

(S E R V E D)  
( DECEMBER 23, 2004 )  
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

46 CFR PART 531

[Docket No. 04-12]

NON-VESSEL-OPERATING COMMON CARRIER SERVICE ARRANGEMENTS

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FINAL RULE - ERRATA

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The Commission has made the following non-substantive revisions to the Final Rule. Specifically, the numbering contained in the summary paragraph has been removed; and the numbering of 46 CFR § 531.8(a) and (c) has been revised as follows:

**§ 531.8 Amendment, correction, cancellation, and electronic transmission errors.**

- (a) Amendment.
  - (1) NSAs may be amended by mutual agreement of the parties. Amendments shall be filed electronically with the Commission in the manner set forth in 531.5 and Appendix A to this part.
    - (i) Where feasible, NSAs should be amended by amending only the affected specific term(s) or subterms.
    - (ii) Each time any part of an NSA is amended, the filer shall assign a consecutive amendment number (up to three digits), beginning with the number "1."
    - (iii) Each time any part of a filed NSA is amended, the "Filing Date" will be the date of filing of the amendment.

(2) [Reserved]

(b) Correction.

(1) Requests shall be filed, in duplicate, with the Commission's Office of the Secretary within forty-five (45) days of the NSA's filing with the Commission, accompanied by remittance of a \$276 service fee.

(2) Requests shall include:

(i) A letter of transmittal explaining the purpose of the submission, and providing specific information to identify the initial or amended NSA to be corrected;

(ii) A paper copy of the proposed correct terms. Matter to be deleted shall be struck through and matter to be added shall immediately follow the language being deleted and underscored;

(iii) An affidavit from the filing party attesting with specificity to the factual circumstances surrounding the clerical or administrative error, with reference to any supporting documentation;

(iv) Documents supporting the clerical or administrative error; and

(v) A brief statement from the other party to the NSA concurring in the request for correction.

(3) If the request for correction is granted, the carrier party shall file the corrected provisions using a special case number as described in Appendix A to this part.

(c) Electronic transmission errors.

(1) An authorized person who experiences a purely technical electronic transmission error or a data conversion error in transmitting an NSA filing or an amendment thereto is permitted to file

a Corrected Transmission ("CT") of that filing within 48 hours of the date and time of receipt recorded in the Commission's electronic filing system (excluding Saturdays, Sundays and legal public holidays). This time-limited permission to correct an initial defective NSA filing is not to be used to make changes in the original NSA rates, terms or conditions that are otherwise provided for in 531.6(b). The CT tab box in the Commission's electronic filing system must be checked at the time of resubmitting a previously filed NSA, and a description of the corrections made must be stated at the beginning of the corrected NSA in a comment box. Failure to check the CT box and enter a description of the correction will result in the rejection of a file with the same name, as documents with duplicate file names or NSA and amendment numbers are not accepted by the FMC's electronic filing system.

(2) [Reserved]

(d) Cancellation.


(1) An account may be adjusted for events and damages covered by the NSA. This shall include adjustment necessitated by either liability for liquidated damages appearing in the NSA as filed with the Commission under 531.6(b)(7), or the occurrence of an event described below in paragraph (d)(2) of this section.

(2) In the event of cancellation as defined in 531.3(g):

(i) Further or continued implementation of the NSA is prohibited; and

(ii) The cargo previously carried under the NSA shall be re-rated according to the otherwise applicable tariff provisions.

(e) If the amendment, correction or cancellation affects an essential term required to be published under 531.9, the statement of essential terms shall be changed as soon as possible after the filing of the amendment to accurately reflect the change to the NSA terms.

  
Bryant L. VanBrakle  
Secretary

FEDERAL MARITIME COMMISSION

46 CFR Part 531

[Docket No. 04-12]

RIN 3072-AC30

Non-Vessel-Operating Common Carrier Service Arrangements

Agency: Federal Maritime Commission.

Action: Final Rule.

Summary: The Federal Maritime Commission is exempting non-vessel-operating common carriers from the tariff publication requirements of the Shipping Act of 1984, subject to certain filing and publication conditions placed on these Non-Vessel-Operating Common Carrier Service Arrangements or “NSAs.” This Final Rule: revises the rule as proposed to allow affiliates of NSA signatories to have access to service, and to provide service under an NSA; corrects typographical errors and an internal reference; and deletes a portion of Form FMC-78 that affects only internal agency use.

Dates: Effective January 19, 2005.

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Supplementary Information:

On October 28, 2004, the Federal Maritime Commission (“FMC” or “Commission”) issued a notice of proposed rulemaking (“NPR”) pursuant to its authority under section 16 of the Shipping Act of 1984 (“Shipping Act”), 46 U.S.C. app. § 1715, to exempt non-vessel-operating common carriers (“NVOCCs”) from the tariff publication requirements of the Shipping Act, subject to certain conditions. 69 Fed. Reg. 63981 (Nov. 3, 2004). Interested persons were given until November 19, 2004, to comment on the NPR. This deadline was later extended to November 30, 2004 in response to a request from the U.S. Department of Justice (“DOJ”).

The Commission received comments on the NPR from: Transoceanic Shipping Co., Inc. and Jagremer Marine, Inc. (“Transoceanic”); NVOCC Committee of China Association of Shipping Agency (“CASA”); the American Institute for Shippers’ Associations, Inc. (“AISA”); the National Customs Brokers and Forwarders Association of America, Inc. (“NCBFAA”); the North Atlantic Alliance Association, Inc. (“NAAA”); the Fashion Accessories Shippers Association, Inc. (“FASA”); the Pacific Coast Tariff Bureau (“PCTB”); the International Shippers’ Association (“ISA”); DOJ;<sup>1</sup> and joint comments from the National Industrial Transportation League, United Parcel Service, Inc., BAX Global, Inc., Transportation Intermediaries

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<sup>1</sup> DOJ filed its comments on December 3, 2004, along with a motion requesting leave to submit its comments past the deadline. We agree with DOJ’s assertion that the public interest will be served and no prejudice will result, and have accepted the late filing.

Association, Fedex Trade Networks Transport and Brokerage, Inc., C.H. Robinson Worldwide, Inc., and BDP International, Inc. (“Joint Commenters”).

The exemption as proposed would allow individual NVOCCs to offer NVOCC Service Arrangements (“NSAs”) to NSA shippers, provided that such NSAs are filed with the Commission and their essential terms are published in the NVOCC’s tariff. The proposed rule defined an NSA as “a written contract, other than a bill of lading or receipt, between one or more NSA shippers and an individual NVOCC in which the NSA shipper makes a commitment to provide a certain minimum quantity or portion of its cargo or freight revenue over a fixed time period, and the NVOCC commits to a certain rate or rate schedule and a defined service level.” 69 Fed. Reg. at 63990. The proposed rule defined an “NSA shipper” as a cargo owner, the person for whose account the ocean transportation is provided, the person to whom delivery is to be made, or a shippers’ association. Id. This proposed definition, however, specifically did not include NVOCCs or shippers’ associations with NVOCC members. Id.

Commenters generally support the rule as proposed and urge the Commission to act expeditiously to provide the relief it represents. AISA at 1; NCBFAA at 1, 4; ISA at 2; DOJ at 2; Joint Commenters at 1; Transoceanic at 1. But see FASA at 2 (rule is not within agency’s authority). The Joint Commenters believe the rule as proposed represents “a progressive solution which will be beneficial at all levels of the U.S. ocean transportation industry.” Joint Commenters at 3. The Joint Commenters also urge the Commission not to delay the implementation of the exemption now to further consider how conditions other than those already

proposed might ensure that competition is not substantially harmed. They assert that if the conditions imposed on the exemption as proposed later prove to be “unnecessarily burdensome, or [that a] less onerous means of achieving the same end can be fashioned, the Commission could consider subsequent adjustments.” Id. at 2. DOJ states that the “proposal would promote competition in ocean transportation.” DOJ at 2.

I. Antitrust Immunity for NSA Activity and Substantial Reduction in Competition

The NPR explained the Commission’s rationale for limiting the exemption to NSAs offered by an individual NVOCC acting as carrier and a non-NVOCC shipper as follows. Courts may interpret the coordinated activity of multiple NVOCCs offering NSAs, and of NSAs between one NVOCC acting as a carrier and one NVOCC acting as a shipper, as immune from the antitrust laws under section 7(a)(2) of the Shipping Act, 46 U.S.C. app. § 1706(a)(2). 69 Fed. Reg. 63986-63987. Section 16 of the Shipping Act, 46 U.S.C. app. § 1715, gives the Commission the authority to make rules exempting regulated entities from the requirements of the Shipping Act only if it finds the exemption will not result in substantial reduction in competition or detriment to commerce. Id. The Commission determined that, in order to ensure that the exemption as proposed will not result in a substantial reduction in competition, it must limit the exemption to individual NVOCCs acting in their capacity as carriers. This is the case because antitrust immunity under section 7(a)(2), along with a lack of regulatory oversight, could substantially reduce competition.



Several commenters disagree with this finding. They argue that no such reduction in competition will occur because, unlike those of vessel-operating common carriers (“VOCCs”) or marine terminal operators (“MTOs”), the concerted activities of NVOCCs are not entitled to immunity from the antitrust laws by any provision of the Shipping Act. They regard the Commission’s concern that the holding of United States v. Tucor, 189 F.2d 834 (9<sup>th</sup> Cir. 1999) may have this effect as misplaced because Tucor is either incorrect or inapposite to the analysis of immunity granted by section 7(a)(2), 46 U.S.C. app. § 1706(a)(2). AISA at 13-14; NCBFAA at 5; ISA at 6-9; DOJ at 2-3; compare, FASA at 4-5. Furthermore, commenters assert that not only would such activity be subject to the regulatory oversight of DOJ under the antitrust laws, it would also be subject to Commission oversight under section 10(c) of the Shipping Act (e.g., 46 U.S.C. app. §§ 1709(c)(1)-(5)). Joint Commenters at n.1; FASA at 3.

Three commenters argue that the Commission should allow groups of NVOCCs to offer NSAs as carriers and to enter into NSAs as shippers because there is no way that such action could result in substantial harm to competition. NCBFAA at 5; NAAA at 8; ISA at 8,9,11. Similarly, three commenters specifically argue that shippers’ associations with NVOCC members should be able to enter into NSAs as shippers. ISA at 8-12; NAAA at 8; AISA at 15-16. AISA makes several arguments to support this position: the Commission does not have the authority to regulate the membership of shippers’ associations; DOJ’s safe harbor guidelines for shippers’ associations are sufficient; restricting shippers’ associations’ uses of NSAs would be an “arbitrary and capricious” policy; and such a limitation would reduce

competition. AISA at 1, 5-10, 11, 15-16. ISA requests that, if the Commission finds it cannot allow NVOCCs to act as shippers, it should make an exception limited to household goods NVOCC shippers' associations. ISA at 14. FASA, on the other hand, believes the Commission is correct to be concerned about the competitive impact of NVOCC collusion because there are NVOCCs that hold enormous market power and could "easily engage in discriminatory tactics against target [beneficial cargo owner shippers'] associations." FASA at 4.

The Commission agrees with the commenters that the rationale of Tucor is incorrect and that its direct precedential value is limited to section 7(a)(4) of the Shipping Act, 46 U.S.C. § 1706(a)(4).<sup>2</sup> However, other tribunals may find Tucor's analysis of section 7(a)(4), which the court read in isolation from the balance of the statute, analogous to section 7(a)(2), 46 U.S.C. app. § 1706(a)(2). This is true because a court could regard an NSA-related activity as an activity within the scope of the Shipping Act undertaken with a reasonable basis to conclude that it is "exempt from any publication . . . requirement of this Act." 46 U.S.C. app. 1706(a)(2)(B)(emphasis added). Such a judicial interpretation would result in a vacuum of regulatory oversight over anti-competitive arrangements undertaken under the cloak of an NSA. While we would disagree with it, we must consider the likelihood of such an outcome in light of Tucor.

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<sup>2</sup> The Commission's views on the inapplicability of Shipping Act antitrust immunity to service contracts between VOCCs and NVOCCs is reflected in the committee report on the bill that became the Ocean Shipping Reform Act of 1998. See, Report of the Committee on Commerce, Science and Transportation on S.414, S.Rep. No. 105-61 at 20 (July 31, 1997). See also, FASA at 5.

We agree with FASA that competing NVOCCs acting together clearly have the ability to affect competition.<sup>3</sup> By agreeing to jointly offer an NSA to a shipper, they would collectively fix a price for their services, i.e., a horizontal price-fixing agreement. The Commission's concern with NVOCCs acting as shippers in NSAs, either individually or collectively through shippers' associations, may be price fixing by NVOCCs who resell the service they are jointly purchasing to end-users (beneficial cargo interest shippers).<sup>4</sup> The under-20% market share threshold of the DOJ "safe harbor" provisions for joint purchasing agreements by itself does not appear to completely cover NVOCC shippers' associations as it may beneficial cargo interest shippers' associations. See, Antitrust Division Response to Request for Business Review Letter – Household Goods Forwarders Association of America, Inc. September 19, 1985, B.R.L. 85-21, 1985 WL 71889 (DOJ) (unopposed because there was no collective rate making or discussions and because the negotiation of rates for services in a market substantially controlled by the group expressly was not authorized). In any case, if activity under an NSA is immunized from the antitrust laws, DOJ's policy guidance on shippers' associations would become inapplicable.

There is nothing in the text of the Shipping Act to prevent the concurrent jurisdiction of the Commission under section 10(c) of the Shipping Act and the agencies responsible for enforcement of the general antitrust laws over NSAs. However, if NSA activities are judged immune from the antitrust laws under section 7(a)(2) of the Shipping Act, there appears to be no prohibition in section 10(c)

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<sup>3</sup> In order to do the same, VOCCs must file agreements with the Commission, which are available for public review and comment.

<sup>4</sup> Horizontal price fixing might also be accomplished in an NSA where the carrier NVOCC and

specifically applicable to NSAs to address price-fixing or market division, activities which are almost universally accepted as the most egregious types of anticompetitive behavior. Therefore, even if the Commission were to find that the provisions of section 10(c) applied generally to NVOCC collective activity, because a court might find NVOCCs immune from the antitrust statutes, there may be no regulation of such patently anticompetitive arrangements if they are undertaken through an NSA.

Accordingly, the Commission has determined at this time not to extend the definition of NSAs to include arrangements between two NVOCCs, whether individually or acting in concert through a shippers' association, due to the potential that they may include activities considered per se anti-competitive under the Sherman Act, 15 U.S.C. §1. The lack of oversight over the competitive impacts of activities undertaken through NSAs may lead to the substantial reduction in competition that section 16 prohibits. As such, the Commission finds that at this time it must limit the exemption as set forth in the proposed rule. However, in accordance with the recommendations of the Joint Commenters, as we gain further experience regarding the practical effects of the exemption, and as the courts assess the scope of the antitrust immunity the Shipping Act grants, the Commission will continue to consider whether there are other means to ensure NSAs meet the criteria of section 16.

## II. Affiliates' Access to NSAs

The Joint Commenters and CASA believe the Commission should allow

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the shipper NVOCC are also competitors.

affiliated NVOCCs to jointly offer NSAs. Joint Commenters at 3; CASA at 1-2. PCTB and CASA similarly argues that shippers' affiliates should be able to have access to NSAs negotiated by a related entity. PCTB at 3-4; CASA at 1-2. The Joint Commenters point out that the Supreme Court has held that the coordinated activities of a parent and its wholly-owned subsidiary must be viewed as a single entity for purposes of restraint of trade analysis under section 1 of the Sherman Act. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

We agree that the analysis of Copperweld with respect to competition under the antitrust laws and the Commission's service contract rules with respect to competitive analysis under the Shipping Act are appropriately applied to the Commission's approach to NSAs, and therefore have decided to allow the participation of affiliates to the NSA signatory parties. The Commission accordingly: (1) revises the proposed rule's requirements for NSAs at section 531.6(b)(9); (2) revises the definition of "NSA" (Final Rule at section 531.3(p)); and (3) adds a definition of "affiliate" (Final Rule at section 531.3(b)), based on the language proposed by the Joint Commenters. Joint Commenters at 3-4.

Proposed section 531.6(b)(9) is revised as follows:

The legal names and business addresses of the NSA parties; the legal names of all affiliates of the NSA shipper entitled to access the NSA; the names, titles and addresses of the representatives signing the NSA for the parties, except that in the case of an NSA entered into by a shippers' association, individual members need not be named unless the contract includes or excludes specific members; and the date upon which the NSA was signed. Subsequent references in the NSA to the signatory parties shall be consistent with the first reference. An NVOCC party which enters into an NSA that includes affiliates must either:

- (i) list the affiliates' business addresses; or
- (ii) certify that this information will be provided to the Commission upon request within ten (10) business days of such request.

Similarly, the Commission adds the following definition of “affiliate” in section 531.3(b): “Affiliate” means two or more entities which are under common ownership or control by reason of being parent and subsidiary or entities associated with, under common control with, or otherwise related to each other through common stock ownership or common directors or officers.

The Final Rule revises the definition of NSA (section 531.3(o) as proposed; section 531.3(p) in the Final Rule), as follows:

NVOCC Service Arrangement (“NSA”) means a written contract, other than a bill of lading or receipt, between one or more NSA shippers and an individual NVOCC or two or more affiliated NVOCCs, in which the NSA shipper makes a commitment to provide a certain minimum quantity or portion of its cargo or freight revenue over a fixed time period, and the NVOCC commits to a certain rate or rate schedule and a defined service level. The NSA may also specify provisions in the event of nonperformance on the part of any party.

Finally, the definition of “NSA shipper” as it appeared in the proposed rule contained a typographical error. The Final Rule corrects this error and eliminates the article “a” appearing before “shippers’ associations.” The definition section in 531.3(o) as final reads, “NSA shipper means a cargo owner, the person for whose account the ocean transportation is provided, the person to whom delivery is to be made, or a shippers’ association. The term does not include NVOCCs or shippers’ associations whose membership includes NVOCCs.”

### III. Other matters

NCBFAA and DOJ argue that the exemption should be broadened to exempt all NVOCCs from all tariff publication requirements without condition because such requirements are unnecessary. NCBFAA at 2,6; DOJ at 2. The Commission,

NCBFAA argues, has never explained how these conditions will protect competition and improperly relies on the eliminated “ability to regulate” criterion. NCBFAA at 6.

NCBFAA argues that the proposed rule’s view that the filed rate doctrine is no longer “sacrosanct” is correct; NSA rates would be “applicable” or “legal” even if not filed with the Commission. NCBFAA at 8-10.

Either eliminating the tariff publication requirement completely and/or eliminating the condition of the exemption that all NSAs be filed with the Commission and their essential terms be published could substantially impact the competition between large NVOCCs and VOCCs (who continue to be required to publish their tariffs, file service contracts and publish service contract essential terms) by continuing to impose costs on one while relieving costs for the other. We anticipate NVOCCs who offer NSAs may wish to use their tariffs in much the same way as VOCCs do for service contracts, as a convenient place to house generally-applicable provisions.

PCTB questions whether the Commission intended to allow NSAs to make reference to tariff publications of NVOCCs other than that offering the NSA. PCTB at 4-5. We agree with PCTB that doing so would likely be confusing to shippers and we revise section 531.6(c)(2) of the Final Rule accordingly. The Commission will endeavor, as PCTB has requested, to post “frequently asked questions” regarding NSAs on its website.

Finally, the Final Rule makes several typographical corrections. It corrects the facsimile number to which registrants may file Forms FMC-78 in section 531.5(d)(1) and the Instructions for Form FMC-78. It corrects the internal reference

to cancellations in section 531.8(d)(2). The line for indicating the initially assigned password appearing in the “FMC use only” portion of Form FMC-78 has been eliminated.

#### IV. Statutory Reviews

In accordance with the Paperwork Reduction Act, 44 U.S.C. 3507, the Commission has submitted estimated burdens of collection of information authorized by this Final Rule to the Office of Management and Budget (“OMB”). The estimated total annual burden for the estimated 110 annual respondents is 165,932 manhours. No comments were received on this estimate.

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 605, the Chairman of the Federal Maritime Commission has certified to the Chief Counsel for Advocacy, Small Business Administration, that the Final Rule will not have a significant impact on a substantial number of small entities. Although NVOCCs as an industry include small entities, the Final Rule provides, but does not require, an alternative for NVOCCs, from the otherwise applicable tariff publication requirements of the Shipping Act and the Commission’s regulations. It potentially relieves a burden. Therefore, the Commission has found that the Final Rule will have no significant economic impact on a substantial number of small entities.

#### **List of Subjects for 46 CFR Part 531**

Exports, Non-vessel-operating common carriers, Ocean transportation intermediaries

Accordingly, the Federal Maritime Commission adds 46 C.F.R. part 531 as follows:



**PART 531 -- NVOCC SERVICE ARRANGEMENTS**  
**Subpart A -- General Provisions**

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**Subpart B -- Filing Requirements**

531.6 NVOCC Service Arrangements.531.7 Notices.531.8 Amendment, correction, cancellation, and electronic transmission errors.

**Subpart C -- Publication of Essential Terms**

531.9 Publication.

**Subpart D -- Exceptions and Implementation**

531.10 Excepted and exempted commodities.531.11 Implementation.

**Subpart E -- Recordkeeping and Audit**

531.12 Recordkeeping and Audit531.13-531.98 [RESERVED]531.99 OMB control numbers assigned pursuant to the Paperwork Reduction Act.  
Appendix A to Part 531 -- Instructions for the Filing of NVOCC Service Arrangements  
Exhibit 1 to Part 531 -- NVOCC Service Arrangement Registration [FORM FMC-78]

Authority: 46 U.S.C. app. § 1715.

**Subpart A -- General Provisions**

**§ 531.1 Purpose.**

This part exempts NVOCCs from certain provisions of the Shipping Act. The purpose of this part is to facilitate the filing of NVOCC Service Arrangements ("NSAs") and the publication of certain essential terms of those NSAs as they are exempt from the otherwise applicable provisions of the Shipping Act of 1984 ("Act"). This part enables the Commission to review NSAs to ensure that they and the parties to them comport with the conditions of the exemption as set forth below.

**531.2 Scope and applicability.**

Only individual NVOCCs compliant with the requirements of section 19 of the Act and the Commission's regulations at 46 C.F.R. part 515 may enter into an NSA with one or more NSA shippers subject to the requirements of these rules. Any NVOCC who has failed to maintain its bond or license or had its tariff suspended or cancelled by the Commission is ineligible to offer and file NSAs.

### § 531.3 Definitions.

When used in this part:

(a) Act means the Shipping Act of 1984 as amended by the Ocean Shipping Reform Act of 1998;

(b) Affiliate means two or more entities which are under common ownership or control by reason of being parent and subsidiary or entities associated with, under common control with, or otherwise related to each other through common stock ownership or common directors or officers.

(c) Amendment means any change to a filed NSA which has prospective effect and which is mutually agreed upon by all parties to the NSA.

(d) Authorized person means an NVOCC or duly appointed agent who is authorized to file NSAs on behalf of the NVOCC and to publish the corresponding statement of essential terms and is registered by the Commission to file under section 531.5 and Appendix A to this part.

(e) BTA means the Commission's Bureau of Trade Analysis, or its successor bureau.

(f) BCL means the Commission's Bureau of Certification and Licensing, or its successor bureau.

(g) Cancellation means an event which is unanticipated by the NSA, in liquidated damages or otherwise, and is due to the failure of the NSA shipper to tender minimum cargo as set forth in the contract, unless such tender was made impossible by an action of the NVOCC.

(h) Commission or FMC means the Federal Maritime Commission.

(i) Common carrier means a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that: (1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel tanker, or by a vessel when primarily engaged in the carriage of perishable agricultural commodities: (i) If the common carrier and the owner of those commodities are wholly owned, directly or indirectly, by a person primarily engaged in the marketing and distribution of those commodities and (ii) Only with respect to those commodities.

(j) Correction means any change to a filed NSA that has retroactive effect.

(k) Effective date means the date upon which an NSA or amendment is scheduled to go into effect by the parties to the NSA. An NSA or amendment becomes effective at 12:01 a.m. Eastern Standard Time on the beginning of the effective date. The effective date cannot be prior to the filing date of the NSA or amendment with the Commission.

(l) Expiration date means the last day after which the entire NSA is no longer in effect.

(m) File or filing (of NSAs or amendments thereto) means the use of the Commission's electronic filing system for receipt of an NSA or an amendment thereto by the Commission, consistent with the method set forth in Appendix A of this part, and the recording of its receipt by the Commission.

(n) OIT means the Commission's Office of Information Technology, or its successor office.

(o) NSA shipper means a cargo owner, the person for whose account the ocean transportation is provided, the person to whom delivery is to be made, or a shippers' association. The term does not include NVOCCs or shippers' associations whose membership includes NVOCCs.

(p) NVOCC Service Arrangement ("NSA") means a written contract, other than a bill of lading or receipt, between one or more NSA shippers and an individual NVOCC or two or more affiliated NVOCCs, in which the NSA shipper makes a commitment to provide a certain minimum quantity or portion of its cargo or freight revenue over a fixed time period, and the NVOCC commits to a certain rate or rate schedule and a defined service level. The NSA may also specify provisions in the event of nonperformance on the part of any party.

(q) Statement of essential terms means a concise statement of the essential terms of an NSA required to be published under this part.

#### **§ 531.4 Confidentiality.**

(a) All NSAs and amendments to NSAs filed with the Commission shall, to the fullest extent permitted by law, be held in confidence by the Commission.

(b) Nothing contained in this part shall preclude the Commission from providing certain information from or access to NSAs to another agency of the Federal government of the United States.

(c) Parties to a filed NSA may agree to disclose information contained in it. Breach of any confidentiality agreement contained in an NSA by either party will not, on its own, be considered a violation of these rules.

#### **§ 531.5 Duty to file.**

(a) The duty under this part to file NSAs, amendments and notices, and to publish statements of essential terms, shall be upon the NVOCC party to the NSA.

(b) The Commission shall not order any person to pay the difference between the amount billed and agreed upon in writing with a common carrier or its agent and the amount set forth in an NSA by that common carrier for the transportation service provided.

(c) Filing may be accomplished by any duly agreed-upon agent, as the parties to the NSA may designate, and subject to conditions as the parties may agree.

(d) Registration.

(1) Application. Authority to file or delegate the authority to file must be requested by a responsible official of the NVOCC in writing by submitting to BTA, either by mail to 800 N. Capitol Street, N.W., Washington, D.C. 20573, or by facsimile to (202) 523-5867, a completed NSA Registration Form (FMC-78)(Exhibit 1 to this part).

(2) Approved registrations. OIT shall provide approved Registrants a log-on identification number ("I.D.") and password for filing and amending NSAs, and notify Registrants of such approval via U.S. mail.

## **Subpart B -- Filing Requirements**

### **§ 531.6 NVOCC Service Arrangements.**

(a) Authorized persons shall file with BTA, in the manner set forth in Appendix A of this part, a true and complete copy of every NSA or amendment before any cargo moves pursuant to that NSA or amendment.

(b) Every NSA filed with the Commission shall include the complete terms of the NSA including, but not limited to, the following:

(1) The origin port ranges in the case of port-to-port movements and geographic areas in the case of through intermodal movements;

(2) The destination port ranges in the case of port-to-port movements and geographic areas in the case of through intermodal movements;

(3) The commodity or commodities involved;

(4) The minimum volume or portion;

(5) The service commitments;

(6) The line-haul rate;

(7) Liquidated damages for non-performance (if any);

(8) Duration, including the (i) Effective date; and (ii) Expiration date;

(9) The legal names and business addresses of the NSA parties; the legal names of all affiliates of the NSA shipper entitled to access the NSA; the names, titles and addresses of the representatives signing the NSA for the parties, except that in the case of an NSA entered into by a shippers' association, individual members need not be named unless the contract includes or excludes specific members; and the date upon which the NSA was signed. Subsequent references in the NSA to the signatory parties shall be consistent with the first reference. An NVOCC party which enters into an NSA that includes affiliates must either:

(i) list the affiliates' business addresses; or

(ii) certify that this information will be provided to the Commission upon request within ten (10) business days of such request.

(10) A description of the shipment records which will be maintained to support the NSA and the address, telephone number, and title of the person who will respond to a request by making shipment records available to the Commission for inspection under 531.12 of this part; and

(11) All other provisions of the NSA.

(c) Certainty of terms. The terms described in paragraph (b) of this section may not:

(1) Be uncertain, vague or ambiguous; or

(2) Make reference to terms not explicitly contained in the NSA itself unless those terms are contained in a publication widely available to the public and well known within the industry. Reference may not be made to a tariff of a common carrier other than the NVOCC party to the NSA.

(d) Other requirements.

(1) For service pursuant to an NSA, no NVOCC may, either alone or in conjunction with any other person, directly or indirectly, provide service in the liner trade that is not in accordance with the rates, charges, classifications, rules and practices contained in a filed NSA.

(2) For service pursuant to an NSA, no NVOCC, may, either alone or in conjunction with any other person, directly or indirectly, engage in any unfair or unjustly discriminatory practice in the matter of rates or charges with respect to any port; and

(3) For service under an NSA, no NVOCC may, either alone or in conjunction with any other person, directly or indirectly, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any port.

(e) Format requirements. Every NSA filed with BTA shall include, as set forth in Appendix A to this part:

(1) A unique NSA number of more than one (1) but less than ten (10) alphanumeric characters in length ("NSA Number"); and

(2) A consecutively numbered amendment number no more than three digits in length, with initial NSAs using "0" ("Amendment number"); and

(3) An indication of the method by which the statement of essential terms will be published.

(f) Exception in case of malfunction of Commission electronic filing system.

(1) In the event that the Commission's electronic filing system is not functioning and cannot receive NSAs filings for twenty-four (24) continuous hours or more, affected parties will not be subject to the requirements of paragraph (a) of this section and 531.11 that an NSA be filed before cargo is shipped under it.

(2) However, NSAs which go into effect before they are filed due to a malfunction of the Commission's electronic filing system pursuant to paragraph (f)(1) of this section, must be filed within twenty-four (24) hours of the Commission's electronic filing system's return to service.

(3) For an NSA that is effective without filing due to a malfunction of the Commission's filing system, failure to file that NSA within twenty-four (24) hours of the Commission's electronic filing system's return to service will be considered a violation of these regulations.

(g) Failure to comply with the provisions of this section shall result in the application of the terms of the otherwise applicable tariff.

### **§ 531.7 Notices.**

Within thirty (30) days of the occurrence of any event listed below, there shall be filed with the Commission, pursuant to the same procedures as those followed for the filing of an amendment pursuant to 531.5 and Appendix A to this part, a detailed notice of:

(a) Correction;

(b) Cancellation;

(c) Adjustment of accounts, by re-rating, liquidated damages, or otherwise;

(d) Final settlement of any account adjusted as described in paragraph (c) of this section; and

(e) Any change to the name, legal name and/or business address of any NSA party.

### **§ 531.8 Amendment, correction, cancellation, and electronic transmission errors.**

(a) Amendment.

(1) NSAs may be amended by mutual agreement of the parties. Amendments shall be filed electronically with the Commission in the manner set forth in 531.5 and Appendix A to this part.

(i) Where feasible, NSAs should be amended by amending only the affected specific term(s) or subterms.

(ii) Each time any part of an NSA is amended, the filer shall assign a consecutive amendment number (up to three digits), beginning with the number "1."

(iii) Each time any part of a filed NSA is amended, the "Filing Date" will be the date of filing of the amendment.

(2) [Reserved].

(b) Correction.

(1) Requests shall be filed, in duplicate, with the Commission's Office of the Secretary within forty-five (45) days of the NSA's filing with the Commission, accompanied by remittance of a \$276 service fee.

(2) Requests shall include:

(i) A letter of transmittal explaining the purpose of the submission, and providing specific information to identify the initial or amended NSA to be corrected;

(ii) A paper copy of the proposed correct terms. Matter to be deleted shall be struck through and matter to be added shall immediately follow the language being deleted and underscored;

(iii) An affidavit from the filing party attesting with specificity to the factual circumstances surrounding the clerical or administrative error, with reference to any supporting documentation;

(iv) Documents supporting the clerical or administrative error; and

(v) A brief statement from the other party to the NSA concurring in the request for correction.

(3) If the request for correction is granted, the carrier party shall file the corrected provisions using a special case number as described in Appendix A to this part.

(c) Electronic transmission errors.

(1) An authorized person who experiences a purely technical electronic transmission error or a data conversion error in transmitting an NSA filing or an amendment thereto is permitted to file a Corrected Transmission ("CT") of that filing within 48 hours of the date and time of receipt recorded in the Commission's electronic filing system (excluding Saturdays, Sundays and legal public holidays). This time-limited permission to correct an initial defective NSA filing is not to be used to make changes in the original NSA rates, terms or conditions that are otherwise provided for in 531.6(b). The CT tab box in the Commission's electronic filing system must be checked at the time of resubmitting a previously filed NSA, and a description of the corrections made must be stated at the beginning of the corrected NSA in a comment box. Failure to check the CT box and enter a description of the correction will result in the rejection of a file with the same name, as documents with duplicate file names or NSA and amendment numbers are not accepted by the FMC's electronic filing system.

(2) [Reserved].

(d) Cancellation.

(1) An account may be adjusted for events and damages covered by the NSA. This shall include adjustment necessitated by either liability for liquidated damages appearing in the NSA as filed with the Commission under 531.6(b)(7), or the occurrence of an event described below in paragraph (d)(2) of this section.

(2) In the event of cancellation as defined in 531.3(g):

(i) Further or continued implementation of the NSA is prohibited; and

(ii) The cargo previously carried under the NSA shall be re-rated according to the otherwise applicable tariff provisions.

(e) If the amendment, correction or cancellation affects an essential term required to be published under 531.9, the statement of essential terms shall be changed as soon as possible after the filing of the amendment to accurately reflect the change to the NSA terms.

### **Subpart C -- Publication of Essential Terms**

#### **§ 531.9 Publication.**

(a) Contents. All authorized persons who choose to file NSAs under this part are also required to make available to the public, contemporaneously with the filing of each NSA with the Commission, and in tariff format, a concise statement of the following essential terms:

(1) The port ranges:

(i) origin; and (ii) destination;

(2) The commodity or commodities involved;

(3) The minimum volume or portion; and

(4) The duration.

(b) Certainty of terms. The terms described in paragraph (a) of this section may not:

(1) Be uncertain, vague or ambiguous; or

(2) Make reference to terms not explicitly detailed in the statement of essential terms, unless those terms are contained in a publication widely available to the public and well known within the industry. Reference may not be made to a tariff of a common carrier other than the NVOCC party to the NSA.

(c) Location. The statement of essential terms shall be published as a separate part of the individual NVOCC's automated tariff system.

(d) References. The statement of essential terms shall contain a reference to the "NSA Number" as described in 531.6(e)(1).

(e) Terms.

(1) The publication of the statement of essential terms shall accurately reflect the terms as filed with the Commission.

(2) If any of the published essential terms include information not required to be filed with the Commission but filed voluntarily, the statement of essential terms shall so note.

(f) Commission listing. The Commission will publish on its website, [www.fmc.gov](http://www.fmc.gov), a listing of the locations of all NSA essential terms publications.

(g) Updating statements of essential terms. To ensure that the information contained in a published statement of essential terms is current and accurate, the



statement of essential terms publication shall include a prominent notice indicating the date of its most recent publication or revision. When the published statement of essential terms is affected by filed amendments, corrections, or cancellations, the current terms shall be changed and published as soon as possible in the relevant statement of essential terms.

## **Subpart D -- Exceptions and Implementation**

### **§ 531.10 Excepted and exempted commodities.**

(a) Statutory exceptions. NSAs for the movement of the following, as defined in section 3 of the Act, the Commission's rules at 46 C.F.R. § 530.3 or 46 C.F.R. § 520.1, are not subject to the conditions of this exemption:

- (1) Bulk cargo;
- (2) Forest products;
- (3) Recycled metal scrap;
- (4) New assembled motor vehicles; and
- (5) Waste paper or paper waste.

(b) Commission exemptions. The following commodities and/or services are not subject to the conditions of this exemption:

- (1) Mail in foreign commerce. Transportation of mail between the United States and foreign countries.
- (2) Department of Defense cargo. Transportation of U.S. Department of Defense cargo moving in foreign commerce under terms and conditions approved by the Military Transportation Management Command and published in a universal service contract. An exact copy of the universal service contract, including any amendments thereto, shall be filed with the Commission as soon as it becomes available.

(c) Inclusion of excepted or exempted matter.

(1) The Commission will not accept for filing NSAs which exclusively concern the commodities or services listed in paragraph (a) or (b) of this section.

(2) NSAs filed with the Commission may include the commodities or services listed in paragraph (a) or (b) of this section only if: (i) There is a tariff of general applicability for the transportation, which contains a specific commodity rate for the commodity or service in question; or (ii) The NSA itself sets forth a rate or charge which will be applied if the NSA is canceled, as defined in 531.3(e) and 531.8(d).

(d) Waiver. Upon filing an NSA pursuant to paragraph (c) of this section, the NSA shall be subject to the same requirements as those for NSAs generally.

### **§ 531.11 Implementation.**

Generally. Performance under an NSA or amendment thereto may not begin before the day it is effective and filed with the Commission.

## **Subpart E -- Recordkeeping and Audit**

### **§ 531.12 Recordkeeping and audit.**

(a) Records retention for five years. Every NVOCC shall maintain original signed NSAs, amendments, and their associated records in an organized, readily accessible or retrievable manner for a period of five (5) years from the termination of each NSA. These records must be kept in a form that is readily available and usable to the Commission; electronically maintained records shall be no less accessible than if they were maintained in paper form.

(b) Production for audit within 30 days of request. Every NVOCC shall, upon written request of the FMC's Director, Bureau of Enforcement, any Area Representative or the Director, Bureau of Trade Analysis, submit copies of requested original NSAs or their associated records within thirty (30) days of the date of the request.

### **§ 531.13-531.98 [RESERVED]**

### **§ 531.99 OMB control numbers assigned 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 3072-0067. The valid control number for form FMC-78 is 3072-0067.

## **Appendix A to Part 531--Instructions for the Filing of NSAs**

NSAs shall be filed in accordance with the instructions found on the Commission's home page, <http://www.fmc.gov>.

### **A. Registration, Log-on I.D. and Password**

To register for filing, an NVOCC or authorized agent must submit the NSA Registration Form (Form FMC-78) to BTA. A separate NSA Registration Form is required for each individual that will file NSAs. BTA will direct OIT to provide approved filers with a log-on identification number ("I.D.") and password. Filers who would like a third party (agent/publisher) to file their NSAs must so indicate on Form FMC-78. Authority for filing can be transferred by submitting an amended registration form requesting the assignment of a new log-on I.D. and password. The original log-on ID will be canceled when a replacement log-on I.D. is issued. Log-on I.D.s and passwords may not be shared with, loaned to or used

by any individual other than the individual registrant. The Commission reserves the right to disable any log-on I.D. that is shared with, loaned to or used by parties other than the registrant.

## **B. Filing**

After receiving a log-on I.D. and a password, a filer may log-on to the NSA filing area on the Commission's home page and file NSAs. The filing screen will request such information as: filer name, organization number ("Registered Persons Index" or "RPI" number); NSA and amendment number; effective date and file name. The filer will attach the entire NSA file and submit it into the system. When the NSA has been submitted for filing, the system will assign a filing date and an FMC control number, both of which will be included in the acknowledgment/confirmation message.

By the Commission.<sup>5</sup>

Bryant L. VanBrakle  
Secretary

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<sup>5</sup> Commissioner Brennan issued the following statement: I strongly support the concept of allowing NVOCCs to offer confidential contracts. I voted against the draft final rule because it does not go far enough. For example, the exemption does not allow shippers' associations, which are often made up of small and medium-sized shippers, to use confidential contracts unless the association excludes an NVO member of the association.

## Instructions For Form FMC-78

**Completed Form FMC-78 should be sent by mail or facsimile to:**

**Federal Maritime Commission Bureau of Trade Analysis 800 N. Capitol Street, NW Washington, DC 20573-0001 Fax (202) 523-5867**

**Line 1. Organization Number.** This is the same as the Regulated Persons Index ("RPI") Number.

**Line 2. Registrant.** Provide the full name of the firm or individual registering for the automated NSA filing system and any trade names. The Registrant's name should match the corporate charter or business license, etc. The Registrant's name cannot be changed without submission of an amended registration form.

**Line 3. FMC License Number.** Provide name of Registrant as licensed by the Commission and date of the effectiveness of that license. If Registrant is a bonded but unlicensed foreign-based NVOCC operating pursuant to Commission's regulations at 46 C.F.R. § 515.3, indicate the name and address of the agent for service of process as required by 46 C.F.R. § 515.24. The name and address of the agent for service of process must be the same as that appearing in the NVOCC's tariff, as provided by 46 C.F.R. § 520.11 (b).

**Line 4. Registration.** Indicate whether this is the initial (first time) registration or an amendment to an existing NSA registration.

**Line 5. Address of Headquarters Office.** The complete street address of the Registrant's principal place of business should be shown in addition to a post office box (if any). Post office box alone is insufficient. Provide the Registrant's Federal Taxpayer Identification Number, if any.

**Line 6. Mailing Address (if different).** Provide the mailing address only if it differs from the headquarters address listed in Line 5. Show the street address as well as any post office box. This is the address to which the Registrant's log-on I.D. and password will be mailed via U.S. mail. Also, if the log-on I.D. and password is to be mailed to a third party, indicate here.

**Line 7. Persons to be granted registration.** Provide the full name of the individual for whom the log-on I.D. and password is requested. If you wish to transfer a log-on I.D. from an existing registration to a new individual, indicate the name of the new registrant and the log-on I.D. to be assigned.

**Line 8. Registration by Third Party.** Indicate, by checking the applicable box, whether the person to be granted registration in Line 7 is a third party (publisher, agent, etc.) of the registrant named in Line 1. The registration must be accompanied by an indication that the NVOCC has authorized the third party to file NVOCC service arrangements and related documents on its behalf.

**Line 9. Signature of Authorized Official.** Indicate the date the registration was signed and title of authorized official.

**Paperwork Reduction Act Notice.**

The collection of this information is authorized generally by section 16 of the Shipping Act of 1984, 46 U.S.C. app. § 1715.

This is an optional form. Submission is completely voluntary. Failure to submit this form will in no way impact the Federal Maritime Commission's assessment of your firm's financial responsibility; however, you will not be able to use the exemption set forth in the Commission's rules at 46 C.F.R. part 531.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. The valid control number for this information collection is 3072-0067. Copies of this form will be maintained until the filer indicates s/he will no longer file NSAs into the electronic filing system.

The time needed to complete and file this form will vary depending on individual circumstances. The total estimated average time to complete this form is: Recordkeeping, 20 minutes; Learning about the form, 20 minutes; Preparing and sending the form to the FMC, 20 minutes.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can write to the Secretary, Federal Maritime Commission, 800 North Capitol Street, N.W., Washington, D.C. 20573-0001, or e-mail: [secretary@fmc.gov](mailto:secretary@fmc.gov).

**FORM FMC-78**

PLEASE TYPE OR PRINT

**NVOCC SERVICE ARRANGEMENT REGISTRATION**  
(SEE ATTACHED INSTRUCTIONS)

1. Organization No. \_\_\_\_\_

2. Registrant \_\_\_\_\_  
Full Legal Name of firm (or individual, if not a firm)

\_\_\_\_\_  
(Doing Business As or Trade Name)

3.a. NVOCC OTI License No. \_\_\_\_\_ Effective date: \_\_\_\_\_  
MM/DD/YYYY

OR b. If foreign-based unlicensed NVOCC, provide the following information for agent for service of process:

Name: \_\_\_\_\_  
Address: \_\_\_\_\_

4. This Registration is: [ ] Initial [ ] Amendment (Specify change)

5. Headquarters Address \_\_\_\_\_ ( ) \_\_\_\_\_  
(Number and Street) Telephone  
\_\_\_\_\_ ( ) \_\_\_\_\_  
(Number and Street) Fax  
\_\_\_\_\_ (City/State/Zip/Country) (Federal TIN Number, if any) E-Mail (optional)

6. Mailing Address (If different)  
c/o name \_\_\_\_\_  
Address \_\_\_\_\_  
\_\_\_\_\_  
Telephone ( ) \_\_\_\_\_  
Fax ( ) \_\_\_\_\_  
Email (optional) \_\_\_\_\_

7. Person(s) to be granted registration. Please list individual(s) for whom a log-on identifier is requested. If this is a transfer of log-on, please list the existing name and existing log-on ID:

Name: \_\_\_\_\_ Existing Log-on: \_\_\_\_\_

8. Is the person listed in question 7 a third party? (check one) [ ] Yes [ ] No If yes, a letter of authority must be submitted with this form.

9. \_\_\_\_\_  
Signature of Authorized Official Print or type name of Authorized Office  
\_\_\_\_\_  
date (MM/DD/YYYY) Title of Authorized official

**FMC USE ONLY**

Logon \_\_\_\_\_ ID \_\_\_\_\_ Directory \_\_\_\_\_ DateAsg \_\_\_\_\_/\_\_\_\_\_/\_\_\_\_ AsgBy \_\_\_\_\_  
11/04 (rev'd 12/04)