



BIG CHANGES AT THE FEDERAL MARITIME COMMISSION

Legal Corner By David Street, TOYSA Legal Counsel

Big changes are brewing at the Federal Maritime Commission. As you know, this is the federal agency with primary responsibility for the regulation of international ocean shipping pursuant to the Shipping Act of 1984. The FMC is run by five Commissioners who are appointed for terms of four years each by the President. By statute, no more than three of the Commissioners may be appointed from the same political party. One of the Commissioners serves as Chairman, also pursuant to appointment by the President.

In recent years, the FMC has been limping along with less than the full complement of five Commissioners. When Chairman Steven R. Blust left the Commission on June 30, 2006 at the end of his term, the Commission was left with only four Commissioners and no Chairman. Although President Bush nominated Commissioner Paul Anderson to serve as Chairman in August, 2007, Mr. Anderson never took this post and eventually resigned on May 30, 2008, leaving only three Commissioners. When Commissioner Hal Creel left the agency at the end of his term on June 30, 2009, there were only two Commissioners serving, Commissioner Joseph Brennan and Commissioner Rebecca Dye.

As a legal matter, lack of three Commissioners did not hamper the ability of the remaining Commissioners to run the agency. According to the applicable statute, the FMC can take action pursuant to a vote of the majority of the Commissioners then in office regardless of their number. As a practical matter, however, having only two Commissioners meant that a unanimous vote was required for the agency to do business on any matter. Given that Commissioners Dye and Brennan are from opposite ends of the ideological spectrum, this meant it was extremely unlikely that any controversial measures would be passed so long as they were the only two serving Commissioners. This was, in fact, the case.

Fortunately, there was only a brief period of two-Commissioner rule. President Obama nominated Richard A. Lidinsky, Jr. to serve as Commissioner on June 18, 2009 and he was confirmed by the Senate on July 24, 2009, bringing the number of Commissioners up to three. Commissioner Lidinsky joined the Commission on August 7, 2009 and was subsequently appointed as Chairman by President Obama on September 14, 2009. On December 3, 2009, President Obama nominated Michael A. Khouri of Louisville,

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Kentucky to be a Commissioner and he was confirmed by the Senate on December 24, 2009. Commissioner Khouri will be sworn in on March 15, 2010.

Thus, we now have four of the five Commissioners contemplated by the statute serving. Moreover, three of the Commissioners actually have previous experience in the maritime industry. One might think that previous maritime experience would be a prerequisite for FMC Commissioners, but in the past, this has not been the rule. Appointment as an FMC Commissioner has sometimes been a political favor for supporters of a President, or a post-retirement benefit provided to former Congressmen of the President's party. President Reagan, in fact, appointed the head of his California security detail as Chairman of the FMC. Of the current Commissioners, Commissioner Dye previously served as the Committee Counsel in the U.S. House of Representatives for the Transportation and Infrastructure Committee and the Merchant Marine and Fisheries Committee. She had also previously worked in the Maritime Administration of the Department of Transportation and the United States Coast Guard.

Chairman Lidinsky began his career working at the FMC in the Office of General Counsel. He also served as a Congressional aide in the U.S. House of Representatives for the Merchant Marine and Fisheries Committee; worked for the Maryland Port Administration and served as Vice President for Governmental Affairs for Sea Containers Ltd., a manufacturer and lessor of maritime shipping containers. The new Commissioner Khouri is a 35-year veteran of the maritime industry who began his career as a sailor, and later Captain of towboats on the inland waterways. He also held numerous executive positions with American Commercial Lines, an inland waterways maritime company where he served as General Counsel, and Senior Vice President for Transportation Services – Marine Operations. Mr. Khouri has also been a maritime lawyer. The fourth Commissioner, Joseph E. Brennan, was formerly Governor of Maine and a Congressman. Although he did not have previous maritime experience, Commissioner Brennan has been serving at the FMC since 1999 and has acquired much relevant experience during that time. In short, the current group of FMC Commissioners is extremely well-qualified in the maritime transportation business.

The new Commissioners are not the only thing going on at the FMC. Chairman Lidinsky has already indicated that he will be an activist Chairman by shaking up the Commission's staff in a major reorganization that became effective on January 31, 2010. There were a number of major changes accomplished in this reorganization. Most notable was a reversion to the previous structure of the Commission whereby the staff is administered by a Managing Director. The Managing Director will serve as the FMC's senior executive responsible for the management and coordination of the Commission's operating bureaus. The major operating bureaus are Certification and Licensing, Enforcement and Trade Analysis. The Managing Director will also directly oversee the Commission's area representatives in New York, Miami, Houston, Los Angeles, New Orleans and Seattle and all internal administrative offices of the Commission. Chairman Lidinsky has

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appointed Ron Murphy as the new Managing Director. Mr. Murphy previously served as the Director of the Office of Consumer Affairs & Dispute Resolution Services (“CADRS”).

A second major facet of the reorganization was the transfer of Vern Hill from Director of the Bureau of Enforcement to become the Director of CADRS. Mr. Hill had been the Bureau of Enforcement’s Director for many years and played an extremely powerful role within the commission. He has always been known as a vigorous enforcer of the Shipping Act and the Commission’s regulations. Possibly to avoid having Mr. Hill’s transfer being seen as a demotion, Chairman Lidinsky has provided in the reorganization that Mr. Hill will report directly to him rather than to the Managing Director. The third major component of the reorganization was the transfer of Peter King from General Counsel to being the Director of the Bureau of Enforcement. This marks a return by Mr. King to the Bureau where he had served for many years as an Enforcement Attorney. However, rather than reporting directly to the Chairman as had been the case when Mr. King was General Counsel, he will now report to the Managing Director. A new General Counsel has not been appointed as part of this reorganization, which may be an indication that Chairman Lidinsky is looking to fill this position from outside the agency. Traditionally, the General Counsel has played a major role in developing Commission policy and the most successful General Counsels have worked very closely with the FMC Chairman. It will be interesting to see who Chairman Lidinsky eventually picks for this position. In the meantime, the General Counsel’s office is being run by the Deputy General Counsel, Rebecca A. Fenneman.

Finally, it appears that Chairman Lidinsky is going to make major moves on the policy front as well. This is evidenced by two recent decisions by the Commission under Chairman Lidinsky’s leadership, both of which have demonstrated a new found willingness by the Commission to take significant steps to loosen the regulatory constraints on the ocean shipping industry. The first decision involved the question of whether agents of licensed NVOCCs in the United States would need to be licensed in their own right. The FMC had previously ruled that such agents would need to be licensed in a decision issued in 2008. This decision had been appealed to the United States Court of Appeals for the District of Columbia Circuit by Landstar Express America, an NVOCC. The federal court overruled the FMC and held that agents of licensed NVOCCs did not have to be licensed themselves to perform services in the name of the licensed NVOCC. Thus, it was clear that the FMC would have to reverse its decision as applied to NVOCCs.

The interesting part of the Commission’s decision, however, came in the way it dealt with ocean freight forwarders. Ocean freight forwarders were first regulated by the FMC in the early 1960s. From the very beginning of the ocean freight forwarder regulations, the FMC had prohibited licensed ocean freight forwarders from using unlicensed agents (except for agents solely engaged in sales services). However, notwithstanding the fact that the Landstar case was primarily concerned with agents for licensed NVOCCs, the Commissioners, over the strong internal opposition of FMC staff, held that the federal court’s decision in the Landstar case

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applied to all ocean transportation intermediaries, including both NVOCCs and ocean freight forwarders. The Commission ordered that agents of licensed NVOCCs and licensed ocean freight forwarders do not themselves need to be licensed. This was a major deregulatory step.

A further major deregulatory step was taken by Chairman Lidinsky's Commission on February 18, 2011, when it voted to grant an exemption from tariff filing to NVOCCs in response to a petition filed by the National Customs Brokers and Forwarders Association of America ("NCBFAA"). This decision represents the culmination of a long fight by the NCBFAA to overturn tariff filing requirements for NVOCCs. Although the scope of the new rules will not become clear until after the FMC has conducted a formal rulemaking - - which should take another six months or so - - it is clear that this decision represents a major change in the Commission's approach to regulation. In this regard, it is interesting that both the new Chairman Lidinsky and the new Commissioner Khouri were in the majority along with Commissioner Dye, who has long been a proponent of deregulating the maritime industry. Only Commissioner Brennan voted against the tariff exemption for NVOCCs. Whether Commissioners Lidinsky, Khouri, and Dye will now be a continuing majority for further deregulation remains to be seen. It is clear, however, that fresh new winds are now blowing at the intersection of the international ocean maritime industry and the government's regulation of that industry. Stay tuned. It should make for an exciting few years.

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