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MEMORANDUM

TO: Clients

FROM: Edward D. Greenberg

DATE: July 31, 2015

RE: **FMC ISSUES NEW OTI REGULATIONS**

After receiving several rounds of comments, the FMC concluded a process it initiated over two years ago when deciding to review and revise the regulations pertaining to ocean transportation intermediaries. This process ended when the Commission, on November 3, 2015, issued its final regulations in Docket No. 13-05, *Ocean Transportation Intermediary Licensing and Financial Responsibility Requirements and General Duties*. Except for one variation discussed below, the new regulations become effective on December 9, 2015.

This process was initiated in May, 2013, when the Commission first issued its Advanced Notice of Proposed Rulemaking. At that time, the agency had contemplated the possibility of making broad, sweeping changes to the regulations. After receiving significant pushback from many members of the shipping industry concerned about what were widely regarded as unnecessary changes, additional significant regulatory burdens and potential due process issues, the Commission significantly scaled back its proposal. As a result, the changes established by the new final rules – while important – may not create major problems for the industry.

Although we have attached a copy, the Commission's decision is also available on its website at www.fmc.gov. As we see it, the most important of these changes are as follows:

1. Definitions – Initially, the FMC had proposed to expand the definition of the term "principal" too broadly, as the term would have encompassed parties well beyond the range of however actually hired the freight forwarder to provide the services. Responding to a number of concerns about this, the Commission agreed to essentially restate the current definition in the regulation (Section 515.2(o)), so that the "principal" again is restricted to the entity that actually employs the services of a freight forwarder.

In addition, the Commission added a definition of qualifying individual (new Section 515.2(p)), but does not change how that party has historically been viewed by the agency.

2. Foreign, Registered NVOCCs – The Commission rejected an attempt by some parties to eliminate the current requirement that foreign based, registered NVOCCs must use a U.S.-licensed OTI with respect to services being provided in the United States. The FMC concluded that it had the statutory authority to continue this requirement and that it was good public policy to do so.

3. Branch Offices – Although there was some modification of the language relating to an OTI's responsibility for the acts of its employees and agents, another significant change here was that the Commission has agreed to drop the requirement that OTIs post an additional $10,000 bond for each branch office. Consequently, that requirement will end on December 9, and OTIs should consider making appropriate arrangements with their sureties to revise the bond amounts accordingly.

4. Licenses and renewals – Several changes were made with respect to the issue of licenses. First, all licenses and renewals will now be required to be filed electronically. Second, the Commission concluded that it would, despite the overwhelming objection of the industry, require all OTIs to renew their licenses every three years. However, recognizing the volume of filings that will need to be made at the outset, and since the Commission does not currently have an IT system capable of handling this load, the new regulation requiring renewals (Section 515.14(c)) will be stayed for an additional year, so that it will not go into effect until December 9, 2016. In advance of that, the Commission will issue a notice on its website of the schedule by which currently licensed OTIs will have to renew their licenses. Thereafter, each company would be required to renew the license three years later.

   At this point, the specific renewal process has not yet been established, but the decision makes it clear that this will be done completely online, there will be no fee imposed, and the process will be "user friendly." It further appears that OTIs will only be required to reflect any changes or any additions to the information that has already been on file with the agency.

   The Commission also agreed with commenting parties that the renewal process would not be used as a basis by which the agency would reevaluate the status or character of a licensee. Rather, the process will be used to ensure that the Commission has current and accurate information relating to the officers, directors and offices of OTIs.

5. Hearing Process – The Commission created a new Section 515.17 to govern the appeals process in the event an application for an OTI license has been denied. We were originally concerned about whether the proposed rule appropriately addressed due process concerns of licensed applicants. And, we remain somewhat concerned, in that it appears that the streamlined process established by the new rule may not provide an applicant with any right of taking discovery and in any event does not provide a basis for an oral hearing before an administrative law judge. While

applicants would be receiving, under the new rule, disclosure of the basis for the denial, it is not clear at this point how this process will ultimately work out or why any "streamlining" is warranted given the relative few number of licensed denials that have ever been appealed.

6. Claims Against OTIs – Notwithstanding the objections of various parties, the Commission is requiring the various sureties to provide the Commission with notices of each "claim, court action, or court judgment" against the bond and each claim that has been paid by the surety. (New Section 515.23(c).) In comments we filed, we argued that simply having a claim was no indication that an OTI lacked responsibility and that having this made public could be used unfairly to the competitive disadvantage of OTIs. The Commission brushed aside those comments by saying that the information was relevant only to the Commission and that it would be kept confidential. However, the Commission failed to explain what use it might have for the information, or, more importantly, how the information could be kept confidential in light of the possibility of mandatory disclosure under the Freedom of Information Act requirements.

7. OTI Duties – Several changes are being made to with respect to the regulations in 515.31 that address the duties of OTIs. First, and of great significance, is that OTI licensees are now responsible for requiring that their agents promptly respond to any requests for records made by the FMC that are directed to their agents. Consequently, we recommend that OTIs review their agency agreements to ensure that they include provisions requiring the agents to cooperate; if no provisions of this nature currently exist in those agreements, consideration should be given to amending them.

   Second, in subsection (j), the Commission has added a regulation concerning advertising. The regulation will now provide that no person can advertise or hold out to act as an OTI unless it holds a valid OTI license or is appropriately registered. While that embodies a decision issued several years ago relating to the issue of advertising, the Commission again listened to various comments, so that the final rule is significantly less intrusive than was originally contemplated in the ANPRM.

8. Forwarder Compensation – The Commission has revised Section 515.42(c) to authorize forwarders to provide for electronic certifications to carriers that the required forwarding services have been provided. While this is undoubtedly helpful, it is worth noting that the Commission did not approve our suggestion that the certification requirement for "compensation" be withdrawn entirely since both the carriers and forwarders presumably knew whether the payment of compensation was appropriate in each instance without having to have a certification that almost certainly is never reviewed by anyone.

9. Forwarder Special Contracts – Finally, the Commission eliminated the provision in former §515.41(c) that pertain to "special contracts" of freight forwarders. The agency agreed with our suggestion that this requirement was no longer relevant in light of the enactment of OSRA and the emergence of individually negotiated rates and agreements.

Again, despite the decision's length, we recommend that you review these regulations carefully, and prepare to make any necessary changes. Of course, if you have any questions or if we can be of assistance, let us know.