BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON COAST GUARD AND MARITIME TRANSPORTATION

Testimony of Geoffrey C. Powell, Vice President, National Customs Brokers and Forwarders Association of America

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Mr. Chairman: Thank you for this opportunity to testify on behalf of the National Customs Brokers and Forwarders Association of America (NCBFAA). I am Geoffrey C. Powell, Vice President of NCBFAA. I am also President of C.H. Powell Company, which is an integrated forwarder and customs broker that is headquartered in Canton, Massachusetts. My office is located in Linthicum, Maryland.

The NCBFAA is the national trade association representing the interests of ocean freight forwarders, non-vessel-operating common carriers ("NVOCCs") and customs brokers in the ocean shipping industry. The NCBFAA's 800 member companies and 28 affiliated regional associations represent the majority of licensed ocean freight forwarders and NVOCCs and are therefore directly affected by maritime regulation. Consequently, NCBFAA has been active in working with the various federal agencies that regulate international ocean shipping and that are responsible for ensuring the security and safety of international U.S. trade. Your invitation to us to testify is extremely timely. NCBFAA is greatly concerned that a recent rulemaking by the Federal Maritime Commission (FMC) is inconsistent with the important goals of job creation, improving the national economy, and reducing – not increasing – the burdens of unnecessary regulation. In that regard, in its Docket No. 13-05, entitled *Amendments to Regulations Governing Ocean Transportation Intermediary Licensing and Financial Responsibility*

Requirements, and General Duties (published at 78 Fed. Reg. 32946, May 31, 2013), the Commission initiated an Advanced Notice of Proposed Rulemaking ("ANPRM") that, if implemented, would significantly and unnecessarily increase the costs and burdens of government regulation on the important segment of the maritime industry that is generally referred to as ocean transportation intermediaries (or OTIs).

OTIs are defined by the U.S. Shipping Act to include both ocean freight forwarders and NVOCCs. 46 U.S.C. §40102(18). OTIs play an important role in ensuring that U.S. importers and exporters can move their goods in international commerce efficiently and economically. These entities typically consolidate smaller shipments that could not otherwise be economically shipped into larger volume lots. They provide their customers with routing and service options that they could not otherwise obtain for themselves. And, they provide the full range of logistical services that are necessary to export or import cargo from and to the United States. Unlike ocean carriers, OTIs do not enjoy antitrust immunity and instead provide their services at low cost to their customers in an extraordinarily competitive environment.

I. Background

Before I address the issues raised by the rulemaking, it may be helpful for the Subcommittee to understand the genesis of this particular initiative by the FMC. In response to numerous complaints the FMC had received from individual consumers that ship their household goods and personal effects between the United States and various foreign countries, the Commission initiated its Fact Finding Investigation No. 27, *Potentially Unlawful, Unfair or Deceptive Ocean Transportation Practices Related to the Movement of Household Goods or Personal Property in U.S.-Foreign Oceanborne Trades*. That proceeding was initiated on June 23, 2010, and was conducted by the FMC's staff under the direction of Commissioner Michael

Khouri. It culminated with the issuance of a Final Report on April 15, 2011. In the course of that investigation, the Commission determined that the consumer complaints being investigated focused almost exclusively on the movement of household goods for individuals and had nothing to do with the movement of commercial cargo by OTIs. Despite these findings, the Commission has not implemented any of its recommendations. Instead, the FMC – over the objection of Commissioner Khouri – used the Fact Finding investigation as a springboard to initiate a proposed rulemaking that had nothing to do with the problems discussed there. The Commission voted to release an ANPRM which would – if implemented – significantly increase unnecessary burdens and expense on OTIs, raise significant due process concerns and create needless administrative burdens on the agency's own staff.

To justify the publication of the ANPRM, the Commission offered several explanations, none of which have any merit. None of the proposed new requirements are based upon changes in industry conditions; they will complicate rather than streamline the agency's internal processes; they will not increase transparency in any meaningful way; and, they will clearly impose rather than reduce unwarranted regulatory barriers and costs. And, of course, none of the contemplated regulations have any rational relationship to any issues reviewed or discussed in the FMC's Fact Finding Investigation No. 27.

The ANRPM is a lengthy document, taking up 33 pages in the Federal Register. Consequently, this testimony does not intend to address the myriad of issues raised by the proposal that will adversely affect this industry. Instead, I feel that highlighting a few of the more problematic areas will give this Subcommittee an appreciation for an administrative process that seems to have lost its way.

II. License Renewal

The Shipping Act provides for OTIs to obtain licenses, without term limits, as a condition for doing business. (46 U.S.C. §40901) Without any explanation, justification or statutory authority, the ANPRM proposes to convert all licenses to two-year terms that require biennial renewals. This will be a burdensome, time-consuming and expensive proposition, as the Commission also proposes to require parties to pay as yet undetermined filing fees for the privilege of renewing their licenses.

It is not clear why the Commission did this. But, if the Commission was influenced by the recent enactment of the Moving Ahead for Progress in the Twenty-First Century Act ("MAP-21"), they failed to see very important distinctions between OTIs and motor carriers, property brokers and domestic surface freight forwarders, which now will have term limits and renewal obligations. In drafting MAP-21, this Committee sought to curb abuses in the domestic transportation industry. There is no such comparable record of abuses, specific legislative authority under the Shipping Act, or direction from the Congress for the FMC to take these steps with respect to OTIs servicing commercial cargo in international trade.

Even if the Commission had the authority to require this, the question becomes: Why should it do so and require all OTIs to submit to periodic license renewals? In the President's Executive Order 13563 (dated January 18, 2011; 76 Fed. Reg. 3821), the order stressed the need to promote "economic growth, innovation, competitiveness and job creation," adding that agencies should:

- ". . . 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 cost of cumulative regulations*." (Emphasis added.)

The Commission has failed to take any of these common sense principles into account. There is no question that adding the evaluation and approval process to FMC staff's obligations will significantly slow down other agency procedures that, in contrast to this, are very likely more necessary. To the extent the FMC purports to justify this burden on the need to ensure that it has current corporate information concerning its licensees, its existing regulations already require that changes in corporate structure or officers and directors must be provided as those events occur. (46 C.F.R. §515.18.)

It is also significant to note that the FMC cannot effectively meet the challenge of issuing new licenses under existing regulations, a process which often takes 2-3 months or more. Adding this additional renewal requirement would inundate FMC staff and grind the entire process to a halt.

One of the fundamental flaws in the Commission's processes with respect to the entire ANPRM was its failure to meet with the industry in order to identify any problems it perceived to exist and then ascertain how that might be ameliorated in the least burdensome way. Had it done so, and if it was clear that existing regulations were inadequate, the NCBFAA would at least have recommended that the Commission consider requiring all licensees to file a list of its current officers, directors and any other information the Commission deemed relevant on an

annual basis. That would not have required a license renewal process and evaluation of the renewal application by FMC staff or the wasteful and time-consuming accumulation of corporate certificates and other documentation that the Commission staff normally reviews during any evaluation process. Nor would it have incurred the use of scant resources to assemble and submit information that in most instances does not change, or the assessment of filing fees.

It is important to note that, for commercial enterprises, expiring licenses and required renewal is not a minor administrative event. A license is a condition of doing business. For a large company or a small one, a delay or administrative error has consequences that are serious. To put a business in this position every two years fails to understand the appropriate role for regulation.

III. Due Process Issues

As we have discussed, it goes without saying that an OTI license is a valuable asset. Without one, a company can no longer provide services to its customers or otherwise continue to operate. Taking a license away is accordingly a very serious matter.

Unfortunately, the ANPRM now proposes to put all licensees at risk of suspension or revocation of their licenses. Without any apparent supporting rationale, the proposal would now authorize suspension or revocation of a license: (1) for doing business in any manner with a company that is not licensed, bonded or tariffed; (2) if the Commission somehow deems the licensee "not qualified" to provide service; or (3) for "any act, omission or matter that would provide the basis for denial of a license to a new applicant." It appears that the Commission feels – without any foundation – that there is an endemic problem in the OTI industry by which non-compliant companies somehow need to be culled out. Whatever the Commission's motivation, this proposal puts every licensee's ability to remain in business at risk. Further, it

now establishes grounds for suspension or revocation that are vague, overbroad and, in some instances, unreasonable.

In a related vein, the proposed regulations that establish what are euphemistically called "hearing procedures" for license revocations raise due process concerns that contravene both the U.S. Constitution and the Administrative Procedures Act. As proposed, the new regulations would create 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 relied upon to support their proposed action), no apparent right to a hearing and no right to cross-examine witnesses or test the veracity of the record other than through the filing of written statements. Nor does there appear to be any right of appeal from the decision of the designated hearing officer.

The NCBFAA agrees that the Commission should properly police the industry so as to ensure that its licensees are properly qualified and conduct their affairs in accordance with all applicable laws and ethical standards. So, while we agree that OTIs may properly be subject to license suspension or revocation, the proposed regulations omit any reference to one of the APA's significant protections, such as the so-called "right to cure." This is a serious matter, and it appears to have been treated in a cavalier manner.

While it appears clear that there is a problem in the small segment of the industry relating to the movement of household goods for individual consumers, it is inappropriate for the Commission to short-circuit due process rights that threaten the livelihood of reputable licensees that provide an important service to exporters and importers alike.

IV. OTI Bonds

Citing just two examples of situations where OTIs went out of business facing claims that significantly exceeded their bonds, the Commission is proposing to increase ocean forwarder and NVOCC bonds by 50% and 33-1/3%, respectively. This will result in increased bond premiums for the several thousands of licensees on an annual basis, despite the fact that the Commission was able to cite only two instances in which a bond was insufficient to cover outstanding claims. Yet, this proposed increase would not dramatically increase any potential claimant's level of protection, since the proposed increased bond would still fall far short of the amounts that were cited in the two examples relied upon by the Commission.

Interestingly, at the same time it is proposing these increases of bond amounts, the Commission is proposing to eliminate the additional bonds required for companies having branch offices. By doing so, the proposal would actually reduce the bonds required for companies doing business out of multiple offices, notwithstanding the fact that they would presumably be conducting more business and perhaps become exposed to greater risk.

Regardless, the fact remains that the Commission does not have a record justifying a wholesale change in the financial security that is appropriate for its licensees. Moreover, the FMC is making an ill-conceived attempt to create a type of priority system by which the sureties will pay claims on these rare instances that an OTI actually goes out of business owing money to third parties. Worse, it is proposing to have requirements that would lead to publication of any claims that may be made against an OTI, regardless of their merit or lack of it, on the Commission's website. It is difficult to understand why the Commission felt it was not unreasonable to post non-verified claims, that are obviously commercially damaging, on a government website.

V. Conclusion

The OTI industry is one of the most competitive and most efficient segments of the U.S. economy. The members of the NCBFAA take their profession and responsibilities seriously, are often regulated by other agencies, and are entrusted by their customers with ensuring the integrity of the supply chain. These companies make significant investments in computer and software systems. They are able to exchange information concerning the movement of international cargo to their customers, the carriers and government agencies. They invest in educational programs so they can keep pace with a rapidly evolving industry and are recognized as being a key element both in the security of the logistics supply chain and in implementing U.S. export and import controls.

Regrettably, the Commission has failed to exercise its presumed expertise to act judiciously in its treatment of this essential segment of the maritime industry.

The Commission's proposals will increase OTI costs and impair efficient operations for no apparent reason other than to create greater regulatory scrutiny over thousands of companies, many of which are small businesses, without any advance input from the stakeholders or evidentiary justification for the significant new regulatory burdens.

For these reasons, the NCBFAA respectfully requests that this Subcommittee require that the FMC explain why it is proceeding along the path outlined by the ANPRM. Mr. Chairman, we are grateful for the subcommittee's interest in this matter.