

NARA-approved agency records schedule with a very short-term retention) on the electronic mail system itself, without the need to copy the record to a paper or electronic recordkeeping system, provided that:

(i) Users do not delete the messages before the expiration of the NARA-approved retention period, and

(ii) The system's automatic deletion rules ensure preservation of the records until the expiration of the NARA-approved retention period.

(3) Except for those electronic mail records within the scope of paragraph (b)(2) of this section,

(i) Agencies must not store the recordkeeping copy of electronic mail messages that are Federal records only on the electronic mail system, unless the system has all of the features specified in paragraph (b)(1) of this section.

(ii) If the electronic mail system is not designed to be a recordkeeping system, agencies must instruct staff on how to copy Federal records from the electronic mail system to a recordkeeping system.

\* \* \* \* \*

3. Amend § 1234.32 by revising paragraph (d) to read as follows:

**§ 1234.32 Retention and disposition of electronic records.**

\* \* \* \* \*

(d) Electronic mail records may not be deleted or otherwise disposed of without prior disposition authority from NARA (44 U.S.C. 3303a).

(1) *Electronic mail records with very short-term (transitory) value.* Agencies may use the disposition authority in General Records Schedule 23, Item 7 for electronic mail records that have very short-term retention periods (e.g., 90, 120, or 180 days). (see 36 CFR 1234.24(b)(2)).

(2) *Other records on the electronic mail system.* When an agency has taken the necessary steps to retain the record in a scheduled recordkeeping system, the identical version that remains on the user's screen or in the user's mailbox has no continuing value. Therefore, NARA has authorized deletion of the version of the record on the electronic mail system under General Records Schedule 20, Item 14, after the record has been preserved in a recordkeeping system along with all appropriate transmission data. If the records in the recordkeeping system are not scheduled, the agency must follow the procedures at 36 CFR part 1228.

(3) *Records in recordkeeping systems.* The disposition of electronic mail records that have been transferred to an appropriate recordkeeping system is governed by the records schedule or

schedules that control the records in that system. If the records in the recordkeeping system are not scheduled, the agency must follow the procedures at 36 CFR part 1228.

Dated: July 29, 2004.

**John W. Carlin,**

*Archivist of the United States.*

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[R07-OAR-2004-IA-0004; FRL-7833-8]

### Approval and Promulgation of State Implementation Plan; State of Iowa

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve a revision to the Iowa state implementation plan (SIP) for the purpose of revising open burning rules. This revision includes a provision that allows the Iowa Department of Natural Resources to require the submittal of additional information when a variance from open burning rules is requested, reemphasizes the state's obligation to protect the National Ambient Air Quality Standards (NAAQS) with regard to open burning, clarifies National Emissions Standards for Hazardous Air Pollutants (NESHAP) guidance for disaster rubbish, updates guidance for training fires, and provides clarification to the existing open burning rules covering agricultural structures.

**DATES:** Comments on this proposed action must be received in writing by December 3, 2004.

**ADDRESSES:** Comments may be mailed to Heather Hamilton, Environmental Protection Agency, Air Planning and Development Branch, 901 North 5th Street, Kansas City, Kansas 66101. Comments may also be submitted electronically or through hand delivery/courier; please follow the detailed instructions in the Addresses section of the direct final rule which is located in the rules section of this **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Heather Hamilton at (913) 551-7039, or by e-mail at [hamilton.heather@epa.gov](mailto:hamilton.heather@epa.gov).

**SUPPLEMENTARY INFORMATION:** In the final rules section of the **Federal Register**, EPA is approving the state's SIP revision as a direct final rule without prior proposal because the

Agency views this as a noncontroversial revision amendment and anticipates no relevant adverse comments to this action. A detailed rationale for the approval is set forth in the direct final rule. If no relevant adverse comments are received in response to this action, no further activity is contemplated in relation to this action. If EPA receives relevant adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed action. EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on part of this rule and if that part can be severed from the remainder of the rule, EPA may adopt as final those parts of the rule that are not the subject of an adverse comment. For additional information, see the direct final rule which is located in the rules section of this **Federal Register**.

Dated: October 26, 2004.

**James B. Gulliford,**

*Regional Administrator, Region 7.*

[FR Doc. 04-24531 Filed 11-2-04; 8:45 am]

BILLING CODE 6560-50-P

## FEDERAL MARITIME COMMISSION

### 46 CFR Part 531

[Docket No. 04-12]

RIN 3072-AC30

### Non-Vessel-Operating Common Carrier Service Arrangements

**AGENCY:** Federal Maritime Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Maritime Commission proposes an exemption from the tariff publication requirements of the Shipping Act of 1984 for service arrangements made by non-vessel-operating common carriers, subject to the conditional filing requirements set forth in this new Part.

**DATES:** Submit an original and 15 copies of comments (paper), or e-mail comments as an attachment in WordPerfect 10, Microsoft Word 2003, or earlier versions of these applications, no later than November 19, 2004.

**ADDRESSES:** Address all comments concerning this proposed rule to: Bryant L. VanBrakle, Secretary, Federal Maritime Commission, 800 North Capitol Street, NW., Room 1046, Washington, DC 20573-0001, [Secretary@fmc.gov](mailto:Secretary@fmc.gov).

**FOR FURTHER INFORMATION CONTACT:**

Amy W. Larson, General Counsel,  
Federal Maritime Commission, 800  
North Capitol Street, NW.,  
Washington, DC 20573-0001, (202)  
523-5740, [generalcounsel@fmc.gov](mailto:generalcounsel@fmc.gov).  
Austin L. Schmitt, Director of  
Operations, Federal Maritime  
Commission, 800 N. Capitol Street,  
NW., Washington, DC 20573-0001,  
(202) 523-0988.

**SUPPLEMENTARY INFORMATION:****I. Background**

Between July 25, 2003 and March 12, 2004, the Federal Maritime Commission ("FMC" or "Commission") received eight petitions from seven individual non-vessel-operating common carriers ("NVOCCs") and one trade association of NVOCCs (collectively "Petitioners"), seeking various exemptions from the tariff publication and adherence requirements of the Shipping Act of 1984, 46 U.S.C. app. §§ 1701-1719 ("Shipping Act").<sup>1</sup> United Parcel Service, Inc. ("UPS"), C.H. Robinson Worldwide, Inc. ("CHRW"), Danzas Corporation d/b/a Danmar Lines Ltd., Danzas Ocean Services and DHL Danzas Air and Ocean ("Danmar"), BDP International, Inc. ("BDP"), and FEDEX Trade Networks Transport & Brokerage, Inc. ("FEDEX") each requested individual exemptions from the tariff publication and adherence requirements of the Shipping Act. They argued that changes in the ocean freight industry since the passage of the Ocean Shipping Reform Act ("OSRA") in 1998 warrant the Commission granting to NVOCCs the authority to contract confidentially with their shipper customers in the

same manner as vessel-operating common carriers ("VOCCs").

The National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA"), a national trade association representing the interests of freight forwarders, NVOCCs and customs brokers, sought an exemption from the tariff publication requirements for all NVOCCs. NCBFAA presented arguments similar to UPS and CHRW, but also asserted that the Shipping Act's tariff publication requirements are outdated and impractical, and requested unconditional exemption for all NVOCCs from the provisions of the Shipping Act that require NVOCCs to establish, publish, maintain and enforce tariffs setting forth ocean freight rates, thereby allowing NVOCCs to offer confidential service contracts as carriers with their shipper customers. Ocean World Lines, Inc. ("OWL") requested a rulemaking to expand the definition and scope of the term "special contracts" in the Commission's regulations to include NVOCCs if UPS' and/or NCBFAA's petitions are not granted. Finally, BAX Global, Inc. ("BAX") sought a rulemaking to permit it and similar "qualified" NVOCCs to enter into confidential service contracts as "ocean common carriers" with their shipper customers. By the close of the comment period to the last of the petitions on April 2, 2004, the Commission had received over 1,400 pages of filed comments from more than 80 commenters and 208 Members of Congress.

On August 2, 2004, the National Industrial Transportation League ("NITL"), UPS, BAX, FEDEX, Transportation Intermediaries Association ("TIA"), CHRW, and BDP (collectively, "Joint Commenters") filed a Motion for Leave pursuant to Rule 73 of the Commission's Rules of Practice and Procedure, 46 CFR 502.73, in the proceedings referenced above to file Joint Supplemental Comments Requesting Expedited Adoption of a Conditional Exemption from Tariff Publication ("Joint Proposal"). Joint Commenters sought acceptance of the Joint Proposal into the record, arguing that the proposal reflects an updated, common approach to the various forms of relief requested in the original individual petitions. They urged the Commission to use its authority under section 16 of the Shipping Act to expeditiously grant NVOCCs a conditional exemption from the tariff publication and enforcement provisions in the Shipping Act and Commission regulations at 46 CFR part 520. Joint Commenters did not withdraw the existing petitions, and submitted that

any Commission action on the proposed conditional tariff exemption should not supercede consideration of petitioners' individual requested relief from the tariff publication requirements. Joint Proposal at 2 n.2.

The Commission granted the motion and reopened the comment period until September 30, 2004. 69 FR 54788 (September 10, 2004). Thirty-four comments were received from: NCBFAA; Danmar; ATEC Systems, Ltd. ("ATEC"); John S. Connor, Inc. ("Connor"); Phoenix International Freight Services, Ltd. ("Phoenix"); Airport Brokers Corporation ("ABC"); Fashion Accessories Shippers Association, Inc. ("FASA"); World Shipping Council ("WSC"); Yellow Roadway Corporation ("Yellow"); Exel Transportation Services Inc. ("Exel"); Landstar System, Inc. ("Landstar"); Worldlink Logistics, Inc. ("Worldlink"); SIRVA Corporation ("SIRVA"); C.H. Powell Company ("Powell"); Interlog USA, Inc. ("Interlog"); Latin American Forwarding Company ("LAFCO"); U.S. Department of Transportation ("DOT"); Alliance Shippers, Inc. d/b/a Alliance International ("Alliance"); Cargo Brokers International, Inc. ("CBI"); A.N. Deringer, Inc. ("Deringer"); Barthco International, Inc. ("Barthco"); USA Shipping, LLC ("USA"); Camelot Company ("Camelot"); All Freight International, Inc. ("All Freight"); ABS Consulting ("ABS"); Topocean Consolidation Service ("Topocean"); Antilles Freight Corp. ("Antilles"); Geologistics Corporation ("Geologistics"); Reilly Transportation Services, Inc. ("Reilly"); Navetrans Corp d/b/a Costa Rica Carriers ("Navetrans"); Thiel Logistics USA, Inc. ("Thiel"); Interport Services Corp. ("Interport"); Express Freight International, Inc. ("Express"); and the Honorable Robert E. Andrews of the U.S. House of Representatives.

**II. Joint Proposal**

Joint Commenters assert that they now present a unified approach to the pending NVOCC tariff publication exemption proceedings that is intended to give "clear direction" to the Commission in its deliberations. Joint Proposal at 2-3. Reiterating their concerns submitted in the pending petitions and comments that the current regulatory scheme undermines competitiveness in the shipping industry, the Joint Commenters request that the Commission use its authority under section 16 of the Shipping Act to exempt certain NVOCC arrangements (hereinafter NVOCC Service

<sup>1</sup> They were: Petition No. P3-03—*Petition of United Parcel Service, Inc. for Exemption Pursuant to Section 16 of the Shipping Act of 1984 to Permit Negotiation, Entry and Performance of Service Contracts*; Petition No. P5-03—*Petition of the National Customs Brokers and Forwarders Association of America, Inc. for Limited Exemption from Certain Tariff Requirements of the Shipping Act of 1984*; Petition No. P7-03—*Petition of Ocean World Lines, Inc., for a Rulemaking to Amend and Expand the Definition and Scope of "Special Contracts" to Include All Ocean Transportation Intermediaries*; Petition No. P8-03—*Petition of BAX Global, Inc. for Rulemaking*; Petition No. P9-03—*Petition of C.H. Robinson Worldwide, Inc. for Exemption Pursuant to Section 16 of the Shipping Act of 1984 to Permit Negotiation, Entry and Performance of Confidential Service Contracts*; Petition No. P1-04—*Petition of Danzas Corporation d/b/a Danmar Lines Ltd.; Danzas AEI Ocean Services and DHL Danzas Air and Ocean for Exemption from the Tariff Publishing Requirements of Section 8 of the Shipping Act of 1984, as Amended*; Petition No. P2-04—*Petition of BDP International, Inc. for Exemption from the Tariff Publishing Requirements of Section 8 of the Shipping Act of 1984, as amended*; Petition No. P4-04—*Petition of FEDEX Trade Networks Transport & Brokerage, Inc. for Exemption from the Tariff Publishing Requirements of Sections 8 and 10 of the Shipping Act of 1984, as Amended*.

Arrangements, or “NSAs”)<sup>2</sup> with shippers from the tariff publication requirements in sections 8(a), (b), (d) and (e) of the Shipping Act and 46 CFR part 520 of the Commission’s rules, as well as the tariff-related prohibited acts found in sections 10(b)(1), (2), (4) and (8) of the Shipping Act. Joint Proposal at 3, Appendix 1. The proposed exemption would apply to any written arrangements between an NVOCC and a shipper (excluding bills of lading, receipts or other transport documents), where the shipper pledges to provide a specific volume/portion of cargo over a fixed time period and the NVOCC commits to a defined rate and service level. *Id.*

According to the Joint Commenters, the proposed exemption would be subject to the following conditions: (1) The arrangements and their essential terms must be filed confidentially with the Commission;<sup>3</sup> (2) the NVOCC must publish a tariff that includes the origin and destination port ranges, commodity involved, minimum volume/portion, and duration of the agreement; and (3) the Commission would retain jurisdiction over NSAs to the same extent as it does over service contracts under the Shipping Act. *Id.*

### III. Replies to the Joint Proposal

#### A. Comments in Support of the Joint Proposal

The World Shipping Council submits its support for the Joint Proposal with the understanding that the Commission will monitor the effects of the exemption and that a condition of the exemption will subject the new NSAs to the same regulatory requirements as VOCC service contracts. WSC at 1, 4. Danmar, All Freight and Topocean support the Joint Proposal because it would promote competition and benefit commerce by enabling NVOCCs to give shippers what they require: individually-tailored transportation packages. Danmar at 3; All Freight at 1; Topocean at 1, 5. These supporters urge the Commission to implement this regulatory reform as expeditiously as possible, as no new or additional issues are proposed and the Commission now has before it a fully developed record

that more than adequately justifies the exemption. Danmar at 3; All Freight at 1; Topocean at 7.

#### B. Comments in Support of the NCBFAA Approach

NCBFAA and the remaining commenters believe that while adoption of the Joint Proposal will provide some short-term relief, it fails to address the significant costs and burdens that currently fall upon NVOCCs. As such, these commenters prefer the exemption from the tariff publication requirements of the Shipping Act and the Commission regulations as proposed by the original NCBFAA petition. NCBFAA at 2–3; LAFCO at 1; ATEC at 1; Connor at 1.

Commenters contend that NVOCCs or shippers will not benefit by transforming the burdens associated with tariff publication into the burdens of filing service contracts. Furthermore, commenters express concerns regarding the Commission’s ability to oversee large volume of NSAs that will be generated by the Joint Proposal. NCBFAA at 3; Yellow at 3; Powell at 1–2; CBI at 1; Deringer at 1; Camelot at 2; Geologistics at 2; Andrews at 18, ABS at 1; ABC at 4. NCBFAA specifically restates its belief that filing service contracts was primarily designed as part of the Commission’s oversight of VOCCs with antitrust immunity. NCBFAA at 3. NCBFAA and Yellow discount any “level playing field argument” for requiring NVOCCs to file service contracts because they believe that NVOCCs have no such immunity, and therefore, there is no basis to support a requirement that NVOCCs file service contracts with the Commission. *Id.* at 3–4, Yellow at 5. As Phoenix explains, the “free market will ensure that these prices are competitive.” Phoenix at 1.

NCBFAA, Connor and CBI specifically suggest that the Commission could condition the grant of the NCBFAA exemption from tariff publication by requiring an NVOCC to maintain in its own files the essential terms of those arrangements. NCBFAA at 5; Connor at 2; CBI at 1. NCBFAA asserts that in the event of a dispute or alleged malpractice, the Commission would continue to have the ability to bring enforcement matters arising under the Shipping Act. NCBFAA at 5.

Commenters assert that while they welcome the opportunity to engage in service contracting, it will be difficult for NVOCCs to structure NSAs with shippers to reflect the fluctuation in pricing schemes and schedules of the multiple VOCCs with whom NVOCCs contract. Phoenix at 1; Powell at 2; CBI at 1. They explain that memorializing

such transactions in NSAs to be filed with the Commission before the cargo moves is impractical, especially in light of the fact that NVOCCs must often re-adjust their rates in reaction to the “spot market” for VOCC rates. Powell at 2; Camelot at 2; CBI at 1; Antilles at 1.

Moreover, Phoenix and Camelot aver that the majority of their customers have no interest in signing such arrangements because they must be able to select from a variety of service providers and such service arrangements would make it more cumbersome to shop for service in such a way. Phoenix at 1, Camelot at 2. Camelot contends that small- to mid-sized shippers “will not only balk, but will run from any attempt to make them contractually accountable to an NVOCC, especially where the matter of dead freight penalties for unremoved cargo present themselves.” Camelot at 2.

The U.S. Department of Transportation reiterates the position it expressed in response to the original petitions: the Commission should grant NVOCCs an exemption from Shipping Act requirements to allow them the ability to contract confidentially with their shipping customers. DOT at 2–3, 6. DOT contends that the Commission should “at the very least” adopt the Joint Proposal, but urges the Commission also to consider points raised by the NCBFAA comments, namely whether a legitimate regulatory purpose would be served by requiring confidential filing of individual NSAs and the publication of their relevant essential terms. *Id.* at 3. DOT argues that conference oversight was Congress’s rationale for enacting the VOCC service contract filing requirements, but is inapplicable to NSAs, as NVOCCs could not concertedly enter into pricing agreements under the Shipping Act even with the exemption at issue. *Id.* at 4. As such, DOT claims that the Commission should not impose any requirements on NVOCCs that serve no regulatory function. *Id.* at 5.

FASA urges the Commission to either initiate a new proceeding and reopen the record for a public examination of the proposal, or reject the Joint Proposal and proceed to consideration of the pending petitions. FASA at 1. FASA asserts that the petitions raise important issues for the small and medium-sized shippers that it represents, as well as fundamental issues relating to the Commission’s statutory authority to grant exemptions from core features of the Shipping Act. *Id.* Thus, FASA believes whether the Joint Proposal represents a common approach is irrelevant; further deliberation is not only necessary, but critical as the Shipping Act does not contemplate

<sup>2</sup> Although referred to by the Joint Proposal as “NVOCC Service Agreements” we use the term “arrangements” in order that they not be confused with “agreements” as set forth in section 4 of the Shipping Act, 46 U.S.C. app. § 1703.

<sup>3</sup> The essential terms would include: (1) Origin and destination port ranges; (2) origin and destination geographic areas in the case of through intermodal movements; (3) list of commodities; (4) minimum volume/portion; (5) line-haul rate; (6) arrangement duration; (7) service commitments; (8) liquidated damages or indemnity provision for non-performance. *Id.*

“rulemaking by coalition action” and the brushing aside of the “rights of numerous smaller, less vociferous, members of the shipping community whose interests deserve the agency’s protection.” *Id.* at 2. FASA avers that the Joint Proposal adds a new procedural dimension to the proceedings. *Id.* at 3. Further, FASA insists, the temporary exemption sought by the Joint Proposal would essentially confer all the relief requested in the underlying petitions already under consideration and could make any contrary, final determination by the Commission appear inconsistent with its prior action. *Id.* FASA worries that the Commission’s deliberative process may be compromised by the premature adoption of such an exemption. *Id.*

#### IV. Discussion

Section 8(a)(1) of the Shipping Act requires “each common carrier \* \* \* [to] keep open to public inspection in an automated tariff system, tariffs showing all its rates.” 46 U.S.C. app. 1707(a)(1). Section 10(b)(2)(A) prohibits common carriers from “provid[ing] service in the liner trade that is not in accordance with the rates \* \* \* contained in a tariff \* \* \* or a service contract.” 46 U.S.C. app. 1709(b)(2)(A). Section 3(19) of the Shipping Act defines a service contract as “a written contract, other than a bill of lading or receipt, between one or more shippers and an individual *ocean common carrier* or an agreement between or among *ocean common carriers*.” 46 U.S.C. app. 1702(19) (emphasis added). The Shipping Act defines an ocean common carrier as “a vessel-operating common carrier.” 46 U.S.C. app. 1702(16).

The cumulative effect of these provisions is that, although both VOCCs and NVOCCs are common carriers under the Shipping Act, all NVOCC services must be provided according to the provisions of a published tariff, while VOCCs may provide service either under a published tariff or under a filed service contract. The eight petitions and the Joint Proposal seek an exemption, pursuant to section 16 of the Shipping Act, enabling NVOCCs to choose whether to offer their services under a published tariff or under an instrument akin to a service contract. To accomplish this, the Joint Proposal suggests the Commission adopt an exemption with conditions which would result in equivalent treatment for service contract-like arrangements offered by NVOCCs. NCBFAA and similar commenters, on the other hand, propose the Commission adopt an exemption from the Shipping Act’s tariff

publication requirements without the service contract-mirroring conditions.

As explained in further detail below, the Commission has determined to issue a notice of proposed rulemaking (“NPR”) providing NVOCCs with the ability to enter into NSAs in lieu of moving all cargo under tariff rates. This determination, based on the Joint Proposal, would grant NVOCCs parity with VOCCs by permitting NVOCCs, in their capacity as carriers, to provide transportation to their shipper customers on a confidential basis.

The proposed regulation defines an NSA as:

A written contract, other than a bill of lading or receipt, between one or more NSA shippers and an individual NVOCC in which the NSA shipper makes a commitment to provide a certain minimum quantity or portion of its cargo or freight revenue over a fixed time period, and the NVOCC commits to a certain rate or rate schedule and a defined service level. The NSA may also specify provisions in the event of nonperformance on the part of any party.

The proposed rule is modeled after the current service contract rules at 46 CFR part 530, and the definition of “NSA” is based on the definition of “service contract” in the Shipping Act. 46 U.S.C. app. 1702(9). *See also* 46 CFR 530.3(q). The Commission proposes that, as VOCCs currently do for service contract filing, NVOCCs wishing to avail themselves of the opportunity to offer NSAs request a log-on identification number and password from the Commission using proposed Form FMC-78. The Commission would then issue the registering NVOCC (“Registrant”) a log-on I.D. and password, and the Registrant would be able to file NSAs electronically via the internet. The proposed rule would also require NVOCCs, as VOCCs are required for service contracts, to publish an NSA’s essential terms in an automated system and file the text of the NSA confidentially with the Commission.

The general approach set forth in the Joint Proposal does not address a myriad of details which would arise from its implementation. We have determined that the exemption must be subject to the conditions set forth below to ensure the exemption will not have any of the negative effects proscribed by section 16.<sup>4</sup> This includes a condition

<sup>4</sup> Section 16 reads, in pertinent part, “The Commission \* \* \* may \* \* \* exempt for the future any class of agreements between persons subject to this Act or any specified activity of those persons from any requirement of this Act if it finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce. The Commission may attach conditions to any exemption and may, by order, revoke any exemption.” 46 U.S.C. app. 1715.

that the NVOCC execute an NSA with the NSA shipper and file it with the Commission. Without these conditions, detriment to commerce may arise from the Commission’s inability to fulfill its statutory mandate to ensure NVOCCs are carrying out their common carrier duties. Furthermore, we believe that the proposed conditional exemption will promote “competitive and efficient ocean transportation” and will lead to “a greater reliance on the marketplace.” 46 U.S.C. app. 1701(4).

#### A. Changes in the Industry Since 1998

The Joint Commenters, the original eight Petitioners and many commenters assert that since the passage of OSRA in 1998, a new commercial climate has developed in which shippers expect and demand the ability to negotiate individualized rates and services fitting their commercial needs. The original Petitioners contend that changes in economic, competitive and technology factors, as well as the improvement of supply chain management and services offered by VOCCs, have led to the emergence of sophisticated NVOCCs that are highly competitive, multinational companies with integrated logistics services. They also contend that many of these are asset-based companies that are generally more financially stable than NVOCCs typically were in 1998.

The original Petitioners also maintain that the competitive landscape for VOCCs has changed significantly since 1998. They believe that there has been significant consolidation in the VOCC industry and that most VOCCs have established or allied themselves with ocean transportation intermediaries (“OTIs”) to provide the full range of integrated logistics services. The original Petitioners aver that they now face substantial competition from the VOCCs which provide logistics services and whose ability to offer confidential service contracts places them at a significant advantage over NVOCCs.

The original Petitioners contend that NSAs would make the entire intermodal system more efficient by allowing NVOCCs to transport consistent volumes of cargo to VOCCs, which in turn will benefit all participants by enabling more uniform contract terms over the entire route of the shipment in a single NVOCC bill of lading. Finally, several of the original Petitioners and commenters on those original petitions believe that because of the delays they experience as a result of security regulations, such arrangements are also necessary to allow them to maintain the pace and volumes their shippers now expect.

### B. Exemption Authority of the Commission

In order for the Commission to grant an exemption under section 16 of the Shipping Act, it must find such an exemption will meet two criteria: the exemption must not result in substantial reduction to competition, and must not be detrimental to commerce. 46 U.S.C. app. 1715. Contrary to the assertions of some commenters and proponents, the statutory criteria for exemption do not include whether the requirements from which relief is sought are “infrequently used by shippers” or that the requirements “serve no valid public policy.” Even if the Commission believes an exemption from a requirement of the Shipping Act or its regulations might relieve burdens on the industry or be a good “public policy” choice, it cannot grant an exemption without a finding that the criteria of section 16 have been met.

In proposing this new exemption, the Commission has concluded that it will not result in a substantial reduction in competition or be detrimental to commerce, as discussed in detail below. In addition, the Commission has determined that the carriage of cargo by NVOCCs under individualized arrangements concerns “specified activity” as that term is used in section 16, and that the tariff-publication requirement from which the Joint Proposal seeks exemption is a “requirement” of the Shipping Act under that section.

#### 1. Judicial Interpretation

The Commission has considered how courts have interpreted other agencies’ exemption authority. The Supreme Court struck down an Interstate Commerce Commission (“ICC”) policy in *Maislin Industries, U.S. Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990) (“*Maislin*”). In *Maislin*, the Court held that the ICC’s policy of creating an exemption to relieve shippers’ obligations to pay the filed rate when a shipper and carrier have privately negotiated a lower rate (known as the “Negotiated Rates Policy”) was inconsistent with the Interstate Commerce Act (“ICA”), and that the ICC did not have the authority to release a shipper from liability for undercharges. The Court found that compliance with the filed rate, known as the “filed rate doctrine,” was “utterly central” to the administration of the ICA. *Id.* at 132 (citing *Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (1986)). The Court found that “the policy, by sanctioning adherence to unfiled rates, undermines the basic

structure of the [ICA]” and that, although it had the authority and expertise generally to adopt new policies when faced with new developments in the industry it regulates, “it [did] not have the power to adopt a policy that directly conflicts with its governing statute.” *Id.* at 132, 134. If strict adherence to the filed rate doctrine “has become an anachronism \* \* \* it is the responsibility of Congress to modify or eliminate these sections.” *Id.* at 136. See also *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218 (1994) (“*MCI*”) (striking down Federal Communications Commission’s deregulation of tariff filing).

The Commission has determined that it can distinguish its statutory authority to exempt NVOCCs from the provisions of the Shipping Act—subject to certain conditions—from both *Maislin* and *MCI*. First, *Maislin* and *MCI* apply to other statutes and their regulatory regimes. See P6–89, *Motor Vehicle Manufacturers Association of the United States—Application for Exemption of Vehicle Shipments from Portions of the Shipping Act of 1984*, 25 S.R.R. 849, 855 (1989) (“*MVMA I*”) (policies underlying other transportation statutes do not “establish that the exemption is consistent with the regulatory scheme established by the [Shipping] Act”). Second, OSRA’s elimination of the absolutist “filed rate doctrine” for more “market based principles” appears to define the Commission’s new role as more market-based than the statutes at issue in *Maislin* and *MCI*. See section 13(f)(1), 46 U.S.C. app. 1712(f)(1) (“Neither the Commission nor any court shall order any person to pay the difference between the amount billed and agreed upon in writing with a common carrier or its agent and the amount set forth in any tariff or service contract by that common carrier for the transportation service provided.”) Third, the Commission’s determination to impose conditions on the requested exemption is consistent with the recent decision of the U.S. Court of Appeals for the Ninth Circuit in *California v. Federal Energy Regulatory Comm’n*, 383 F.3d 1006 (9th Cir. 2004). In that case, the court upheld a decision of FERC to deregulate filed tariff requirements. *Id.* at 1013 (citing 16 U.S.C. 824d(c)). Even though the Ninth Circuit described the filed rate doctrine as “central to FERC’s operations,” it distinguished the case before it from *MCI* and *Maislin* because FERC had combined the provision with two requirements: first, an *ex ante* finding of the absence of market power; and

second, sufficient post-approval reporting requirements. *Id.* The court of appeals found that the structure of market-based tariffs complied with the Federal Power Act only so long as it was coupled with enforceable post-approval reporting that would enable FERC to determine whether the rates were “just and reasonable” and whether market forces were truly determining the price. *Id.* at 1014. The Commission’s proposed conditional exemption is analogous to the program found by the court of appeals to be within FERC’s authority to deregulate.

#### 2. Substantial Reduction in Competition

Section 16 requires the Commission to find that a proposed exemption will not result in substantial reduction in competition before it may be granted. 46 U.S.C. app. 1715. The Commission’s interpretation of this provision has been sparse, but the agency has not limited itself to consideration of the effects that the exemption may have on competition between VOCCs. The Commission, for example, analyzed competition between FMC-regulated carriers and non-regulated carriers in Docket No. 92–36, *Reduction of Notice for Tariff Increases in the Domestic Offshore Trades*, 26 S.R.R. 526, 528 (1992). It has also considered competition between large and small automobile shippers, first in *MVMA I*, 25 S.R.R. at 854, and again in P7–92, *Motor Vehicle Manufacturers Association of the United States and Wallenius Lines, N.A.—Joint Application for Exemption from Certain Requirements of the Shipping Act of 1984 for Certain Limited Shipments of Passenger Vehicles*, 26 S.R.R. 1002 (FMC 1993) (order referring petition for further proceedings). In the present case, the Commission has determined that it may grant the requested relief only if it imposes conditions to ensure no substantial reduction in competition occurs.

##### a. Competition Among NVOCCs

In order to ensure there is no substantial reduction in competition among NVOCCs, the exemption must be available to all NVOCCs compliant with section 19 of the Shipping Act and with the conditions of the exemption. ABC and FASA contend that the conditional exemption may cause some reduction in competition between large NVOCCs that can afford the administrative and legal costs of drafting, negotiating, filing and enforcing NSAs, and small NVOCCs that cannot. Because the approach we propose is optional, and it is consistent with the statutory scheme of the Shipping Act, we believe that it should

be available to compliant NVOCCs without regard to size or capitalization.

The proposed regulation specifically does not permit two or more NVOCCs to offer NSAs in concert, as there is reason for concern that doing so may cause substantial reduction in competition due to the inability of either the Department of Justice under the antitrust laws or the Commission under the Shipping Act to oversee such concerted behavior. Section 7(a)(2)(B) of the Shipping Act provides that the antitrust laws do not apply to “any activity or agreement within the scope of this Act, whether permitted under or prohibited by this Act, undertaken or entered into with a reasonable basis to conclude that \* \* \* it is exempt under section 16 of this Act from any filing or publication requirement of this Act.” 46 U.S.C. app. 1706(a)(2)(B). It could be argued that operating under an NSA would constitute activity that has been exempted under section 16 from the tariff publication requirement, and that such activity should therefore be exempt from the antitrust laws. This would mean that NSAs offered by two or more NVOCCs acting in concert would enjoy immunity from antitrust enforcement, even though their collusive activity is not monitored by the Commission. See, e.g., *United States v. Tucor*, 189 F.3d 834 (9th Cir. 1999) (section 7(a)(4) of the Shipping Act immunizes NVOCCs from antitrust prosecution for the foreign inland segment of through transportation to the United States involving military household goods). In addition, we believe that the prohibitions of section 10(c) were intended to apply only to coordination between ocean common carriers as defined in section 4 of the Shipping Act, 46 U.S.C. app. 1703. Therefore, allowing two or more unrelated NVOCCs to offer NSAs in concert could present significant impediments to competition, as NVOCCs would be permitted to collude without the oversight of the Commission or the Department of Justice.

In order to avoid this potential effect, the Commission proposes to define NSAs specifically as arrangements between NVOCCs and non-NVOCC shippers in which the NVOCC acts as a carrier offering a service and the non-NVOCC shipper receives the service as a customer of the NVOCC. We expect that this will ensure that NVOCCs are not granted antitrust immunity that was not intended by Congress.

Further, the proposed rule would not permit an NVOCC to enter into an NSA in its capacity as a shipper; it would limit the definition of “NSA shipper” to

beneficial cargo owners and shippers’ associations with no NVOCC members. Section 7(a)(2) provides antitrust immunity to “any activity” under the Shipping Act that has been “exempt[ed] under section 16 \* \* \* from any filing or publication requirement.” Section 7(a) does not on its face limit the scope of antitrust immunity to VOCCs, and does not limit the scope of that immunity to transactions between carriers and other carriers. In other words, section 7(a)’s grant of immunity to “any activity” that has been exempted from the Shipping Act’s filing or publication requirements could be read to include transactions between carriers and shippers. Under *Tucor*, the immunity would likely be interpreted to include an NSA entered into between an NVOCC acting as a carrier and an NVOCC acting as a shipper.

Because of the dual role (as carriers and shippers) occupied by NVOCCs, allowing them to enter into NSAs as shippers could result in such arrangements being immune from antitrust prosecution. The particular difficulty about this is that NVOCCs—in their capacity as carriers—are engaged in competition with one another. It is possible that NVOCCs could affect shipping rates through collusive arrangements in which one NVOCC is characterized as a carrier and the other is characterized as a shipper. Authorizing a mechanism by which they could collude on price, free from antitrust enforcement, could “result in a substantial reduction in competition.” 46 U.S.C. app. 1715.

We would emphasize that the proposed limitation on the definition of “shipper” would not undermine parity between NVOCCs and VOCCs, because their situations are not analogous: VOCCs do not occupy a dual role in the transportation chain, and do not compete against most of their shippers. Although VOCCs could be said to be engaged in competition against NVOCCs and are nonetheless permitted to offer service contracts to NVOCCs acting as shippers, the same concerns do not arise from such arrangements as would arise if NVOCCs were permitted to enter into NSAs as shippers. This is, again, because section 7(a)(2) would appear to confer antitrust immunity on any activity that has been exempted from filing or publishing requirements. A service contract between a VOCC and an NVOCC acting as a shipper would not fall under such an exemption, as it is already authorized by the Shipping Act. See 46 U.S.C. app. 1703(19) and 1703(17)(B). An NSA between two NVOCCs, however, would fall under the

exemption, and would arguably be immune from antitrust prosecution.

We request comment on issues surrounding the potential activities of NVOCC affiliates under NSAs. In light of the potentially broad applicability of antitrust immunity under the Shipping Act found in *Tucor*, we believe it is prudent to permit only one NVOCC to offer an NSA in its capacity as a carrier. However, it may be possible for the Commission to permit wholly-owned subsidiaries of the NVOCC to participate as carrier parties to an NSA. Thus, we seek input on the viability and likelihood of such arrangements.

#### b. Competition Between NVOCCs and VOCCs

In order to ensure there is no substantial reduction in competition between NVOCCs and VOCCs, the Commission proposes that the exemption be conditioned on the same statutory and regulatory requirements and protections applicable to VOCCs’ service contracts: namely, filing of executed agreements; publication of essential terms of those agreements; and confidential treatment, similar to that set forth in 46 CFR part 530.

Section 8(a)(1) requires that, except with regard to certain commodities, “each common carrier \* \* \* keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices.” 46 U.S.C. app. 1707(a)(1). This requirement does not differentiate between VOCCs and NVOCCs, and it is clear that VOCCs generally must comply with this requirement. However, implicitly, VOCCs do enjoy an alternative to the requirement that they show “all” rates, etc. in a tariff, because they may include such matters in their filed service contracts. It appears necessary, therefore, to explicitly exempt NVOCCs from the requirement of section 8(a)(1) that they publish all rates, etc. in a tariff on the condition that those rates, etc. are contained in a filed NSA. Under the proposed rule, NVOCCs would remain subject, as VOCCs are, to the general requirement of section 8(a)(1) that they maintain a tariff. With the exemption we propose, NVOCC licensure will continue to require publication of a tariff, although every rate an NVOCC charges will not be required to be published therein, if the rate is filed in an NSA. This approach also preserves the Commission’s remedial authorities for tariff prohibition, cancellation and suspension pursuant to sections 11(b)(2) and 11(b)(3) for NVOCCs. 46 U.S.C. app. 1710(b)(2), (b)(3).

The Shipping Act excepts certain commodities from the requirement that conditions for their carriage be reflected in a published tariff or a filed service contract, and the Commission has likewise exempted the provision of certain services from the tariff publication requirements of sections 8(a)(1) and section 8(c)(2). Sections 8(a)(1) and 8(c)(2) excepts the following commodities: bulk cargo, forest products, recycled metal scrap, new assembled motor vehicles, waste paper and paper waste; the Commission has exempted the Department of Defense cargo and U.S. mail from the service contract filing requirements of section 8(c)(2) in its rules at 46 CFR 530.13. The proposed rule mirrors the provisions of the Commission's rules on service contracts for excepted and exempted commodities and services.

The prohibited acts contained in sections 10(b)(1), (2), (5) and (9), 46 U.S.C. app. 1709(b)(1), (2), (5), (9), apply to cargo moved under service contract. To ensure consistency with VOCC treatment, the Commission proposes identical administrative prohibitions applicable to NSAs. The prohibited actions applicable only to tariffs would not apply to cargo moved under an NSA, but would still remain in effect, as they do for VOCCs, for cargo handled under a tariff.<sup>5</sup>

Section 10(b)(1) reads, in pertinent part, "No common carrier \* \* \* may \* \* \* allow any person to obtain transportation for property at less than the rates or charges established by the carrier in its tariff or service contract by means of false billing, false classification, false weighing, false measurement, or by any other unjust or unfair device or means." 46 U.S.C. app. 1709(b)(1). A rate established in an NSA becomes the legal rate for the subject shipment. To ensure the Commission has the same oversight over cargo carried under an NSA with respect to the prohibitions contained in section 10(b)(1), the Commission proposes that this provision be made applicable by regulation.

The Shipping Act prohibits VOCCs from discriminating against ports through service contracts. 46 U.S.C. app. 1709(b)(5), 1709(b)(9). The NPR

includes provisions prohibiting this to mirror the requirements the Shipping Act places on VOCC service contracting.

#### c. Competition Among Shippers

To ensure competition among shippers is not substantially harmed, the Commission proposes to require the publication of the essential terms of all NSAs in automated systems and the filing of the full text of those arrangements with the Commission. Publication of NSA essential terms will enable shippers to determine, as they currently are able for VOCC-offered service contracts, general information on the services NVOCCs are offering their competitors. This will enable shippers to gather information on general market conditions as they evaluate their own transportation needs, and potentially identify any prohibited conduct.

#### 3. Detriment to Commerce

The "detrimental to commerce" criterion was carried over to the present statute from 1966 amendments to section 35 of the Shipping Act, 1916, although the use of the phrase since has been removed from other provisions of the Shipping Act. In P7-92, *Motor Vehicle Manufacturers Association of the United States, Inc. and Wallenius Lines, N.A.—Joint Application for Exemption from Certain Requirements of the Shipping Act of 1984 for Certain Limited Shipments of Passenger Vehicles*, 26 S.R.R. 1269 (ALJ recommended decision)

(administratively final, April 29, 1994) ("MVMA ALJ"), drawing on the Commission's reasoning in Docket No. 65-45, *Investigation of Ocean Rate Structures in the Trade between United States North Atlantic Ports and Ports in the United Kingdom and Eire—North Atlantic United Kingdom Freight Conference, Agreement 7100, and North Atlantic Westbound Freight Association, Agreement 5850*, 12 F.M.C. 34, 35 (1968), the ALJ found "detriment to commerce" must mean "something harmful" other than one of the other criteria of the exemption provision. *MVMA ALJ* at 1300. Interpreting the two criteria of section 16 identically would be contrary to the well-accepted canon of construction which requires that meaning be given to every provision of a statute; if "detriment to commerce" had the same meaning as "no substantial reduction in competition," it would be mere surplusage. See, e.g., *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 697-698 (1995).

Although the conditions placed on the proposed exemption to ensure that

it is not detrimental to commerce may overlap to a certain extent with the conditions ensuring against reduction in competition, the analysis is distinct. Many important shipper protections provided for in the Shipping Act relating to service contracts offered by VOCCs ensure against detriment to commerce. Thus, the Commission proposes making applicable to carriage under an NSA, those provisions of the Shipping Act that would be applicable to service contracts.

Section 10(a)(1) reads, "No person may knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means obtain or attempt to obtain ocean transportation for less than the rates or charges that would otherwise be applicable." 46 U.S.C. app. 1709(a)(1). This provision is at the heart of the "filed rate doctrine"—that there must always be an "applicable" or "legal" rate. Just as rates provided under service contracts are "applicable rates," so compliant NSA rates would be applicable rates. Doing away with the requirements that common carriers publish tariffs and adhere to rates that are either published in those public tariffs available to all-comers, or adhere to rates filed in their service contracts or NSAs, would likely undercut those principles and thereby cause detriment to commerce.<sup>6</sup>

Section 10(b)(12) of the Shipping Act prohibits VOCCs from knowingly and willfully entering into service contracts with an NVOCC that does not have a license and bond, insurance, or other surety as required by sections 8 and 19 of the Shipping Act, or with an affiliate of such an NVOCC. 46 U.S.C. app. 1709(b)(12). Because the NPR permits NVOCCs to participate in NSAs only in their capacity as carriers, it is not necessary to adopt section 10(b)(12) as a parallel administrative violation. However, the NPR does contain a requirement that only those NVOCCs who are in compliance with the licensing, bonding and tariff publishing requirements of the Shipping Act be

<sup>5</sup> The following prohibitions, which are now applicable to all common carriers, including NVOCCs, would remain applicable to cargo movements regardless of whether they are accomplished under an NSA, under a published tariff, or under a filed service contract: section 10(b)(3) (retaliation); section 10(b)(7) (deferred rebates); section 10(b)(10) (unreasonable refusal to deal or negotiate); section 10(b)(11) (moving cargo for unlicensed OTIs); section 10(b)(13) (disclosure of shipper information); and section 10(d)(1) (unreasonable practices).

<sup>6</sup> Section 8(d) reads, in pertinent part, "No new or initial rate or change in an existing rate that results in an increased cost to the shipper may become effective earlier than 30 calendar days after publication." 46 U.S.C. app. 1707(d). As an NSA rate under the proposed exemption would not be considered a tariff rate, it would not be held to this requirement. Furthermore, this protection does not appear necessary for shippers who negotiate service contracts as the shipper is a party to the negotiation. The same is not true for shippers who move cargo under tariffs, which are "take it or leave it" terms.

permitted to offer NSAs in their capacity as carriers.<sup>7</sup>

Section 10(b)(11), 46 U.S.C. app. 1709(b)(11), contains a slightly different prohibition (it forbids acceptance of cargo from a non-compliant NVOCC for movements rated under tariffs and service contracts). As the Commission proposes that NVOCCs may only offer NSAs as carriers, and may not act as shippers, and that only compliant NVOCCs may offer NSAs, we believe it is not necessary to provide equivalent shipper protections to movements under an NSA.

Therefore, to ensure the exemption does not result in any detriment to commerce, the proposed rule requires NVOCCs to file their NSAs electronically with the Commission, to retain the original (in the same manner that service contracts offered by VOCCs are now filed) and prohibits noncompliant NVOCCs from offering NSAs. These conditions will enable the Commission to perform audits of these arrangements to ensure against malpractices by which shippers may be harmed.

## V. Proposed Regulation—Section-by-Section Analysis

### Section 531.1 Purpose

The NPR proposes an exemption from certain provisions of the Shipping Act. Section 531.1 sets for the purpose for the exemption and its conditions.

### Section 531.2 Scope and Applicability

This provision indicates that only individual NVOCCs compliant with the requirements of section 19 of the Shipping Act, 46 U.S.C. app. 1718, and the Commission's regulations at 46 CFR part 515, may enter into an NSA with one or more NSA shippers subject to the requirements of these rules. Further, it states that any NVOCC who fails to maintain its bond or license or has had its tariff suspended or cancelled by the

Commission is ineligible to offer and file NSAs.

### Section 531.3 Definitions

This section sets forth the definitions of terms to be used in this part. This section defines an NVOCC service arrangement ("NSA") as "a written contract, other than a bill of lading or receipt, between one or more NSA shippers as defined in this regulation and an individual NVOCC in which the NSA shipper makes a commitment to provide a certain minimum quantity or portion of its cargo or freight revenue over a fixed time period, and the NVOCC commits to a certain rate or rate schedule and a defined service level. The NSA may also specify provisions in the event of nonperformance on the part of any party." This definition largely tracks the definition of "service contract" as set forth in the Commission's current rules at 46 CFR part 530.3(q), except that the phrase "such as, assured space, transit time, port rotation, or similar service features" has been eliminated. The definition also differs from the statutory definition of service contract inasmuch as it adds the phrase "or freight revenue," which is consistent with the current regulatory definition. This phrase was originally added to the Commission's definition of "service contract" in its 1984 rulemakings. As the Commission explained, the definition was modified "to recognize that such contracts may be based upon the amount or revenue provided by the shipper as well as a specific minimum volume of cargo." Docket No. 84-21, *Publishing and Filing Tariffs by Common Carriers in the Foreign Commerce of the United States—Service Contracts and Time/Volume Contracts*, 46 CFR part 580, 49 FR 24701 (June 14, 1984) (interim rule).

The proposed rule defines "NSA shipper" as "a cargo owner, the person for whose account the ocean transportation is provided, the person to whom delivery is to be made, or a shippers' association. The term does not include NVOCCs or a shippers' associations whose membership includes NVOCCs." This definition of NSA shipper is different from that of "shipper" in the Commission's regulations on service contracts at 46 CFR part 530 and section 3(21) of the Shipping Act, 46 U.S.C. app. 1702(21). This is because the Commission has determined, for the reasons outlined above, that NVOCCs, and groups that include NVOCCs, should not be able to obtain NSAs as shipper parties.

### Section 531.4 Confidentiality

This provision reflects the Commission's intent to keep NSAs and their amendments confidential, to the full extent permitted by law. However, the Commission shall provide certain information to other agencies of the Federal government of the United States as it sees fit. Also, the parties to a filed NSA may agree to disclose information contained in it. Breach of any confidentiality agreement contained in an NSA by either party will not, on its own, be considered a violation of these rules.

### Section 531.5 Duty to File

As the Commission's rules provide for the filing of service contracts in 46 CFR part 530, the proposed rule requires the NVOCC party to an NSA to file the NSA, amendments and notices and to publish the statement of essential terms. No such obligation is placed on the NSA shipper party to the NSA.

The proposed rule also provides that, similar to the provision set forth in section 13(f)(1) of the Shipping Act, 46 U.S.C. app. 1712(f)(1), the Commission shall not order any person to pay the difference between an amount billed and an amount in an NSA.

Further, this section provides that the filing may be done by an agent or publisher. This section sets for the requirements for registration that must be undertaken before an NVOCC may file its NSAs into the Commission's automated NSA system. There is no provision for paper-based/non-electronic filing.

### Section 531.6 NVOCC Service Arrangements

This section sets forth the form and manner requirements for NSAs. It also provides that an NSA must be filed prior to any cargo moves pursuant to that NSA or amendment. The NSA as filed must include the complete terms of the NSA, including, but not limited to the origin port ranges in the case of port-to-port movements and geographic areas in the case of through intermodal movements; the destination port ranges in the case of port-to-port movements and geographic areas in the case of through intermodal movements; the commodity or commodities involved; the minimum volume or portion; the service commitments; the line-haul rate; the liquidated damages for non-performance (if any); the duration of the NSA, including the effective date and expiration date; the legal names and business addresses of the NSA parties; the names, titles and addresses of the representatives signing the NSA for the

<sup>7</sup> The NPR does not relieve NVOCCs from any of the requirements applicable to them under section 19 of the Shipping Act or the Commission's regulations relating to licensure, financial responsibility, or the compensation NVOCCs may pay freight forwarders. 46 U.S.C. app. 1718. The Commission's regulations at 46 CFR part 515 outline the general duties of OTIs, including NVOCCs. The draft regulation does not contradict any requirement of these regulations. Specifically, we have considered that 46 CFR 535.31(g) requires licensees to make all records connected with its OTI business available to the Commission. While we believe the requirements of these provisions would apply equally to NSA-related records, the proposed rule includes a records-retention provision specifically applicable to NSAs. These requirements also correspond to the Commission's requirements for service contracts. Similarly, NVOCCs will not be relieved of the requirement under 46 CFR 515.42(b) and (d) regarding freight forwarder compensation and certifications.

parties; and the date upon which the NSA was signed; a description of the shipment records which will be maintained to support the NSA and the address, telephone number, and title of the person who will respond to a request by making shipment records available to the Commission for inspection; and all other provisions of the NSA. The terms of the NSA may not be uncertain, vague or ambiguous or make reference to terms not explicitly contained in the NSA itself unless those terms are contained in a publication widely available to the public and well known within the industry.

This section also requires that, for service pursuant to an NSA, that no NVOCC may, either alone or in conjunction with any other person, directly or indirectly provide service in the liner trade that is not in accordance with the rates, charges, classifications, rules and practices contained in a filed NSA; engage in any unfair or unjustly discriminatory practice in the matter of rates or charges with respect to any port; or give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any port.

The format requirements are as follows. Each NSA must include a unique NSA number of more than one (1) but less than ten (10) alphanumeric characters in length ("NSA Number"); a consecutively numbered amendment number no more than three digits in length, with initial NSAs using "0" ("Amendment number"); and an indication of the method by which the statement of essential terms will be published. This section makes provisions for any malfunction of the Commission's electronic filing system.

#### *Section 531.7 Notices*

This section requires that, within thirty days of the occurrence of correction, cancellation, adjustment, final settlement of any adjusted account and any change to the name, legal name and/or business address of any NSA party, the NVOCC shall file a notice, pursuant to the same procedures as those followed for the filing of an amendment to the NSA.

#### *Section 531.8 Amendment, Correction, Cancellation, and Electronic Transmission Errors*

This section describes the procedures for amendment, correction, cancellation and electronic transmission errors. Amendment to an NSA may only be done by mutual agreement of the parties. A filing fee will be assessed at the same rate as presently assessed in

the Commission's rules at 46 CFR 530.10(c).

#### *Section 531.9 Publication*

This section sets out the requirements for the essential terms ("ET") publication for each NSA filed with the Commission. It also describes the Commission's publication at <http://www.fmc.gov> of a listing of the locations of all NSA essential terms publications and requires that the ET publication indicate the date upon which it has most recently been updated.

#### *Section 531.10 Excepted and Exempted Commodities*

This section lists the commodities and services for which no NSA filing may be made.

#### *Section 531.11 Implementation*

This section provides that performance under an NSA or amendment thereto may not begin before the day it is effective and filed with the Commission.

#### *Section 531.12 Recordkeeping and Audit*

This section sets forth the requirement that all original signed NSAs and related records must be retained by the NVOCC for five years from the termination of each NSA in an organized, readily accessible or retrievable manner. It also requires every NVOCC, upon written request of the FMC's Director, Bureau of Enforcement, any Area Representative or the Director, Bureau of Trade Analysis, to submit copies of requested original NSAs or their associated records within thirty days of the date of the request.

#### *Appendix A, Form FMC-78 and Instructions*

Appendix A, together with Form FMC-78 and its associated instructions, set forth the registration requirements for filing NSAs electronically with the Commission's automated NSA system.

### **VI. Statutory Reviews and Request for Comments**

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the Chairman of the Federal Maritime Commission certifies that this rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. The Commission recognizes that the majority of businesses that would be affected by this rule qualify as small entities under the guidelines of the Small Business Administration. The rule, however, would establish an

optional method for NVOCCs to carry cargo for their customers to be used at their discretion. The rule would pose no economic detriment to small business entities. Rather, it exempts NVOCCs from the otherwise applicable requirements of the Shipping Act when such entities comply with the rules set forth herein.

This regulatory action is not a "major rule" under 5 U.S.C. 804(2).

The collection of information requirements contained in this proposed 46 CFR part 531 have been submitted to the Office of Management and Budget ("OMB") for review under section 3504(h) of the Paperwork Reduction Act of 1980, as amended. The estimated total annual burden for the estimated 110 annual respondents is 165,932 manhours. This estimate includes, as applicable, the time needed to review instructions, develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to respond to a collection of information, search existing data sources, gathering and maintain the data needed, and complete and review the collection of information; and transmit or otherwise disclose the information.

The Chairman of the Federal Maritime Commission, pursuant to 5 CFR 1320.13, has requested emergency processing of the proposed collection of information described in proposed Form FMC-78 and that OMB determine to approve or disapprove that proposed collection of information by November 12, 2004. Inasmuch as the exemption is deregulatory and voluntary, OMB's approval of the collection of information required for the registration form prior to the effective date of the proposed regulation will permit the FMC to prepare for the effectiveness of the proposed rule by allowing the agency's staff to begin processing the registration requests and issuing identification numbers and passwords to NVOCCs intending to take advantage of the exemption. The Commission is not permitted to collect information until OMB has approved of it. As the proposed rule will expand by ten-fold the number of common carriers eligible to file their service arrangements with the FMC, it is necessary to begin the process of registering such industry participants before the rule goes into effect. This regulatory oversight is at the heart of the FMC's mission, and will likely be disrupted if the agency cannot

begin processing the registration requests as soon as possible. For these reasons, the Chairman has determined that this collection of information is essential to the mission of the agency and that the FMC cannot reasonably comply with the normal clearance procedures under this part because the use of the normal clearance procedures is reasonably likely to disrupt the collection of information and the efficient implementation of the proposed rule.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Austin L. Schmitt, Director of Operations, Federal Maritime Commission, 800 North Capitol Street, NW., Washington, DC 20573; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Federal Maritime Commission, Washington, DC 20503.

#### List of Subjects for 46 CFR Part 531

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

Accordingly, the Federal Maritime Commission proposes to add 46 CFR part 531 as follows:

### PART 531—NVOCC SERVICE ARRANGEMENTS

#### Subpart A—General Provisions

Sec.

- 531.1 Purpose.
- 531.2 Scope and applicability.
- 531.3 Definitions.
- 531.4 Confidentiality.
- 531.5 Duty to file.

#### Subpart B—Filing Requirements

- 531.6 NVOCC service arrangements.
- 531.7 Notices.
- 531.8 Amendment, correction, cancellation, and electronic transmission errors.

#### Subpart C—Publication of Essential Terms

- 531.9 Publication.

#### Subpart D—Exceptions and Implementation

- 531.10 Excepted and exempted commodities.
- 531.11 Implementation.

#### Subpart E—Recordkeeping and Audit

- 531.12 Recordkeeping and Audit
- 531.13–531.98 [RESERVED]
- 531.99 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

Appendix A to Part 531—Instructions for the Filing of NVOCC Service Arrangements Exhibit 1 to Part 531—NVOCC Service Arrangement Registration [FORM FMC–78]

Authority: 46 U.S.C. app. 1715.

### Subpart A—General Provisions

#### § 531.1 Purpose.

This part exempts NVOCCs from certain provisions of the Shipping Act. The purpose of this part is to facilitate the filing of NVOCC service arrangements (“NSAs”) and the publication of certain essential terms of those NSAs as they are exempt from the otherwise applicable provisions of the Shipping Act of 1984 (“Act”). This part enables the Commission to review NSAs to ensure that they and the parties to them comport with the conditions of the exemption as set forth below.

#### § 531.2 Scope and applicability.

Only individual NVOCCs compliant with the requirements of section 19 of the Act and the Commission’s regulations at 46 CFR part 515 may enter into an NSA with one or more NSA shippers subject to the requirements of these rules. Any NVOCC who has failed to maintain its bond or license or had its tariff suspended or cancelled by the Commission is ineligible to offer and file NSAs.

#### § 531.3 Definitions.

When used in this part:

- (a) *Act* means the Shipping Act of 1984 as amended by the Ocean Shipping Reform Act of 1998;
- (b) *Amendment* means any change to a filed NSA which has prospective effect and which is mutually agreed upon by all parties to the NSA.
- (c) *Authorized person* means an NVOCC or duly appointed agent who is authorized to file NSA on behalf of the NVOCC and to publish the corresponding statement of essential terms and is registered by the Commission to file under § 531.5 and Appendix A to this part.
- (d) *BTA* means the Commission’s Bureau of Trade Analysis, or its successor bureau.
- (e) *BCL* means the Commission’s Bureau of Certification and Licensing, or its successor bureau.
- (f) *Cancellation* means an event which is unanticipated by the NSA, in liquidated damages or otherwise, and is due to the failure of the NSA shipper to tender minimum cargo as set forth in the contract, unless such tender was made impossible by an action of the NVOCC.
- (g) *Commission* or *FMC* means the Federal Maritime Commission.
- (h) *Common carrier* means a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that:

(1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and

(2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel tanker, or by a vessel when primarily engaged in the carriage of perishable agricultural commodities:

(i) If the common carrier and the owner of those commodities are wholly owned, directly or indirectly, by a person primarily engaged in the marketing and distribution of those commodities; and

(ii) Only with respect to those commodities.

(i) *Correction* means any change to a filed NSA that has retroactive effect.

(j) *Effective date* means the date upon which an NSA or amendment is scheduled to go into effect by the parties to the NSA. An NSA or amendment becomes effective at 12:01 a.m. Eastern Standard Time on the beginning of the effective date. The effective date cannot be prior to the filing date of the NSA or amendment with the Commission.

(k) *Expiration date* means the last day after which the entire NSA is no longer in effect.

(l) *File* or *filing* (of NSAs or amendments thereto) means the use of the Commission’s electronic filing system for receipt of an NSA or an amendment thereto by the Commission, consistent with the method set forth in Appendix A of this part, and the recording of its receipt by the Commission.

(m) *OIT* means the Commission’s Office of Information Technology, or its successor office.

(n) *NSA shipper* means a cargo owner, the person for whose account the ocean transportation is provided, the person to whom delivery is to be made, or a shippers’ association. The term does not include NVOCCs or a shippers’ associations whose membership includes NVOCCs.

(o) *NVOCC service arrangement* (“NSA”) means a written contract, other than a bill of lading or receipt, between one or more NSA shippers and an individual NVOCC in which the NSA shipper makes a commitment to provide a certain minimum quantity or portion of its cargo or freight revenue over a fixed time period, and the NVOCC commits to a certain rate or rate schedule and a defined service level. The NSA may also specify provisions in

the event of nonperformance on the part of any party.

(p) *Statement of essential terms* means a concise statement of the essential terms of an NSA required to be published under this part.

#### **§ 531.4 Confidentiality.**

(a) All NSAs and amendments to NSAs filed with the Commission shall, to the fullest extent permitted by law, be held in confidence by the Commission.

(b) Nothing contained in this part shall preclude the Commission from providing certain information from or access to NSAs to another agency of the Federal government of the United States.

(c) Parties to a filed NSA may agree to disclose information contained in it. Breach of any confidentiality agreement contained in an NSA by either party will not, on its own, be considered a violation of these rules.

#### **§ 531.5 Duty to file.**

(a) The duty under this part to file NSAs, amendments and notices, and to publish statements of essential terms, shall be upon the NVOCC party to the NSA.

(b) The Commission shall not order any person to pay the difference between the amount billed and agreed upon in writing with a common carrier or its agent and the amount set forth in an NSA by that common carrier for the transportation service provided.

(c) Filing may be accomplished by any duly agreed-upon agent, as the parties to the NSA may designate, and subject to conditions as the parties may agree.

(d) *Registration.* (1) *Application.* Authority to file or delegate the authority to file must be requested by a responsible official of the NVOCC in writing by submitting to BTA, either by mail to 800 N. Capitol Street, NW., Washington, DC 20573, or by facsimile to (202) 523-5767, a completed NSA Registration Form (FMC-78) (Exhibit 1 to this part).

(2) *Approved registrations.* OIT shall provide approved Registrants a log-on identification number ("I.D.") and password for filing and amending NSAs, and notify Registrants of such approval via U.S. mail.

### **Subpart B—Filing Requirements**

#### **§ 531.6 NVOCC service arrangements.**

(a) Authorized persons shall file with BTA, in the manner set forth in Appendix A of this part, a true and complete copy of every NSA or amendment before any cargo moves pursuant to that NSA or amendment.

(b) Every NSA filed with the Commission shall include the complete terms of the NSA including, but not limited to, the following:

(1) The origin port ranges in the case of port-to-port movements and geographic areas in the case of through intermodal movements;

(2) The destination port ranges in the case of port-to-port movements and geographic areas in the case of through intermodal movements;

(3) The commodity or commodities involved;

(4) The minimum volume or portion;

(5) The service commitments;

(6) The line-haul rate;

(7) Liquidated damages for non-performance (if any);

(8) Duration, including the:

(i) Effective date; and

(ii) Expiration date;

(9) The legal names and business addresses of the NSA parties; the names, titles and addresses of the representatives signing the NSA for the parties; and the date upon which the NSA was signed. Subsequent references in the NSA to the signatory parties shall be consistent with the first reference.

(10) A description of the shipment records which will be maintained to support the NSA and the address, telephone number, and title of the person who will respond to a request by making shipment records available to the Commission for inspection under § 531.12; and

(11) All other provisions of the NSA.

(c) *Certainty of terms.* The terms described in paragraph (b) of this section may not:

(1) Be uncertain, vague or ambiguous; or

(2) Make reference to terms not explicitly contained in the NSA itself unless those terms are contained in a publication widely available to the public and well known within the industry.

(d) *Other requirements.* (1) For service pursuant to an NSA, no NVOCC may, either alone or in conjunction with any other person, directly or indirectly, provide service in the liner trade that is not in accordance with the rates, charges, classifications, rules and practices contained in a filed NSA.

(2) For service pursuant to an NSA, no NVOCC, may, either alone or in conjunction with any other person, directly or indirectly, engage in any unfair or unjustly discriminatory practice in the matter of rates or charges with respect to any port; and

(3) For service under an NSA, no NVOCC may, either alone or in conjunction with any other person, directly or indirectly, give any undue or

unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any port.

(e) *Format requirements.* Every NSA filed with BTA shall include, as set forth in Appendix A to this part:

(1) A unique NSA number of more than one (1) but less than ten (10) alphanumeric characters in length ("NSA Number"); and

(2) A consecutively numbered amendment number no more than three digits in length, with initial NSAs using "0" ("Amendment number"); and

(3) An indication of the method by which the statement of essential terms will be published.

(f) *Exception in case of malfunction of Commission electronic filing system.* (1) In the event that the Commission's electronic filing system is not functioning and cannot receive NSAs filings for twenty-four (24) continuous hours or more, affected parties will not be subject to the requirements of paragraph (a) of this section and § 531.11 that an NSA be filed before cargo is shipped under it.

(2) However, NSAs which go into effect before they are filed due to a malfunction of the Commission's electronic filing system pursuant to paragraph (f)(1) of this section, must be filed within twenty-four (24) hours of the Commission's electronic filing system's return to service.

(3) For an NSA that is effective without filing due to a malfunction of the Commission's filing system, failure to file that NSA within twenty-four (24) hours of the Commission's electronic filing system's return to service will be considered a violation of these regulations.

(g) Failure to comply with the provisions of this section shall result in the application of the terms of the otherwise applicable tariff.

#### **§ 531.7 Notices.**

Within thirty (30) days of the occurrence of any event listed below, there shall be filed with the Commission, pursuant to the same procedures as those followed for the filing of an amendment pursuant to § 531.5 and Appendix A to this part, a detailed notice of:

(a) Correction;

(b) Cancellation;

(c) Adjustment of accounts, by re-rating, liquidated damages, or otherwise;

(d) Final settlement of any account adjusted as described in paragraph (c) of this section; and

(e) Any change to the name, legal name and/or business address of any NSA party.

### § 531.8 Amendment, correction, cancellation, and electronic transmission errors.

(a) *Amendment.* NSAs may be amended by mutual agreement of the parties. Amendments shall be filed electronically with the Commission in the manner set forth in § 531.5 and Appendix A to this part.

(1) Where feasible, NSAs should be amended by amending only the affected specific term(s) or subterms.

(2) Each time any part of an NSA is amended, the filer shall assign a consecutive amendment number (up to three digits), beginning with the number "1."

(3) Each time any part of a filed NSA is amended, the "Filing Date" will be the date of filing of the amendment.

(b) *Correction.* (1) Requests shall be filed, in duplicate, with the Commission's Office of the Secretary within forty-five (45) days of the NSA's filing with the Commission, accompanied by remittance of a \$276 service fee, and shall include:

(i) A letter of transmittal explaining the purpose of the submission, and providing specific information to identify the initial or amended NSA to be corrected;

(ii) A paper copy of the proposed correct terms.

(2) Corrections shall be indicated as follows:

(i) Matter being deleted shall be struck through; and

(ii) Matter to be added shall immediately follow the language being deleted and be underscored;

(3) An affidavit from the filing party attesting with specificity to the factual circumstances surrounding the clerical or administrative error, with reference to any supporting documentation;

(4) Documents supporting the clerical or administrative error; and

(5) A brief statement from the other party to the NSA concurring in the request for correction.

(6) If the request for correction is granted, the carrier party shall file the corrected provisions using a special case number as described in Appendix A to this part.

(c) *Electronic transmission errors.* An authorized person who experiences a purely technical electronic transmission error or a data conversion error in transmitting an NSA filing or an amendment thereto is permitted to file a Corrected Transmission ("CT") of that filing within 48 hours of the date and time of receipt recorded in the Commission's electronic filing system (excluding Saturdays, Sundays and legal public holidays). This time-limited permission to correct an initial defective

NSA filing is not to be used to make changes in the original NSA rates, terms or conditions that are otherwise provided for in § 531.6(b). The CT tab box in the Commission's electronic filing system must be checked at the time of resubmitting a previously filed NSA, and a description of the corrections made must be stated at the beginning of the corrected NSA in a comment box. Failure to check the CT box and enter a description of the correction will result in the rejection of a file with the same name, as documents with duplicate file names or NSA and amendment numbers are not accepted by the FMC's electronic filing system.

(d) *Cancellation.* (1) An account may be adjusted for events and damages covered by the NSA. This shall include adjustment necessitated by either liability for liquidated damages appearing in the NSA as filed with the Commission under § 531.6(b)(7), or the occurrence of an event described below in paragraph (d)(2) of this section.

(2) In the event of cancellation as defined in § 531.3(3):

(i) Further or continued implementation of the NSA is prohibited; and

(ii) The cargo previously carried under the NSA shall be re-rated according to the otherwise applicable tariff provisions.

(e) If the amendment, correction or cancellation affects an essential term required to be published under § 531.9, the statement of essential terms shall be changed as soon as possible after the filing of the amendment to accurately reflect the change to the NSA terms.

### Subpart C—Publication of Essential Terms

#### § 531.9 Publication.

(a) *Contents.* All authorized persons who choose to file NSAs under this part are also required to make available to the public, contemporaneously with the filing of each NSA with the Commission, and in tariff format, a concise statement of the following essential terms:

- (1) The port ranges:
  - (i) Origin; and
  - (ii) Destination;
- (2) The commodity or commodities involved;
- (3) The minimum volume or portion; and
- (4) The duration.

(b) *Certainty of terms.* The terms described in paragraph (a) of this section may not:

- (1) Be uncertain, vague or ambiguous; or
- (2) Make reference to terms not explicitly detailed in the statement of

essential terms, unless those terms are contained in a publication widely available to the public and well known within the industry.

(c) *Location.* The statement of essential terms shall be published as a separate part of the individual NVOCC's automated tariff system.

(d) *References.* The statement of essential terms shall contain a reference to the "NSA Number" as described in § 531.6(e)(1).

(e) *Terms.* (1) The publication of the statement of essential terms shall accurately reflect the terms as filed with the Commission.

(2) If any of the published essential terms include information not required to be filed with the Commission but filed voluntarily, the statement of essential terms shall so note.

(f) *Commission listing.* The Commission will publish on its Web site, <http://www.fmc.gov>, a listing of the locations of all NSA essential terms publications.

(g) *Updating statements of essential terms.* To ensure that the information contained in a published statement of essential terms is current and accurate, the statement of essential terms publication shall include a prominent notice indicating the date of its most recent publication or revision. When the published statement of essential terms is affected by filed amendments, corrections, or cancellations, the current terms shall be changed and published as soon as possible in the relevant statement of essential terms.

### Subpart D—Exceptions and Implementation

#### § 531.10 Excepted and exempted commodities.

(a) *Statutory exceptions.* NSAs for the movement of the following, as defined in section 3 of the Act, the Commission's rules at 46 CFR 530.3 or 46 CFR 520.1, are not subject to the conditions of this exemption:

- (1) Bulk cargo;
- (2) Forest products;
- (3) Recycled metal scrap;
- (4) New assembled motor vehicles;

and

- (5) Waste paper or paper waste.

(b) *Commission exemptions.* The following commodities and/or services are not subject to the conditions of this exemption:

(1) *Mail in foreign commerce.* Transportation of mail between the United States and foreign countries.

(2) *Department of Defense cargo.* Transportation of U.S. Department of Defense cargo moving in foreign commerce under terms and conditions

approved by the Military Transportation Management Command and published in a universal service contract. An exact copy of the universal service contract, including any amendments thereto, shall be filed with the Commission as soon as it becomes available.

(c) *Inclusion of excepted or exempted matter.* (1) The Commission will not accept for filing NSAs which exclusively concern the commodities or services listed in paragraph (a) or (b) of this section.

(2) NSAs filed with the Commission may include the commodities or services listed in paragraph (a) or (b) of this section only if:

(i) There is a tariff of general applicability for the transportation, which contains a specific commodity rate for the commodity or service in question; or

(ii) The NSA itself sets forth a rate or charge which will be applied if the NSA is canceled, as defined in § 531.3(e) and § 531.8(d).

(d) *Waiver.* Upon filing an NSA pursuant to paragraph (c) of this section, the NSA shall be subject to the same requirements as those for NSAs generally.

#### **§ 531.11 Implementation.**

*Generally.* Performance under an NSA or amendment thereto may not begin before the day it is effective and filed with the Commission.

### **Subpart E—Recordkeeping and Audit**

#### **§ 531.12 Recordkeeping and audit.**

(a) *Records retention for five years.* Every NVOCC shall maintain original

signed NSAs, amendments, and their associated records in an organized, readily accessible or retrievable manner for a period of five (5) years from the termination of each NSA. These records must be kept in form that is readily available and usable to the Commission; electronically maintained records shall be no less accessible than if they were maintained in paper form.

(b) *Production for audit within 30 days of request.* Every NVOCC shall, upon written request of the FMC's Director, Bureau of Enforcement, any Area Representative or the Director, Bureau of Trade Analysis, submit copies of requested original NSAs or their associated records within thirty (30) days of the date of the request.

#### **§§ 531.13–531.98 [RESERVED]**

#### **§ 531.99 OMB control numbers assigned pursuant to the Paperwork Reduction Act.**

The Commission has received OMB approval for this collection of information pursuant to the Paperwork Reduction Act of 1995, as amended. In accordance with that Act, agencies are required to display a currently valid control number. The valid control number for this collection of information is 3072–XXXX.

#### **Appendix A to Part 531—Instructions for the Filing of NVOCC Service Arrangements**

NSAs shall be filed in accordance with the instructions found on the Commission's home page, <http://www.fmc.gov>.

#### **A. Registration, Log-On I.D. and Password**

To register for filing, an NVOCC or authorized agent must submit the NSA Registration Form (Form FMC–78) to BTA. A separate NSA Registration Form is required for each individual that will file NSAs. BTA will direct OIT to provide approved filers with a log-on identification number (“I.D.”) and password. Filers who would like a third party (agent/publisher) to file their NSAs must so indicate on Form FMC–78. Authority for filing can be transferred by submitting an amended registration form requesting the assignment of a new log-on I.D. and password. The original log-on ID will be canceled when a replacement log-on I.D. is issued. Log-on I.D.s and passwords may not be shared with, loaned to or used by any individual other than the individual registrant. The Commission reserves the right to disable any log-on I.D. that is shared with, loaned to or used by parties other than the registrant.

#### **B. Filing**

After receiving a log-on I.D. and a password, a filer may log-on to the NSA filing area on the Commission's home page and file NSAs. The filing screen will request such information as: filer name, organization number (“Registered Persons Index” or “RPI” number); NSA and amendment number; effective date and file name. The filer will attach the entire NSA file and submit it into the system. When the NSA has been submitted for filing, the system will assign a filing date and an FMC control number, both of which will be included in the acknowledgment/confirmation message.

**BILLING CODE 6730–01–P**

EXHIBIT 1 -- NVOCC SERVICE ARRANGEMENT REGISTRATION [FORM FMC-78] OMB No. 3072-\_\_\_\_\_  
 FORM FMC-78 (expiration date: \_\_\_\_\_)

PLEASE TYPE OR PRINT

# NVOCC SERVICE ARRANGEMENT REGISTRATION

(SEE ATTACHED INSTRUCTIONS)

1. Organization No. \_\_\_\_\_

2. Registrant \_\_\_\_\_

Full Legal Name of firm (or individual, if not a firm) \_\_\_\_\_

(Doing Business As or Trade Name) \_\_\_\_\_

3. a. NVOCC OTI License No. \_\_\_\_\_

Effective date \_\_\_\_\_

MM/DD/YYYY

OR

b. If foreign-based unlicensed NVOCC, provide the following information for agent for service of process:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

4. This Registration is:

☐ Initial

☐ Amendment (Specify change) \_\_\_\_\_

5. Headquarters

Address

(Number and Street) \_\_\_\_\_

( ) Telephone \_\_\_\_\_

(Number and Street) \_\_\_\_\_

( ) Fax \_\_\_\_\_

(City/State/Zip/Country) \_\_\_\_\_

(Federal TIN Number, if any) \_\_\_\_\_

E-Mail (optional) \_\_\_\_\_

6. Mailing

Address

(If different)

(c/o Name) \_\_\_\_\_

(Number and Street) \_\_\_\_\_

( ) Telephone \_\_\_\_\_

(Number and Street) \_\_\_\_\_

( ) Fax \_\_\_\_\_

(City/State/Zip/Country) \_\_\_\_\_

E-Mail (optional) \_\_\_\_\_

7. Person(s) to be granted registration. Please list individual(s) for whom a log-on identifier is requested. If this is a transfer of log-on, please list the existing name and existing log-on ID:

Name: \_\_\_\_\_

Existing Log-on: \_\_\_\_\_

8. Is the person listed in question 7 a third party? (check one)

☐ Yes ☐ No

If yes, a letter of authority must be submitted with this form.

9.

Signature of Authorized Official \_\_\_\_\_

Print or type name of Authorized Official \_\_\_\_\_

date (MM/DD/YYYY) \_\_\_\_\_

Title of Authorized Official \_\_\_\_\_

FMC USE ONLY

Logon \_\_\_\_\_ Initial Password \_\_\_\_\_ ID \_\_\_\_\_ Directory \_\_\_\_\_

DateAsg \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_ AsgBy \_\_\_\_\_

11/04

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**Instructions For Form FMC-78**

**Completed Form FMC-78 should be sent by mail or facsimile to:**

**Federal Maritime Commission  
Bureau of Trade Analysis  
800 N. Capitol Street, NW  
Washington, DC 20573-0001**

**Fax (202) 523-5767**

**Line 1. Organization Number.** This is the same as the Regulated Persons Index ("RPI") Number.

**Line 2. Registrant.** Provide the full name of the firm or individual registering for the automated NSA filing system and any trade names. The Registrant's name should match the corporate charter or business license, etc. The Registrant's name cannot be changed without submission of an amended registration form.

**Line 3. FMC License Number.** Provide name of Registrant as licensed by the Commission and date of the effectiveness of that license. If Registrant is a bonded but unlicensed foreign-based NVOCC operating pursuant to Commission's regulations at 46 C.F.R. § 515.3, indicate the name and address of the agent for service of process as required by 46 C.F.R. § 515.24. The name and address of the agent for service of process must be the same as that appearing in the NVOCC's tariff, as provided by 46 C.F.R. § 520.11 (b).

**Line 4. Registration.** Indicate whether this is the initial (first time) registration or an amendment to an existing NSA registration.

**Line 5. Address of Headquarters Office.** The complete street address of the Registrant's principal place of business should be shown in addition to a post office box (if any). Post office box alone is insufficient. Provide the Registrant's Federal Taxpayer Identification Number, if any.

**Line 6. Mailing Address (if different).** Provide the mailing address only if it differs from the headquarters address listed in Line 5. Show the street address as well as any post office box. This is the address to which the Registrant's log-on I.D. and password will be mailed via U.S. mail. Also, if the log-on I.D. and password is to be mailed to a third party, indicate here.

**Line 7. Persons to be granted registration.** Provide the full name of the individual for whom the log-on I.D. and password is requested. If you wish to transfer a log-on I.D. from an existing registration to a new individual, indicate the name of the new registrant and the log-on I.D. to be assigned.

**Line 8. Registration by Third Party.** Indicate, by checking the applicable box, whether the person to be granted registration in Line 7 is a third party (publisher, agent, etc.) of the registrant named in

Line 1. The registration must be accompanied by an indication that the NVOCC has authorized the third party to file NVOCC service arrangements and related documents on its behalf.

**Line 9. Signature of Authorized Official.** Indicate the date the registration was signed and title of authorized official.

**Paperwork Reduction Act Notice.**

The collection of this information is authorized generally by section 16 of the Shipping Act of 1984, 46 U.S.C. app. § 1715.

This is an optional form. Submission is completely voluntary. Failure to submit this form will in no way impact the Federal Maritime Commission's assessment of your firm's financial responsibility; however, you will not be able to use the exemption set forth in the Commission's rules at 46 C.F.R. part 531.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. The valid control number for this information collection is 3072-[XXXX]. Copies of this form will be maintained until the filer indicates s/he will no longer file NSAs into the electronic filing system.

The time needed to complete and file this form will vary depending on individual circumstances. The total estimated average time to complete this form is: Recordkeeping, 20 minutes; Learning about the form, 20 minutes; Preparing and sending the form to the FMC, 20 minutes.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can write to the Secretary, Federal Maritime Commission, 800 North Capitol Street, N.W., Washington, D.C. 20573-0001, or e-mail: [secretary@fmc.gov](mailto:secretary@fmc.gov).

By the Commission.

**Bryant L. VanBrakle,**  
Secretary.

[FR Doc. 04-24467 Filed 11-2-04; 8:45 am]

BILLING CODE 6730-01-C

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

#### 49 CFR Parts 379, 381, 385, 390, and 395

[Docket No. FMCSA-1998-3706]

RIN 2126-AA76

#### Hours of Service of Drivers; Supporting Documents

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Supplemental notice of proposed rulemaking (SNPRM); request for comments.

**SUMMARY:** The FMCSA intends to clarify that each motor carrier has the duty under the current regulations to: Verify the accuracy of drivers' hours of service (HOS) and records of duty status (RODS), and this obligation extends to the HOS and RODS of independent drivers or owner-operators while driving for the motor carrier; ensure each driver collects and submits to the employing motor carrier all supporting documents with the RODS; and ensure all motor carriers know of the requirement to maintain supporting documents in a method that allows cross reference to the RODS. This notice also proposes a supporting document based self-monitoring system that would be the carrier's primary method for ensuring compliance with the HOS regulations. In recognition of developing technologies, the FMCSA proposes to permit the use of electronic documents as a supplement to, and, in certain circumstances, in lieu of, paper supporting documents. The intended effect of this proposal is to provide clearer and more detailed definitions of "supporting documents", "employee", "driver", and a requirement for each motor carrier to use a self-monitoring system to verify accuracy of HOS and RODS.

**DATES:** We must receive your comments by January 3, 2005.

**ADDRESSES:** You may submit comments identified by DOT DMS Docket Number FMCSA-1998-3706 by any of the following methods:

- *Web site:* <http://dms.dot.gov>. Follow the instructions for submitting

comments on the DOT electronic docket site.

- *Fax:* 1-202-493-2251.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590-0001.

- *Hand Delivery:* Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

*Instructions:* All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all comments received will be posted without change to <http://dms.dot.gov>, including any personal information provided. Please see the Privacy Act heading for further information.

*Docket:* For access to the docket to read background documents or comments received, go to <http://dms.dot.gov> at any time or to Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

*Privacy Act:* Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit <http://dms.dot.gov>.

Comments received after the comment closing date will be included in the docket and we will consider late comments to the extent practicable. The FMCSA may, however, issue a final rule at any time after the close of the comment period.

**FOR FURTHER INFORMATION CONTACT:** Mr. Jerry Fulnecky, Office of Enforcement and Compliance, (202) 366-4553, FMCSA, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

#### SUPPLEMENTARY INFORMATION:

##### Legal Basis for the Rulemaking

This rulemaking is required by, and based on, section 113 (Driver's Record of Duty Status) of the Hazardous

Materials Transportation Authorization Act of 1994, Pub. L. 103-311, August 26, 1994, 108 Stat. 1673, at 1676 (hereinafter the HMTAA). Section 113, however, assumes the existence of FMCSA's more general authority to regulate the HOS of commercial motor vehicle (CMV) drivers and related matters. That authority is conferred by the Motor Carrier Act of 1935,<sup>1</sup> now codified at 49 U.S.C. 31502(b), and the Motor Carrier Safety Act of 1984,<sup>2</sup> 49 U.S.C. 31136(a).

Section 113(a) requires FMCSA to amend 49 CFR part 395 to improve both driver and carrier compliance with the HOS regulations and the effectiveness and efficiency of HOS enforcement, at a cost reasonable to the motor carrier industry. As described in detail later in the preamble, this proposal would close the loopholes that made it possible for some operators to obscure their violations of the HOS rules by failing to collect, retain, or properly to index, documents that could be used to check the accuracy of drivers' RODS. Drivers—both employees and owner-operators—would be required to collect all documents that could be used to evaluate RODS data, put their name or the vehicle number on those documents and forward them to the employing motor carrier. The carrier would have to maintain these records and collect related documents from other sources that could be used to check each driver's RODS. All of these records would have to be available to special agents in the same manner as RODS themselves. The enforceability of the HOS regulations would be substantially improved. As for the cost of the proposal, there would be none if motor carriers and drivers were in full compliance with the current supporting documents regulation, as interpreted by a series of administrative and Federal appellate court decisions.<sup>3</sup> Because that is not the case, the costs will be borne by motor carriers not now collecting, retaining, and/or indexing supporting documents. FMCSA estimates the annual cost of the rule would be \$14.2 million,<sup>4</sup> a modest sum given the very large carrier and driver population that would be covered by it. The

<sup>1</sup> Public Law 74-255, 49 Stat. 543, August 9, 1935.

<sup>2</sup> Public Law 98-554, Title II, 98 Stat. 2832, October 30, 1984.

<sup>3</sup> See the section below headed Motor Carrier Responsibilities for a discussion of the Federal appellate court decisions and the section headed Collection and Retention of Supporting Documents for a discussion of the administrative decisions.

<sup>4</sup> See the section headed Regulatory Impact Analysis for the discussion of how the agency estimated the \$14.2 million costs.