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Trade Association Asks FMC to Reopen NRA Rulemaking

On April 12, 2011, counsel for the National Customs Brokers and Forwarders Association of America ("NCBFAA" or "the Association") submitted a letter to the Federal Maritime Commission ("FMC") offering commentary and a request for a reopening of proceedings under Docket No. 10-03, *Non-Vessel Operating Common Carrier Negotiated Rate Arrangements*. As described in [Venable's February 2011 alert](#), Docket No. 10-03 resulted in a final rule which provided non-vessel operating common carriers ("NVOCCs") with an exemption from tariff publication requirements of the Shipping Act of 1984. Under the new regulations, NVOCCs may enter into Negotiated Rate Arrangements ("NRAs") with individual shippers without publishing and/or adhering to rate tariffs for ocean transportation.

While the NCBFAA letter applauded this final rule, the Association remarked that the "benefits of the exemption have been mitigated by the retention and/or imposition of unnecessary restrictions." In view of this, the Association asked that the FMC "reopen" the proceeding to "complete the job started by the final rule issued in this docket."

To support its request for a reopening of the proceeding, the NCBFAA highlighted five topical issues arising in Docket No. 10-03 that it argued would justify reopening of those proceedings by the FMC. These topical areas, and a brief summary of the arguments presented by the Association, are as follows.

1. Limits on Inclusion of Certain Economic Issues

NCBFAA argued in favor of allowing for the incorporation of additional contractual elements in the NRA. It wrote, "[t]o the extent traffic moving under an NRA covers a time period during which underlying vessel operators impose [general rate increases], precluding NVOCCs and their customers from covering this topic in an NRA reduces the value of exemption and seems arbitrary. It is also difficult to understand why an NRA should not include items such as credit, minimum quantities, penalty provisions, and similar economic terms if the shipper and NVOCC agree."

2. Modification

While the FMC wrote in its final rule, which did not allow for the modification of NRAs, that "maintaining the integrity of NRA rates protects both the shipper and the NVOCC," the Association's letter expressed its disagreement. It remarked that "[t]he party most likely to be punished by the restriction against modification is the shipper, since its NVOCC service provider would be unable to reduce its rates in response to more attractive vessel operator rate offerings even if it wished to do so." The NCBFAA describes the prohibition on modification as "even more rigid than would be the case if rates were memorialized in tariff form," as those rates may be reduced on one day's notice.

3. Discrimination Provisions of Sections 10(b)(4) and 10(b)(8)

In its final rule, the FMC declined to extend the new rule's exemption to these provisions, which respectively prohibit common carriers from "unfair or unjustly discriminatory practices in services pursuant to a tariff," as well as "undue or unreasonable preference or advantage or undue or unreasonable prejudice or disadvantage for tariff service." In response, the NCBFAA wrote that "the reluctance to exempt NVOCCs from these provisions when they have negotiated rates with their customers is outdated...[i]f the shipper wants to consider moving its traffic under a regulatory scheme that includes rate tariffs and these antidiscrimination provisions, it need not enter into an NRA."

4. Foreign NVOCCs

NCBFAA noted that the final rule indicated that the FMC would initiate proceedings to consider whether to extend the new exemption to foreign-based, registered, unlicensed NVOCCs. The Association urged the FMC to begin this process. Additionally, with an eye to the anticipated treatment of American NVOCCs abroad in the wake of the FMC rule, the Association expressed concern that in the absence of an FMC proceeding to extend the exemption to foreign NVOCCs "it is just a matter of time before [China reacts] and takes actions that would create the same if not greater disadvantages for U.S.-licensed NVOCCs doing business in China as this restriction imposes on their nationals."

5. Procedure

The NCBFAA expressed concern regarding the process by which "some members of Staff have apparently taken on an advocacy role," but "did not publicly submit their views and thereby prevented a full and open discussion about the merits of their position." While remaining neutral as

to the legal propriety of this procedure, the Association suggested that the FMC “consider having its staff participate as a party in those proceedings in which [it] apparently has strong views and is actively advocating specific results.”

Whether the FMC may ultimately elect to reopen this proceeding is unclear. It appears unlikely due to the logistics and timing of the matter, given that the effective date of the final rule produced pursuant to Docket No. 10-03 is April 18th, 2011. Additionally, the NCBFAA has not acted on or signaled an intent to contest the rule via litigation prior to its implementation; indeed, the content of the letter praised the essence of the rule and appeared to offer only alterations to a rule it fundamentally supports.

Additionally, the procedural method envisioned by the NCBFAA for reopening the proceedings in Docket No. 10-03 is unclear. A letter, on its own, submitted by an industry trade association may not justify the reopening of the proceeding absent a timely-filed motion submitted in conformity with 46 C.F.R. § 502.230. Nevertheless, the letter submitted by the NCBFAA would appear to identify the contours of future regulatory adjustments desired by those NVOCCs who currently stand to benefit from the new NRA rule. We will continue to follow this development, as well as the anticipated implementation of the new rule following its April 18th effective date.

This novel re-regulatory initiative by the FMC may result in a sea-change of business practices, including those of both U.S. and foreign-based NVOCCs and their shipper-customers. The move by the NCBFAA is bound to create a bit of uncertainty for the industry, just as the NRA rule is set to become live. Venable is monitoring these developments closely. Those interested in how the new rule, and possible challenges by NCBFAA and the FMC's reaction, may affect their business operations are welcome to contact the authors of this alert or any of the professionals in [Venable's International Trade and Customs Group](#).

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