

(S E R V E D)
(August 23, 1990)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION
46 CFR PARTS 510, 580 AND 582
[DOCKET NO. 90-11]

ANTI-REBATE CERTIFICATION
TARIFF CANCELLATION AND REJECTION
AND LICENSE SUSPENSION AND REJECTION

AGENCY : Federal Maritime Commission.

ACTION : Final Rule.

SUMMARY: Since imposing an anti-rebate certification requirement on common carriers and ocean freight forwarders under the Shipping Act of 1984, the Commission has experienced chronic non-compliance with these requirements. Therefore, the Commission is amending its anti-rebate certification and tariff regulations to provide for cancellation and rejection of tariffs of common carriers that do not file required anti-rebate certifications and do not publish tariff notices of such filings. The Commission also is amending its anti-rebate certification and freight forwarder regulations to provide for suspension of licenses and rejection of applications of ocean freight forwarders and applicants for license that do not file required anti-rebate certifications.

DATE : Effective [Insert date 30 days from publication in the Federal Register.]

FOR FURTHER INFORMATION CONTACT:

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Supplementary Information:

Section 15 of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. 1714, mandates that the Federal Maritime Commission ("Commission" or "FMC") require the Chief Executive Officer ("CEO") of each common carrier to file with the Commission a written anti-rebate certification ("ARC") under oath. Section 15 also authorizes the Commission to require the CEO of each ocean freight forwarder to file with the Commission a written ARC under oath. Section 15 of the 1984 Act provides that whoever fails to file a required ARC is liable to the United States for a civil penalty of not more than \$5,000 for each day the violation continues.

Part 582 of the FMC rules, 46 CFR Part 582, implements section 15 of the 1984 Act by establishing the content of ARCs and procedures governing their filing. 46 CFR §580.5(c)(2)(ii)(B) requires common carriers to file anti-rebate certifications on or before December 31 of each year. 46 CFR § 510.25 requires freight forwarders to file anti-rebate certifications on or before December 31 of each year. 46 CFR § 510.16 establishes the Commission's authority to suspend or revoke a freight forwarder's license for violation of any provision of the Shipping Act of 1984 or FMC orders and regulations.

Past experience indicates that civil penalty assessments are an ineffective and inefficient means of enforcing section 15 of the 1984 Act. To provide alternatives to civil penalties, the Commission proposed to amend its ARC and tariff regulations to provide for summary cancellation and rejection of tariffs of common

carriers that do not file ARC's. The Commission also proposed to amend its anti-rebate certification and freight forwarder regulations to provide for suspension of licenses of ocean freight forwarders that do not file anti-rebate certifications. The Notice of Proposed Rulemaking, 55 FR 13293, was issued April 10, 1990, and solicited comments from interested persons.

Under the Proposed Rule common carriers that do not file ARC's will be notified by Federal Register publication and by letter that the Commission intends to cancel the common carrier's tariff(s) thirty days from publication of Federal Register notice unless the carrier demonstrates to the Commission that it filed an ARC. The Commission would reject the tariff(s) of a common carrier that did not file an ARC with initial tariff(s). Under the Proposed Rule ocean freight forwarders that do not file ARC's will be notified by Federal Register publication and by letter that the Commission intends to suspend the freight forwarder's license thirty days from publication of Federal Register notice unless the freight forwarder demonstrates to the Commission that it had filed an ARC. The Commission would reject the application of an ocean freight forwarder applicant that did not file an ARC with its license application.

Upon review of the comments submitted in response to the Proposed Rule¹, the Commission has determined to issue a Final Rule

¹Comments were submitted by:
North Europe Conferences
National Customs Brokers & Forwarders Association of America, Inc.
("NCBFAA")

in this proceeding. The Final Rule addresses most of the concerns raised in the comments and expressly incorporates some of the suggestions contained in those comments.

In particular, the Commission is persuaded by those commenters who complained that the notice provisions of the Proposed Rule were inadequate. CENSA suggested that the notice period be extended to sixty days to "ensure that there is sufficient time to rectify any failure to file". The Final Rule provides for a forty-five day notice period rather than the thirty day period set forth in the Proposed Rule. This change accounts for possible postal delays and gives common carriers and freight forwarders more time to review their records and prepare a response to the Commission's notice. A forty-five day notice period should satisfy the notice concerns without unnecessarily delaying the regulatory process.

NCBFAA requests that notice be sent certified mail, return receipt requested, with suspension of licenses to take place thirty

Council of European and Japanese National Shipowners' Associations
("CENSA")
Crowley Maritime Corporation ("Crowley")
Trans-Pacific Freight Conference of Japan ("TPFCJ")
Japan-Atlantic and Gulf Freight Conference ("JAGFC")
Atlantic and Gulf/West Coast of South America Conference
United States Atlantic/Venezuela Freight Association
United States Gulf/Venezuela Freight Conference
United States/Central America Liner Association
United States/ Jamaica Discussion Agreement
United States Atlantic and Gulf/Hispaniola Steamship Freight
Association
United States Atlantic and Gulf/Southeastern Caribbean Conference
Central America Discussion Agreement
United States Atlantic and Gulf/Panama Conference Hispaniola
Discussion Agreement
Southeastern Caribbean Discussion Agreement
Inter-American Freight Conference

days after receipt of such notice. This suggestion would impose an unreasonable administrative burden on the Commission and is rejected. Return of signed receipts to the Commission is often erratic and not always dependable. Consequently, determination of the elapsed thirty days from each of the various actual delivery dates would appear to be unmanageable, particularly in view of the volume involved.

However, in an attempt to address the NCBFAA's concern, the Final Rule provides that common carriers and freight forwarders who fail to file anti-rebate certifications by December 31 will be notified by certified mail and Federal Register publication that the Commission does not have their anti-rebate certifications on file and that their tariffs or licenses will be cancelled or suspended at the end of the forty-five days if no corrective action is taken. This procedure should ensure that all entities receive actual notice that their tariffs or licenses are in jeopardy. After the notice period has lapsed, all common carriers and freight forwarders who still have not filed anti-rebate certifications will be notified by certified mail, return receipt requested, and by Federal Register publication, that their tariff or license has been cancelled or suspended, respectively. By extending the time period to forty-five days and providing notice through certified mail and Federal Register publication, every affected regulated entity will receive adequate notice and be provided a reasonable opportunity to respond.

Several of the comments request that common carriers receive the same notice and opportunity for hearing that freight forwarders receive under the Proposed Rule.² These comments are consistent with the Commission's intent as set forth in the Supplementary Information to the Proposed Rule. Accordingly, the text of the Final Rule is modified to explicitly so provide.

In response to certain commenters' request that all parties receive an opportunity to file anti-rebate certifications during the notice period, the Final Rule clarifies the status of those common carriers and freight forwarders who do file anti-rebate certifications after December 31 but within the forty-five day notice period. Such entities will be subject to civil penalties, but their tariffs or licenses will not be cancelled or suspended.

Crowley suggests that common carriers be given an opportunity to file anti-rebate certifications before publication of Federal Register notice because publication of their names could be "chilling to the carrier's business". The risk that publication of a carrier's name may negatively affect that carrier is outweighed by the need for the Commission to make its best efforts to assure carriers are provided notice of the Commission's intent to cancel their tariffs. Moreover, the possibility of publication of its name may create an incentive for a common carrier to take the necessary steps to ensure that its anti-rebate certification has been filed. Therefore, the Commission has not adopted this suggestion.

²This request was made by NCBFAA, CENSA, TPFCJ and JAGFC.

TPFCJ and JAGFC comment that under section 13(b) of the 1984 Act, 46 U.S.C. app. 1712, the Commission can only suspend tariffs after notice and hearing and after an order is submitted to the President. This comment, while accurate, is irrelevant. The notice, hearing and Presidential approval provisions of section 13(b) apply to tariff cancellations for violations of sections 10(b)(1), (2), (3), (4) and (8) and section 12 of the 1984 Act, 46 U.S.C. app. 1709 and 1711. As explained fully in the Supplemental Information of the Proposed Rule, section 15 establishes the requirement that anti-rebate certifications be filed. Because the cancellation of tariffs for failure to file an anti-rebate certification is based upon a violation of section 15, the notice, hearing and Presidential approval provisions of section 13 are inapplicable.³

NCBFAA questions the Commission's authority to cancel tariffs as provided by the Proposed Rule. However, this comment incorrectly assumes that the Commission based its authority to cancel tariffs upon its power to reject tariffs under 46 U.S.C. app. 1707(f). As explained in the Supplementary Information to the Proposed Rule, 55 FR 13293, at 13294, the Commission bases this rule on its authority to cancel tariffs that mislead the public. Ghezzi Trucking Inc.-Cancellation of Inactive Tariff, 13 F.M.C. 253, 255 (1969).

³In any event, because the Final Rule allows affected entities 45 days either to establish that an anti-rebate certification was filed or to file one, adequate notice and full opportunity for hearing have been provided.

NCBFAA also asserts that every failure by a freight forwarder to file an anti-rebate certification is not necessarily a willful failure to file, and therefore does not necessarily warrant license suspension. We disagree. All freight forwarders are required to know and abide by the Commission's regulations. The anti-rebate certification regulation has been in effect since 1986, and has been the subject of two formal adjudicatory proceedings and now a rulemaking proceeding. Furthermore, every freight forwarder that has been licensed after 1986 has been required by 46 CFR §510.12(a) to file an initial anti-rebate certification with its application. Therefore, all such forwarders should be fully aware of their filing requirements. Moreover, the Final Rule provides actual notice of a freight forwarder's failure to have an anti-rebate certification on file and yet another opportunity to file the anti-rebate certification before the Commission suspends its license. If after the forty-five days notice period an anti-rebate certification still has not been filed, the Commission can justifiably conclude that the freight forwarder is in willful disregard of its obligations as a regulated entity.

Any comments not specifically addressed herein were either determined to be without merit, of minimal consequence, or satisfied by the changes incorporated into the Final Rule.

The Commission has determined that this Final Rule is not a "major rule" as defined in Executive Order 12291, dated February 17, 1981, because it will not result in:

- (1) An annual effect on the economy of \$100 million or more;
and
- (2) A major increase in costs or prices for consumers,
individual industries, Federal, State or local government
agencies, or geographical regions; or
- (3) Significant adverse effect on competition, employment,
investment, productivity, innovations, or on the ability
of United States-based enterprises to compete with
foreign-based enterprises in domestic or export markets.

The Federal Maritime Commission certifies, pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that this Final Rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units or small governmental organizations.

The Paperwork Reduction Act, 44 U.S.C. 3501-3520, as amended, does not apply to this Final Rule because the proposed amendments to Part 582 of Title 46, Code of Federal Regulations, do not impose any additional reporting or record-keeping requirements or change the collection of information from members of the public which require the approval of the Office of Management and Budget.

List of subjects affected: Anti-Rebate Certification, Common Carriers, Freight Forwarders, Licenses, and Tariffs.

THEREFORE, pursuant to 5 U.S.C. 553 and sections 8, 10, 15, 17 and 19 of the Shipping Act of 1984, 46 U.S.C. app. 1707, 1709, 1714, 1716 and 1718, the Federal Maritime Commission amends Parts

510, 580 and 582 of Title 46 of the Code of Federal Regulations as follows:

Part 510 - [AMENDED]

1. The authority citation to Part 510 continues to read:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1702, 1707, 1709, 1710, 1712, 1714, 1716 and 1718.

2. Section 510.16 is amended by deleting "or" from the last line of paragraph (a)(4), adding "; or" at the end of paragraph (a)(5), and adding a new paragraph (a)(6) to read as follows:

§ 510.16 Revocation or Suspension of License

(a) * * *

(6) Failure to file an annual anti-rebate certification as required by § 510.25 and Part 582 of this chapter. Any licensed freight forwarder who fails to file an annual anti-rebate certification will be notified by Federal Register publication and by certified mail that if within forty-five (45) days from the date the certified notice is mailed the licensee does not either establish that the required anti-rebate certification was filed in accordance with § 510.25 and Part 582 or file the required anti-rebate certification, its license will be suspended until such time as it is reinstated by the Commission after an anti-rebate certification is filed. The license of any freight forwarder who files an anti-rebate certification after December 31 but before the end of the forty-five (45) days notice period will not be suspended; however, the licensee will be subject to civil penalties as provided in Part 582. After the forty-five (45) days, any

licensee that still does not have an anti-rebate certification on file with the Commission will be notified by Federal Register publication and certified mail, return receipt requested, that its license has been suspended.

* * * * *

3. Section 510.25 is amended by adding the following at the end of paragraph (b):

§ 510.25 Anti-rebate Certifications

* * * * *

(b) * * * Any application for an ocean freight forwarder license that does not include an anti-rebate certification in accordance with § 510.12 and Part 582 of this chapter shall be rejected.

* * * * *

PART 580 - [AMENDED]

4. The authority citation to Part 580 continues to read:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1702-1705, 1707-1709, 1712, 1714-1716 and 1718.

5. Section 580.5 is amended by adding the following at the end of paragraph (c)(2)(ii)(B):

§ 580.5 Tariff Contents

* * * * *

(c) * * *

(2) * * *

(ii) * * *

(B) * * * Failure of a common carrier to file an anti-rebate certification with initial tariffs and publish notice of that certification in its tariffs as required by this part and Part 582 of this chapter shall result in rejection of that carrier's tariff. Any common carrier who fails to file an annual anti-rebate certification as required by Part 582 will be notified by Federal Register publication and by certified mail that if within forty-five (45) days from the date the certified notice is mailed the common carrier does not either establish that the required anti-rebate certification was filed in accordance with this part and Part 582 or file the required anti-rebate certification, its tariff will be cancelled. In the event a common carrier's rates are published in one or more conference tariffs, the name of that common carrier who did not file an anti-rebate certification will be stricken from the list of carriers participating in those conference tariffs. The tariff(s) of any common carrier who files an anti-rebate certification after December 31 but before the end of the forty-five (45) days notice period will not be cancelled; however, the common carrier will be subject to civil penalties as provided in Part 582. After the forty-five (45) days, any common carrier that does not have an anti-rebate certification on file with the Commission will be notified by Federal Register publication and certified mail, return receipt requested, that its tariff(s) have been cancelled or its name has been stricken from conference tariff(s).

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PART 582 - [AMENDED]

6. The authority citation to Part 582 continues to read:

Authority: 5 U.S.C. 533; 46 U.S.C. app. 1701, 1702, 1707, 1709, 1712 and 1714-1716.

7. Section 582.1 is amended by revising paragraph (b) to read as follows:

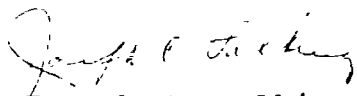
§ 582.1 Scope

* * * * *

(b) Information obtained under this part will be used to maintain continuous surveillance over common carrier and ocean freight forwarder activities and to deter rebating practices. Failure to file the required certification may result in a civil penalty of \$5,000 for each day such violation continues. Failure of a common carrier to file an anti-rebate certification and publish notice of certification in its tariffs as provided by this part and Part 580 of this chapter will result in tariff cancellation effective forty-five (45) days after notice, as provided in § 580.5(c)(2)(ii)(B) or, if an initial tariff filing, rejection. In the event a common carrier's rates are published in one or more conference tariffs, the name of the common carrier will be stricken from the list of carriers participating in those conference tariffs. The tariff(s) of any common carrier who files an anti-rebate certification after December 31 but before the end of the forty-five days notice period will not be cancelled; however, those common carriers will be subject to civil penalties. Failure of an ocean freight forwarder to file an anti-rebate

certification as provided by this part and Part 510 of this chapter will result in suspension of that ocean freight forwarder's license effective forty-five (45) days after notice, as provided in §510.16(a)(6). The license of any freight forwarder who files an anti-rebate certification after December 31 but before the end of the forty-five days notice period will not be suspended; however, those freight forwarders will be subject to civil penalties. Failure of an ocean freight forwarder applicant to include an anti-rebate certification with a license application as provided by this part and Part 510 of this chapter will result in rejection of that ocean freight forwarder applicant's license application, as provided in §510.25(b).

By the Commission


Joseph C. Polking
Secretary