainstream, legitimate companies.

VI. CHANGES IN OTI BONDS

In proposed Section 515.21, the ANPRM proposes to increase the bonding requirements for the purpose of reflecting inflation and because existing levels "have proven inadequate" to protect parties who might make claims against these bonds. In support of this, ANRPM cites two examples of situations where claims were made against OTIs that significantly exceeded the amount of the bonds. In one case, claims totaling in excess of $636,000 were made, while in the other the claims totaled approximately $550,000. Quite obviously, an increase of the bonds by the proposed $25,000 (from $50,000 to $75,000 for licensed forwarders and from $75,000 to $100,000 for NVOCCs) would be inadequate to deal with claims of that magnitude. Thus, while there may well be merit to increasing bond amounts by some inflationary measure, there is no rationale to support the approach taken in the ANPRM – namely, that the proposed bond increases would prevent the two situations that are discussed from occurring.

Moreover, even if the issue of the level of bonds was significant – and there is no indication that this is in truth a significant problem[10] – the burden of this proposal falls unevenly and disproportionately on the backs of smaller OTIs. For example, and completely aside from the fact that larger OTIs are likely to pay significantly less in premiums on a dollar-for-dollar basis than their significantly smaller competitors, the proposal would eliminate the need for OTIs with branch offices to increase their bond amounts by $10,000 for each office. Consequently,

[10] Given the volume of shipments handled by OTIs every year, having two or even five or ten situations in which claims exceeding the bond amount are made hardly seems sufficient to justify making any fundamental change in the existing system.

and notwithstanding the proposed increases, the proposal has the quixotic effect of actually reducing the bond amounts required by the new rule for any company that has three or more branch offices.

The Commission should also consider that while the amounts of these bonds have never been adjusted for inflation, any significant increase in the bond amounts could be a barrier to entry or to continued operation by a small OTI. In some instances, bond underwriters require full cash collateral as a prerequisite for underwriting the FMC bonds; a large increase could be a significant burden for smaller companies (*see* the Comments of Mr. Mario Theranus of Econoshippers, filed June 7, 2013 in this proceeding; the Comments of Don McSwain of Ship A Pallet, LLC, filed June 10, 2013 and Ms. Teri Zimmerman-Reynolds of Ray-Mont Logistics, filed June 13, 2013). While it is fully appropriate for OTIs to both be required to maintain appropriate levels of financial responsibility and be adequately capitalized in order to meet the needs of their customers and the associated business requirements, it is important for the Commission to understand that the existence of such bonds rarely becomes relevant with respect to the international movement of commercial cargo. Notwithstanding the vast amount of cargo that is handled by OTIs, most shippers of commercial cargo don't have these problems and have no occasion to make claims against OTI bonds. Those shippers select and utilize the services of OTIs based on professional reputation and demonstrable expertise and efficiency. Membership in professional associations, such as the NCBFAA, or demonstrated knowledge of the OTI staff by having achieved certifications as a Certified Export Specialist, are more important guides to their level of competence than the amount of their company's bonds.

It is certainly true that cargo is occasionally damaged and that errors are sometimes made in the course of the often extraordinarily complex arrangements involved in moving intermodal

cargo between two points halfway around the world. But, most commercial shippers are insured against cargo loss and damage and it is undoubtedly the rule, rather than the exception, that OTIs have both cargo liability and Errors & Omissions ("E&O") insurance coverage to protect their customers in the event some mishap does occur. And, unlike the situation with many motor carrier property brokers that led to the enactment of the FFIT, licensed OTIs typically make significant capital investments in IT systems, warehouses, and other facilities essential for the conduct of their business and, accordingly, have real assets in place that need to be protected. OTIs do not stay in business by failing to resolve commercial disputes with their customers. The continued viability in this highly competitive industry of an OTI is predicated on continued, repeat business, a situation which leads both the OTIs and their customers to amicably work out problems that do occur. Consequently, the NCBFAA suspects that the incidents of claims against bonds for NVOCCs moving commercial cargo is a minute fraction of 1%. As such, the implication in the ANPRM that there may be some endemic problem in the commercial OTI industry requiring significant increases in bond amounts is inaccurate.

Of greater concern is the proposal to amend Section 515.23 to introduce a multi-tiered priority system for claims against OTI bonds, along with a rather complex notification and payment system. Initially, the NCBFAA agrees with all of the comments of the World Shipping Council, file July 18, 2013, in this docket. In the event the Commission was to go forward with the priority system, this could significantly change the way ocean cargo moves, as the VOCCs would be tempted to put all NVOCCs on a cash basis and/or assert liens to prevent cargo from being released. This would significantly disrupt the smooth flow of international shipments, since import cargo moving on a "collect" basis could not be cleared and moved to destination until the consignees pay all applicable freights. Given the relatively few number of instances in

which sureties have ever had to pay off against OTI bonds, the Commission needs to carefully consider the unintended consequences that could result from a proposal of this nature.

Even if a VOCC does extend excessive credit to a specific OTI, so that both the VOCC and other claimants are not able to receive full restitution of their respective claims, the VOCCs in that situation would take a larger financial hit than anyone else. Regardless of any increase the Commission might make, the bond is not intended to make all claimants whole; for that to be the case, it would need to be so large that few companies could afford it. So, just as it behooves shippers to carefully select the OTI with whom they do business, and for NVOCCs to do the same, this is also true for VOCCs.[11]

Another serious issue with the proposed changes to Section 515.23 relates to the proposal to require parties to report claims to the FMC, so that the Commission can then publish a list of those actions and claims on its website "for information purposes only." Although proposed §515.23(e) indicates that the notices relate only to claims made ***by*** carriers and marine terminal operators, the text in the Commission's discussion is not so narrow, instead stating that the notice required relates to "court actions or claims filed ***or claims received***." Does this mean that any claims or court actions involving an OTI need to be reported, even including loss and damage claims? What about demurrage and detention claims that are made against an OTI, but which

[11] OTIs are not the only parties in the international ocean shipping community that can cause financial problems. VOCCs have become insolvent in the past, owing shippers, OTIs, lenders and suppliers significant amounts of money. Indeed, every time a carrier declares general average, shippers and/or OTIs are likely to sustain financial injury. (*See* "Corporate Restructuring and Bankruptcy," New York Law Journal, March 4, 2103.) Similarly, NVOCCs are not infrequently stuck with large demurrage bills when their customers default on their obligations. And, there are situations where carriers go bankrupt and, similar to the motor carrier undercharge crisis in the early 1990s, seek to compel OTIs to pay significant sums under service contracts for "dead freight" notwithstanding their cessation of service. *See, for example*, the continuing litigation involving The Containership Company, which is seeking literally millions of dollars from shippers and NVOCCs. *In re: The Containership Company (TCC) A/S*, No. 11-12622 (Bankr. S.D.N.Y.).

are in reality attributable to and ultimately the responsibility of the cargo interests? Or disputes between an OTI and its landlord? Are these claims to be listed? This needs to be clarified.[12]

The NCBFAA also questions the propriety of having the Commission publish a list of claims against OTIs, even with a disclaimer that the agency is not commenting upon the merits or the validity of those claims. Just having a list published on the Commission's website will result in the publication of sensitive, commercial data that would likely be detrimental to the OTI in question. This is even more problematic given the likelihood that no claim, regardless of the outcome of any pending claim or litigation, would actually ever be made against the bond; again, given the insurance coverage of OTIs, in the event of liability most litigation would be handled by that company's liability or E&O insurer.

The Association accordingly suggests that the Commission not go forward with its proposal concerning the Section 515.23 priority and notice provisions. The unintended consequences that these changes might cause would likely be far more significant than any concerns about the need to prorate bond recoveries in the rare instances that an OTI goes out of business with significant pending transportation-related claims.

VII. AGENCY ISSUES

While the NCBFAA recognizes and agrees that the Commission should implement a number of the recommendations from the FF 27 Report pertaining to advertising and agents in household goods industry, there is no need for the Commission to carry those recommendations forward into the mainstream commercial OTI industry. All of the problems and issues that are identified in the FF 27 Report pertain exclusively to the movement of individual household goods and personal effects. While the Association believes that significant consumer oriented

[12] Similarly, might the proposed payment deadlines and "hold" periods contravene court orders?

regulations should be considered for that traffic, it is not aware of any reason for the proposed regulations concerning agency agreements and advertising in proposed Section 515.31 to be made applicable to the movement of mainstream commercial cargo.

As the Commission itself recognizes, basic tenets of principal/agency law make it quite clear that NVOCCs and freight forwarders are directly responsible for the actions of their agents.[13] Except with respect to the issues raised in Fact Finding Investigation No. 27, there is no explanation or justification provided in the ANPRM supporting the need for commercial OTIs to have written agreements with all their agents or to otherwise regulate the nature of advertising that OTI agents can issue.

It is questionable whether OTIs are actually able to enter into written agreements with all of the parties that could be acting as their agents in a given transaction. When issuing a through (or door-to-door) intermodal house bill of lading, an NVOCC becomes responsible for performing all of the transportation services. While they are third party subcontractors, the performing parties an NVOCC engages to actually provide those services could often be considered to be the OTI's agents in performing services for the shipper parties. Thus, the list of agents could include, in addition to breakbulk and booking agents, sales agents, backroom document services, packers, truckers and cartage companies, railroads, steamship lines, surveyors, etc. While the OTI principal *might* be able to insist that its breakbulk, booking and/or sales agents enter into written agency agreements, that will not likely be the case with respect to the other parties involved; those are independent third parties who provide service for the shipping public. In any event, since the OTI will ultimately be responsible for any actions or problems caused by their agents, and since there is no indication that cargo interests are confused

[13] Indeed, and with respect to surface transportation, Congress has specifically codified the common law principle that carriers engaging in the transportation of household goods are liable for the acts of their agents. 49 U.S.C. §13907. If the Commission believes this is a problem, it could seek similar legislation.

on this point, it is not immediately evident why written agency agreements with all OTI agents should be required.

With respect to the advertising issue, while it may be possible to require an OTI's originating or breakbulk agent to include the name of the principal (and its license number) on all transportation documentation, it is not clear that the other agents in the transportation chain would either be able or willing to do so. To the extent a marine terminal operator or other party issues a dock receipt for cargo delivered and pending transportation, it would be acting as the agent of the NVOCC, but would likely not be willing to show the principal's name and license number on that document. It provides services to too many parties to do this. Yet, a dock receipt is likely considered to be part of the transportation documentation. Similarly, motor carrier and railroad bills of lading that are issued on intermodal traffic might also be considered to be part of shipping documentation. And, those parties commonly exchange various types of communications (emails, letters, invoices) with the OTI and perhaps the underlying shipper/consignee or other third parties. Yet, again, it is unlikely that they would be including the OTI's name and license number on that documentation.

Even with respect to breakbulk and origin agents, the Association believes that the proposed requirement for agents to only show the name of the principal and license number in their advertising should be withdrawn. If the Commission could narrow the subject of these regulations with respect to advertising to just breakbulk or origin agents, it still might not be feasible to require that those parties always show the name of the OTI and license number in their advertising. In many cases, origin and breakbulk agents (as well as the myriad of other types of OTI "agents") represent more than one OTI. In that case, it is not clear how that agent would be able to comply with such a directive. In addition, what about radio or television

advertising? How would an OTI principal be able to list its license number on the ad? Or, to the extent an agent advertised using that media, how would that party be able to comply with proposed §515.31(j)?

Consequently, if the Commission believes that there is a need to regulate the way shipping documentation and communications are issued, it should first be able to better define the type of "agent" that would be the subject of the proposals and provide a mechanism for practicably implementing the requirement. And, the Commission should explain why this seeming micromanagement is necessary in the commercial OTI industry, given the fact that commercial cargo interests are typically well-aware of the identity of the OTI to whom they entrust their cargo.

VIII. FF 27 REPORT ISSUES

Following up on the issues discussed in the FF 27 Report, the Commission has raised a number of questions. As many of those questions can only be answered by companies engaged in providing the relevant services, the NCBFAA will only address those policy questions that affect the entire OTI industry.

Before doing so, the Association believes that it is helpful and appropriate to point out that the international movement of household goods is not confined to the so-called barrel trade intermediaries, many of whom are unlicensed and unbonded, that market their services primarily using the internet. Many licensed NVOCCs and ocean forwarders that are primarily engaged in handling commercial cargo for their corporate customers are also involved in the movement of household goods. In most instances, that work is done through significant contractual arrangements between the OTIs and their corporate shippers who are relocating employees, with traditional household goods moving companies whose customers are moving overseas or with

corporate relocation companies. In those instances, although the OTI is handling the household goods for individual consumers, it contracts with some corporate entity in the same way as they would with a commercial cargo exporter or importer.

Yet, these OTIs may also be involved in handling individual relocations in which they work directly with individual consumer. In those instances, there is no contract with a sophisticated corporate shipper. And, whether or not the contracting shipper is a corporate entity or an individual shipper, it is often the case that the household goods and personal effects are ultimately packed and shipped in barrels.

The NCBFAA agrees with most of the FF 27 Report, particularly the section that discusses and stresses the importance of educating individual consumers about the processes and risks involved in the international movement of household goods. This includes the importance of using licensed OTIs, who can properly explain issues relating to shipping and delivery schedules, insurance, methods of communication, estimates, demurrage and exactly which company will actually be providing the service. An educated consumer is the best protection against the types of negligent and outright fraudulent practices with which the Commission has been required to deal and which are well described in the FF 27 Report.

With that background in mind, the NCBFAA has the following specific comments in response to some of the questions raised in the ANPRM on these issues:

A. Separate License for Household Goods

While it is tempting to think that issuing a separate license would alleviate the problems in this trade, the NCBFAA does not think this will do more than create a redundant licensing scheme. Although the Association did initially suggest this to the FF 27 task force, that recommendation was based on the fact that the Interstate Commerce Commission ("ICC") had treated household goods differently from so-called "general commodities" when issuing licenses.

On reflection, however, the genesis for this separate licensing was attributable to the different type of equipment used when shipping household goods. Rather than using regular trailers and flat beds that are used for regular cargo that does not need special handling, household goods carriers used specialized equipment that provided better protection for the more delicate household goods and related items that were not likely to be packed in protective crating. *See, e.g., Classification of Motor Carriers of Property,* 2 M.C.C. 703, 709-10 (1937); *Reams Extension of Operations - - Indian and Nebraska,* 7 M.C.C. 283 (1938).[14]

Nonetheless, if the Commission believes that having a special license category of, for example, "used household goods and personal effects, not for sale", would be helpful in reducing the level of complaints, that may be an avenue worth trying. The Association accordingly recommends that the Commission consider proposing this alternative, subject to the understanding that licensed OTIs already handling this type of cargo should be "grandfathered" and not required to reapply for this new license.

B. Caps on Volume

In response to one of the Commission's questions, the NCBFAA sees no reason to impose an arbitrary cap on the volume or value of shipments of household goods that any licensed OTI should be able to handle. As noted above, it is not just the so-called "barrel trade" companies that provide these services to the shipping public, as mainstream OTIs, some of whom operate from multiple offices around the country, may also service commercial and/or consumer household goods shippers. Putting artificial restrictions on the volume of traffic they can handle would reduce the competitive alternatives available to shippers without addressing the problem caused by unlicensed companies operating illegally.

[14] This same special licensing format was used for carriers authorized to handle "Class A & B explosives", as the ICC wanted to ensure that those carriers also had the specialized equipment necessary to adequately protect these sensitive, dangerous items.

If the Commission feels that higher volumes of traffic require greater financial protection, then it could consider requiring higher bonds for companies providing such services. However, as the Association does not believe that there is any logical nexus between the amount of cargo that an OTI handles and the risk to the public, it is hard to see how the issue of volume should enter into any regulations that might be enacted in this area. In the NCBFAA's view, the problem relates to the fact that individual consumers need to be sufficiently educated to use the services of appropriately licensed, experienced and ethical companies. Imposing artificial caps or excessive bonding requirements on lawfully operating companies only serves to reduce the number of legitimate choices for consumers and penalizes the OTIs that are compliant.

C. The Bond Amount and QI Experience

In recognition of the fact that there are companies engaged in the barrel trade that are not currently licensed and bonded, the Commission has raised the question of whether the current licensing and bonding requirements are too difficult for companies engaged in providing OTI services for household goods. In the NCBFAA's view, the answer is "no". Indeed, the suggestion seems counterintuitive.

Mainstream OTIs deal with sophisticated commercial accounts that tend to be very familiar with ocean shipping and the special issues that are involved with shipping goods internationally and who typically insure their cargo which, in any event, can usually be replaced in the event of loss. That is very different from the situation with individual consumers, who typically have little experience with ocean shipping, do not have an appreciation of the relationship between an estimate and the actual ocean freight costs, who typically do not understand the importance of insurance, and whose personal effects are often irreplaceable. The NCBFAA accordingly believes that there is no good reason to establish a regulatory scheme

where entities with no demonstrable length of experience or expertise or documented reliability should have lower entry standards.

In the Association's view, and just as the ICC ultimately determined, while a separate license for household goods was appropriate, the real issue was that special regulations were needed both to educate the consumers and restrict unscrupulous practices of some the parties engaged in providing transportation services. That agency accordingly promulgated its consumer protection regulations governing the transportation of household goods that were codified in 49 C.F.R. Part 375. Those regulations have undergone several revisions over the ensuing years, and are now implemented by FMCSA.

The NCBFAA therefore also suggests that the Commission consider promulgating specific consumer protection regulations, comparable to those in 49 C.F.R Part 375, albeit more specifically tailored to international ocean shipping, that provide clear guidance to both the consumer and the OTI, carrier or other third party providing such services, and which covers items such as:

- the benefit of using licensed/bonded OTIs,
- the purpose and use of binding and non-binding estimates,
- the need for insurance and the limitations of carrier cargo coverage under COGSA,
- communication between the shipper and service provider, including the establishment of a 24-hour "hot line" so that the shipper has someone to contact if problems do arise,
- the realities of shipping/performance commitments, and

- dispute resolution procedures, including arbitration or referral to the Commission's Consumer Affairs and Dispute Resolution Services ("CADRS") offices.

In addition, the Commission might consider recommending that Congress add enforcement tools akin to the remedies available to FMCSA in 49 U.S.C. §14901(d) that might help the agency better police this facet of the industry. In that regard, FMCSA's statutory enforcement tools includes mandatory minimum penalties of $25,000 for persons providing such services without proper authorization and penalties for falsification of transportation documentation, for failing to comply with the relevant regulations and for providing estimates without having a price agreement from the underlying carrier.

IX. SUGGESTED NEW REVISIONS

Consistent with both the thrust of Executive Order 13563 and its experience with the regulatory and commercial issues that arise with respect to international shipping, the NCBFAA suggests that the Commission consider the following initiatives. In most instances, the NCBFAA has already proposed, in form or another, that the Commission address these issues and implement new processes or eliminate existing regulatory requirements that are no longer necessary.

Since the Commission has sought comments concerning proposals that it has apparently been contemplating, this is probably a good opportunity for the trade to suggest changes that will be helpful in alleviating unnecessary regulation while not compromising the FMC's oversight responsibilities. These proposals are:

- Eliminate procedural requirements for NRAs. The NCBFAA believes that the requirements in 46 CFR § 532.5, at least with respect to requiring a writing from

both parties, are largely unnecessary and too complex. For example, several members of the Commission's staff, in conducting recent audits of NVOCC compliance with these regulations were unaware that the Commission had deleted the original requirement that bills of lading be annotated with a statement that the shipment was moving pursuant to an NRA. That requirement was never relevant to shippers, but the fact that Commission staff were concerned to enforce it suggests that the forest is being lost because of the trees.

Even though this is also not relevant to shippers, it is still required that there be a writing from both the NVOCC and shipper concerning the fact that the shipment is subject to an NRA. Yet, in every other commercial relationship, a contract is formed by an offer and acceptance. In ocean shipping, an OTI's offer followed by a shipper's booking and/or tender of cargo should accordingly suffice to form the necessary NRA contract. Yet, based upon the position taken by Commission staff, that may not be sufficient to comply with Section 532.5(c). The NCBFAA believes that the reason relatively few number of OTIs that are taking advantage of NRA is largely attributable to their recognition of the difficulty they would have getting shippers to confirm their acceptance of NRA rate quotes prior to booking and tendering cargo. This requirement should be reviewed and then eliminated. In virtually every instance, the shipment file will still provide all the evidence that might be needed to determine – in the rare event there is a dispute – what the agreed rate was.

- Eliminate the need for NVOCCs to file NVOCC Service Agreements (“NSAs”) or publish their essential terms. The NCBFAA has on several occasions made the

point that the filing of service contracts and publication of essential terms that are required of the VOCCs is attributable largely to the fact that their filed Agreements have antitrust immunity. Since NVOCCs do not have such immunity, and since no public benefit is derived by continued filing of NSAs, these requirements should be reviewed and then eliminated.

- The FMC should require the vessel operators to establish and file their contingency plans for dealing with cargo during periods of anticipated severe congestion, including the amount and timing of proposed surcharges, all of which information could be posted on the Commission's website. This would be extremely beneficial to shippers and OTIs alike, as the trade could then be advised of those plans in the event there are severe weather or other issues that could be expected to lead to significant service disruptions. A system of this nature would have alleviated a considerable amount of expense and confusion that resulted from Hurricane Sandy and other significantly disruptive weather that affects the movement of international cargo.
- The Commission should work with the FMCSA to establish a common bond for OTIs and motor carrier property brokers, which would reduce the financial burden on intermediaries that are regulated by both agencies. As noted above, the Commission was very helpful in working with the PRC government to alleviate the burden on US licensed NVOCCs when confronted with that country's bill of lading registration requirements. While the issues are not exactly the same, the Association believes that it should not be necessary for OTIs to have duplicative

bonds required by two different agencies, both of which relate to the same basic issue.

The NCBFAA believes that each of these initiatives are very much in the public interest and would significantly improve the efficiency of OTIs, all to the benefit of their customers.

X. CONCLUSION

The NCBFAA appreciates having been given the opportunity to comment on the proposals set forth in the ANPRM. However, the Association believes that the Commission should focus its attention in more closely on the issues discussed in the FF 27 Report rather than imposing new requirements on licensed OTIs that do nothing to facilitate the efficiency and competitiveness of this industry.

Respectfully submitted,

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