

Issued: April 29, 2010

FEDERAL MARITIME COMMISSION

46 CFR Parts 520, 532

Docket No. 10-03

RIN 3072-AC38

NVOCC Negotiated Rate Arrangements

AGENCY: Federal Maritime Commission

ACTION: Notice of Proposed Rulemaking

SUMMARY: The Federal Maritime Commission proposes a new part 532 providing an exemption for non-vessel-operating common carriers agreeing to negotiated rate arrangements from certain provisions and requirements of the Shipping Act of 1984 and certain provisions and requirements of the Commission's regulations. The Commission also proposes to add a provision at 46 CFR 520.13(e) to reflect the existence of these instruments.

DATES: Written comments are due by June 4, 2010. If an interested party requests an opportunity to present oral comments to the Commission concerning the proposed regulatory changes by May 14, 2010, the FMC will hold a public meeting on May 24, 2010.

ADDRESSES: Submit all comments concerning this proposed rule to:

Karen V. Gregory
Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Room 1046
Washington, D.C. 20573-0001
secretary@fmc.gov

FOR FURTHER INFORMATION CONTACT:

Rebecca A. Fenneman
Deputy General Counsel
Federal Maritime Commission
800 North Capitol Street, N.W.
Room 1018
Washington, D.C. 20573-0001
(202)523-5740
generalcounsel@fmc.gov

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

Submit Comments: Submit an original and fifteen copies of written comments in paper form, and submit a copy in electronic form (Microsoft Word 2007 or 2003) by e-mail to secretary@fmc.gov on or before June 4, 2010. Include in the subject line: "Docket No. 10-03 Comments on NVOCC Negotiated Rate Arrangements". Interested parties may also request an opportunity to present oral comments to the Commission at a public meeting to take place on May 24, 2010, at the Commission's Main Hearing Room, Room 100, 800 North Capitol Street N.W., Washington, D.C. 20573. Requests to present oral comments must be received by the Commission on or before May 14, 2010. The Commission will announce the time of the meeting, the order of presentation, and time allotment via its website and service on interested presenters.

On July 31, 2008, the National Customs Brokers and Forwarders Association of America, Inc. (NCBFAA) filed a petition with the Federal Maritime Commission (FMC or Commission), requesting the Commission exercise its authority under 46 U.S.C. § 40103 to issue an exemption from provisions of the Shipping Act of 1984 (the Act) requiring non-vessel-operating common carriers (NVOCCs) to publish and/or adhere to

rate tariffs for ocean transportation in those instances where they have individually negotiated rates with their shipping customers and memorialized those rates in writing. Petition No. P1-08, Petition of the National Customs Brokers and Freight Forwarders Association of America, Inc. for Exemption from Mandatory Rate Tariff Publication at 10 ("Petition"). Notice of the Petition was published on August 11, 2008 and comments on it were due by September 26, 2008. 73 FR 46625-02 (August 11, 2008).

On December 24, 2009, NCBFAA filed a motion for leave to supplement the record and submit a verified statement on behalf of DJR Logistics, Inc. By order served January 5, 2010, the Commission granted NCBFAA's motion, accepted the verified statement, and reopened the record for the limited purpose of receiving updated tariff cost information, and any replies thereto, from previous commenting parties of record by January 21, 2010.

A. The Petition

NCBFAA included as an attachment to its Petition a "Statement of Common Principles Concerning a Section 16 Exemption for NVOCCs," issued in 2004 and agreed to by the National Industrial Transportation League (NITL), NCBFAA, and the Transportation Intermediaries Association (TIA). NCBFAA also attached to the Petition supporting verified statements on behalf of eight ocean transportation intermediaries (OTIs)(Econocaribe Consolidators, Inc.; Kuehne + Nagel, Agent of Blue Anchor Line, Division of Transpac Container System, Ltd.; John S. Connor, Inc.; Panalpina, Inc.; American International Cargo Service, Inc.; Barthco Transportation Services, Inc.; DHL Global Forwarding; and C.H. Powell Company).

NCBFAA's proposal incorporated the following principles: the exemption is voluntary; the exemption would relate only to rates tariffs, not to rules tariffs; disputes relating to exempt contracts would be settled only under contract law; NVOCC Service Arrangements (NSAs), to the extent used, would continue to be filed with the Commission and NSA essential terms will continue to be published; exempt contracts would be memorialized in writing; the Commission would have access to documentation relating to exempt contracts; the exemption would not be construed to extend antitrust immunity to NVOCCs; and only NVOCCs that are licensed or registered ocean transportation intermediaries would be eligible to use the exemption.

B. Comments in Response to the Petition

Comments in response to the Petition were filed by members of Congress; two Federal government agencies; OTIs; associations; consultants; tariff publishers; and vessel-operating common carriers (VOCCs). Comments from members of Congress were received from Senator Bernard Sanders (Vermont); Representative Peter Welch (at-Large Vermont); and Representative Jerry Weller (11th District, Illinois). Comments were received from the following OTIs: A Customs Brokerage, Inc. (ABC); All Freight Transportation, Inc.; Alpha Sun International, Inc.; American International Forwarding; A.N. Deringer, Inc.; Balguerie; Camelot Company; Cargo-Link International, Inc.; CJ International, Inc.; CV International, Inc.; D.J. Powers Company, Inc.; DJR Logistics, Inc.; DJS International Services, Inc.; DT Gruelle Company; Diplomat Global Logistics; EMO Trans, Inc.; FedEx Trade Networks Transport & Brokerage; Fracht FWO; Global Fairways, Inc.; Global Link Logistics; Independent Brokerage, LLC; JAS Forwarding Worldwide; Logistics Worldwide USA, Inc.; Mid-America Overseas, Inc./Hanseatic

Container Line Ltd.; Multimodal International Shipping; NACA Logistics (USA); New Direx; New England Groupage; Norman G. Jensen, Inc.; North American Logistics, Inc.; O.T.S. Astracon LLC; ProTrans International; RIM Logistics; R.S. Express, Inc.; Schenker, Inc.; SeaSchott; Serra International; Shipco Transport, Inc.; Superior Brokerage Services, Inc.; Trans-Border Global Freight Systems, Inc.; and USA Shipping, LLC.

The following associations filed comments in response to the Petition: Household Goods Forwarders Association of America, Inc.; National Industrial Transportation League (NITL); New York/New Jersey Foreign Freight Forwarders & Brokers Association, Inc.; Transportation Intermediaries Association; WorldWide Alliance; Florida Shipowners' Group, Inc. and World Shipping Council. Comments were received from the U.S. Department of Transportation (DOT) and the U.S. Department of Justice (DOJ).¹ Two consultants filed comments: ABS Consulting and Stan Levy Consulting, LLC (Levy). Comments were also filed by two tariff publishers: Distribution Publications, Inc. (DPI), and Global Maritime Transportation Services, Inc. (GMTS).

Supplemental comments were received from the following OTIs: Balguerrie; DHL Global Forwarding; Global Fairways International Transportation & Logistics; Kuehne + Nagel, Inc.; North American Logistics, Inc.; O.T.S. Astracon LLC; Panalpina, Inc.; RIM Logistics, Ltd.; and Trans-Border Global Freight Systems, Inc. Supplemental comments were also received from NITL, Levy, and DPI.

¹ The Department of Justice moved to file comments on February 5, 2010 and the Commission determined to accept these late-filed comments on February 17, 2010.

II. SUMMARY OF THE COMMENTS

A. Initial Comments in Support of the Petition

Two members of Congress who filed comments in response to the Petition support granting the Petition on the grounds that tariff publication is expensive, adds little value to the shipping public, and is out of step with the modern ocean transportation environment (Welch at 1; Weller at 1). Senator Sanders noted that tariff publishing requirements have not been updated for a number of years and cost freight forwarders time and resources (Sanders at 1). The Department of Transportation states that it has supported exemption of NVOCCs from tariff filing since such relief was first sought (DOT at 2-3); the Commission's exemption for NSAs do not go far enough and impose unnecessary burdens and costs (*Id.* at 5-6); the 1998 Ocean Shipping Reform Act (OSRA) had made the requirements for exemption more flexible; and that other agencies have used their exemption authority to relieve regulatory burdens (*Id.* at 7-8). The Department of Justice also states that it has long supported an exemption for NVOCCs from all tariff publication requirements in order to produce the greatest competitive benefits. (DOJ at 1).

OTIs state that complying with tariff publication requirements is expensive, with estimates of annual expenditures for compliance ranging from approximately \$450 plus additional charges per rate item filed (Independent Brokerage, LLC at 2), to \$200,000 (Global Link Logistics at 2; RIM at 2). They also state that NVOCCs' customers do not request tariff information and do not rely on tariffs, as rates are negotiated individually (American International Forwarding at 2; DT Gruelle Company at 1). In addition, they

maintain that there are generally no rate disputes with shippers (Camelot Company at 2; Diplomat Global Logistics at 2). OTIs state that NSAs have not provided adequate relief from tariff publication requirements, and, as NSAs are required to be filed with the FMC and their essential terms published in a tariff, they do not provide cost savings. In addition, OTIs state that shippers balk at the contractual commitments required by NSAs (American International Forwarding at 2; DJR Logistics, Inc. at 2).

A number of OTIs state that since 2001, they have added costs associated with security requirements such as Customs-Trade Partnership Against Terrorism (C-TPAT) certification and the 24-hour advance manifest reporting requirement; and that, as small businesses, they need "regulatory offsets" so that their limited resources can be invested in programs that benefit the shipping public and contribute to the nation's security (New Direx, Inc. at 2-3; Superior Brokerage Services, Inc. at 2-3). Finally, several OTIs take the position that the proposed exemption should include charges as well as rates (Schenker, Inc. at 4-6; Shipco at 3-4), and Schenker, Inc. argues that rules should be exempt as well as rates and charges (Schenker, Inc. at 6).

The Household Goods Forwarders Association of America, Inc. (HGFAA) states that the publication of NVOCC rates for household goods movements is particularly burdensome, because these rates are door-to-door rates from inland point to inland point and are determined on an individual basis for each shipment through negotiations between competing NVOCCs and a shipper (HGFAA at 2). HGFAA states that tariff publication is of no benefit to household goods shippers, as published rates are limited in duration and geographic application and shippers of household goods do not use NVOCC tariffs to compare rates of various NVOCCs (*Id.* at 2-3).

NITL states that tariffs are rarely reviewed or consulted by shippers to determine ocean transportation pricing, and that they function more as a costly regulatory afterthought (NITL at 1). NITL argues that the proposed exemption meets statutory exemption standards and is likely to promote competition by reducing regulatory costs for NVOCCs, increasing their potential to offer competitive ocean rates to shippers (*Id.* at 5). With regard to detriment to commerce, NITL argues that the exemption would not be detrimental to commerce as it would allow NVOCCs to respond more efficiently to changing market conditions; establish a regime for NVOCC pricing that is consistent with regulation of intermediaries in other U.S.-based transportation industries; and would promote the growth of U.S. exports by placing a greater reliance on the marketplace (*Id.* at 6-7).

The New York/New Jersey Foreign Freight Forwarders & Brokers Association, Inc. (NYNJFFF&BA) argues that the tariff publication requirement inhibits the beneficial effects of competition for shippers (NYNJFFF&BA at 3); that the tariff publication requirement is costly and unnecessary in the contract carriage system that exists (*Id.* at 4); and that NSAs are not a viable option for most NVOCC movements (*Id.*).

The Transportation Intermediaries Association (TIA) states that FMC regulations require NVOCCs to keep complete accounting records for every shipment, and tariff publication requirements duplicate that requirement (TIA at 6). TIA states that intermediaries often act as both forwarder and NVOCC on different segments of a movement, and the way that these arrangements are expressed in tariff language can cause confusion (*Id.* at 8-9). The WorldWide Alliance (WWA) states that tariff publishing does not exist in any trade lanes other than those involving the U.S., and this

puts U.S. traffic at a disadvantage as NVOCCs cannot respond as quickly to rate and charge fluctuations as they can in other non-U.S. trades (WWA at 2). ABS Consulting (ABS) states that NVOCC rate tariffs have become obsolete and no longer serve their original purpose (ABS at 1). In addition, ABS states that the current tariff publication process adds unnecessary costs to NVOCCs, and thus increases shipping rates (*Id.* at 2).

B. Initial Comments Opposing the Petition

Levy, DPI, and GMTS oppose granting the relief sought by the Petition. Levy argues that the Petition does not substantiate with facts that the requested exemption would not result in substantial reduction in competition or be detrimental to commerce, as based on Levy's assertion that NCBFAA has offered no new facts or information since its previous petition seeking the same relief was filed in 2003 (Levy at 4). Levy states that tariffs may not be used on a daily basis by shippers, but they provide a framework governing shipments so that when there is a cost or service issue, there is a legal tariff binding on all parties (*Id.* at 5). Levy states that if the exemption is granted, NVOCC shippers would lose the ability to use the FMC as a forum for complaints, contrary to the intent of the Act (*Id.* at 6). Finally, Levy argues that it is more appropriate for Congress to revise the Act and that the Petition should be denied, but that the FMC should initiate a proceeding to review and reform tariff regulations for both NVOCCs and VOCCs, to make tariff compliance less burdensome, tariffs more accessible, and tariff information more useful (*Id.* at 5,7).

Tariff publishers DPI and GMTS state that tariffs published on their website are frequently used to verify rates in order to settle disputes (DPI at 13; GMTS at 7). FMC

access to tariffs, the tariff publishers argue, is essential for the agency to monitor NVOCC activities and protect the public from violations of Section 10 of the Shipping Act (DPI at 13; GMTS at 10; DPI at 14), and the exemption would shift the cost and burden of enforcement away from the industry to the FMC and the public (GMTS at 10). DPI argues that granting the Petition would cause detriment to commerce because elimination of the 30-day notice requirement for tariff rates would produce rate quotations that would be valid for short periods of time. GMTS urges the Commission to clarify its regulations so that carriers reduce the number of published tariff items to those rates that actually move the cargo (*Id.* at 9).

Florida Shipowners' Group Inc. (FSG) (on behalf of Bernuth Lines, Ltd.; CMA CGM SA; Crowley Caribbean Services, LLC; Seaboard Marine, Ltd.; Sea Freight Line, Ltd.; and Tropical Shipping USA, LLC) states that NVOCCs compete with VOCCs in reselling VOCC transportation services to beneficial cargo owners, and eliminating tariff publication requirements for NVOCCs while leaving them in place for VOCCs will affect the competitive balance between them (FSG at 2). With regard to tariff costs, FSG states that the costs borne by VOCCs to develop and maintain vessels, equipment, and infrastructure needed to move international trade, dwarfs the costs borne by NVOCCs to comply with tariff requirements (*Id.* at 3). FSG states that Congress chose to retain the tariff publication requirement on both NVOCCs and VOCCs, and the FMC should not remove that requirement from one class of competitors (*Id.*).

C. Other Comments

The World Shipping Council (WSC), a trade association of over 25 international liner shipping ocean carriers, takes no position on the Petition but offers corrections to

inaccurate statements in the Petition. WSC states that neither vessel capacity nor container availability is connected with tariff publication (WSC at 2). WSC argues that claims of short-notice VOCC rate changes are inaccurate, as most NVOCCs structure their dealings with VOCCs through service contracts so that any rate changes would be mutually agreed (*Id.*). WSC states that the generalization that NVOCCs have greater numbers of customers than VOCCs is misleading, as some VOCCs deal with thousands of beneficial cargo owners and NVOCC customers, and this should be taken into consideration in connection with relative tariff filing burdens (*Id.* at 2-3).

D. Supplemental Comments Supporting the Petition

NCBFAA submitted a verified supporting statement from DJR Logistics (DJR), to supplement the record. DJR states that virtually every rate change by ocean carriers requires it to make multiple changes in its tariff rates, at a cost of between \$3.25 and \$13 per change (DJR at 2). DJR estimates its annual tariff publishing bill will be between \$25,000 and \$30,000 (*Id.*). DJR states that none of its customers review its tariffs. Instead, DJR memorializes rate changes via e-mails or other written communications (*Id.* at 3).

The OTIs submitting supplemental comments generally state that they have increased their tariff filings due to changes in VOCC rates and surcharges. Their average annual tariff publication costs are estimated to be from \$2,000 (O.T.S. Astracon at 2), to \$240,000 (DHL Global Forwarding at 2, based on stated average monthly costs of \$20,000). Some of the OTIs state that a written quotation is the accepted practice in rate negotiation, and therefore there is always written communication that can be used by the FMC (*See, e.g.,* Kuehne + Nagel at 2; Panalpina at 1). Kuehne + Nagel and

O.T.S. Astracon state that NSAs have not provided the relief needed from the burden and expense of tariff publication (Kuehne + Nagel at 1; O.T.S. Astracon at 2).

NITL states that the primary purpose of tariff publication, to prevent discriminatory pricing among shippers, is no longer a protection that is required or desired by shippers (NITL at 1). NITL states that the great majority of international ocean shipments move under service contracts, and therefore, tariffs are rarely reviewed by shippers to determine pricing (*Id.* at 1-2). NITL states that there are substantial costs associated with maintaining tariffs and these costs must either be passed on to shippers or absorbed by the NVOCC (*Id.* at 2). NITL argues that the proposed exemption would allow for a regulatory system that is more closely aligned with real time business practices (*Id.*).

E. Supplemental Comments Opposing the Petition

Levy states that when Congress decided to keep tariffs in 1984, it was mindful that it was continuing to impose a regulatory cost on carriers (Levy at 2). DPI also states that it publishes and maintains FMC tariffs for 1,019 NVOCCs, and in 2009, annual tariff costs for its NVOCC clients ranged from \$400 to \$75,000 (DPI at 4).

Levy states that tariffs are required to assist shippers and enable the FMC to fulfill its statutory duties (*Id.* at 3). DPI states that shippers can rely on tariff rates to be accurate, complete and in effect for 30 days; in the event of a dispute, the tariff can be easily accessed and reviewed (DPI at 5). DPI states that tariffs maintained at its website have been used thousands of times to verify rates in order to settle disputes (*Id.*). DPI states that tariffs help protect the public from violations by carriers of Section 10 of the Shipping Act, and enable the Commission to assist in resolving disputes (*Id.*).

DPI argues that granting an exemption will produce an increase in disputes between shippers and NVOCCs over applicable rates and charges (*Id.* at 6). Levy also argues that exempting carriers from tariff compliance could be detrimental to commerce because there would be higher legal costs associated with settling disputes in court instead of at the FMC (*Id.*). Levy states that the issues of overly burdensome regulations, access to tariffs and their usefulness should not be ignored, and the FMC should consider reforming its tariff regulations so that it can perform its duty and maintain the regulatory framework envisioned by Congress, rather than exempting NVOCCs from the Act's requirements (*Id.*). Levy strongly supports having the FMC initiate a proceeding to review and reform tariff regulations for both NVOCCs and VOCCs, to make tariff compliance less burdensome, tariffs more accessible and tariff information more useful (*Id.*).

III. COMMISSION ACTION

After consideration of the Petition and all comments at a meeting on February 18, 2010, the Commission determined to initiate a rulemaking to relieve licensed NVOCCs from the costs and burdens of tariff rate publication.² The Commission specifically found that it was within its statutory authority and discretion under Section 16 of the Shipping Act to grant such an exemption with certain conditions, after having considered all the comments filed in support and in opposition to the Petition, as doing so would not result in substantial reduction in competition or be detrimental to commerce, consistent with the Act. See 46 U.S.C. § 40103(a). Section 16 of the Act, as recodified, reads,

40103. Administrative exemptions.

² Commissioner Joseph E. Brennan dissented.

(a) In General.-- The Federal Maritime Commission, on application or on its own motion, may by order or regulation exempt for the future any . . . specified activity of [persons subject to this part] from any requirement of this part if the Commission finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce. The Commission may attach conditions to an exemption and may, by order, revoke an exemption.

(b) Opportunity for Hearing.-- An order or regulation of exemption may be issued only if the Commission has provided an opportunity for a hearing to interested persons and departments and agencies of the United States Government.

The Commission determined to issue this notice of proposed rulemaking, providing the licensed NVOCCs relief from tariff rate publication requirements and imposing several conditions, including the following: NVOCCs would continue to publish standard rules tariffs containing contractual terms and conditions governing shipments, and would be required to provide these rules free of charge; rates charged by NVOCCs must be agreed to and memorialized in writing by the date cargo is received for shipment by the common carrier; and NVOCCs must retain documentation of the agreed rate and terms for each shipment for a period of five years, and must make this documentation available promptly to the Commission on request pursuant to the Commission's regulations at 46 CFR § 515.31(g).

IV. DISCUSSION

As described above, the Commission voted at its meeting of February 18, 2010, exercising its discretion under Section 16 of the Act, codified at 46 U.S.C. § 40103, to exempt licensed NVOCCs by regulation from these requirements of the Act: the requirement in Section 8(a), codified at 46 U.S.C. §§ 40501(a)-(c) that each common carrier keep open to public inspection in an automated tariff system tariffs showing all its rates; Section 8(b), codified at 46 U.S.C. § 40501(d)(time volume rates); Section 8(d),

codified at 46 U.S.C. § 40501(e) (tariff rate increase may not be effective on less than 30 days' notice but decrease effective immediately); Section 8(e), codified at 46 U.S.C. § 40503 (carrier application to grant refunds); and Section 10(b)(2)(A)'s requirement of adhering to the published tariff rate, codified at 46 U.S.C. § 41104(2)(A). The Commission also determined to seek public comment on whether the regulation should also extend the exemption to the prohibitions of Section 10(b)(4), codified at 46 U.S.C. § 41104(4)(prohibiting common carriers from unfair or unjustly discriminatory practices in services pursuant to a tariff), and Section 10(b)(8), codified at 46 U.S.C. § 41104(8)(prohibiting common carriers from undue or unreasonable preference or advantage or undue or unreasonable prejudice or disadvantage for tariff service). The Commission voted to make this exemption subject to several conditions, as described below. The Commission now publishes a proposed regulation and seeks comment from the public on the proposal.

The regulation, as proposed, would exempt licensed NVOCCs from certain provisions of the Act, specified as follows. The Petition also requests that the exemption be applicable for NVOCCs unlicensed but registered pursuant to 46 CFR 515.21(a)(3). The Commission will consider comments on whether the exemption should be extended to such NVOCCs. The proposed regulation would recognize NVOCC negotiated rate arrangements (NRAs) and proposes defining that instrument as "a written and binding arrangement between a shipper and an eligible NVOCC to provide specific transportation service for a stated cargo quantity, from origin to destination, on and after the receipt of the cargo by the carrier or its agent (or the originating carrier in the case of through transportation)."

For the exemption rule to apply to an NVOCC, the NVOCC must meet the following conditions:

- Notice that the NVOCC is invoking the exemption and opting out of rate publication must be published in a prominent place in a rules tariff;
- Public access to the rules tariff must be free of charge or the rules tariff must be provided with each of the NVOCC's proposed NRAs or rate quotes;
- NRAs must:
 - be agreed to by both parties;
 - be memorialized in writing;
 - include the applicable rate for each shipment;
 - be agreed and memorialized on or before the date on which the cargo is received by the common carrier or its agent (including originating carrier in the case of through transportation rates);
 - include prominent notice of the existence and location of the NVOCC's rules tariff; and
- NRAs and associated records must be retained for five years and are subject to the records availability requirements of the Commission's regulations at 46 CFR § 515.31(g).

When these conditions have been met, the regulation as proposed would exempt the NVOCC from the following requirements of the Act and the Commission's related regulations:

1. The requirement in Section 8(a)(1)(codified at 46 U.S.C. § 40501(a)), (requirement that a tariff containing the applicable rate be published in an automated tariff system);
2. Section 8(b) (codified at 46 U.S.C. § 40501(d))(a rate under which a tariff may vary with the volume of cargo over a specified period of time);
3. Section 8(d), (codified at 46 U.S.C. § 40501(e)) (tariff rate increase may not be effective on less than 30 days' notice but may decrease effective on publication);
4. Section 8(e), (codified at 46 U.S.C. § 40503) (common carrier may apply for Commission authority to grant refunds); and from
5. Section 10(b)(2)(a)'s requirement to adhere to a published tariff rate (codified at 46 U.S.C. § 41104(2)(A)).

Other than the specific provisions of the Act and the Commission's related regulations referenced above, eligible NVOCCs will be subject to the requirements of the Act and all applicable antitrust laws under the proposed regulation.

The Commission seeks comment on whether the regulation should additionally specifically exempt eligible NVOCCs from the prohibitions of Section 10(b)(4), codified at 46 U.S.C. § 41104(4)(prohibiting common carriers from unfair or unjustly discriminatory practices in service pursuant to a tariff), and Section 10(b)(8), codified at 46 U.S.C. § 41104(8)(prohibiting common carriers from undue or unreasonable preference or advantage or undue or unreasonable prejudice or disadvantage for tariff service).

The Commission also requests comment on additional terms to be required in the NRA documentation. In addition, the Commission requests comments on which

elements should be required to qualify the NRA for a “safe harbor” status that affords a presumption that the corresponding shipment is not subject to the tariff rate publication requirement.

Finally, the Commission proposes to add 46 CFR 520.13(e) to its current tariff regulations indicating the interaction of NRAs and otherwise applicable tariff publication requirements of that section.

V. SECTION-BY-SECTION ANALYSIS

A. Section 532.1 – Purpose

The NPRM proposes an exemption from certain provisions of the Act. Section 532.1 sets forth the purpose for the exemption and its conditions.

B. Section 532.2 – Scope and Applicability

This provision describes the scope and applicability of the proposed exemption. Notably, the Commission has proposed that the exemption be limited to NVOCCs that are licensed pursuant to 46 CFR Part 515. Further, it states that any NVOCC who fails to maintain its bond or license or has had its tariff suspended or cancelled by the Commission is ineligible to avail itself of the exemption.

The Commission has proposed that, as the exemption as proposed will only apply to rates, but not the other terms of the agreement between shipper and carrier, standard terms (“tariff rules”) will continue to be required to be made public in the NVOCC’s tariff publication.

C. Section 532.3 – Definitions

This provision defines the terms used in the exemption regulation. Specifically, the Commission introduces a new term, “NVOCC Negotiated Rate Arrangement”

(NRA). The Commission notes that it does not propose to remove or revise the exemption regulations for NVOCC Service Arrangements (NSAs), 46 C.F.R. Part 531.

The rule as proposed would define an NRA as; "a written and binding arrangement between a shipper and an eligible NVOCC to provide specific transportation service for a stated cargo quantity, from origin to destination, on and after the receipt of the cargo by the carrier or its agent (or the originating carrier in the case of through transportation)." This definition is based on that of "rate" as it appears in the Commission's rules at 46 CFR § 520.2. The proposed exemption regulation would also define the term "rules tariff."

D. Section 532.4 - Duties

This proposed provision imposes the duty to provide all terms of an NRA upon the offering NVOCC and is intended for the protection of the shipper. The proposed rule requires that an NVOCC invoking the exemption either (1) provide the public electronic access to its rules tariff free of charge or (2) provide a copy of its rules tariff with each of its proposed NRAs.

E. Section 532.5 - Requirements for NVOCC Negotiated Rate Arrangements

This provision details the requirements for the timing, contents and documentation of NRAs. NRAs must be agreed to and memorialized in writing. Specifically, the Commission wishes commenters to take notice of the timing requirements of the exemption regulation. NRAs must be concluded and in place prior to the date the cargo is received by the common carrier or its agent (including originating carriers in the case of through transportation). These requirements are based on the applicable rate provision of the Commission's tariff regulations found at 46

CFR § 520.7(c). The Commission wishes to note that the regulation as proposed does not allow for any modification to the NRA after the cargo is received by the carrier or its agent (or the originating carrier in the case of through transportation).

F. Section 532.6 - Notices

This section provides details of the required notices that an NVOCC invoking the exemption must provide to the Commission and to potential customers. The proposed regulation requires NVOCCs invoking the exemption to continue to publish a rules tariff, which contains terms and conditions for shipments, but not the agreed rate for a particular shipment. The proposed rule requires that the published rules tariff include prominent notice that the NVOCC has chosen to operate under the exemption and opt out of publishing rates in its tariffs.

Alternatively, if an NVOCC seeks to invoke the exemption for all of its dealings with shippers, it may be simpler to provide an indication of this election to the Commission on the NVOCC's Form FMC-1 filing, which would then be reflected on the Commission's website along with the NVOCC's tariff location. The Commission seeks comment on whether the regulation should also specify that, when a tariff rate and a duly-executed NRA appear to address the same shipment, the lower rate shall prevail.

G. Section 532.7 – Recordkeeping and Audit

This provision would require an NVOCC invoking the exemption to maintain original NRAs and associated records for 5 years in a format easily produced to Commission. An NVOCC would be required to make the NRAs and associated records available to the Commission promptly in response to a request pursuant to 46 CFR § 515.31(g).

Failure to keep records would remove the operation of the exemption (even if it had been invoked by a notice as set forth in foregoing sections) and therefore would make the NVOCC subject to penalties for violations of the Act including, for example, 46 U.S.C. §§ 41104(1)(prohibition against a common carrier allowing a person to obtain transportation at less than applicable tariff rates by an unjust or unfair means or device), and 41104(2)(A)(prohibition against a common carrier providing service not in accordance with a tariff).

VI. STATUTORY REVIEWS AND REQUEST FOR COMMENT

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the Chairman of the Federal Maritime Commission certifies that the proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. The Commission recognizes that the majority of businesses affected by this rule qualify as small entities under the guidelines of the Small Business Administration. The rule, however, would establish an optional method for NVOCCs to carry cargo for their customers to be used at their discretion. The rule would pose no economic detriment to small business entities. Rather, it exempts NVOCCs from the otherwise applicable requirements of the Act when such entities comply with the rules set forth herein.

This regulatory action is not a "major rule" under 5 U.S.C. 804(2).

The collection of information requirements contained in this proposed 46 CFR Part 532 have been submitted to the Office of Management and Budget for review under section 3504(h) of the Paperwork Reduction Act of 1980, as amended. Send comments regarding the burden estimate or any other aspect of this collection of

information, including suggestions for reducing this burden, to Ronald D. Murphy, Managing Director, Federal Maritime Commission, 800 North Capitol Street, N.W., Washington, D.C. 20573, e-mail: OMD@fmc.gov, or fax: (202) 523-3646; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Federal Maritime Commission, 17th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20503, e-mail: [OIRA Submission@OMB.EOP.GOV](mailto:OIRA_Submission@OMB.EOP.GOV), or fax: (202) 395-5806.

List of Subjects

46 CFR Part 520

Common carrier, Freight, Intermodal transportation, Maritime carrier, Reporting and recordkeeping requirements

46 CFR Part 532

Exports, Non-vessel-operating common carriers, ocean transportation intermediaries.

Accordingly, the Federal Maritime Commission proposes to amend 46 CFR Part 520 and add 46 CFR Part 532 as follows:

PART 520 - Carrier Automated Tariffs

1. The authority for Part 520 continues to read as follows:

AUTHORITY: 5 U.S.C. 553; 46 U.S.C. 305, 40101-40102, 40501-40503, 40701-40706, 41101-41109.

§ 520.13 [Amended]

2. In 520.13, add a new section (e) to read as follows:

§ 520.13 Exemptions and exceptions.

(e) NVOCC Negotiated Rate Arrangements. A licensed NVOCC that satisfies the requirements of part 532 of this chapter is exempt from the requirement in this part that it include rates in a tariff open to public inspection in an automated tariff system.

3. Add part 532 to read as follows:

PART 532 – NVOCC Negotiated Rate Arrangements

Subpart A – General Provisions

- Sec. 532.1 Purpose
- Sec. 532.2 Scope and Applicability
- Sec. 532.3 Definitions

Subpart B – Procedures Related to NVOCC Negotiated Rate Arrangements

- Sec. 532.4 Duties of the NVOCC
- Sec. 532.5 Requirements for NVOCC Negotiated Rate Arrangements
- Sec. 532.6 Notices

Subpart C – Recordkeeping Requirements

- Sec. 532.7 Recordkeeping and audit
- Sec. 532.91 OMB control number assigned pursuant to the Paperwork Reduction Act

AUTHORITY: 46 U.S.C. 40103

Subpart A - General Provisions

§ 532.1 – Purpose

The purpose of this Part, pursuant to the Commission's statutory authority, is to exempt licensed and bonded non-vessel-operating common carriers (NVOCCs) from the tariff rate publication and adherence requirements of the Shipping Act of 1984, as enumerated herein.

§ 532.2 – Scope and Applicability

This Part exempts NVOCCs duly licensed pursuant to 46 CFR 515.3, holding adequate proof of financial responsibility pursuant to 46 CFR 515.21; and meeting the requirements of 46 CFR 532.4 through 532.7; from the following requirements and prohibitions of the Shipping Act and the Commission's regulations:

- (a) the requirement in 46 U.S.C. 40501(a)-(c) that the NVOCC include its rates in a tariff open to public inspection in an automated tariff system;
- (b) 46 U.S.C. 40501(d);
- (c) 46 U.S.C. 40501(e)
- (d) 46 U.S.C. 40503;
- (e) the prohibition in 46 U.S.C. 41104(2)(A); and
- (f) the Commission's corresponding regulation at 46 CFR 520.3(a) that the NVOCC include its rates in a tariff open for public inspection in an automated tariff system;
- (g) the Commission's corresponding regulations at 46 CFR 520.4(a)(4), 520.4(f), 520.6(e), 520.7(c), (d), 520.8(a), 520.12, and 520.14. Any NVOCC failing to maintain its bond or license as set forth above, or who has had its tariff suspended by the Commission, shall not be eligible to invoke this exemption.

§532.3 – Definitions

When used in this part,

- (a) "NVOCC Negotiated Rate Arrangement" means a written and binding arrangement between a shipper and an eligible NVOCC to provide specific transportation service for a stated cargo quantity, from origin to destination,

on and after receipt of the cargo by the carrier or its agent (or the originating carrier in the case of through transportation).

(b) "Rate" means a price stated for providing a specified level of transportation service for a stated cargo quantity, from origin to destination, on and after a stated date or within a defined time frame.

(c) "Rules tariff" means the portion of a tariff, as defined by 46 CFR 520.2, containing the terms and conditions governing the charges, classifications, rules, regulations and practices of an NVOCC, but does not include a rate.

Subpart B - Procedures Related to NVOCC Negotiated Rate Arrangements

§532.4—Duties of the NVOCC

Before entering into an NRA under this Part, the NVOCC must:

- (a) for each NRA, provide the prospective shipper all the applicable terms as set forth in its rules tariff; or
- (b) provide electronic access to its rules tariffs to the public free of charge.

§532.5-Requirements for NVOCC Negotiated Rate Arrangements

In order to qualify for the exemptions to the general rate publication requirement as set forth in section 532.2, an NRA must:

- (a) be in writing;
- (b) be agreed to by both shipper and NVOCC prior to the date on which the cargo is received by the common carrier or its agent (including originating carriers in the case of through transportation);
- (c) clearly specify the rate and to which shipment or shipments such rate will apply; and

(d) may not be modified after the time the shipment is received by the carrier or its agent (including originating carriers in the case of through transportation).

§532.6-Notices

(a) An NVOCC wishing to invoke an exemption pursuant to this part must indicate that intention to the Commission and to the public by one or more of the following:

- (1) A prominent notice on its rules tariff; or
- (2) By so indicating on its Form FMC-1 on file with the Commission.

Subpart C - Recordkeeping

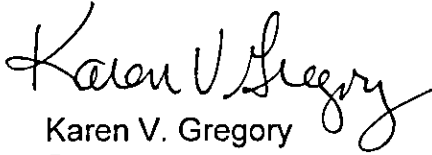
§532.7 – Recordkeeping and Audit

- (a) An NVOCC invoking an exemption pursuant to this part must maintain original NRAs and all associated records including written communications for 5 years in a format easily produced to Commission.
- (b) NRAs and all associated records and written communications are subject to inspection and reproduction requests under section 515.31(g) of this chapter. An NVOCC shall produce the requested NRAs and associated records, including written communications, promptly in response to a Commission request.
- (c) Failure to keep or timely produce original NRAs and associated records and written communications will disqualify an NVOCC from the operation of the exemption provided pursuant to this part, regardless of whether it has been invoked by notice as set forth above, and may result in a Commission finding of a violation of 46 U.S.C. 41104(1), 41104(2)(A) or other acts prohibited by the Shipping Act.

§532.91 - OMB control number issued pursuant to the Paperwork Reduction Act

The Commission has received OMB approval for this collection of information pursuant to the Paperwork Reduction Act of 1995, as amended. In accordance with that Act, agencies are required to display a currently valid control number. The valid control number for this collection of information is [3072-XXX].

By the Commission.


Karen V. Gregory
Secretary