

(S E R V E D)
(FEBRUARY 21, 2013)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

46 CFR Parts 515, 520, and 532

Docket No. 11-22

RIN: 3072-AC51

**Non-Vessel-Operating Common Carrier Negotiated Rate
Arrangements; Tariff Publication Exemption**

AGENCY: Federal Maritime Commission.

ACTION: Notice of Proposed Rulemaking

SUMMARY: The Federal Maritime Commission proposes to impose registration requirements on foreign-based unlicensed non-vessel-operating common carriers and to extend an exemption from certain provisions and requirements of the Shipping Act of 1984 and the Commission regulations to foreign-based unlicensed non-vessel-operating common carriers that agree to negotiated rate arrangements.

DATES: Comments or suggestions due on or before: April 29, 2013

ADDRESSES: Submit all comments concerning this proposed rule to:

Karen V. Gregory, Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573-0001
Phone: (202) 523-5725
E-mail: secretary@fmc.gov

FOR FURTHER INFORMATION CONTACT:

Rebecca A. Fenneman, General Counsel
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573-0001
Phone: (202) 523-5740
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SUPPLEMENTARY INFORMATION:

Submit Comments: Submit an original and 5 copies in paper form, and if possible, send a PDF of the document by e-mail to secretary@fmc.gov. Include in the subject line: Docket No. 11-22, Comments on Non-Vessel-Operating Common Carrier Negotiated Rate Arrangements; Tariff Publication Exemption.

Background

On March 2, 2011, the Commission published a final rule promulgating 46 CFR part 532, Docket No. 10-03, Non-Vessel-Operating Common Carrier Negotiated Rate Arrangements, which exempted licensed non-vessel-operating common carriers (NVOCCs) that enter into negotiated rate arrangements (NRAs) from the tariff rate publication requirements of the Shipping Act of 1984 and certain provisions and requirements of the Commission's regulations. 76 FR 11351 (Mar. 2, 2011).

However, concerns about extending the exemption to foreign-based unlicensed NVOCCs were raised by staff. Id. at 11355-11356. Foreign-based unlicensed NVOCCs are not subject to the same stringent requirements as licensed NVOCCs, such as review of the experience and character of the shareholders, major officers, and Qualifying Individual of the license applicant. Accordingly, the Commission decided at the time to permit the NRAs only to licensed NVOCCs, while stating that it will commence proceedings to obtain and consider additional comments on potential modifications to the final rule, including possible extension of the exemption to foreign-based unlicensed NVOCCs. Id. at 11357.

The Commission later issued a Notice of Inquiry, Docket No. 11-22, Non-Vessel-Operating Common Carrier Negotiated Rate Arrangements; Tariff Filing Exemption, seeking comments on ways to make the NRA rules more useful and on its possible extension to foreign-

based unlicensed NVOCCs. 76 FR 80866 (Dec. 27, 2011). Adopting suggestions by a number of ocean transportation intermediaries and U.S. and foreign trade associations, the Commission published a direct final rule eliminating some of the technical requirements of the rule. 77 FR 33971 (June 8, 2012). The Commission, however, decided to continue to consider other suggestions, including possible extension of the exemption to foreign-based unlicensed NVOCCs, at a future date. Id. at 33972.

Discussion

The Commission may exempt any specified future activity from any requirements of the Shipping Act of 1984 “if the Commission finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce.” 46 U.S.C. 40103. The Commission may attach conditions to an exemption and may, by order, revoke an exemption. Id. In Docket No. 10-03, the Commission found that allowing licensed NVOCCs to opt out of the requirements to publish tariff rates will enhance competition, rather than result in a substantial reduction in competition among licensed NVOCCs. 76 FR 11351, 11352. After reviewing all of the comments received and in light of the conditions for using NRAs, the Commission also found that permitting licensed NVOCCs the option of operating under NRAs would not be detrimental to commerce. Id. at 11353.

Commission staff, however, raised concerns that extending the exemption to foreign-based unlicensed NVOCCs could hamper the Commission’s ability to protect the shipping public, as the exemption is predicated, among other things, on the prompt availability of records. Id. at 11353. There were also concerns about the lack of oversight of foreign-based unlicensed NVOCCs. Id. at 11356. The licensing process for licensed NVOCCs includes a detailed review of the experience and character of the applicant’s Qualifying Individual, and the character of its

major officers and shareholders. Id. Further, the Commission's Bureau of Certification and Licensing's review of applicants includes a thorough vetting of the Commission's complaint and enforcement records system as well as commercial databases to analyze the applicant's financial background. Id. While the Commission approves a license based upon substantive and verified information, the Commission knows little more than the name and address of foreign-based unlicensed NVOCCs. Id. Further, foreign-based unlicensed NVOCCs are not required to designate a Qualifying Individual. Id.

Those discussions brought to light the need for a registration process for foreign-based unlicensed NVOCCs. The registration process requires such NVOCCs submit a registration form to the Commission that identifies the NVOCCs' legal name, trade name(s), principal address, contact information including name of a contact person, and name, address, and contact person for a designated legal agent for service of process in the U.S. A proposed form is not included within this notice.

A strong majority of comments received by the Commission in Docket No. 10-03¹ supported extending the exemption of 46 CFR part 532 to foreign-based unlicensed NVOCCs. 76 FR 11351, 11355. With the imposition of the registration process and certain other requirements enumerated below, the Commission believes that extending the NRAs to foreign-based unlicensed NVOCCs will make the NRAs more useful and thus enhance competition among all NVOCCs. Pursuant to the Commission's above-referenced review and analysis under section 16 of the Shipping Act in Docket No. 10-03, the Commission now finds that, with the adoption of these conditions and requirements, extending the NRAs to foreign-based unlicensed

¹ The Commission has incorporated the record in Docket No. 10-03 into this proceeding, Docket No. 11-22. 77 FR 33971 (June 8, 2012).

NVOCCs will not result in substantial reduction in competition or be detrimental to commerce. Consequently, to encourage better and fair competition among NVOCCs generally, the Commission proposes to extend the exemption from the Shipping Act and the Commission's regulation contained in 46 CFR part 532 to foreign-based unlicensed NVOCCs.

Without the registration requirements and other conditions, extending the exemption to foreign-based unlicensed NVOCCs may be detrimental to commerce by reducing the Commission's ability to protect the shipping public. Therefore, to address those concerns, the Commission proposes extending the exemption subject to the following:

- Foreign-based unlicensed NVOCCs must be registered with the Commission in accordance with § 515.19 of this proposed rule.
- Such registrations are effective for 3 years, as stated in § 515.19(d) of this proposed rule.
- Such registrations may be terminated or suspended pursuant to § 515.19(g) of this proposed rule, which includes failure to comply with 46 CFR 515.24 Agent for service of process.
- As stated in § 532.7 of this proposed rule, all NVOCCs that enter into NRAs are subject to the Commission's inspection and reproduction requests and must produce the requested NRAs promptly in response to a Commission request. All records produced must be in English or be accompanied by a certified English translation.

Statutory Review

The collection of information requirements contained in this proposed 46 CFR part 515 and 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. 44 U.S.C. 3501 *et seq.* 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.

According to the Small Business Administration’s regulation, “a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.” 13 CFR 121.105(a)(1). As foreign-based unlicensed NVOCCs have their principal place of business in foreign countries and operate primarily in foreign countries, they are not small businesses as defined by the regulation and, thus, are not small entities under the Regulatory Flexibility Act (RFA). 5 U.S.C. 601-612. Therefore, this rulemaking is not subject to the RFA.

This proposed rule is not a “major rule” under 5 U.S.C. 804(2).

List of Subjects

46 CFR Part 515

Freight, Freight forwarders, Maritime carriers, Reporting and recordkeeping requirements.

46 CFR Part 520

Freight, Intermodal Transportation, Maritime carriers, Reporting and recordkeeping requirements.

46 CFR Part 532

Exports, Non-vessel-operating common carriers, Ocean transportation intermediary.

For the reasons stated in the supplementary information, the Federal Maritime

Commission adds § 515.19 to part 515, amends § 515.24 of part 515, amends § 520.13 of part 520, and amends part 532 of 46 CFR as follows.

PART 515 – LICENSING, FINANCIAL RESPONSIBILITY REQUIREMENTS, AND GENERAL DUTIES FOR OCEAN TRANSPORTATION INTERMEDIARIES

1. The authority citation for part 515 continues to read as follows:

Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 46 U.S.C. 305, 40102, 40104, 40501-40503, 40901-40904. 41101-41109, 41301-41302, 41305-41307; Pub. L. 105-383, 112 Stat. 3411; 21 U.S.C. 862.

2. In subpart B, add new § 515.19 to read as follows:

§ 515.19 Registration of foreign-based unlicensed NVOCC.

(a) Any person whose primary place of business is located outside the United States that elects to operate as a registered NVOCC in the United States foreign trade shall register with the Commission by submitting to the Director of the Bureau of Certification and Licensing (BCL) a completed registration form, Form FMC-[_____] (Foreign-based Unlicensed NVOCC Registration/Renewal). A notice of each registration shall be published on the Commission's website www.fmc.gov. It is a violation of the Commission's regulations implementing the Shipping Act for a foreign-based unlicensed non-vessel-operating common carrier to provide NVOCC services in the U.S. foreign trade without a valid registration and an effective tariff.

(b) A registration form which appears, upon submission, to be substantially incomplete may be rejected. If rejected, a notice, together with the reasons therefore, shall be sent to the foreign-based unlicensed NVOCC and the filing fee shall be refunded. Persons who have had a registration rejected may submit a new registration at any time together with the applicable fee.

(c) Registrations are complete upon receipt of a registration form which meets the requirements of this section and upon evidence of financial responsibility being furnished pursuant to § 515.21.

(d) Registrations shall be effective for a period of three (3) years. Thereafter, registrations will be renewed for sequential three year periods upon submission of an updated registration form.

(e) A tariff shall not be published and NVOCC service shall not commence until the Commission receives valid proof of financial responsibility from the registrant and a Form FMC-1 has been filed.

(f) Any changes to legal name(s) or trade name(s), principal place of business address (including telephone number, facsimile number), contact person and email address (including physical address if different from principal place of business), name of resident agent(s) (including physical address, mailing address, email address, telephone and facsimile number(s), and contact person) in the United States for receipt of service of judicial and administrative process (including subpoenas) must be reported to BCL within 30 days of such changes.

(g) *Termination or suspension of the registration of a registered NVOCC.*

(1) *Grounds.* A registration shall become automatically ineffective for a failure of a registered NVOCC to maintain proof of financial responsibility on file with the Commission. The

effectiveness of such a registration may otherwise be terminated or suspended, after notice and the opportunity for a hearing, for any of the following reasons:

- (i) Violation of any provision of the Act, or any other statute or Commission order or regulation related to carrying on the business of an ocean transportation intermediary;
- (ii) Failure to respond to any lawful order or inquiry by the Commission or an authorized Commission representative;
- (iii) Making a materially false or misleading statement to the Commission in connection with a registration or renewal thereof;
- (iv) Failure to honor financial obligations to the Commission;
- (v) Failure to timely renew a registration;
- (vi) Failure to maintain a Form FMC-1 and a tariff in compliance with 46 CFR Part 520;
- (vii) Knowingly and willfully processing, booking, or accepting cargo from, or transporting cargo for the account of, an NVOCC that is not licensed or registered, or has not provided proof of financial responsibility or published an effective tariff; and
- (viii) Failure to designate and maintain a person in the United States as legal agent for the receipt of judicial and administrative process, including subpoenas, as required by § 515.24.

(2) [Reserved]

(3) *Publication of Notice.* The Commission shall publish on the Commission's website, www.fmc.gov, a notice of each termination or suspension.

3. In § 515.24, revise paragraphs (b), (c), and (d) to read as follows:

§ 515.24 Agent for service of process.

* * * * *

(b) Service of administrative process, other than subpoenas, may be effected upon the legal agent by dispatching a copy of the document to be served by mail or courier service. Administrative subpoenas shall be served in accordance with § 502.134 of this chapter.

(c) If the designated legal agent cannot be served because of death, disability, unavailability, termination or expiration of the designation, or if a legal agent authorized to receive such service is not designated in compliance with this section, the Secretary of the Federal Maritime Commission will be deemed to be the legal agent for service of process. Any person serving the Secretary must also send to the ocean transportation intermediary, or group or association of ocean transportation intermediaries which provide financial coverage for the financial responsibilities of a member ocean transportation intermediary, by mail or courier service at the ocean transportation intermediary's, or group's, address published in its tariff, a copy of each document served upon the Secretary, and shall attest to that service at the time service is made upon the Secretary. For purposes of this paragraph, it is sufficient that a person seeking to serve process on an ocean transportation intermediary, or group of such intermediaries, affirm to the Commission's Secretary that: they have contacted, or attempted to contact, the designated agent to confirm whether it remained authorized to accept service of process; or, if no legal agent is designated in the tariff, that it has no knowledge of the identity of the ocean transportation intermediary's legal agent. Designation of the Commission's Secretary as the legal agent shall survive any cancellation of the OTI's license or tariff and shall continue for the entire period during which claims may be made under the OTI's financial responsibility instrument.

(d) Designations of legal agent under paragraphs (a) and (b) of this section and provisions relating to service of process under paragraph (c) of this section shall be published in the ocean transportation intermediary's tariff, when required, in accordance with part 520 of this chapter.

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PART 520 – CARRIER AUTOMATED TARIFFS

4. The authority citation 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.

5. In § 520.13, amend paragraph (e) by removing the reference “A licensed NVOCC” and add in its place the reference “An NVOCC” to read as follows:

§ 520.13 Exemptions and exceptions.

* * * * *

(e) NVOCC Negotiated Rate Arrangements. An 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.

PART 532 – NVOCC NEGOTIATED RATE ARRANGEMENTS

6. The authority citation for part 532 continues to read as follows:

Authority: 46 U.S.C. 40103.

7. Amend § 532.1 by removing the reference “licensed and bonded” to read as follows:

§ 532.1 Purpose.

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

8. Amend § 532.2 as follows:
- a. Revise introductory text to read as follows; and
 - b. Amend paragraph (g) to read as follows.

§ 532.2 Scope and applicability.

This Part exempts NVOCCs duly licensed pursuant to 46 CFR 515.3 or registered pursuant to 46 CFR 515.19, 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:

* * * * *

(g) * * * Any NVOCC failing to maintain its bond or license or registration as set forth above, or who has had its tariff suspended by the Commission, shall not be eligible to invoke this exemption.

9. In § 532.7, amend paragraph (b) by removing the reference “under § 515.31(g) of this chapter” and adding in its place “by the Commission” to read as follows.

§ 532.7 Recordkeeping and audit.

* * * * *

(b) NRAs are subject to inspection and reproduction requests by the Commission. An NVOCC shall produce the requested NRAs promptly in response to a Commission request. All records produced must be in English or be accompanied by a certified English translation.

* * * * *

By the Commission.

Karen V. Gregory
Secretary