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FEDERAL MARITIME COMMISSION

BEFORE THE FEDERAL MARITIME COMMISSION

Docket No. 11 - 22

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**COMMENTS OF UPS REGARDING FEDERAL MARITIME COMMISSION  
REGULATIONS ON NVOCC NEGOTIATED RATE ARRANGEMENTS**

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March 26, 2012

UPS Ocean Freight Services, Inc.  
12380 Morris Road  
Alpharetta, GA 30005

Thomas F. Jensen  
Vice President  
UPS  
Suite 300  
316 Pennsylvania Avenue, SE  
Washington, DC 20003-1185

J. Michael Cavanaugh  
Holland & Knight LLP  
2099 Pennsylvania Avenue, NW  
Washington, DC 20006  
(202) 955-3000  
Counsel for UPS

## **I. INTRODUCTION**

UPS Ocean Freight Services, Inc. (FMC License No. 016781N), UPS Europe SA and UPS Asia Group Pte. Ltd. (collectively "UPS") offer the following comments in response to the Commission's request for comments on the Commission's regulations governing Non-Vessel Operating Common Carriers' ("NVOCCs") use of Negotiated Rate Arrangements ("NRAs"). UPS suggests four changes to this program that will promote greater competition and efficient service, benefitting both shippers and NVOCCs, and which will avoid uncertainty and unwarranted administrative costs.

## **II. BACKGROUND – UPS NVOCCs' INTEREST IN THE RULEMAKING**

Founded in 1907, UPS is the world's largest package delivery company and a provider of specialized transportation and logistics services serving more than 200 countries and territories worldwide, with more than 800 logistics facilities in over 120 countries. UPS, with 2011 consolidated corporate revenues of \$53 billion, has 398,000 employees worldwide with 323,000 in the United States. The company operates a fleet of 101,000 trucks and other vehicles, and more than 500 aircraft. Principal UPS air freight hubs are in the U.S., Canada, Europe and South and East Asia. UPS is a publicly-traded company and its shares are listed on the New York Stock Exchange.

UPS commenced NVOCC operations in 2001. UPS maintains three NVOCCs, including UPS Ocean Freight Services, Inc. (FMC license No. 016871N), UPS Europe SA, incorporated in Belgium (FMC Entity No. 021750) and UPS Asia Group Pte. Ltd. Incorporated in Singapore (FMC Entity No. 023718).<sup>1</sup> A UPS affiliate, UPS Supply

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<sup>1</sup> UPS also maintains a fourth NVOCC, UPS SCS (Asia) Limited, incorporated in Hong Kong (FMC Entity No. 21751) which currently publishes a tariff and has a bond with the Commission, but UPS is in the process of assigning all its Asia NVOCC operations to UPS Asia Group Pte., Ltd.

Chain Solutions, Inc. (FMC License No. 00275F) is a licensed freight forwarder. UPS handles hundreds of thousands of TEUs of ocean freight annually.

The UPS NVOCC customer base is large and diverse. UPS serves shippers ranging from large multinational industrial corporations moving hundreds of thousands of TEUs annually inbound and outbound, to small businesses exporting a few containers annually. In many instances, UPS customers look to the company for integrated logistics solutions in addition to ocean transportation.

### **III. COMMENTS ON FMC NRA REGULATIONS**

UPS's comments focus on four specific elements of the Commission's NRA regulations at 46 C.F.R. Part 532, including (A) inclusion of unlicensed bonded tariff-publishing NVOCCs, (B) clarification of the substantive terms that may be included in an NRA; (C) the current prohibition on amendment of NRAs, and (D) the requirement for retention of all NRA "associated records, including written communications".

#### **A. Inclusion of Unlicensed NVOCCs**

The UPS NVOCCs include one licensed NVOCC, UPS Ocean Freight Services, Inc., and two unlicensed NVOCCs, UPS Europe SA, and UPS Asia Group, Pte., Ltd. Both unlicensed UPS NVOCCs have obtained organization numbers from the Commission, published ocean tariffs and provided the bonds required pursuant to the Commission's rules.

Unlicensed NVOCCs appear to be subject to the same Shipping Act provisions, regulatory jurisdiction and Commission scrutiny as licensed NVOCCs. For purposes of NRAs, UPS believes licensing is a distinction without a difference.

However, if the Commission elects not to extend NRAs to unlicensed entities generally, UPS suggests that the exemption at least be extended to those unlicensed NVOCCs that are affiliates (under common ownership and control) with licensed NVOCCs in good standing.

#### **B. Scope and Substantive Terms Allowed in an NRA**

At such time as the Rotterdam Rules (UN Convention on Contracts for International Carriage of Goods Wholly or Partly by Sea) come into effect following U.S. ratification, the limits on NRAs in the Commission's regulations at 46 C.F.R. Part 532.5 should be broadened to allow inclusion of carrier-shipper agreements on points in addition to rates, to enable NRAs to double as "volume contracts" under the Rotterdam Rules. To utilize "volume contracts" in U.S. trades, U.S. NVOCCs' only option at present would be to file a Non-Vessel Operating Common Carrier Service Arrangement under 46 C.F.R. Part 531. Allowing "volume contract" contents to be included in NRAs would allow greater efficiency and would avoid filing burdens and duplicative paperwork.

#### **C. NRA Amendments**

The current Commission regulations at 46 C.F.R. Part 532.5(e) preclude amendment of an NRA, and appear to require that the parties enter a new NRA if they agree on a rate change. Requiring constant re-creation of NRAs to accommodate periodic rate changes imposes a bureaucratic burden that conveys no benefit on anyone. This is by nature an inefficient practice. It does not enable the Commission to monitor, audit or enforce the regulations more easily. Parties should be free to amend NRAs subject to the same requirements as the original NRA, in exactly the same

manner as parties are currently allowed to amend service contracts and NVOCC service arrangements (see e.g., 46 C.F.R. Parts 530.10 and 531.8).

**D. Document Retention**

UPS is concerned that the Commission's current regulations at 46 C.F.R. Part 532.7 create uncertainty and mandate expensive screening and retention of documents beyond the NRAs themselves that are entirely irrelevant to performance of the parties' transactions, regulatory compliance or any other foreseeable purpose. The requirement to retain "associated records" is vague, and the extension to all "written communications" serves no purpose.

The Commission has successfully regulated tariff publication, service contracts and NVOCC Service Arrangements for many decades without such a requirement. (For example, the tariff integrity requirements in 46 C.F.R. § 520.10 only mandate retention of the actual data that appeared in tariffs, not associated documents or communications.) The Commission should not impose a more formal and costly recordkeeping requirement on what is intended to be a less formal contracting system to stimulate competition, innovation and efficiency.

The regulation should require only the retention of those specific documents constituting the contract between the NVOCC and shipper, which includes any document necessary to interpret and enforce the contract, i.e., offers, counteroffers and acceptances in paper or electronic form, as well as transaction records showing the rate actually charged and paid. Those documents, which enable the parties and the Commission and staff to determine what the agreement was and whether the parties have complied with the regulations, are all that could be relevant in interpreting and

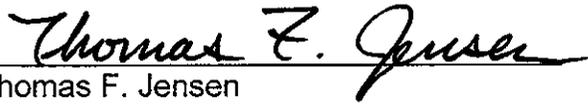
enforcing an NRA in court, administrative hearings or arbitration proceedings. "Associated records" and "written communications" can run to hundreds of pages of emails in shipping transactions, most of which would not be admissible in a trial or even discoverable under the Commission's rules of practice and procedure. The regulations should be changed to require retention only of documents constituting contracts in whole or part, or necessary to interpret or enforce such contracts, such as payment records.

#### **IV. SUMMARY**

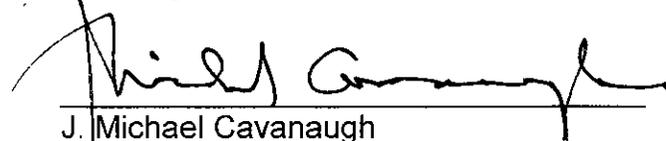
UPS again commends the Commission and staff for implementing the NRA exemption. Although UPS has not been able to utilize NRAs to date due to the foregoing issues, UPS looks forward to future participation if these simple and beneficial revisions to the regulations are placed in effect.

*[signatures on next page]*

Respectfully submitted,



Thomas F. Jensen  
Vice President  
UPS  
Suite 300  
316 Pennsylvania Avenue, SE  
Washington, DC 20003-1185



J. Michael Cavanaugh  
Holland & Knight LLP  
2099 Pennsylvania Avenue, NW  
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