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FEDERAL MARITIME COMMISSION
46 CFR Parts 580 and 581

[Docket No. 90-25]

PUBLICATION AND FILING OF PAYMENTS MADE BY COMMON
CARRIERS TO FOREIGN FREIGHT FORWARDERS AND
OCEAN FREIGHT BROKERS IN TARIFFS AND SERVICE CONTRACTS

AGENCY: Federal Maritime Commission.

ACTION: Proposed Rule.

SUMMARY: The Federal Maritime Commission ("Commission" or "FMC") proposes to amend its foreign tariff filing regulations to require common carriers and conferences to state in their tariffs the amount of payments made, and a description of services for which any payments are made, to foreign freight forwarders or ocean freight brokers. The Proposed Rule defines foreign freight forwarders and ocean freight brokers. The Proposed Rule also amends the FMC's service contract filing regulations to require common carriers and conferences to state in service contracts the amount of payments made, and a description of services for which any payments are made, to foreign freight forwarders or ocean freight brokers. The Proposed Rule will require public disclosure of any payments made by common carriers for services provided by foreign freight forwarders and ocean freight brokers. The proposal is intended to facilitate enforcement efforts to detect and prevent unlawful activity related to such payments.

DATE: Comments due [on or before 60 days after publication in the Federal Register]

ADDRESS: Comments (Original and 15 copies) to:

Joseph C. Polking, Secretary
Federal Maritime Commission
1100 L Street, N.W.
Washington, DC 20573-0001
(202) 523-5725

FOR FURTHER INFORMATION CONTACT:

Austin L. Schmitt, Director
Bureau of Trade Monitoring
Federal Maritime Commission
1100 L Street, N.W.
Washington, DC 20573-0001
(202) 523-5787

SUPPLEMENTARY INFORMATION:

The interrelationship of carriers and conferences and so-called "intermediaries" poses significant enforcement problems for the Commission and possible disruption in the industry. In many foreign countries such intermediaries are referred to as "freight forwarders" or "freight brokers."¹ Their functions often go beyond those of licensed United States ocean freight forwarders. Some of these firms are conglomerates consisting of carriers,

¹ The terms "freight brokers" and "brokerage" are subject to varying interpretations. The FMC's rules at 46 CFR 510.2(m) define an ocean freight broker as a person who matches up cargo with available cargo space and who receives from the carrier a sum of money for that service (defined as "brokerage"). The industry often uses the term "broker" in the widest possible sense, meaning a party acting on behalf of another party, almost with the meaning of "agent". The industry also often uses "broker" to distinguish between those persons who arrange for booking cargo and who provide documentation service on outbound ocean shipments (defined in the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. § 1701, and by the Commission as "ocean freight forwarders") and those who do parallel work on inbound shipments (i.e., persons currently defined neither by the 1984 Act, nor by regulations issued by the Commission). This latter type of "broker" is usually foreign based, often has connections to foreign firms (including shippers and consignees) and provides a broader spectrum of services, including intermodal links, than an "ocean freight forwarder" as defined by the Commission. The situation is made more complex by the use of the term "brokerage" to describe what the Commission defines as "compensation" (i.e., payment by carriers to FMC licensed forwarders for services performed on outbound shipments) (46 CFR 510.2(d)).

warehouse companies, trucking companies, etc. Commercial sources, particularly foreign ones, may refer to any and all of these entities as either "foreign freight forwarders" or "brokers". In comparison with FMC-licensed ocean freight forwarders, these intermediaries may have greater influence in determining the selection of a carrier, the selection of the providers of ancillary services, and the terms of the movement.

This variety of activities and the lack of common terminology can obscure what services these intermediaries perform and for what services they are being paid by the carriers, i.e., for packing and warehousing, for inland transportation, for securing ocean transportation, for preparing documentation, etc. As a result, more and more intermediary entities are in a position to take advantage of this situation to pass some or all of the payments back to the shipper, directly or indirectly.

Sections 8(a)(1)(C) and 19(d)(3) of the 1984 Act, 46 U.S.C. app. § 1707(a)(1)(C) and § 1718(d)(3), require carriers and conferences to set forth in their tariffs the rate or rates of compensation to be paid to licensed ocean freight forwarders on United States export shipments; FMC Tariff Rule No. 9, 46 CFR 580.5(d)(9), implements this requirement. There is, however, no express statutory requirement that carriers and conferences describe in their respective tariffs or service contracts compensation paid to "intermediary" entities that are not statutorily defined -- e.g., forwarders on import shipments. Because the present tariff and service contract filing requirements apply only to licensed ocean freight forwarders, who operate only in the United States export trades, and do not cover common carrier and

conference activities involving intermediaries operating in the United States import trades,² uncertainty exists concerning the responsibility of carriers and conferences to publish in their tariffs and service contracts the amount of payments to be made to such intermediaries. In order to ensure that it has the means to ascertain the extent and legality of such payments, the Commission has determined to impose these requirements by rule under the authority set forth below.

Section 8(a)(1) of the 1984 Act requires, inter alia, that carriers and conferences shall ". . . file with the Commission . . . tariffs showing all . . . practices . . . that have been established" Furthermore, section 10(b)(2) of the 1984 Act, 46 U.S.C. app. § 1709(b)(2), makes it unlawful for a "common carrier, either alone or in conjunction with any other person, directly or indirectly, . . . [to] rebate, refund, or remit in any manner, or by any device, any portion of its rates except in accordance with its tariffs or service contracts." This would include rebates and refunds paid to intermediaries.

Section 8(c) of the 1984 Act, 46 U.S.C. app. § 1707(c), requires not only the confidential filing of a service contract, but also the filing of a concise statement of its essential terms which are to be made available to the

² Section 3(19) of the 1984 Act, 46 U.S.C. app. § 1702(19), defines an ocean freight forwarder as a person that dispatches shipments from the United States via common carriers, books space for those shipments and processes the documents incident to those shipments. Section 19 of the 1984 Act, 46 U.S.C. app. § 1718, requires that persons who perform ocean freight forwarding functions obtain a license from the Commission and that only they are entitled to compensation from the carriers.

general public in tariff format. Those essential terms are to be made available to all shippers similarly situated. The FMC's service contract filing regulations at 46 CFR 581.4(a)(2)(i) require that service contracts contain the complete terms of the contract, including all essential terms.

Section 17 of the 1984 Act, 46 U.S.C. app. § 1716, authorizes the Commission to prescribe rules and regulations necessary to carry out the purposes of the Act.

The Proposed Rule would (1) define "foreign freight forwarder" and "foreign freight forwarder services"; (2) restate the definition of "ocean freight broker" (the pertinent language for this definition will be the same as that now set forth in 46 CFR 510.2(m)); (3) require common carriers and conferences to include in Rule 23 of their tariffs any and all payments, whether direct or indirect, which are made to foreign freight forwarders or ocean freight brokers, along with the description of the services for which such payments are made; and (4) require service contracts to include an essential term with a statement of any and all payments, whether direct or indirect, which are made by ocean common carriers or conferences to foreign freight forwarders or ocean freight brokers, along with a description of the services for which the payments are made. Definitions of "foreign freight forwarder" and "ocean freight broker",³ and a requirement that carrier tariffs and service contracts describe services and list payments connected to "foreign freight forwarders" or "ocean freight brokers", will facilitate enforcement of

³ Specifically those operating in the inbound trades.

the 1984 Act's tariff-filing and essential terms-filing provisions as well as the proscriptions against rebating.

Commenting parties are encouraged to submit, along with any comments, draft language for any changes suggested.

The Commission has determined that this Proposed Rule is not a "major rule" as defined in Executive Order 12291 dated February 27, 1981, because it will not result in: (1) An annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects 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 Commission also finds that the Proposed Rule in this proceeding is exempt from the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, regarding the economic impact on small entities. Section 601(2) of that Act excepts from its purview any "rule of particular applicability to rates or practices relating to such rates. . . ." As the Proposed Rule relates to particular application of rates and rate practices, the Regulatory Flexibility Act requirements are inapplicable.

The collection of information requirements contained in this Proposed Rule have been submitted to the Office of Management and Budget for review under section 3503(h) of the Paperwork Reduction Act, 44 U.S.C. 3504(h). Public reporting burden for this collection of information is

estimated to be 20 minutes for each tariff and service contract revision. Since the common carriers and conferences already have commercial documentation procedures in operation for the handling of any payments made, only nominal time or paperwork will be required for any changes that result, if the Proposed Rule is adopted. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to John Robert Ewers, Director, Bureau of Administration, Federal Maritime Commission, Washington, DC 20573, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

List of Subjects in 46 CFR Parts 580 and 581.

Maritime carriers, Rates and fares, Service contracts, Reporting and recordkeeping requirements.

Therefore, pursuant to 5 U.S.C. 553; secs. 8, 9, 10 and 17 of the Shipping Act of 1984, 46 U.S.C. app. 1707, 1708, 1709 and 1716, the Federal Maritime Commission proposes to amend Parts 580 and 581 of Title 46 of the Code of Federal Regulations as follows:

PART 580 - [AMENDED]

1. The authority citation for 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.

2. Section 580.2 is amended by adding paragraphs (x), (y) and (z) as follows:

§ 580.2 Tariff Definitions.

* * * * *

(x) "*Foreign freight forwarder*" means a person that performs foreign freight forwarding services as specified in paragraph (y) of this section.

(y) "*Foreign freight forwarding services*" refers to the dispatching of shipments to the United States on behalf of others, in order to facilitate shipment by a common carrier, and may include but is not limited to, the following:

- (1) Ordering cargo to port;
- (2) Preparing and/or processing state-required shipping documentation not otherwise herein specified;
- (3) Booking, arranging for or confirming cargo space;
- (4) Preparing or processing delivery orders or dock receipts;
- (5) Preparing and/or processing ocean bills of lading;

- (6) Preparing or processing consular documents or arranging for their certification;
- (7) Arranging for warehouse storage;
- (8) Arranging for cargo insurance.

(z) "*Ocean freight broker*" is an entity which is engaged by a carrier to secure cargo for such carrier and/or to sell or offer for sale ocean transportation services and which holds itself out to the public as one who negotiates between shipper or consignee and carrier for the purchase, sale, conditions and terms of transportation.

3. Section 580.5 is amended by adding paragraph (d)(23) as follows:

§ 580.5 Tariff contents.

* * * * *

(d) * * *

(22) RESERVED

(23) *Payments by common carriers for services provided by foreign freight forwarders and ocean freight brokers operating in the import/export trades.*

Common carriers and conferences shall specify in their tariffs any and all payments which are to be made by common carriers or conferences directly or indirectly to foreign freight forwarders or ocean freight brokers (as defined in 46 CFR 580), along with the description of the services for which such payments are made.

PART 581 - [AMENDED]

1. The authority citation for Part 581 continues to read:

AUTHORITY: 5 U.S.C. 553; 46 U.S.C. app. 1702, 1706, 1707, 1709, 1712, 1714-1716 and 1718.

2. Section 581.5 is amended by redesignating paragraph (a)(3)(vii) as paragraph (a)(3)(viii), by redesignating paragraph (a)(3)(viii) as paragraph (a)(3)(ix) and by adding a new paragraph (a)(3)(vii) as follows:

§ 581.5 Content of essential terms; contingency clauses.

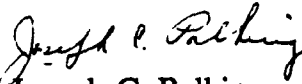
(a) * * *

(3) * * *

(vii) a statement of any and all payments which are to be made by ocean common carriers or conferences directly or indirectly to foreign freight forwarders or ocean freight brokers (as defined in 46 CFR 580), along with the description of the services for which such payments are made.

* * * * *

By the Commission⁴


Joseph C. Polking
Secretary

⁴ Statement of Commissioner Quartel is attached.

STATEMENT OF COMMISSIONER QUARTEL IN
OPPOSITION TO THE PROPOSED RULE

While I am sympathetic to the enforcement concerns with which this rule is intended to deal, and while I certainly recognize that this is a proposed rather than final rule, the fact remains that any such proposal carries with it the weight of apparent reason and authority. The particular application of this proposed rule is both beyond the intent of the law and is a classic, albeit well-intended, case of regulatory overreach. Notwithstanding assertions to the contrary, the rule would clearly extend FMC regulation and possible jeopardy attendant to that regulation to certain kinds of services provided by a class of persons, the services of which are not now, nor were they contemplated to be, regulated; and, it would do so not directly as law would intend, but through an indirect third party means. Moreover, the rule as proposed would create another form of liability for carriers through a new tariff disclosure burden, and thus a new basis for future violations of the law. While I support the public comment process and will reserve final judgement until this process is completed, I oppose issuing this proposed rule for the reasons stated above.

