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FMC Affirms Lawful Use of Unlicensed Agents by Ocean Transportation Intermediaries

Ocean Transportation Intermediaries ("OTIs") should be advised that on November 6, 2009, the Federal Maritime Commission ("FMC") granted a Petition for Declaratory Order from Team Ocean Services, Inc. ("Team Ocean"). In the order granting the petition, the FMC affirmed that it is legal for OTIs to engage unlicensed persons to act as their agents in the conducting of OTI services.

BACKGROUND

The Shipping Act of 1984, as amended, provides that "[a] person in the United States may not act as an ocean transportation intermediary unless the person holds an ocean transportation intermediary's license issued by the Federal Maritime Commission."^[1] In January 2006, Landstar Express America, Inc. ("Landstar") requested an opinion letter from the FMC's General Counsel concerning the legality of the use of unlicensed agents in certain aspects of the licensed OTI's business. The General Counsel advised that such a practice would be legally permissible, since the agents would not be "holding out in their own right to provide [OTI] services."

However, when Team Ocean petitioned the FMC in August 2006 for a Declaratory Order affirming this position, the Commission rejected the General Counsel's view.^[2] The Commission found that the licensing requirement of the Shipping Act of 1984 demonstrated an "overriding legislative intent . . . to protect the public from unqualified and potentially unscrupulous OTI services providers" and that "[a]llowing licensed OTIs to introduce unknown and unqualified 'agents' to provide OTI services to the public would undermine Congress's intent in enacting [the licensing requirement of the Act]." Taking the position that the requirements of the Shipping Act of 1984 mandated that only licensed OTIs provide OTI services, and that in providing services for an OTI provided in the Shipping Act of 1984, and that the FMC thus lacked the authority to extend the OTI licensing requirement to agents. The Court additionally found that common law principles of agency were sufficient to protect the public from the activities of an unscrupulous agent since the identity of the principal, the licensed OTI, would be disclosed.

In April 2009, Landstar petitioned the U.S. Court of Appeals for the District of Columbia Circuit to review the Commission's decision.^[3] The Court of Appeals vacated the Commission's Declaratory Order, noting that the Shipping Act of 1984's definition of an OTI includes only those entities that are held out to the general public to provide the services of an OTI. The Court contended that an unlicensed agent would not hold itself out to the public to provide the services of an OTI, but would simply provide certain services on behalf of a disclosed principal, the licensed OTI. Accordingly, the Court found that agents necessarily could not fall within the definition of an OTI provided in the Shipping Act of 1984, and that the FMC thus lacked the authority to extend the OTI licensing requirement to agents. The Court additionally found that common law principles of agency were sufficient to protect the public from the activities of an unscrupulous agent since the identity of the principal, the licensed OTI, would be disclosed.

PETITION FOR DECLARATORY ORDER GRANTED

Following the decision of the Court of Appeals, Team Ocean again petitioned the FMC for a Declaratory Order affirming the legality of the use of unlicensed agents in OTI business. On November 6, 2009, the Court granted Team Ocean's petition "to the extent consistent with the Court's decision in *Landstar*" and affirmed that it is lawful for a licensed OTI to engage an unlicensed person to act as its agent to perform OTI services on behalf of the disclosed, licensed OTI.

Notably, the FMC's order included a concurrence by Commissioner Brennan which suggested that additional regulatory changes from the FMC may be forthcoming. Commissioner Brennan took note of the "invalidating effect" that the decision of the Court of Appeals had on a regulation^[4] which provided that "no licensed freight forwarder shall enter into an agreement or other arrangement . . . with an unlicensed person that bestows any fee, compensation, or other benefit upon the unlicensed person." The Commissioner advised that the FMC "has an obligation to move quickly to acknowledge and resolve any conflict with the agency's existing OTI regulations."

WHAT THE ORDER MEANS TO YOU

In light of the Commission's November 6 Order, we suggest that licensed OTIs review and consider the role that agents can play in your business, to the extent permissible under the Order (including within the

United States). Additionally, OTIs are advised to review the role of any agents presently conducting operations on behalf of your company in order to ensure compliance with the Order. Any unlicensed agent may perform OTI functions on behalf of forwarders and/or NVOCC's that are in good standing with FMC rules - your agents, though, must disclose that regulated services are rendered on your behalf, rather than under their own names.

Venable's International Trade attorneys are able to supplement this advisory with further analysis and commentary pertaining to individual situations and companies.

^[1] 46 U.S.C. § 40101(a).

^[2] *In Re Lawfulness of Unlicensed Persons Acting as Agents for Licensed OTIs*, 31 S.R.R. 185 (FMC 2008).

^[3] *Landstar Express America v. Federal Maritime Commission*, 569 F.3d 493 (D.C. Cir. 2009).

^[4] 46 C.F.R. § 515.32(b).

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