

FEDERAL MARITIME COMMISSION

46 CFR Part 530

[Docket No. 20-22]

RIN: 3072-AC84

Service Contracts

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission is amending its service contract filing requirements to permit ocean common carriers to file original service contracts up to 30 days after the contract goes into effect.

DATES: This rule is effective June 2, 2021.

FOR FURTHER INFORMATION CONTACT: Rachel E. Dickon, Secretary; Phone: (202) 523-5725; Email: secretary@fmc.gov.

SUPPLEMENTARY INFORMATION

I. Executive Summary

II. Background

- A. Service Contract Requirements
- B. 2016-2018 Rulemakings
- C. 2018 World Shipping Council Petition for Exemption
- D. 2020-2021 Exemptions

III. Summary of Proposed Changes

IV. Comment Summary

V. Revisions to Service Contract Regulations and Response to Comments

- A. Delayed Filing for Original Service Contracts
 - 1. General Issues
 - 2. Definition of “Effective Date” (§ 530.3)
 - 3. Service Contract Filing Requirements (§ 530.8)
 - 4. Service Contract Implementation Requirements (§ 530.14)
- B. Technical Amendments
 - 1. Definition of “Authorized Person” (§ 530.3)
 - 2. Exceptions and Exemptions (§ 530.13)

VI. Rulemaking Analyses and Notices

I. EXECUTIVE SUMMARY

The Shipping Act of 1984, as amended (46 U.S.C. 40101-41309) (Shipping Act or Act) permits ocean common carriers and shippers to enter into individual, confidential service contracts for the international transportation of cargo, and requires that these contracts be filed with the Federal Maritime Commission. Under the current regulations in 46 CFR part 530, original service contracts must be filed on or before their effective date, while service contract amendments must be filed within 30 days *after* they go into effect. The disparate treatment of original service contracts versus amendments was the result of a 2016-2017 rulemaking in which the Commission determined to allow delayed filing for amendments while retaining the requirement that original service contracts be filed on or before their effective date.

In response to the COVID-19 pandemic and its impact on service contract negotiation and filing, the Commission recently granted a temporary exemption permitting original service contracts, like amendments, to be filed up to 30 days after their effective date. Based on the Commission's experience during the exemption period and the perceived benefits of allowing delayed filing for original service contracts, the Commission issued a Notice of Proposed Rulemaking (NPRM) on January 19, 2021, to make the status quo permanent.¹ The Commission proposed to revise its service contract regulations in part 530 to allow original service contracts, like amendments, to be filed up to 30 days after they go into effect. The Commission also proposed several technical amendments to the service contract regulations.

The Commission received eight comments from a broad range of stakeholders including an ocean carrier trade association, shipper and intermediary trade associations, parties to an

¹ 86 FR 5106.

ocean carrier agreement, and individual shippers/ocean transportation intermediaries. All but one of the commenters generally supported the proposal. Several expressed concerns about potential carrier abuse of the contracting process, while others objected to specific language proposed by the Commission.

The Commission has carefully considered the comments and determined to adopt the proposed rule with certain changes based on the comments received. Although the Commission is adopting without change the proposed definition of “Effective date” in § 530.3(i), the Commission is clarifying its interpretation of that provision to address concerns about the language tying the effective date to the date the parties sign the contract. In addition, the Commission is including a provision in § 530.8(a) to make clear that failure to timely file a service contract or amendment will not affect the applicability of the contract or amendment to shipments received on or after the effective date, even if those shipments were received more than 30 days before the carrier files the contract or amendment.

II. BACKGROUND

A. Service Contract Requirements

The Shipping Act permits ocean common carriers and shippers to enter into individual, confidential service contracts for the international transportation of cargo, and requires that these contracts be filed with the Federal Maritime Commission.² For many years, the Commission’s implementing regulations required that ocean common carriers file all service contracts and amendments with the Commission before the contract or amendment could go into effect.³

² See 46 U.S.C. 40502.

³ See, e.g., 46 CFR 530.8(a) (2016).

B. 2016-2018 Rulemakings

In 2016, the Commission published an advanced notice of proposed rulemaking (ANPRM) to revise its regulations governing service contracts and non-vessel-operating common carrier (NVOCC) negotiated service arrangements (NSAs).⁴ The rulemaking was based on the Commission's retrospective review of its regulations and feedback from the industry and shippers. One suggestion from ocean common carriers was to allow service contract amendments to go into effect before filing with the Commission, provided that the amendment was filed within 30 days after the earlier of: (1) the date the parties agreed to the amendment; or (2) the date the carrier received cargo to which the amendment applied.⁵ Beneficial cargo owners and NVOCCs that provided feedback to the Commission, however, indicated that filing amendments prior to the acceptance of cargo protected rate and contract commitments, and these shippers were confident ocean common carriers would honor the rates and contract commitments knowing that the contracts were filed with the Commission.⁶ Notwithstanding these concerns, the Commission requested comment on the carriers' proposal.⁷

The Commission subsequently published an NPRM in 2016 that proposed, among other things, to allow service contract amendments to be filed up to 30 days after the effective date.⁸ The Commission noted that the majority of commenters to the ANPRM supported the change and some advocated extending the same relief to the filing of original service contracts.⁹ Responding to these comments, the Commission initially discussed how the existing

⁴ ANPRM: Service Contracts and NVOCC Service Arrangements, 81 FR 10198 (Feb. 29, 2016).

⁵ *Id.* at 10201.

⁶ *Id.*

⁷ *Id.*

⁸ NPRM: Amendments to Regulations Governing Service Contracts and NVOCC Service Arrangements, 81 FR 56559 (Aug. 22, 2016).

⁹ *Id.* at 56562.

requirements protected shipper interests by demonstrating agreement among the parties prior to the movement of cargo, and that shippers had expressed confidence in this process knowing that both the shipper and carrier would honor the commitment of their service contract filed with the Commission.¹⁰ The Commission moved on to distinguish original service contracts from service contract amendments, describing an original service contract as “a comprehensive agreement between the parties that encompasses the commodities that are to be shipped, the origins and destinations between which cargo is to move, the rates for the transportation of that cargo, as well as terms and conditions governing the transportation of goods for the shipper.”¹¹ The Commission described service contract amendments, on the other hand, as “more limited in scope, generally adding new commodities and/or rates.”¹² The Commission therefore proposed to allow filing of service contract amendments up to 30 days after going into effect, but declined to propose extending the same treatment to original service contracts “given their nature and the Commission’s belief that doing so would diminish its oversight abilities.”¹³

The Commission published a final rule in 2017 adopting, among other changes, the proposed change to permit filing of service contract amendments up to 30 days after the effective date.¹⁴ Carriers and shippers had asserted in their comments that the service contract effective date requirement was overly restrictive, particularly with respect to service contract amendments, and stated that the majority of amendments were for minor revisions to commercial terms, such as a revised rate or the addition of a new origin/destination or commodity.¹⁵ The Commission

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Final Rule: Amendments to Regulations Governing Service Contracts and NVOCC Service Arrangements, 82 FR 16288 (Apr. 4, 2017).

¹⁵ *Id.* at 16290.

also cited carrier claims that, in certain instances, parties had agreed to amend a service contract, but the cargo was received before the carrier filed the amendment with the Commission, meaning that the rates and terms in the amendment could not be applied to the cargo under the Commission's regulations.¹⁶ The Commission concluded that permitting delayed filing was warranted because: (1) it would reduce the filing burdens on the industry by allowing carriers to file multiple amendments made within a 30-day period at the same time rather than on a piecemeal basis; (2) it would avoid the commercial harm associated with failing to timely file an amendment and allow the parties to apply the agreed rates and terms to the intended shipments; and (3) the Commission would maintain the ability to protect the shipping public.¹⁷

In discussing a related proposal that the service contract correction process be amended to permit carriers to submit inadvertently unfiled original service contracts and amendments to the Commission within 180 days, the Commission determined that “[i]n the case of original service contracts, shipper protections at the time of contracting and for the ensuing contract term are best assured by requiring that the agreement be contemporaneously filed as the best evidence of the actual agreement between the parties when first reached.”¹⁸ The Commission expressed concern that delayed filing of service contracts could negatively affect its ability to investigate and enforce the Shipping Act because “[u]nlike those limited and modest revisions to accommodate industry needs for correction of contract amendments, failure to file the original contract may conceal the very existence of a contractual arrangement in a given trade lane or lanes, avoiding early detection of market-distorting practices by individual carriers.”¹⁹

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 16293.

¹⁹ *Id.*

Following publication of the 2017 service contract/NSA final rule, the Commission initiated a separate rulemaking in 2017 to address regulatory revisions proposed by the National Customs Brokers and Forwarders Association of America in a 2015 petition.²⁰ Although this rulemaking focused on NSAs and NVOCC Negotiated Rate Arrangements (NRAs), the Commission discussed the World Shipping Council's (WSC) comments on the 2015 petition regarding the implementation of similar changes to the service contract requirements.²¹ The Commission noted that these comments predated the 2016-2017 service contract/NSA rulemaking, and with the publication of the final rule in that proceeding, the Commission had substantially met the WSC's request for regulatory relief for ocean common carriers.²² The Commission stated that any further relief related to service contracts could be undertaken after the Commission had an opportunity to analyze the impact of the recent changes on carrier operations and shippers.²³

C. 2018 World Shipping Council Petition for Exemption

In 2018, the WSC petitioned the Commission for an exemption from the service contract filing and essential terms publication requirements.²⁴ The Commission denied the request for exemption from the service contract filing requirements but granted the request for exemption from the essential terms publication requirements.²⁵ Although the petition and subsequent Commission decision were focused on eliminating the service contract filing requirement entirely, delayed filing was discussed. For example, as part of the Commission's analysis of the

²⁰ NPRM: Amendments to Regulations Governing NVOCC Negotiated Rate Arrangements and NVOCC Service Arrangements, 82 FR 56781 (Nov. 30, 2017).

²¹ *Id.* at 56785.

²² *Id.*

²³ *Id.*

²⁴ *See Pet. of World Shipping Council for an Exemption from Certain Provisions of the Shipping Act of 1984, as amended, for a Rulemaking Proceeding*, 1 F.M.C.2d 504 (FMC 2019).

²⁵ *Id.*

potential economic harm that could result from eliminating the filing requirement, the Commission pointed to the shipper comments discussed in the 2016-2017 service contract/NSA rulemaking indicating that the filing requirement encouraged ocean common carriers to adhere to contract terms and deterred them from introducing unreasonable terms into service contract boilerplate language.²⁶ The Commission also stated that delayed filing for service contract amendments addressed a number of the issues raised by commenters.²⁷ Finally, in response to WSC's argument that maintaining the filing requirement would negatively impact the ability of NVOCCs to use the expedited contract acceptance and effective date provisions implemented by the Commission in the recent 2017-2018 NSA/NRA rulemaking, the Commission pointed out that WSC's assertion was based on the premise that service contract filing delays the effectiveness of service contracts.²⁸ The Commission noted that WSC had not alleged that such a delay existed nor had Commission experience shown such a delay, and in the absence of such a showing, the Commission did not believe that granting WSC's petition was necessary to give full effect to the changes made in the 2018 NSA/NRA final rule.²⁹

D. 2020-2021 Exemptions

The spread of coronavirus disease 2019 (COVID-19) in 2020 had a significant effect on the global freight delivery system, including service contract negotiation and implementation.³⁰ Many businesses began working remotely because of social distancing guidance and stay-at-home orders.³¹ For some entities, this situation, combined with other COVID-19-related

²⁶ *Id.* at 510 (citing ANPRM: Service Contracts and NVOCC Service Arrangements, 81 FR 10198, 10201 (Feb. 29, 2016)).

²⁷ *Id.* at 513.

²⁸ *Id.* at 514-515 (referring to Final Rule: Amendments to Regulations Governing NVOCC Negotiated Rate Arrangements and NVOCC Service Arrangements, 83 FR 34780 (July 23, 2018)).

²⁹ *Id.* at 515.

³⁰ *Temporary Exemption from Certain Service Contract Requirements*, 2 F.M.C.2d 65 (FMC 2020).

³¹ *Id.* at 65.

disruptions to commercial operations, made complying with service contract filing requirements difficult.

To allow parties time to adapt to the increased pressures from COVID-19 and minimize disruptions to the contracting process, the Commission issued a temporary blanket exemption on April 27, 2020, extending the filing flexibilities for service contract amendments to original service contracts.³² The exemption is conditioned on carriers continuing to file original service contracts, subject to the same delayed filing requirements as service contract amendments (i.e., original service contracts must be filed within 30 days after the effective date). The exemption was originally set to expire December 31, 2020, but the Commission recently extended it until June 1, 2021.³³

On October 7, 2020, CMA CGM, S.A. and its corporate affiliates petitioned the Commission for an exemption from the service contract filing and tariff publishing requirements to mitigate the effects of a cyberattack on their information systems.³⁴ On March 24, 2021, K Line filed a nearly identical petition for exemption.³⁵ While the carriers stated that they appreciated the flexibility afforded by the temporary exemption, they requested further exemption from the filing requirements with respect to original service contracts and amendments to permit them to be filed more than 30 days after they went into effect. The Commission granted an exemption to CMA CGM and its affiliates on October 20, 2020, and granted an exemption to K Line on April 9, 2021.

³² *Id.* at 65-67.

³³ *Temporary Exemption from Certain Service Contract Requirements*, Docket No. 20-06, 2020 FMC LEXIS 206 (FMC Oct. 1, 2020).

³⁴ *Pet. of CMA CGM, S.A.*, Pet. No. P2-20, slip op. (FMC Oct. 20, 2020).

³⁵ *Pet. of Kawasaki Kisen Kaisha, Ltd.*, Pet. No. P1-21, slip op. (FMC Apr. 9, 2021).

III. SUMMARY OF PROPOSED CHANGES³⁶

In the NPRM, the Commission stated that while it had expressed concern about permitting original service contracts to be filed after their effective date during the 2016-2017 service contract/NSA rulemaking and decided to limit delayed filing to amendments, it had not permanently foreclosed future changes to the service contract requirements, citing statements in the 2017 NSA/NRA NPRM that further relief related to service contracts could be undertaken after the Commission had an opportunity to analyze the impact of the 2017 final rule on carriers and shippers. In line with this statement, the Commission reexamined the issue of allowing delayed filing for original service contracts after considering both the agency's experience with delayed filing of amendments and the recent experience with delayed filing of original service contracts under the current temporary exemption.

The Commission tentatively concluded that permanently allowing delayed filing of original service contracts would provide the same type of benefits as delayed filing of service contract amendments, namely avoiding the commercial harm associated with situations in which cargo is received after the parties have agreed to a service contract but before the service contract is filed with the Commission. The Commission noted recent events supporting the need for this flexibility, including the commercial disruption, social distancing, and stay-at-home orders stemming from COVID-19, which has impacted carriers' ability to file service contracts and prompted the Commission to grant a temporary exemption. And the Commission cited CMA CGM's recent exemption petition in response to a cyberattack, in which the carrier noted with appreciation the flexibility afforded by the ability to file service contracts and amendments after their effective date. The Commission stated that these recent events demonstrated that, in certain

³⁶ 86 FR at 5108-5109.

circumstances, requiring that service contracts be filed before they go into effect can potentially delay performance under the contract to the detriment of shippers.

The Commission also tentatively concluded that allowing original service contracts to be filed up to 30 days after the effective date would not materially impact the agency's ability to provide oversight and protect the shipping public. The Commission noted that, at the time, it had not received any shipper complaints regarding delayed filing of amendments or the recent exemption allowing delayed filing of original service contracts. The Commission tentatively concluded that the service contract filing requirement would continue to ensure adherence to service contract terms and deter the introduction of unreasonable terms, regardless of whether original service contracts are filed before, on, or after the effective date.³⁷ The Commission emphasized that the proposed amendments would make clear that original service contracts and amendments would continue to be prospective in nature, ensuring that the parties have reached agreement *before* cargo moves under the contract.

Although the Commission recognized that original service contracts are more comprehensive in scope than amendments, the Commission tentatively concluded that this difference did not support different filing requirements. The Commission pledged to continue to monitor filed service contracts and observed that delayed filing would not negatively impact the Commission's ability to investigate potential Shipping Act violations given the relatively short filing period being proposed (30 days after the effective date).³⁸

³⁷ As discussed above, the Commission recently reaffirmed its commitment to retaining the service contract filing requirement in its decision to deny WSC's exemption request. *Pet. of World Shipping Council*, 1 F.M.C.2d 504.

³⁸ The Commission's concerns in the 2017 service contract/NSA final rule regarding the impact of delayed filing on enforcement were made in response to comments stating that the correction process should allow carriers to submit inadvertently unfiled service contracts with the Commission within a much longer period (180 days).

Based on the foregoing, the Commission proposed to revise its service contract regulations in part 530 to allow original service contracts, like amendments, to be filed up to 30 days after the effective date. The proposed revisions were also intended to clarify that the trigger for the 30-day filing period would be the effective date of the service contract or amendment.

In addition, the Commission proposed technical amendments to the service contract regulations following the Commission order and subsequent rulemaking to exempt ocean common carriers from the requirement to publish service contract essential terms.³⁹ These amendments would: (1) remove a reference to essential terms publication that was inadvertently retained; and (2) add language describing the exemption to ensure that ocean common carriers and other stakeholders that may not know the history of the matter were aware of the exemption.

The Commission requested comments on these proposed amendments and any other amendments necessary to implement delayed filing for original service contracts.

IV. COMMENT SUMMARY

The Commission received eight comments in response to the NPRM from the following stakeholders:

- The National Industrial Transportation League (NITL), which represents shippers and receivers of goods, as well as third party intermediaries, logistics companies and other entities engaged in the transportation of goods.
- The Green Coffee Association (GCA), a trade association representing companies importing, trading, and roasting green coffee beans as well as those companies involved with transporting, storing, handling, insuring, or financing coffee shipments.

³⁹ *Pet. of World Shipping Council*, 1 F.M.C.2d at 515-516. See Final Rule: Service Contracts, 85 FR 38086 (June 25, 2020).

- WSC,⁴⁰ a non-profit trade association that represents the liner shipping industry. WSC members operate approximately 90% of the world's liner vessels.
- The Caribbean Shipowners' Association (CSO),⁴¹ a group of ocean common carriers that serve the trades between the U.S. and various countries in and bordering on the Caribbean Sea.
- BassTech International, a company that supplies specialty raw materials. BassTech's comments were drafted by Lori Fellmer, BassTech's VP Logistics & Carrier Management, a logistics professional with decades of experience in ocean transportation, both on the ocean carrier and beneficial cargo owner (BCO) sides of the business.
- Poseidon Logistics, Inc., an NVOCC and ocean freight forwarder in California.
- De Well Group, an NVOCC with multiple offices in the U.S. and Asia.
- Fracht FWO, Inc., an NVOCC and ocean freight forwarder in Texas.

All but one of the commenters generally supported the proposal to permit delayed filing for original service contracts, though several commenters expressed concerns about potential carrier abuse of the contracting process. In addition, some commenters identified specific concerns with the proposed language and requested clarification from the Commission or specific changes to address these issues.

V. REVISIONS TO SERVICE CONTRACT REGULATIONS AND RESPONSE TO COMMENTS

A. Delayed Filing for Original Service Contracts

1. General Issues

a. Comments

⁴⁰ FMC Agreement No. 201349.

⁴¹ FMC Agreement No. 010979.

Most of the commenters supported the general proposal to allow delayed filing for original service contracts. NITL stated that, overall, it concurred with the Commission's findings in the NPRM and supported the proposal to permit original service contracts to be filed up to 30 days after the effective date.⁴² NITL concurred that the proposal would address carrier and shipper contracting needs and shipping requirements and would not materially impact the Commission's ability to oversee and protect the shipping public given the 30-day deadline to file. NITL argued that contract filings impose a regulatory cost on the industry and that administrative efficiencies will flow from the Commission's adoption of the proposal. GCA was similarly supportive of the proposal in general and emphasized the group's continued support for the requirement that carriers file service contracts with the Commission.⁴³ WSC generally supported the proposal, stating that although it would not eliminate the service contract filing requirement (as WSC has urged in the past), it would provide ocean carriers with additional flexibility.⁴⁴ CSO also generally supported the proposal.⁴⁵ De Well Group, Poseidon Logistics, and Fracht FWO indicated their support for the proposal with no further comment.

NITL noted that its support was tempered by the concerns of several of its shipper members that the relaxed filing requirement could adversely impact small and mid-sized shippers.⁴⁶ NITL asserted that with increasing concentration among ocean carriers and the impact of the alliance structure, NITL members have growing concerns about ocean carrier rates and practices, including the carriers' failure to follow their service contract terms. NITL commented that small and mid-sized shippers, in particular, lack the negotiating leverage of

⁴² NITL Comments at 2-3.

⁴³ GCA Comments at 1.

⁴⁴ WSC Comments at 2.

⁴⁵ CSO Comments at 5.

⁴⁶ NITL Comments at 2, 4.

larger shippers and are concerned that carriers may use the modified filing requirement to pressure shippers into accepting unfavorable contract rates or terms by manipulating the contract effective date to the carrier's benefit based on the spot market or other industry conditions. NITL stated that these concerns are exacerbated by the current market disruption and the problems shippers face with enforcing their existing contract rates and terms and getting timely access to equipment and vessel capacity. NITL therefore requested the Commission closely monitor ocean carrier contracting practices if the proposal is adopted and address any unreasonable contracting practices that may develop.

GCA echoed some of NITL's concerns, stating that the Commission should make clear that the 30-day filing window may not be used by carriers as an "option" which they may hold for 30 days without full commitment to the shipper.

BassTech did not support the proposal,⁴⁷ stating that while the Commission's temporary exemption was a fair and considered action to prevent potential commercial harm that may have resulted from the carriers' inability to comply with the original service contract filing requirements during the initial disruption from the COVID-19 pandemic, organizations have now creatively adapted to meeting all sorts of obligations in the new environment, and with the end of the pandemic in sight, the reasons for the temporary exemption do not justify making the change permanent. BassTech expressed skepticism that ocean carriers find that timely filing a service contract with the Commission, which is as difficult as attaching a file to an email, is too burdensome or unable to be simplified through technology. Rather, BassTech argued that the persistent request for service contract filing deregulation, exemplified by the WSC's petition

⁴⁷ BassTech Comments at 1-2.

seeking an exemption from the service contract filing requirements, seemed to be based on ulterior motives and will have a negative impact on U.S. commerce.

BassTech stated that even when there is no protracted debate over rates or terms, the contracting process often requires multiple document iterations that take days or weeks before the carrier produces a document that reflects the intended agreement well enough to be signed, leading to practices such as extending expiring service contracts for 30 days to cover any potential lapse in coverage or signing and filing less-than-perfect service contracts with an understanding that a subsequent amendment will be prepared to correct outstanding anomalies.⁴⁸ BassTech expressed skepticism that carrier performance in this area will be better or faster without the pressure of a filing obligation, which it argued would potentially diminish the already weak negotiating position of small or medium-sized shippers anxious to keep their cargo moving. BassTech asserted that the reality of the negotiation process driven by the carriers, combined with an enormous imbalance of power between the parties, would lend itself to cargo moving on a “promise” prior to the service contract being in force (notwithstanding the fact that this would not be permitted under the proposed rule).

BassTech asserted that the real benefit carriers will see from the proposal is the ability use single shipment “mini” service contracts through online rate quotation applications (with non-negotiable boilerplate contract terms, no-show penalties, and confidentiality pledges) to offer small and medium shippers very-short-term pricing while circumventing the 30-day notice requirement for tariff increases.⁴⁹ According to BassTech, this allows ocean carriers the ability to fill space not reserved for cargo moving under long-term service contracts at the best possible

⁴⁸ BassTech Comments at 2-3.

⁴⁹ BassTech Comments at 4-6.

market levels. BassTech asserted that for larger shippers, carriers have and will push requests for additional space outside of the existing long-term service contract to the carrier's online rate quote application, relegating this cargo to the spot market without the service guarantees and predictable service that a service contract affords. BassTech further contended that this will further enable carriers to exclude small and medium shippers from long-term service contracts, and could harm NVOCCs by improving the ease of entering into short-term service contracts with beneficial cargo owners (BCOs) directly.

Finally, BassTech discussed concerns that the effects of the proposal will add to the increasing lack of transparency that disadvantages the shipping public.⁵⁰ Specifically, BassTech stated that the earlier elimination of the essential terms publication requirements, combined with the tariff becoming unused and effectively pointless and shippers bound by confidentially provisions in short-term service contracts for spot-market traffic, will create a situation in which the shipping public will be ill-equipped to challenge an ocean carrier's stance that its policy prevents it from entering into a service contract of the type being proposed by a shipper. BassTech concluded by stating that although the proposal on its face may benefit shippers by preventing any negative impact of delays in carrier filing of service contracts, eliminating any regulation that will reduce transparency and meaningful Commission oversight of ocean carrier behavior will have a negative impact on U.S. businesses that rely on importing and exporting by ocean transportation.

⁵⁰ BassTech Comments at 6.

b. *Discussion*

The general concerns about the proposal fall into two broad categories: (1) potential carrier abuse of the service contract negotiation and filing process; and (2) carriers using the relaxed filing requirements to make increased use of single shipment service contracts.

The first issue appears to center around concern that carriers may take advantage of small and medium-sized shippers anxious to ship their cargo by getting them to agree to an informal “handshake” agreement with the promise that a pending contract document reflecting terms to the shipper’s satisfaction will be presented for signing and then, within the 30-day filing period and after shipments have begun, pressuring those shippers to accept less favorable terms in the final contract document. Per the commenters, these concerns are exacerbated by problems shippers are facing in enforcing the terms of existing service contracts in the current market. NITL and GCA continued to support the proposal notwithstanding these concerns, with NITL requesting the Commission closely monitor ocean carrier contracting practices if the proposal is adopted and address any unreasonable contracting practices that may develop. On the other hand, BassTech opposed the proposal given these and other concerns.

The Commission is very concerned about the allegations that some ocean carriers may not be abiding by the terms of their existing service contracts or may seek to use the delayed filing to pressure shippers to accept unfavorable contract terms. Depending on the specific facts at issue, the carrier contracting practices described in the comments could violate the Shipping Act. In particular, the Shipping Act prohibits carriers from providing service that is not in accordance with the terms of a service contract (46 U.S.C. 41104(a)(2)(A)) and unreasonably refusing to deal or negotiate (46 U.S.C. 41104(a)(10)). But the Commission agrees with NITL and GCA that these concerns do not support rejecting the proposal for delayed filing for original

service contracts. Delayed filing will provide benefits to the ocean transportation industry, addressing shipper and carrier contracting needs and avoiding commercial harm that can result from the current requirement that a service contract be filed before it can become effective. And the revised definition of “Effective date” clarifying that a service contract may go into effect only after the parties sign will limit a carrier’s ability to engage in the type of bait-and-switch tactics described in the comments.

To the extent that delayed filing creates any increased risk of carrier abuse of the contracting process, the Commission believes that in line with NITL’s request, increased Commission monitoring of carrier contracting practices and the use of Commission and private enforcement tools to address prohibited conduct will help deter such conduct and mitigate its harm if it does occur.

Under the final rule, service contracts will continue to be filed and subject to Commission oversight and, as discussed in the NPRM, delayed filing will not negatively impact the Commission’s ability to investigate potential Shipping Act violations given the relatively short filing period. If the Commission’s monitoring uncovers conduct that may violate the Shipping Act, the Commission will investigate and take enforcement action as necessary. The Commission may also consider future rulemaking efforts to address such conduct.

In addition to the Commission’s own monitoring and investigatory efforts, the Commission encourages shippers that have been harmed by prohibited conduct (e.g., a carrier’s unreasonable refusal to deal or negotiate) to file a formal or informal complaint seeking reparations (damages) with the Commission.⁵¹ Further, if a shipper believes that a carrier has breached the terms of a service contract, the shipper may bring an action in an appropriate court

⁵¹ Additional information about how to file a complaint can be found on the Commission’s website: <https://www.fmc.gov/resources-services/attorneys-litigants/>.

or other forum agreed to by the parties (the Shipping Act precludes the Commission from adjudicating breach of service contract claims).⁵² And it is the Commission’s opinion that because, under the final rule, service contracts do not need to be filed with the Commission before going into effect, the filing date should have no bearing on the enforceability of a service contract, i.e., if a carrier breaches a service contract within the 30-day window between the effective date and filing date, the fact that the service contract is not yet filed should not preclude the shipper from bringing a breach of contract action in court or other agreed-upon forum. This point is further reinforced by additional language the Commission is adding to § 530.8(a) to make clear that failure to timely file a service contract or amendment does not affect the applicability of the contract or amendment to cargo received on or after the effective date (discussed in more detail in Section V.A.3).

The second area of concern, increased use of single shipment service contracts through online rate quotation systems, centers on matters that are beyond the scope of this rulemaking. Carrier decisions on which instrument to use for spot market cargo (service contracts or tariffs), increasing use of digital platforms, and the potential impact on shippers involve complex issues only tangentially related to service contract filing. In short, this rulemaking does not directly impact such “mini” service contracts; they are not currently prohibited under part 530 and will continue to be permitted under the final rule. Delayed filing will, however, increase the flexibility of carriers and shippers to enter into all types of service contracts, including those limited to single shipments. The Commission is not making any changes to the final rule in response to the comments on this issue, but the Commission will continue to monitor the broader

⁵² 46 U.S.C. 40502(f).

trends identified in the comments to determine whether Commission action in this area is warranted.

2. Definition of “Effective Date” (§ 530.3)

a. *NPRM*⁵³

The current definition of “Effective date” describes: (1) what an effective date is; (2) the relationship between the effective date and the filing date for both original service contracts and amendments (i.e., the effective date may not be before the filing date for original service contracts or more than 30 days prior to the filing date for amendments); and (3) the specific time on the effective date when an original service contract or amendment is effective (12:01 a.m. Eastern Standard Time).

In the NPRM, the Commission proposed to amend the definition of “Effective date” by removing the language tying the effective date to the filing date. Reflecting the tentative determination to extend delayed filing to original service contracts, the Commission proposed to delete the sentence stating that the effective date for original service contracts cannot be prior to the filing date. The Commission also proposed to delete the sentence stating that the effective date of an amendment can be no more than 30 days prior to the filing date because this sentence simply repeats the filing requirement in § 530.8(a)(2). The Commission tentatively determined that § 530.8(a), as amended by the proposed revisions, would adequately describe the filing requirement and the deadline for filing, and repeating the requirement in § 530.3(i) was therefore unnecessary.

The Commission also proposed to clarify the time on the effective date when a service contract or amendment goes into effect. Currently, § 530.3(i) provides that a service contract or

⁵³ 86 FR at 5109.

amendment is effective at 12:01 a.m. Eastern Standard Time. The proposed revision added the equivalent time zone relative to Coordinated Universal Time (UTC) for added clarity (i.e., UTC-05:00) given that ocean cargo often originates and moves through non-U.S. time zones and to avoid any confusion regarding the part of the year when daylight saving time is in effect in parts of the U.S.

Finally, the Commission proposed to add language to the definition to clarify that although service contracts and amendments may be filed after the effective date, the Commission was retaining the requirement that service contracts and amendments must be prospective in nature and cannot have retroactive effect. Under the current regulations, service contract amendments may only have prospective effect.⁵⁴ And, prior to the recent temporary exemption, original service contracts could not become effective prior to being filed with the Commission and were therefore also limited to having prospective effect. Because the Commission proposed to allow original service contracts to be filed after they go into effect, the Commission also proposed to add language to the definition of “Effective date” to reflect the continuing requirement that service contracts and amendments may only have prospective effect. The proposed language specified that the effective date cannot be earlier than the date on which all the parties have signed the service contract or amendment.

b. *Comments*

NITL supported the proposed amendments to § 530.3 to the extent they clarify that the effective date of the original service contract is the date upon which the service contract is scheduled to go into effect and not the filing date.⁵⁵ NITL agreed that the effective date should be

⁵⁴ § 530.10(a)(1).

⁵⁵ NITL Comments at 3.

no earlier than the date on which all parties have signed the service contract and that service contracts and amendments should have prospective effect, ensuring that contract performance may not begin until the parties have agreed upon the terms and effective date.

GCA expressed concerns regarding the proposed definition of effective date, specifically the part specifying that the effective date cannot be earlier than the date on which all parties have signed the service contract or amendment.⁵⁶ GCA stated that, in most cases, service contracts are prepared and presented unsigned by the ocean carrier to the shipper for review and acceptance, and once all of the rates, terms, and conditions are agreed to, the shipper signs the contract handwritten or electronically and returns it to the carrier for signature and filing with the Commission. GCA asserted that the shipper oftentimes does not receive a copy of the fully executed contract with the carrier's signature but relies on the assumption that the contract is in fact signed by the carrier and filed with the Commission. GCA contended that there has been a "meeting of the minds" between the ocean carrier and shipper when the shipper signs the service contract prepared and presented by the carrier, and that the carrier should be obligated to perform under the service contract at that point.

BassTech questioned the assumptions underlying the proposed definition of effective date, stating that the definition presumes that carriers find challenging the filing of service contracts while foreseeing no difficulty in accomplishing the more complex tasks of negotiating, drafting, and obtaining signatures for service contracts in time to meet commercial deadlines, urgent shipping needs, or prior service contract expirations.⁵⁷

⁵⁶ GCA Comments at 1-2.

⁵⁷ BassTech Comments at 2-3.

WSC and CSO expressed concern that the proposed definition of “Effective date” would have unintended consequences that would limit the usefulness of the proposed regulatory changes.⁵⁸ WSC and CSO asserted that under the current regulations, service contract amendments may be filed no later than 30 days after cargo moves under the amendment and, citing the NPRM, argued that linking the deadline for filing to the movement of cargo rather than the execution of the contract amendment helped avoid difficulties encountered when cargo is tendered before an amendment is signed by the shipper. WSC and CSO asserted that the proposed definition of “Effective date” would withdraw this existing relief and perpetuate this problem for both original service contracts and amendments. Specifically, WSC and CSO pointed to the provision stating that the effective date can be no earlier than the date all parties sign the service contract or amendment. WSC argued that this provision is unnecessarily narrow in light of modern electronic contract formation and documentation practices. CSO asserted that the change will once again force carriers to choose between commercial understandings that have been reached but not signed and adhering to their statutory obligations.

WSC emphasized that it is not objecting at this time to the Commission’s intent behind the provision, namely to reflect that original service contracts and amendments may only have prospective effect.⁵⁹ Rather, WSC and CSO viewed the use of signatures as the sole trigger for contract effectiveness as unnecessarily restrictive and out of step with the general contract law principles of offer and acceptance.⁶⁰ CSO stated that it is difficult to explain to some customers that they cannot have their cargo rated pursuant to an understanding reached via phone, text, or email because the carrier does not have a signature. WSC and CSO pointed to section 2-206 of

⁵⁸ WSC Comments at 2-3; CSO comments at 2.

⁵⁹ WSC Comments at 3.

⁶⁰ WSC Comments at 3-4; CSO Comments at 2-3.

the Uniform Commercial Code (UCC) and § 30(2) of the Restatement (Second) of Contracts, which provide that an offer invites acceptance in any manner and by any medium reasonable in the circumstances. WSC argued that the proposed definition of “Effective date” would contravene these principles by requiring that a service contract offer may be accepted only by signature. CSO stated that it is unclear why tendering cargo is not a reasonable means of accepting an offer and why customers should be subject to contract acceptance formalities beyond those applicable in other industries.

CSO argued that requiring a service contract or amendment be signed before implementation would treat service contracts differently than other types of contractual arrangements subject to Commission jurisdiction.⁶¹ Specifically, CSO contended that tender of cargo can constitute acceptance of an NRA under 46 CFR 532.5(c)(3) and that the Commission does not require signature as a prerequisite to the implementation of an NSA under 46 CFR 531.3(f).

WSC also stated that the concept of what constitutes a signature has evolved over time, particularly to address electronic commerce.⁶² WSC described as an example a shipper requires a quote, the carrier providing terms in response, and the shipper pressing a button or key to accept. WSC asserted that it is unclear whether the reference to the date the parties sign the service contract or amendment in the proposed definition would include such processes, but recommended that it should. WSC cited the definition of “electronic signature” in the Electronic Signatures in Global and National Commerce Act (E-SIGN Act) and stated that this definition reflects that an intent to form an agreement can be expressed by a variety of actions, is consistent

⁶¹ CSO Comments at 3-4.

⁶² WSC Comments at 4-5.

with the UCC and the Restatement (Second) of Contracts, and recognizes the reality of today's modern business environment.

WSC therefore urged the Commission to revise the last sentence of the proposed definition of "Effective date" to read:⁶³

The effective date may not be earlier than the date on which all parties have taken actions that manifest their mutual agreement to the terms of the service contract or amendment, or the date on which performance documentable as associated with that service contract or amendment begins.

WSC asserted that the suggested revision would allow parties to implement service contracts and amendments on whatever documentable contract formation process to which they agree and avoid the difficulties outlined in its comments. CSO also urged the Commission to adopt the WSC's proposed revision, claiming that it would allow parties to implement a contract or amendment without first obtaining physical signatures, or any signature.⁶⁴ WSC and CSO claimed that this change would not undermine the prohibition against retroactive service contracts and amendments, since the Commission would still be able to obtain the service contract records necessary to determine the date on which performance began or the service contract/amendment was agreed to by the parties.

c. *Discussion*

For the reasons stated in the NPRM and the discussion below, the Commission has determined to adopt the proposed definition of "Effective date" in § 530.3(i). The comments on the definition focused on the last sentence, which states that the effective date may be no earlier than the date all parties have signed the service contract or amendment. While NITL supported this provision, WSC and CSO asserted that requiring signatures before the contract may go into

⁶³ WSC Comments at 5-6.

⁶⁴ CSO Comments at 4-5.

effect was unnecessarily restrictive and out of step with general contract law principles. GCA opined that the shipper's signature should be sufficient for effectiveness.⁶⁵ The comments opposing this provision appear to be based on a misunderstanding of the purpose and nature of the provision. The Commission believes that additional explanation and clarification of the provision will address these concerns.

Under the current regulations, service contracts must be signed before they go into effect, and the filed contract must identify who signed the contract and the date it was signed.⁶⁶ The proposed definition of "Effective date" was intended to provide flexibility to the service contract filing process by allowing delayed filing while ensuring that service contracts continued to be prospective agreements, i.e., the parties reach agreement before performance begins. To accomplish this latter goal, the proposed definition retained the current requirement that service contracts must be signed before going into effect. Because filed service contracts already include the date of signature as well as the effective date, the Commission is easily able to verify that the effective date is on or before the signature date and therefore that the parties reached agreement before the contract went into effect and cargo began to move. In other words, the proposed definition was not intended to address service contract formation or what constitutes offer and acceptance but merely reflected a current requirement that could be used to ensure contracts are prospective in nature. None of the commenters objected to service contracts retaining their prospective nature.

⁶⁵ BassTech's comment, though referencing the proposed definition of "Effective date," was focused primarily on the general concerns discussed above in Section V.A.1.

⁶⁶ § 530.8(b)(9) (requiring that the filed contract include the names, titles and addresses of the representatives signing the contract for the parties and the date upon which the service contract was signed) § 530.3(i) (defining the effective date for original service contracts as no earlier than the filing date).

One of WSC's primary concerns was that it was unclear what constituted an acceptable signature under the proposed definition. WSC pointed to the broad definition of "electronic signature" in the E-SIGN Act⁶⁷ and stated that the definition reflects that an intent to form an agreement can be expressed by a variety of actions, is consistent with the UCC and the Restatement (Second) of Contracts, and recognizes the reality of today's modern business environment.

The Commission appreciates the opportunity to clarify the intersection between the E-SIGN Act and the Commission's regulations and what constitutes a signature for purposes of the service contract regulations in part 530. The E-SIGN Act was enacted on June 30, 2000, and effective on October 1, 2000.⁶⁸ The E-SIGN Act provides, in relevant part, that notwithstanding any statute, regulation, or other rule of law, a signature, contract, or other record related to a transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic format nor may a contract related to the transaction be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.⁶⁹ The E-SIGN Act goes on to define an "electronic signature" as an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.⁷⁰ To further clarify, an "electronic signature" will suffice to demonstrate agreement between the parties and allow a service contract to go into effect, as the E-SIGN Act's definition of "electronic signature" is based on, and nearly identical to, the definition of "electronic signature" in the Uniform

⁶⁷ Pub. L. No. 106-229 (2000) (codified at 15 U.S.C. 7001-7006).

⁶⁸ 15 U.S.C. 7001 note.

⁶⁹ 15 U.S.C. 7001.

⁷⁰ 15 U.S.C. 7006(5).

Electronic Transactions Act (UETA), model state legislation developed in 1999, and the commentary to the UETA makes clear that the definition includes the standard webpage click-through process for obtaining goods or services (e.g., clicking a box accepting the terms of the agreement).

Consistent with the E-SIGN Act, the Commission interprets the requirements in part 530 that service contracts be signed as being met with electronic signatures as defined in the E-SIGN Act. This interpretation extends to the reference to signing in the proposed definition of “Effective date.” In other words, from the Commission’s perspective, the act of signing a service contract can be accomplished by electronic signature, which is broadly defined under the E-SIGN Act. This means that carriers and shippers have great flexibility and discretion in determining what form signature will take. Based on WSC’s positive comments regarding the E-SIGN Act and the definition of “electronic signature,” the Commission believes that this interpretation addresses both WSC and CSO’s concerns, which appear to have been based on fears that the Commission had a narrower concept of what constitutes a service contract signature than the E-SIGN Act.⁷¹ This clarification should also alleviate GSA’s concerns because the broad definition of “electronic signature” also applies to carriers.

⁷¹ CSO’s concerns also appear to be based on a misunderstanding of the Commission regulations governing NSAs and NRAs. Specifically, CSO contended that the proposed definition of “Effective date” in part 530 would treat service contracts differently than NRAs and NSAs. Specifically, CSO argued that tender of cargo can constitute acceptance of an NRA under 46 CFR 532.5(c)(3) and that the Commission does not require signature as a prerequisite to the implementation of an NSA under 46 CFR 531.3(f). Neither of these statements is correct. Section 532.5(c)(3) states that booking a shipment can constitute shipper acceptance of an NRA so long as the NRA includes a specific notice to that effect in the NRA. In the 2018 final rule that added this provision, however, the Commission expressly rejected the idea that tender of cargo alone constitutes acceptance, stating that allowing tender prior to agreement would create the potential for an unfair environment for shippers and increase transactional confusion, instead retaining the requirement that the NRA had to be agreed to by both shipper and NVOCC prior to the receipt of cargo. 83 FR at 34789. As for NSAs, the same 2018 final rule expressly stated that NSAs must be signed by both the NVOCC and shipper and are binding upon signature of the parties. *Id.* at 34790.

Based on the foregoing, the Commission has determined to adopt the proposed definition of “Effective date.” Because the proposed definition, as interpreted above, addresses the concerns raised by WSC, the Commission concludes that it is unnecessary to adopt the substitute language offered by WSC. The Commission has determined that it is more prudent to rely on the universal definition of “electronic signature” in the E-SIGN Act than adopt its own, separate definition in part 530.⁷² In addition, WSC’s definition would nullify one of the primary advantages of the proposed definition, i.e., the Commission’s ability to confirm from the face of the filed contract that it is prospective in nature by comparing the effective date and date of signature. As WSC admits, the Commission would have to obtain specific service contract records in order to determine when the service contract was agreed to by the parties if the Commission were to adopt its proposed language. Finally, as discussed above in Section V.A.1, tying the effective date to the date of signature will limit carriers’ ability to use the type of bait-and-switch tactics certain commenters fear could occur with delayed filing.

3. Service Contract Filing Requirements (§ 530.8)

a. NPRM⁷³

Section 530.8 sets forth the filing requirements for service contracts and amendments. Under the current regulations, amendments must be filed no later than 30 days after cargo moves pursuant to the amendment, and, prior to the temporary exemption, original service contracts had to be filed before any cargo moved pursuant to the service contract.⁷⁴ In the NPRM, the Commission proposed to allow a 30-day filing period for both original service contracts and amendments and combine § 530.8(a)(1) and (2) into a single provision at § 530.8(a). The revised

⁷² At this time, the Commission is not formally incorporating into its regulations any definitions or requirements from the E-SIGN Act, but may revisit this issue in the future.

⁷³ 86 FR at 5109-5110.

⁷⁴ § 530.8(a)(1), (2).

§ 530.8(a) would require that ocean common carriers file service contracts and amendments no later than 30 days after the effective date.

The trigger for the filing period under the proposed revisions thus differed from the current requirement for service contract amendments in § 530.8(a)(2). The current regulations include two trigger events. Current § 530.3(i) requires that the effective date for the amendment be no more than 30 days prior to the filing date, while current § 530.8(a)(2) requires that an amendment be filed no later than 30 days after cargo moves pursuant to the amendment. In accordance with § 530.14(a), performance under an original service contract or amendment may not begin until the effective date, and therefore the effective date could be earlier than the date cargo moves under the contract or amendment. Accordingly, in order to comply with both §§ 530.3(i) and 530.8(a)(2), ocean common carriers must file service contract amendments no later than 30 days after the effective date. Based on this interpretation, the Commission published guidance on its website shortly after the 2017 final rule was issued to make clear that service contract amendments must be filed no later than 30 days after their effective date.⁷⁵ The Commission therefore proposed a single trigger (effective date) for the 30-day filing period for both original service contract and amendments in order to make clear when service contracts must be filed and allow the Commission to readily assess compliance.

The Commission also proposed amendments to § 530.8(e) to reflect the 30-day filing period for original service contracts. Section 530.8(e) currently provides that if the Commission's service contract filing system is unable to receive filings for 24 hours or more, affected parties are not subject to the requirements in §§ 530.8(a) and 530.14(a) that a service contract must be filed before cargo is shipped under the contract. This exception is conditioned

⁷⁵ https://web.archive.org/web/20190321030253/https://www.fmc.gov/resources/amended_service_contract_nsas_rule.aspx (last visited April 9, 2021).

on the affected service contracts being filed within 24 hours after the Commission filing system returns to service.

The proposed amendments to §§ 530.8(a) and 530.14(a) required corresponding changes to § 530.8(e). The proposed changes to § 530.8(e) provided that if the Commission's service contract filing system is down for 24 hours or more, any service contract or amendment that must be filed during that period (i.e., because the 30-day filing period concludes while the system is down) will be considered timely filed so long as the contract or amendment is filed no later than 24 hours after the Commission filing system returns to service. The proposed revisions to § 530.8(e) also deleted the reference to § 530.14(a) given the proposed revisions to the latter section.

b. *Comments*

NITL supported the proposed changes to § 530.8. NITL stated that a single trigger for the 30-day filing period for original service contracts and amendments is appropriate and concurred with the proposed changes addressing how filings are treated when the Commission's system is down.⁷⁶ NITL also requested that the Commission clarify that a shipper that tenders cargo under a service contract during the 30-day filing window will not be penalized if the carrier fails to file the service contract within the window (e.g., by having shipments re-rated under tariff rates). NITL stated that shippers typically get notice of the filing date from the carrier so they know when the contract rates and terms apply, but with a 30-day filing period, the shipper will base its shipments on the effective date and not the filing date.

Other commenters echoed this last point. GCA asserted that the carrier should bear full responsibility to file service contracts within the 30-day filing period and should bear any burden

⁷⁶ NITL Comments at 3-4.

or consequence stemming from the failure to timely file the contract.⁷⁷ BassTech stated that it is important for any new rule to specify what happens to the rating of cargo that has shipped during the 30-day filing window if the carrier neglects to timely file the service contract and suggested that the rule expressly state that any duly signed service contract will prevail regardless of filing status.⁷⁸

c. *Discussion*

The Commission agrees that shippers should not be penalized for an ocean carrier's failure to timely file a service contract. As the commenters note, shippers will base their shipments on the effective date of the contract or amendment and have no control over whether the carrier files the contract or amendment within 30 days. Retroactive re-rating of cargo received more than 30 days prior to the filing date would unnecessarily punish the shipper for the ocean carrier's failure to comply with the filing requirements and permit the ocean carrier to collect the generally higher tariff rate for those shipments. To address this issue, the final rule adopts the text of proposed paragraph (a) in § 530.8 as paragraph (a)(1) and includes a new paragraph (a)(2) that expressly states that failure to timely file a service contract or amendment does not affect the applicability of the contract or amendment to cargo received on or after the effective date.

This change does not mean, however, that the Commission will overlook an ocean carrier's failure to timely file a service contract or amendment. The Commission will continue to closely monitor carrier compliance with the filing requirements and take enforcement action against violators, including the assessment of civil penalties.

⁷⁷ GCA Comments at 2.

⁷⁸ BassTech Comments at 2.

In addition to revising § 530.8(a), the Commission is adopting without change the proposed revisions to § 530.8(b) and (e) for the reasons described above and in the NPRM.

4. Service Contract Implementation Requirements (§ 530.14)

NITL supported the proposed revisions to § 530.14 and stated that performance under a service contract should not begin until the effective date.⁷⁹ None of the other commenters discussed the changes. Accordingly, for the reasons stated in the NPRM⁸⁰ and below, the Commission is adopting the proposed revisions without change.

Section 530.14 provides that performance under a service contract or amendment may not begin until the effective date and conditions performance on compliance with the relevant filing requirements, i.e., performance under an original service contract may not begin until the contract is filed while performance under an amendment may begin on the effective date provided that the amendment is filed no later than 30 days after the effective date.

Given that the changes to § 530.8(a) prescribe the same filing period for original service contracts and amendments (30 days after the effective date), the Commission is replacing the separate requirements for original service contracts and amendments in § 530.14(a) with a single requirement that performance under either may not begin until the effective date. The Commission is also removing the language tying performance to the filing date as it simply repeats the filing requirement in § 530.8(a). The Commission determined that § 530.8(a), as amended, will adequately describe the filing requirement and the deadline for filing, and repeating the requirement in § 530.14(a) was therefore unnecessary. This change will also help avoid confusion regarding the applicability of a service contract or amendment if the carrier fails

⁷⁹ NITL Comments at 3.

⁸⁰ 86 FR at 5110.

to file the contract or amendment within the 30-day filing period. As discussed above, a carrier's failure to timely file a contract or amendment will not affect the applicability of the contract or amendment to shipments received on or after the effective date, even if those shipments were received more than 30 days before filing.

The Commission is adding a new sentence to § 530.14(a) to clarify that original service contracts and amendments may apply only to cargo received by the carrier on or after the effective date. As noted in the NPRM, this provision is implied by the current language of §§ 530.8(a) (describing when a service contract or amendment must be filed in relation to when cargo moves under the contract) and 530.14(a) (prohibiting performance under a service contract or amendment until the effective date) and had been stated in previous rulemakings.⁸¹ Because the Commission is amending § 530.8(a) so that the filing period is tied to the effective date rather than the date cargo moves, the Commission is including language in § 530.14(a) clearly stating that service contracts and amendments may only apply to cargo received on or after the effective date.

B. Technical Amendments

The NPRM proposed additional technical amendments to part 530 to implement the Commission's December 2019 decision to grant in part WSC's petition and exempt ocean common carriers from the essential terms publication requirements.⁸² NITL supported all of the proposed technical amendments.⁸³ No other commenters discussed the technical amendments.

⁸¹ *See, e.g.*, 82 FR at 16290 (noting that because of the previous requirement that amendments had to be filed before cargo could move under the terms of the amendment, “[c]arriers have cited instances in which the parties have agreed to amend the contract, however, due to unavoidable circumstances, the cargo was received before the carrier filed the amendment with the Commission” and “[i]n such cases, the amendment’s rates and terms may not be applied to that cargo pursuant to the Commission’s rules.”).

⁸² *Pet. of World Shipping Council*, 1 F.M.C.2d at 515-516.

⁸³ NITL at 4.

Accordingly, for the reasons stated in the NPRM⁸⁴ and below, the Commission is adopting the proposed technical amendments without change.

1. Definition of “Authorized Person” (§ 530.3)

The definition of “Authorized person” in § 530.3(c) includes a reference to publishing statements of essential terms. The definition also cross-references a nonexistent paragraph (§ 530.5(d)) when referring to the registration requirements for filing service contracts. The Commission is amending the definition by removing the reference to essential terms publication and including the correct citation for the registration requirements (§ 530.5(c)).

2. Exceptions and Exemptions (§ 530.13)

The Commission is adding a new paragraph (e) to § 530.13 to reflect the exemption granted by the Commission from the essential terms publication requirements. Although the Commission recently eliminated the essential terms publication requirements in part 530, ocean common carriers that are not aware of the exemption may be confused as to whether the statutory requirement in 46 U.S.C. 40502(d) continues to apply. Accordingly, the Commission is including a new provision reflecting the exemption from section 40502(d).

VI. RULEMAKING ANALYSES AND NOTICES

Effective Date

The Administrative Procedure Act generally requires a minimum of 30 days before a final rule can go into effect but excepts from this requirement: (1) substantive rules which grant or recognize an exemption or relieve a restriction; (2) interpretive rules and statements of policy; and (3) when an agency finds good cause for a shorter period of time and includes those findings with the rule. 5 U.S.C. 553(d).

⁸⁴ 86 FR at 5110.

The final rule is a substantive rule relieving a restriction and warrants an earlier effective date under 5 U.S.C. 553(d). The rule provides relief from the requirement that original service contracts be filed with the Commission before they may go into effect. The rule also revises part 530 so that failure to timely file an original service contract or amendment will no longer affect the applicability of the service contract or amendment to shipments received more than 30 days before filing.

The Commission also finds good cause for an effective date of June 2, 2021, under 5 U.S.C. 553(d)(3). Because the current temporary exemption allowing original service contracts to go into effect up to 30 days before filing expires on June 1, 2021, a delayed effective date would create a gap period during which original service contracts would need to be filed before going into effect, which would be contrary to the public interest. A June 2, 2021 effective date ensures no gap between the exemption and the final rule. The remaining amendments are technical updates to reflect the 2019 exemption from the essential terms publication requirements and to correct certain cross-references, and a delayed effective date for these revisions is unnecessary.

Congressional Review Act

The rule is not a “major rule” as defined by the Congressional Review Act, codified at 5 U.S.C. 801 *et seq.* The rule will not result in: (1) an annual effect on the economy of \$100,000,000 or more; (2) a major increase in costs or prices; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies. 5 U.S.C. 804(2).

Regulatory Flexibility Act

The Regulatory Flexibility Act (codified as amended at 5 U.S.C. 601–612) provides that whenever an agency is required to publish a notice of proposed rulemaking under the Administrative Procedure Act (APA) (5 U.S.C. 553), the agency must prepare and make available a final regulatory flexibility analysis describing the impact of the proposed rule on small entities, unless the head of the agency certifies that the rulemaking will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 604-605. Based on the analysis below, the Chairman of the Federal Maritime Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities. The regulated business entities that would be impacted by the rule are ocean common carriers (i.e., vessel-operating common carriers). The Commission has determined that ocean common carriers generally do not qualify as small entities under the guidelines of the Small Business Administration (SBA). *See FMC Policy and Procedures Regarding Proper Consideration of Small Entities in Rulemakings* (Feb. 7, 2003), available at https://www.fmc.gov/wp-content/uploads/2018/10/SBREFA_Guidelines_2003.pdf.

National Environmental Policy Act

The Commission’s regulations categorically exclude certain rulemakings from any requirement to prepare an environmental assessment or an environmental impact statement because they do not increase or decrease air, water or noise pollution or the use of fossil fuels, recyclables, or energy. 46 CFR 504.4. The final rule allows ocean common carriers to file original service contracts up to 30 days after their effective date. This rulemaking thus falls within the categorical exclusion for actions related to the receipt of service contracts (§ 540.4(a)(5)). Therefore, no environmental assessment or environmental impact statement is required.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521) (PRA) requires an agency to seek and receive approval from the Office of Management and Budget (OMB) before collecting information from the public. 44 U.S.C. 3507. The agency must submit collections of information in proposed rules to OMB in conjunction with the publication of the notice of proposed rulemaking. 5 CFR 1320.11.

The information collection requirements associated with the service contract filing requirements in part 530 are currently authorized under OMB Control Number 3072-0065. In compliance with the PRA, the Commission submitted the proposed revised information collection to the Office of Management and Budget in conjunction with publication of the NPRM and provided notice of the revised information collection in the NPRM. Comments received regarding the proposed changes, as well as the Commission's responses, are discussed above. No comments specifically addressed the revised information collection in part 530.

Title: 46 CFR Part 530—Service Contracts and Related Form FMC-83.

OMB Control Number: 3072-0065.

Abstract: 46 U.S.C. 40502 and 46 CFR part 530 require ocean common carriers to file certain service contracts confidentially with the Commission.

Current Action: The final rule amends the service contract filing requirements to allow ocean common carriers to file original service contracts up to 30 days after the effective date. Currently, part 530 requires that ocean common carriers file original service contracts on or before the effective date, while amendments must be filed within 30 days after the effective date.

Type of Request: Revision of a previously approved collection.

Needs and Uses: The Commission monitors service contract filings to ensure compliance with the Shipping Act of 1984.

Frequency: Frequency of filings is determined by the ocean common carrier and its customers. When parties enter into a service contract or amend the contract, the service contract or amendment must be filed with the Commission.

Type of Respondents: Ocean common carriers or their duly appointed agents are required to file service contracts and amendments with the Commission.

Number of Annual Respondents: The Commission does not anticipate that the revisions will affect the number of respondents. As a general matter, however, the number of respondents has decreased since the last revision to the information collection. The Commission estimates an annual respondent universe of 86 ocean common carriers.

Estimated Time per Response: The Commission does not anticipate that the revisions will affect the estimated time per response, which will continue to range from 0.0166 to 1 person-hours for reporting and recordkeeping requirements contained in the regulations, and 0.1 person-hours for completing Form FMC-83.

Total Annual Burden: The Commission does not anticipate that the revisions will affect the number of service contracts filed or the burden associated with each filing and, therefore, will not affect the total annual burden. Due to the decrease in the number of respondents since the last revision, however, the Commission expects that the total annual burden will decrease. The Commission estimates the total person-hour burden at 30,448 person-hours.

Executive Order 12988 (Civil Justice Reform)

This final rule meets the applicable standards in E.O. 12988 titled, "Civil Justice Reform," to minimize litigation, eliminate ambiguity, and reduce burden. Section 3(b) of E.O.

12988 requires agencies to make every reasonable effort to ensure that each new regulation: (1) clearly specifies the preemptive effect; (2) clearly specifies the effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct, while promoting simplification and burden reduction; (4) clearly specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. This document is consistent with that requirement.

Regulation Identifier Number

The Commission assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda). The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda, available at <http://www.reginfo.gov/public/do/eAgendaMain>.

List of Subjects in 46 CFR Part 530

Freight, Maritime carriers, Report and recordkeeping requirements.

For the reasons set forth above, the Federal Maritime Commission is proposing to amend 46 CFR part 530 as follows:

PART 530-SERVICE CONTRACTS

1. The authority citation for part 530 continues to read as follows:

Authority: 5 U.S.C. 553; 46 U.S.C. 305, 40301-40306, 40501-40503, 41307.

2. Amend § 530.3 by revising paragraphs (c) and (i) to read as follows:

§ 530.3 Definitions.

* * * * *

(c) *Authorized person* means a carrier or a duly appointed agent who is authorized to file service contracts on behalf of the carrier party to a service contract and is registered by the Commission to file under § 530.5(c) and appendix A to this part.

* * * * *

(i) *Effective date* means the date upon which a service contract or amendment is scheduled to go into effect by the parties to the contract. A service contract or amendment becomes effective at 12:01 a.m. Eastern Standard Time (Coordinated Universal Time (UTC)-05:00) on the effective date. The effective date may not be earlier than the date on which all parties have signed the service contract or amendment.

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3. Amend § 530.8 by:

- a. Revising paragraph (a);
- b. Adding a subject heading to paragraph (b); and
- c. Revising paragraph (e).

The revisions and addition read as follows:

§ 530.8 Service Contracts.

(a) *Filing.* (1) Authorized persons shall file with BTA, in the manner set forth in appendix A of this part, a true and complete copy of every service contract and every amendment to a service contract no later than thirty (30) days after the effective date.

(2) Failure to file a service contract or amendment in accordance with paragraph (a)(1) of this section does not affect the applicability of the service contract or amendment to cargo received on or after the effective date by the ocean common carrier or its agent.

(b) *Required terms.* * * *

* * * * *

(e) *Exception in case of malfunction of Commission filing system.* In the event that the Commission's filing systems are not functioning and cannot receive service contract filings for twenty-four (24) continuous hours or more, an original service contract or amendment that must be filed during that period in accordance with paragraph (a)(1) of this section will be considered timely filed so long as the service contract or amendment is filed no later than twenty-four (24) hours after the Commission's filing systems return to service.

4. Amend § 530.13 by adding paragraph (e) to read as follows:

§ 530.13 Exceptions and exemptions.

* * * * *

(e) *Essential terms publication exemption.* Ocean common carriers are exempt from the requirement in 46 U.S.C. 40502(d) to publish and make available to the general public in tariff format a concise statement of certain essential terms when a service contract is filed with the Commission.

5. Amend § 530.14 by revising paragraph (a) to read as follows:

§ 530.14 Implementation.

(a) *Generally.* Performance under an original service contract or amendment may not begin until the effective date. An original service contract or amendment may apply only to cargo received on or after the effective date by the ocean common carrier or its agent, including originating carriers in the case of through transportation.

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By the Commission.

Rachel E. Dickon
Secretary