

International Trade Alert

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FMC Proposes Permitting Foreign-Based NVOCCs to Use Negotiated Rate Agreements

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On February 22, the Federal Maritime Commission (FMC) **issued a proposed rule** that would permit foreign-based unlicensed non-vessel-operating common carriers (NVOCCs) to offer and enter into Negotiated Rate Arrangements (NRAs) covering ocean transport services in the U.S. foreign commerce. This is a break from the FMC's past position on whether unlicensed NVOCC's could utilize NRAs for non-tariff-based transactions. Interested parties can submit comments to the FMC on or before April 29, 2013.

Specifically, the rule, issued pursuant to Docket 11-22, would: (1) extend certain exemptions from the Shipping Act of 1984 ("the Shipping Act") and FMC regulations to foreign-based NVOCCs allowing them to enter into NRAs; and (2) impose more detailed registration requirements on such foreign-based unlicensed NVOCCs.

Under the current regime, the FMC exempts only licensed NVOCCs that enter into NRAs from the Shipping Act's tariff rate publication requirements and related FMC regulations. 46 C.F.R. Part 532. The FMC originally elected not to extend the same exemptions to foreign-based unlicensed NVOCCs, citing concern for oversight and record keeping.

The FMC has concluded, pursuant to its qualified authority to exempt activities from requirements of the Shipping Act, that with the imposition of a more stringent registration process, extending the NRA exemption to foreign-based NVOCCs will benefit competition. Accordingly, the FMC would impose the following registration conditions:

- Foreign-based unlicensed NVOCCs who wish to enter into NRAs and take advantage of the Shipping Act exemptions must register with the FMC, in accordance with § 515.19 of the proposed rule. Registration is effective for three years.
- Registration can be terminated or suspended pursuant to conditions set forth in § 515.19(g), including, for example, failure to provide an agent for service of process.
- Any NVOCC that enters into an NRA will be subject to the FMC's inspection and reproduction requests. All records produced must be in English or be accompanied by certified translation.

This rule is part of a larger effort to craft a regulatory scheme that is more efficient and less costly to administer, including a possible overhaul of the rules governing ocean transportation intermediaries (OTIs). Currently, an OTI license is required of any individual or entity resident in or incorporated in the U.S. and performing OTI services in the foreign commerce of the U.S. Foreign-based NVOCCs are currently required to register with the FMC, but registration is simple and straightforward – requiring only proof of a bond and the publication of a tariff. The new registration requirements are more onerous for the registrant, but allow the FMC more oversight of foreign-based NVOCCs.

In the same meeting where the Commission voted to release the proposed rule, the FMC also voted to prioritize review of service contracts and NVOCC service arrangements as part of a broad retrospective review of current governance.

Venable is able to assist NVOCCs, shippers, shippers' associations, and vessel-operating common carriers in submitting comments and further understanding the implications of the FMC's proposed rule. For any questions related to the rule or general questions about Ocean Transportation Intermediaries, please feel free to contact **Ashley Craig** at 202.344.4351 or any of the above listed authors for further information and assistance.