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FMC's New Rule Exempts Licensed NVOCCs from Tariff Publication Requirements

On February 16, 2011, the Federal Maritime Commission ("FMC" or "Commission") adopted new regulations which provide non-vessel operating common carriers ("NVOCCs") with an exemption from tariff publication requirements of the Shipping Act of 1984.¹ Under the new regulations, to be codified at 46 C.F.R. Part 532, NVOCCs may enter into Negotiated Rate Arrangements ("NRAs") with individual shippers without publishing and/or adhering to rate tariffs for ocean transportation. According to the Commission record, the exemption could save each of 3,300 licensed NVOCCs up to \$200,000 per year.

The new regulations also provide additional flexibility to qualifying NVOCCs. To begin with, NVOCCs may decide whether or when to use NRAs. In other words, NVOCCs may use NRAs for all of their services or some of their services (while providing other services pursuant to their published tariffs). The final rule also allows NVOCCs to enter into NRAs with other NVOCCs, and permits affiliates of "NRA shippers" (which is defined to include NVOCCs) to use NRAs so long as their names are included. A single NRA can cover more than one shipment and may include all of the components or just base rates. Nevertheless, NVOCCs using NRAs are still subject to the Shipping Act Sections 10(b)(4) (which prohibits common carriers from unfair or unjustly discriminatory practices in services pursuant to a tariff) and 10(b)(8) (which prohibits common carriers from undue or unreasonable preference or advantage or undue or unreasonable prejudice or disadvantage for tariff service).

Importantly, only licensed NVOCCs may use the exemption. Foreign, registered NVOCCs are not eligible, though the Commission indicated that it may revisit this issue later this year with a Notice of Inquiry.

The new regulations contain several conditions on the use of NRAs, including:

- NRAs must be agreed to by both parties and memorialized in writing by the date cargo is received for shipment;
- NRAs must include the applicable rate for each shipment;
- NRAs may not be modified after the time cargo is received for shipment;
- NRAs must include prominent notice of the existence and location of the NVOCC's rule tariff;
- NRAs may not include a minimum commitment provision (and related penalty provision), though maximum quantity commitment is allowed;
- NVOCCs using NRAs are required to publish rules tariffs containing terms and conditions governing shipments (which must be provided to the public free of charge); and
- NRAs and associated records are subject to five-year record keeping requirements and must be promptly available to the Commission upon request.

The final rule will be issued February 23, 2011. The rule will become effective 45 days after its publication in the Federal Register.

FMC's new regulations are expected to transform current ocean transportation industry practices, particularly the business operations of both licensed and foreign-based, registered NVOCCs. For further information on FMC's new regulations and advice on structuring or revising business plans in light of the new regulations, please contact the authors listed or any of the attorneys in Venable's [International Trade Group](#).

This client alert is based on the FMC's public hearing on February 16, 2011 and the information published on the agency's website. Our commentary is subject to examination of the final FMC action.

1. Docket No. 10-03: Non-Vessel-Operating Common Carrier Negotiated Rate Arrangements.

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