

FEDERAL MARITIME COMMISSION

Docket 13-05 - Amendments to Regulations Governing Ocean Transportation Intermediary Licensing and Financial Responsibility Requirements, and General Duties Final Rule

SUMMARY OF COMMENTS

The Commission received 25 comments in response to the proposed rule.

Section 515.2 – Definitions.

The proposed rule removes several definitions that are no longer relevant to the Commission’s regulatory activities, including “ocean freight broker” (section 515.2(n)), “brokerage” (section 515.2(d)) and “small shipment” (section 515.2(u)). NCBFAA and NYNJFFF&BA agree that these terms are no longer necessary.

Several comments expressed concern that the revision of the term “principal” in section 515.2(o) made it capable of a broader and more problematic, application than the current definition. The Commission revised the definition to substantially restore the current definition.

Favorable comments were made regarding revisions to the definitions of “freight forwarding services” and “non-vessel-operating common carrier services.”

The term “qualifying individual” (QI) is added and defines QI as an individual who meets the Shipping Act’s experience and character requirements. Comments on the definition of “qualifying individual” (QI), opined that the Commission’s review process of the QI does not adequately address a qualifying individual’s competence and recommended establishment of affirmative competency requirements. The Commission noted that the suggestions were beyond the scope of the NOPR and would require subsequent rulemaking proceedings.

Section 515.3 – License; when required.

Comments asserted that the requirement that unlicensed foreign-based OTIs must use only licensed OTIs as their agents in the U.S. may have the prohibited effect of regulating NVOCCs' agents. The Commission noted its reliance upon Congress' instructions in enacting the Ocean Shipping Reform Act of 1998, that the Commission determine "when foreign-based entities conducting business in the United States are to be considered persons in the United States" for purposes of the licensing requirements of section 19 of the 1984 Act. The rule comports with that instruction.

Section 515.4 – License; when not required.

Comments uniformly supported the elimination of the current requirement that OTI increase their bonds by \$10,000 for each unincorporated branch office.

Comments opposed a provision in section 515.4(b) that an OTI be fully responsible for the acts and omissions of any of its employees and agents performed in connection with a licensee's business. The Commission indicated that the current rule reference to strict responsibility is imprecise and the change will avoid inference that "strict liability" regimes applicable under other laws govern the provision.

Section 515.5 – Forms and fees.

Comments support the changes to section 515.5 providing for the electronic filing of applications and the reorganization of information regarding applicable fees and regarding efficiencies that occur with implementation of electronic payments.

Section 515.11 – Basic requirements for licensing; eligibility.

Comments questioned why the experience of foreign-based OTIs must be obtained with respect to transactions in the U.S. ocean-borne foreign commerce. The Commission responded

that such OTI experience provides them with exposure to and working knowledge of U.S. laws, regulations, and practices, including the Shipping Act and Commission regulations.

Comments expressed concern that certain information considered by the Commission in the process of assessing an applicant's character could result in the denial of a license though the information has no connection to an licensee's/applicant's character. The Final Rule notes that factors set out in the rule revision have been relied upon for years in Commission licensing determinations.

Section 515.14 – Issuance, renewal, and use of license.

Comments object to the requirement that licenses be renewed every three years because the Commission's regulations already require that certain changes in a licensee's organization be submitted to the Commission for prior approval on an ongoing basis and suggested vigorous enforcement of current rules. The Final Rule Supplementary Information indicates that the incidence of noncompliance with the current reporting requirements supports the new license renewal requirements.

Section 515.17 – Hearing procedures governing: denial, revocation, or suspension of OTI licenses.

Commenters expressed concern that the section 515.17 expedited hearing procedure may not accord OTIs adequate due process. In response, the Commission revised the section in the Final Rule so that where the Commission gives notice of intent to revoke or suspend an OTI's license, terminate the registration of an un-licensed foreign-based NVOCC, or deny a license application, the OTI or license applicant may file exceptions formally challenging an adverse decision pursuant to the requirements of section 502.227 of the Commission's Rules of Practice

and Procedure. Section 502.227 governs exceptions filed to, for example, Initial Decisions of Administrative Law Judges in formal Commission proceedings.

Section 515.23 - Claims against an ocean transportation intermediary.

Some commenters expressed concern that the requirement, in each of the Forms, that financial responsibility providers report claims made against and claim pay-outs from, OTI financial responsibility, could be used against an OTI by competitors. Financial responsibility providers have long been required by the terms of the Forms to report claims to the Commission. The Final Rule requires such information to be reported only to the Commission; that the information is for the Commission's internal use only; and that such data will be protected to the extent provided by law.

A financial responsibility provider supported claim notification requirements. The provider also pointed out minor corrections to the Surety Bond Form and the need to delete a "proviso" paragraph that was not appropriate for Forms FMC-48, FMC-67 and FMC-68. The Commission made these changes.

Section 515.27 - Proof of compliance – NVOCC.

The Commission adopted a commenter's suggestion that subsection 515.27(d), as proposed, be harmonized with the remainder of the section.

Section 515.31 - General duties.

Comments suggested that OTIs are not in a position to ensure that OTIs' agents make their corporate records available when requested by the Commission. The Commission responded that OTIs are able to obligate their agents to provide records by incorporating provisions in agency agreements.

Comments expressed concern that section 515.31(j) can be read to apply to agents that might advertise to perform miscellaneous OTI services as an agent of an OTI. The Commission agreed and revised the requirement to clarify that it prohibits the advertisement or holding out by a person to “act” as an OTI unless that person is licensed or registered.