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(JULY 12, 2013)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

46 CFR Parts 515, 520, and 532

Docket No. 11-22

RIN: 3072-AC51

**Non-Vessel-Operating Common Carrier Negotiated Rate
Arrangements; Tariff Publication Exemption**

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission (Commission) revises its rules to impose registration requirements on foreign-based unlicensed non-vessel-operating common carriers and to extend an exemption from certain provisions and requirements of the Shipping Act of 1984 and the Commission regulations to foreign-based unlicensed non-vessel-operating common carriers that agree to negotiated rate arrangements.

DATES: Effective date: This Final Rule is effective July 19, 2013.

Compliance date: Foreign-based unlicensed non-vessel-operating common carriers shall comply with the requirements of 46 CFR 515.19 no later than October 17, 2013.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Background

Under the Commission's current rule at 46 CFR part 532, titled NVOCC Negotiated Rate Arrangements, licensed non-vessel-operating common carriers (NVOCCs) that choose to enter into negotiated rate arrangements (NRAs) are exempted from the tariff rate publication requirements of the Shipping Act of 1984 and certain provisions and requirements of the Commission's regulations. At the time of the promulgation of the rule, the Commission determined to exempt only licensed NVOCCs because of concerns relating to the limited information available to the Commission about foreign-based unlicensed NVOCCs.

On December 5, 2012, however, the Commission determined it could extend the exemption at 46 CFR part 532 to foreign-based unlicensed NVOCCs by implementing new registration and other requirements. A Notice of Proposed Rulemaking (NPRM) was published on February 26, 2013. 78 FR 13011.

Comments

The Commission received six comments: Federazione Nazionale delle Imprese di Spedizioni Internazionali (FEDESPEDI), International Federation of Freight Forwarders Association (FIATA), National Customs Brokers and Forwarders Association of America, Inc. (NCBFAA), Transportation Intermediaries Association (TIA), Unaffiliated Shippers of America (USOA), and UPS Ocean Freight Services, Inc. (UPS).

FEDESPEDI supports the proposed rule and argues that the current rule is discriminatory. FEDESPEDI believes that granting the exemption to foreign-based

unlicensed NVOCCs “will contribute to a level playing field and, at the same time, will reduce operating costs for [its] members, allowing them to concentrate on quality and price, rather th[a]n expending unnecessary time and money on administrative compliance.”

FIATA states that many of its members are NVOCCs. FIATA supports equal treatment of all NVOCCs, so that they are permitted to use the exemption whether or not they are licensed by the Commission. FIATA states that an NVOCC not using the exemption has the expense of maintaining tariff publication with no offsetting benefit to the shipping public. FIATA also states that the Commission has the ability to revoke the exemption for any NVOCC found to be abusing it. Like FEDESPEDI, FIATA believes that the proposed rule “will resolve the problem of unequal playing fields for foreign-based NVOCCs and their competitors in the United States and will give them the same tools to serve their customers without additional costs.”

NCBFAA supports the proposed rule. NCBFAA states that the extension of the exemption would increase competition by freeing foreign-based unlicensed NVOCCs from the burden of rate tariff publication obligation; that eliminating the costs of rate tariff publication for foreign-based unlicensed NVOCCs will better position them to serve their customers and that removing the artificial distinction between U.S. and foreign NVOCCs will avoid possible regulatory measures of foreign governments seeking to level the playing field between their nationals and those of the U.S. NCBFAA notes that extending the NRA exemption will not remove any Shipping Act protections available to shippers because the exemption would not disturb or remove prohibitions for false billings, classifications or other unfair or unjust efforts to either obtain transportation at

inappropriate rates or to otherwise engage in fraudulent billing practices. NCBFAA believes that the registration and other requirements suggested in the NPRM are reasonable and appropriate as they do not impose any burden on foreign entities that is greater than that currently borne by licensed NVOCCs. In particular, NCBFAA believes that the proposed registration process requiring foreign-based unlicensed NVOCCs to provide basic information about their identity, appoint an agent for service of process, or agree to comply with legitimate document requests is appropriate.

TIA commends the Commission for moving forward with the NPRM. TIA states that the proposed extension will level the playing field for foreign-based unlicensed NVOCCs and their competitors in the U.S. and will give such NVOCCs the same tools to serve their customers without incurring additional cost.

USOA asserts that, as there are many examples of foreign-based NVOCCs “acting in manners which reflects extortion against [l]icensed US based NVOCCs,” the Commission should not allow foreign-based unlicensed NVOCCs any exemption from the present requirements of the Shipping Act. USOA states that the NRA should not be available to foreign-based unlicensed NVOCCs “except if there is a valid bonded tariff on file with FMC.”

Although it appears that UPS does not oppose the extension of NRA to foreign-based unlicensed NVOCCs in general, UPS opposes the requirements in the NPRM for a formal renewal process every three years for such NVOCCs. UPS states that “[t]his is an unnecessary regulatory burden that clearly will not facilitate Commission regulation or enforcement in any way, and does not otherwise benefit US commerce or shippers.” UPS claims that because foreign-based NVOCCs are already required to update their

information promptly under the proposed section 515.19(f), the three-year renewal requirement is unnecessary, burdensome and should be dropped. Alternatively, UPS suggests that proposed 46 CFR 515.19(d) be revised to allow submission of a certificate, in lieu of a renewal of registration.¹

Discussion

With the registration and other requirements proposed in the NPRM, the Commission believes that the shipping public will be adequately protected. The NPRM proposed:

- Foreign-based unlicensed NVOCCs must be registered with the Commission.
- Such registrations must be renewed regularly.
- Such registrations may be terminated or suspended for reasons enumerated in the proposed rule.
- All NVOCCs that enter into NRAs are subject to the Commission's inspection and reproduction requests, and must produce the requested NRAs promptly in response to a Commission request. All records produced must be in English or be accompanied by a certified English translation.

USOA's concern that the exemption should be available only to bonded and tariffed NVOCCs is misplaced. Regardless of whether foreign-based unlicensed NVOCCs use the NRA rate tariff publication exemption, foreign-based unlicensed NVOCCs must nevertheless furnish proof of financial responsibility under the Shipping

¹ UPS suggests that the proposed 46 CFR 515.19(d) be revised by adding to the end the reference ". . . provided, however, that where applicable, a registered foreign NVOCC may submit in lieu of an updated registration form a certificate signed by a fully-authorized representative reading: '[Name of NVOCC] hereby certifies that all information previously provided to the Commission in its registration form and updates in accordance with 46 C.F.R. §515.19(f) continues to be accurate and complete.'"

Act (46 U.S.C. 40902(a)) and the Commission's regulation (46 CFR 515.21), and must also publish a tariff² as required by the Shipping Act (46 U.S.C. 40501(a)) and the Commission's regulation (46 CFR 520.3).

UPS suggests that the proposed renewal requirement should be replaced by a filing of a certificate confirming that the information previously provided to the Commission continues to be accurate and complete. The Commission is currently working to automate the registration and renewal procedure, which it believes will allow registration and renewal with minimal burden to foreign-based unlicensed NVOCCs.

Although the Commission's discussion of an NRA extension necessitated inclusion of the requirement of registration (and renewal) of foreign-based unlicensed NVOCCs in this rulemaking, the registration and renewal of such NVOCCs is not a condition only for NRA exemption. Even if a foreign-based unlicensed NVOCC does not use the NRA exemption, such an NVOCC must still register with the Commission under the final rule because the Commission believes that keeping updated information not only for foreign-based unlicensed NVOCCs that enter into NRAs, but also for all foreign-based unlicensed NVOCCs is necessary to better protect the shipping public.

The extension of the NRA rule will increase competition among NVOCCs by providing a level playing field to all NVOCCs, and thus will not lead to a substantial reduction in competition. Further, with the additional requirements proposed in the NPRM and included in this final rule, the extension will not be detrimental to commerce.

² NVOCCs are exempt from the tariff rate publication requirements for shipments moving under lawful NRAs. 46 CFR 532.2.

Dates of Effectiveness and Compliance

This Final Rule will become effective upon its date of publication in the Federal Register. Foreign-based unlicensed NVOCCs may file Form FMC-65 as the Final Rule provides. A foreign-based unlicensed NVOCC may enter into NRAs as specified in 46 CFR part 532 upon completion of the required registration.

Mandatory compliance with the registration requirements of 46 CFR 515.19 will be delayed until [insert 90 days after date of publication in the Federal Register] to provide time for foreign-based unlicensed NVOCCs to comply. Lawful operation by foreign-based unlicensed NVOCCs requires compliance by this date.

Statutory Review

In accordance with the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, the Commission submitted burdens of collection of information estimates under this Final Rule to the Office of Management and Budget (OMB). In the NPRM published on February 26, 2013, the Commission requested comments on the burden or any other aspect of the collection of information. The Commission received one such comment and discussed it in this Final Rule. The estimated time to fulfill the collection of information is 5,484 hours per year for part 515 and 5,970 hours per year for part 532. The Commission has received OMB approval for this collection of information pursuant to the PRA. The valid control numbers for this collection of information are 3072-0018 for 46 CFR part 515 and 3072-0071 for 46 CFR part 532.

According to the Small Business Administration's regulation, "a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a

significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.” 13 CFR 121.105(a)(1). As foreign-based unlicensed NVOCCs have their principal place of business in foreign countries and operate primarily in foreign countries, they are not small businesses as defined by the regulation and, thus, are not small entities under the Regulatory Flexibility Act (RFA). 5 U.S.C. 601-612. Therefore, this rulemaking is not subject to the RFA.

This final rule is not a “major rule” under 5 U.S.C. 804(2).

List of Subjects

46 CFR Part 515

Freight, Freight forwarders, Maritime carriers, Reporting and recordkeeping requirements.

46 CFR Part 520

Freight, Intermodal Transportation, Maritime carriers, Reporting and recordkeeping requirements.

46 CFR Part 532

Exports, Non-vessel-operating common carriers, Ocean transportation intermediary.

For the reasons stated in the **SUPPLEMENTARY INFORMATION**, the Federal Maritime Commission amends 46 CFR parts 515, 520, and 532 as follows.

PART 515 – LICENSING, FINANCIAL RESPONSIBILITY REQUIREMENTS, AND GENERAL DUTIES FOR OCEAN TRANSPORTATION INTERMEDIARIES

1. The authority citation for part 515 continues to read as follows:

Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 46 U.S.C. 305, 40102, 40104, 40501-40503, 40901-40904. 41101-41109, 41301-41302, 41305-41307; Pub. L. 105-383, 112 Stat. 3411; 21 U.S.C. 862.

2. In subpart B, add new § 515.19 to read as follows:

§ 515.19 Registration of foreign-based unlicensed NVOCC.

(a) Any NVOCC whose primary place of business is located outside the United States and does not elect to become licensed by the Commission shall register with the Commission by submitting to the Director of the Bureau of Certification and Licensing (BCL) a completed registration form, Form FMC-65 (Foreign-based Unlicensed NVOCC Registration/Renewal). A notice of each registration shall be published on the Commission's website www.fmc.gov. It is a violation of the Commission's regulations implementing the Shipping Act for a foreign-based unlicensed non-vessel-operating common carrier to provide NVOCC services in the U.S. foreign trade without a valid registration and an effective tariff.

(b) A registration form which appears, upon submission, to be substantially incomplete may be rejected. If rejected, a notice, together with the reasons therefore, shall be sent to the foreign-based unlicensed NVOCC. Persons who have had a registration rejected may submit a new registration at any time.

(c) Registrations are complete upon receipt of a registration form which meets the requirements of this section and upon evidence of financial responsibility being furnished pursuant to § 515.21.

(d) Registrations shall be effective for a period of three (3) years. Thereafter, registrations will be renewed for sequential three year periods upon submission of an updated registration form.

(e) A tariff shall not be published and NVOCC service shall not commence until the Commission receives valid proof of financial responsibility from the registrant and a Form FMC-1 has been filed.

(f) Registered NVOCCs must report in writing to BCL any changes, within 30 days of such changes, to: legal name(s) or trade name(s); principal place of business address (including telephone number, facsimile number); contact person and email address (including physical address if different from principal place of business); name of resident agent(s) (including physical address, mailing address, email address,

telephone and facsimile number(s), and contact person) in the United States for receipt of service of judicial and administrative process (including subpoenas).

(g) *Termination or suspension of registration.*

(1) *Grounds.* A registration shall become automatically ineffective for a failure of a registered NVOCC to maintain proof of financial responsibility on file with the Commission. The effectiveness of such a registration may otherwise be terminated or suspended, after notice and the opportunity for a hearing, for any of the following reasons:

(i) Violation of any provision of the Act, or any other statute or Commission order or regulation related to carrying on the business of an ocean transportation intermediary;

(ii) Failure to respond to any lawful order or inquiry by the Commission or an authorized Commission representative;

(iii) Making a materially false or misleading statement to the Commission in connection with a registration or renewal thereof;

(iv) Failure to honor financial obligations to the Commission;

(v) Failure to timely renew a registration;

(vi) Failure to maintain a Form FMC-1 or a tariff in compliance with 46 CFR part 520;

(vii) Knowingly and willfully processing, booking, or accepting cargo from, or transporting cargo for the account of, an NVOCC that is not licensed or registered, or has not provided proof of financial responsibility or published an effective tariff; and

(viii) Failure to designate and maintain a person in the United States as legal agent for the receipt of judicial and administrative process, including subpoenas, as required by § 515.24.

(2) [Reserved]

(3) *Publication of Notice.* The Commission shall publish on the Commission's website, www.fmc.gov, a notice of each termination or suspension.

3. In § 515.24, revise paragraphs (b), (c), and (d) to read as follows:

§ 515.24 Agent for service of process.

* * * * *

(b) Service of administrative process, other than subpoenas, may be effected upon the legal agent by dispatching a copy of the document to be served by mail or courier service. Administrative subpoenas shall be served in accordance with § 502.134 of this chapter.

(c) If the designated legal agent cannot be served because of death, disability, unavailability, termination or expiration of the designation, or if a legal agent authorized to receive such service is not designated in compliance with this section, the Secretary of the Federal Maritime Commission will be deemed to be the legal agent for service of process. Any person serving the Secretary must also send to the ocean transportation intermediary, or group or association of ocean transportation intermediaries which provide financial coverage for the financial responsibilities of a member ocean transportation intermediary, by mail or courier service at the ocean transportation intermediary's, or group's, address published in its tariff, a copy of each document served upon the Secretary, and shall attest to that service at the time service is made upon the Secretary. For purposes of this paragraph, it is sufficient that a person seeking to serve process on an ocean transportation intermediary, or group of such intermediaries, affirm to the Commission's Secretary that: they have contacted, or attempted to contact, the designated agent to confirm whether it remained authorized to accept service of process; or, if no legal agent is designated in the tariff, that it has no knowledge of the identity of the ocean transportation intermediary's legal agent. Designation of the Commission's Secretary as the legal agent shall survive any cancellation of the OTI's license or tariff and shall continue for the entire period during which claims may be made under the OTI's financial responsibility instrument.

(d) Designations of legal agent under paragraphs (a) and (b) of this section and provisions relating to service of process under paragraph (c) of this section shall be published in the ocean transportation intermediary's tariff, when required, in accordance with part 520 of this chapter.

* * * * *

4. In § 515.91, correct the reference "3072-0012" to read "3072-0018."

PART 520 – CARRIER AUTOMATED TARIFFS

5. The authority citation for part 520 continues to read as follows:

Authority: 5 U.S.C. 553; 46 U.S.C. 305, 40101-40102, 40501-40503, 40701-40706, 41101-41109.

6. In § 520.13, revise paragraph (e) to read as follows:

§ 520.13 Exemptions and exceptions.

* * * * *

(e) NVOCC Negotiated Rate Arrangements. An NVOCC that satisfies the requirements of part 532 of this chapter is exempt from the requirement in this part that it include rates in a tariff open to public inspection in an automated tariff system.

PART 532 – NVOCC NEGOTIATED RATE ARRANGEMENTS

7. The authority citation for part 532 continues to read as follows:

Authority: 46 U.S.C. 40103.

8. Revise § 532.1 to read as follows:

§ 532.1 Purpose.

The purpose of this Part, pursuant to the Commission's statutory authority, is to exempt non-vessel-operating common carriers (NVOCCs) from the tariff rate publication and adherence requirements of the Shipping Act of 1984, as enumerated herein.

9. Amend § 532.2 as follows:
 - a. Revise introductory text to read as follows; and
 - b. Amend paragraph (g) by revising the second sentence to read as follows.

§ 532.2 Scope and applicability.

This Part exempts NVOCCs duly licensed pursuant to 46 CFR 515.3 or registered pursuant to 46 CFR 515.19, holding adequate proof of financial responsibility pursuant to 46 CFR 515.21, and meeting the requirements of 46 CFR 532.4 through 532.7, from the following requirements and prohibitions of the Shipping Act and the Commission's regulations:

* * * * *

(g) * * * Any NVOCC failing to maintain its bond or license or registration as set forth above, or who has had its tariff suspended by the Commission, shall not be eligible to invoke this exemption.

10. In § 532.7, revise paragraph (b) to read as follows.

§ 532.7 Recordkeeping and audit.

* * * * *

(b) NRAs are subject to inspection and reproduction requests by the Commission. An NVOCC shall produce the requested NRAs promptly in response to a Commission request. All records produced must be in English or be accompanied by a certified English translation.

* * * * *

By the Commission.

Karen V. Gregory
Secretary