[FR Doc. 2011–4650 Filed 3–1–11; 8:45 am]
BILLING CODE 6560–50–P

FEDERAL MARITIME COMMISSION

46 CFR Parts 520 and 532

[Docket No. 10–03]

RIN 3072–AC38

Non-Vessel-Operating Common Carrier Negotiated Rate Arrangements

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission is exempting licensed non-vessel-operating common carriers that enter into negotiated rate arrangements from the tariff rate publication requirements of the Shipping Act of 1984 and certain provisions and requirements of the Commission's regulations.

DATES: The final rule is effective April 18, 2011.

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SUPPLEMENTARY INFORMATION:

I. Background

a. Summary of Proposed Rule

On May 7, 2010, the Federal Maritime Commission (FMC or Commission) issued a notice of proposed rulemaking (NPR), pursuant to its authority under sections 16 and 17 of the Shipping Act of 1984 (Shipping Act), 46 U.S.C. 40103 and 46 U.S.C. 42101, seeking comments on a proposal to exempt licensed non-vessel-operating common carriers (NVOCCs) from the rate publication requirements of the Shipping Act, subject to certain conditions.[1] The Commission found that it was within its statutory authority under Section 16 of the Shipping Act to grant such an exemption, subject to certain conditions, as doing so would not result in substantial reduction in competition or be detrimental to commerce, consistent with the Shipping Act. *See* 46 U.S.C. 40103(a). As proposed, the exemption would relieve licensed NVOCCs from their tariff rate publication obligations when entering into a "negotiated rate arrangement" (NRA). An NRA is defined as "a written and binding arrangement between a shipper and an eligible NVOCC to provide specific transportation service for a stated cargo quantity, from origin to destination, on and after the receipt of the cargo by the carrier or its agent (or the originating carrier in the case of through transportation)." Proposed Section 532.3(a). The use of NRAs would be subject to several conditions, including (1) NVOCCs who use NRAs would be required to continue publishing standard rules tariffs containing contractual terms and conditions governing shipments, including any accessorial charges and surcharges, and would be required to make their rules tariffs available to shippers free of charge; (2) NRA rates charged by NVOCCs must be mutually agreed and memorialized in writing by the date cargo is received for shipment; and (3) NVOCCs who use NRAs must retain documentation confirming the agreed rate and terms for each shipment for a period of five years, and must make such documentation promptly upon request available to the Commission pursuant to the Commission's regulations at 46 CFR 515.31(g).

Licensed NVOCCs, to the extent they enter into NRAs, would be exempt by regulation from the following provisions of the Shipping Act: Section 8(a), codified at 46 U.S.C. 40501(a)–(c) (obligation to publish an automated rate tariff); Section 8(b), codified at 46 U.S.C. 40501(d) (time volume rates); Section 8(d), codified at 46 U.S.C. 40501(e) (tariff rate increases may not be effective on less than 30 days notice but decreases may be effective immediately); Section 8(e), codified at 46 U.S.C. 40503 (carrier refunds due to a tariff error); and Section 10(b)(2)(A), codified at 46 U.S.C. 41104 (requiring adherence to published tariff rates).

The Commission also sought public comment on whether the exemption should be extended to the prohibitions of Section 10(b)(4), codified at 46 U.S.C. 41104(4) (prohibiting common carriers from unfair or unjustly discriminatory practices in services pursuant to a tariff), and Section 10(b)(8), codified at 46 U.S.C. 41104(8) (prohibiting common carriers from undue or unreasonable preference or advantage or undue or unreasonable prejudice or disadvantage for tariff service). Additionally, the Commission requested interested parties to submit comments on whether the exemption should be extended to foreign-based NVOCCs who are unlicensed but bonded pursuant to 46 CFR 515.21(a)(3), and on which elements, if any, qualify an NRA for a "safe harbor" that affords a presumption that the corresponding shipment is not subject to the tariff rate publication requirement.

b. Comments Received

The Commission received a total of forty-four public comments: one comment from two members of Congress; two comments from other federal agencies; nineteen from U.S.-based, licensed NVOCCs; seven from foreign unlicensed NVOCCs; four from U.S.-based trade associations; three from foreign-based trade associations; two from consultants; and six from tariff publishers and their employees.[2] On

[1] 75 FR 25151 (May 7, 2010). The proposed rule was issued following a petition filed by the National Customs Brokers and Forwarders Association of America, Inc. (NCBFAA) requesting the Commission to exercise its authority under 46 U.S.C. 40103 to exempt NVOCCs from provisions of the Shipping Act requiring publication and adherence to rate tariffs for ocean transportation to the extent such transportation is provided under individually negotiated rates with shipping customers and memorialized in writing. Petition No. P1–08, *Petition of the National Customs Brokers and Freight Forwarders Association of America, Inc. for Exemption from Mandatory Rate Tariff Publication* ("Petition"), published for comment on August 11, 2008. After consideration of the Petition and the comments received, the Commission determined to initiate a rulemaking to relieve licensed NVOCCs from the costs and burdens of tariff rate publication.

[2] The Commission received written comments on the NPR from: Congressmen Mike Doyle, 14th District, Pennsylvania and Tim Murphy, 18th District, Pennsylvania (Joint Congressional Commenter); the Department of Justice, Antitrust Division, Transportation, Energy & Agriculture Section; the Department of Transportation, Office of General Counsel; Econocaribe Consolidators, Inc.; John S. Connor, Inc.; AIReS, A1 Relocation Solutions; J.W. Allen & Co., Inc.; C.H. Powell Company, NVOCC Division; The Camelot Company; BDG International, Inc.; Hanseatic Container Line Ltd. and Mid-America Overseas, Inc.; Lori Fleissner, President, Global Fairways, Inc.; M.E. Dey & Co., Inc.; Nakamura (USA) Inc.; CV International; Mohawk Global Logistics; NACA Logistics (USA) Inc. d/b/a Vanguard Logistics Services; BDP Transport, Inc., CaroTrans International, Inc. and Mallory Alexander International Logistics, LLC (Joint Commenters); UPS Ocean Freight Services; UTi, United States, Inc.; DHL–Danzas d/b/a DHL Global Forwarding d/b/a Danmar Lines Ltd.; Ocean World Lines, Inc.; Alfred Balguerie, S.A.; Damco A/S; Trans Service Line; Schenkerocean Limited; CDS Global Logistics, Inc.; Juerge Bandle, Senior Vice President, Kuehne + Nagel, Inc., agent of Blue Anchor Line, Division of Transpac Container System Ltd., Hong Kong; Panalpina, Inc. as agent for and on behalf of Pantainer, Ltd.; New York New Jersey Foreign Freight Forwarders & Brokers Association, Inc. (NYNJFFF&BA); National Industrial Transportation League (NIT League); Transportation Intermediaries Association (TIA); National Customs Brokers and Forwarders Association of America, Inc. (NCBFAA); China Association of Shipping Agencies & Non-Vessel-Operating Common Carriers (CASA); British International Freight Association; Fedespedi-Federazione Nazionale delle Imprese di Spedizioni Internazionali; Albert Saphir d/b/a ABS Consulting; Stan Levy, Stan Levy Consulting, LLC; The Descartes Systems Group, Inc.; RateWave Tariff

Continued

May 24, 2010, the Commission held a public meeting to receive oral comments.[3] The Commission considered all comments in developing this final rule. A discussion of significant comments and the Commission's response to those comments as well as minor modifications and clarifications made to the proposed rule is provided below.

II. The Authority of the Commission to Grant the Exemption

The strong balance of the comments expressed general support for exempting NVOCCs who use NRAs from the tariff rate publication requirements of the Shipping Act and the Commission's regulations. Notably, the Department of Justice opined that the proposed elimination of the NVOCC tariff publication requirements would meet the Section 16 exemption authority standard and would be an appropriate exercise of the Commission's authority. Other commenters agreed with this analysis, further stating that the proposed exemption will allow NVOCCs to be more flexible and more responsive to their shippers, and will promote competition and commerce by eliminating substantial regulatory costs to NVOCCs, a savings that could be passed on to their customers. A number of commenters argued that the ability to enter into NRAs would allow them to quickly adjust service offerings and rates due to rapidly changing rates and surcharges imposed by ocean common carriers. Most commenters opined that the proposed rule would not result in a substantial reduction in competition or be detrimental to commerce and, in fact, would increase competition and promote commerce by making it easier and more efficient for NVOCCs to quote rates and to devote their resources to serving their customers. The NCBFAA argued that the issuance of the exemption for NVOCCs would increase, not decrease, competition in the NVOCC industry, and would not be detrimental to commerce, but would instead increase NVOCC efficiency, substantially reduce unnecessary costs, save jobs, permit NVOCCs to expend scarce resources in positive ways and allow NVOCC's to reduce rates for their shippers. Conversely, several commenters opined that the NPR did not meet these standards and was therefore beyond the Commission's current statutory authority.

The Commission issued the NPR pursuant to its authority under section 16 of the Shipping Act, which allows the Commission to exempt future activity from the requirements of the Shipping Act if the Commission finds that the exemption will not result in a substantial reduction in competition or be detrimental to commerce. 46 U.S.C. 40103. The Commission may attach conditions to such an exemption and may, by order, revoke an exemption. The Commission has granted exemptions in the past. For example, in 2004, the Commission used its authority under Section 16 to exempt NVOCCs who entered into negotiated service arrangements (NSAs) from the Shipping Act's tariff publication requirements.. The Commission has also denied such requests for exemption in the past.[4]

The Commission, as previously stated, is authorized to grant an exemption under Section 16 when it finds that the exemption will not result in a substantial reduction in competition and, separately, will not be detrimental to commerce. The relevant competitive considerations in determining whether to grant the exemption and allow licensed NVOCCs to enter into NRAs were: competition among NVOCCs; competition between NVOCCs and VOCCs; competition among VOCCs; and competition among shippers.

With regard to competition among NVOCCs, the Commission's records show that as of February 10, 2011, there were 3,368 NVOCCs licensed in the United States and 1,125 foreign unlicensed NVOCCs, indicating that customers can choose among a wide array of competing service providers. Additionally, allowing licensed NVOCCs the ability to opt out of the tariff rate publishing requirements of the Shipping Act could reduce entry costs for additional potential competitors in the NVOCC market, thereby resulting in more service providers and even greater competition. The Commission believes that allowing licensed NVOCCs to opt out of the requirement to publish tariff rates will enhance competition, rather than result in a substantial reduction in competition among licensed NVOCCs.

One commenter voiced concerns that granting the exemption will put VOCCs at a competitive disadvantage to NVOCCs as not all cargo moves under VOCC service contracts. That lone commenter is not a transportation provider, either as an NVOCC or a VOCC. Such issues were not raised by any VOCC. Some commenters have argued that NVOCCs and VOCCs do not compete against each other, as NVOCCs tend to service small-to-medium sized shippers and VOCCs tend to serve larger customers that sign service contracts. The record demonstrated, however, that many shippers use both NVOCCs and VOCCs at one time or another, thereby creating a competitive market.

The Joint Commenters, citing generally accepted industry statistics, noted that since the implementation of the Ocean Shipping Reform Act of 1998 (OSRA), over 90% of shippers' dealings with ocean common carriers have been in the form of confidential service contracts, rather than through tariff rates. Thus, VOCCs would appear to have had a statutory competitive advantage over NVOCCs, an advantage that will be somewhat reduced by this rule. As a result, NVOCCs will likely become more competitive with VOCCs.

Providing NVOCCs the ability to opt out of tariff rate publishing is highly unlikely to reduce competition among VOCCs. All NVOCC cargo must eventually move with a VOCC which, in turn, competes with other VOCCs for NVOCC cargo. If NVOCCs were able to somehow increase their cargo share due to their ability to opt out of rate tariff publishing, then those VOCCs who are more reliant on NVOCC cargo could conceivably capture more cargo from VOCCs that do not rely as much on NVOCC cargo. This, however, is in the Commission's view extremely speculative and, if such a scenario actually came about, we believe that it would be more likely to lead to changed business models by affected VOCCs and ultimately lead to increased competition overall. Thus, the Commission finds that granting the exemption would not result in a substantial reduction in competition among VOCCs.

Finally, many commenters asserted that their customers do not inquire as to published tariff rates, making such published rates effectively useless. Other commenters stated that their customers consult with multiple carriers directly, by e-mail or phone, in search

Services, Inc.; Laurie Zack-Olson; Dart Maritime Service, Inc.; Distribution Publications, Inc.; and the Kaslea Corporation d/b/a U.S. Traffic Service.

[3] Oral comments were made by from the following individuals: Edward D. Greenberg, Counsel for National Customs Brokers & Forwarders Association of America, Inc.; Paulette Kolba, Vice President of Ocean Compliance, Panalpina, Inc. as agent for Pantainer Ltd.; Robert J. Schott, President, SEASCHOTT, Division of AIRSCHOTT, Inc.; Robert A. Voltmann, President & CEO, Transportation Intermediaries Association; Neil Barni, President, CargoSphere; James E. Devine, President, Distribution Publications, Inc.; Stan Levy, President, Stan Levy Consulting; Gerard P. Wardell, President, and Laurie A. Zack-Olson, Vice President of Tariff Operations, RateWave Tariff Services, Inc.

[4] *See 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,* Petition, 26 S.R.R. 1269 (1994) (Commission denied a petition for exemption based on the pre-Ocean Shipping Reform Act version of Section 16 of the Shipping Act of 1984).

of the best quote and do not consult published tariffs. Several commenters stated that their shipper customers have never used a published tariff to review the marketability of an ocean freight rate.[5] Accordingly, the record demonstrates that shippers, for the most part, do not presently use published NVOCC tariffs for price information. Exempting such publication requirements, therefore, would have little effect on competition and, certainly, would not have a substantial impact. The Commission also notes that since the advent of confidential service contracts offered by VOCCs and, to some extent, NSAs offered by NVOCCs, it appears that pricing competition has increased rather than decreased. For these reasons, the Commission does not believe that allowing NVOCCs to opt out of the requirement to publish tariff rates will result in a substantial reduction in competition among shippers.

The Commission's authority under section 16 to grant exemptions from the statutory requirements of the Shipping Act, in whole or in part, requires the Commission to find not only that the exemption will not result in a substantial reduction in competition, but also that the exemption will not "be detrimental to commerce."[6] Ensuring that any exemption granted by the Commission is not detrimental to U.S. commerce is of particular importance at this time, considering the goal of the Administration's National Export Initiative to double U.S. exports over the next five years.[7]

Initially, it is significant that no shipper or carrier—NVOCC or VOCC—has appeared in this proceeding to object to granting the exemption or to allege economic harm resulting from providing NVOCCs the option of entering into NRAs,[8] a matter of significance in previous exemption cases. *See, Petition for Exemption from Tariff Filing Requirements Previously Granted, etc.,* 22 S.R.R. 1040, 1043 (1984); *Tariff Filing Notice Periods—Exemptions,* 24 S.R.R. 1604, 1605–06 (1989). Indeed, the NIT League, a large organization of shippers in the United States, has submitted comments in support of the grant of the exemption.

Moreover, the Commission has already concluded in this proceeding that authorizing licensed NVOCCs to enter into NRAs, subject to the conditions imposed, will reduce NVOCC operating costs and increase competition in the U.S. trades. Consequently, the Commission believes that allowing NRAs as proposed will result in a benefit to commerce. Accordingly, after reviewing all of the comments received, and in light of the relief sought and the conditions proposed in the NPR, the Commission finds that permitting licensed NVOCCs the option of operating under NRAs would not be detrimental to commerce.

Numerous commenters argued that because shippers do not access NVOCC tariffs, the maintenance of such tariffs serves no purpose and imposes additional costs on NVOCCs. The Joint Commenters argued that the exemption, as proposed, will allow NVOCCs to eliminate unnecessary costs. In contrast, several commenters questioned whether any cost saving experienced by NVOCCs would be passed on to shippers and whether there will be a net gain in jobs since jobs could be lost as the function of coordinating rate filings and submitting them to a tariff publisher will no longer exist. However, with a highly competitive industry consisting of more than 3,300 licensed NVOCCs competing for cargo, the Commission believes it is likely any cost savings realized through use of NRAs will be passed through to shippers in the form of more competitive rates. Residual savings to NVOCCs, as well as savings from lower rates to shippers, will provide funds for reinvestment and growing their respective businesses. Accordingly, providing this exemption would likely result in economic growth that would ultimately increase jobs.

Notwithstanding the ability of NVOCCs to enter into NSAs, a number of commenters expressed the view that there remained a need for NRAs that would exempt NVOCCs from tariff rate publication. One NVOCC commented that while some shippers may wish to work under a contract/NSA basis and some NVOCCs may wish to issue an NSA to obtain a volume commitment, most small-to-medium enterprises work on a quotation basis, often for a variety of services, and these companies do not want or need to engage in a formal contract process. Although several commenters suggested the Commission revisit NSAs and their relatively infrequent usage by NVOCCs, the Commission does not believe it is necessary at this time to initiate such a proceeding, as NSAs were implemented to give NVOCCs and their customers additional flexibility to structure their shipping transactions and their usage is voluntary. NVOCCs' lack of widespread NSA usage does not bear on the question of whether the Commission should grant the instant exemption, except that it does tend to corroborate a point argued by supporters of the exemption—that NRAs are necessary because the business models of many NVOCCs are not conducive to using NSAs.

Several commenters questioned whether NVOCCS entering into NRAs would continue to be common carriers at all. The answer is clearly yes. Entering into an NRA with a shipper, as opposed to providing service at tariff rates, would not change the common carrier status of an NVOCC.[9] The publishing of a tariff is not what characterizes an entity as a common carrier, and NVOCCs would still be required to publish a rules tariff.[10] Rather, the existence of a common carrier triggers the requirement to publish a tariff.

As discussed by the TIA, common carriage existed from 1916 to 1961 under the Shipping Act of 1916 without a statutory requirement that common carriers file or publish tariffs. Congress added a filing requirement in 1961 at the time dual rate loyalty agreements were authorized for conferences and carriers. The tariff provision was intended to protect shippers against sudden and unannounced rate increases. H. Rep. No. 498, 87th Cong., 1st Sess. at 2–3 (1961); S. Rep. No. 860, 87th Cong., 1st Sess. at 10–19 (1961). Congress changed the filing requirement to a publication requirement in 1998 with the passage of the OSRA. The ability of an NVOCC to enter into NRAs with its shipper customers in lieu of

[5] Several commenters suggested that the Commission initiate a proceeding to review and reform its tariff regulations for NVOCCs and VOCCs. The Commission does not believe such action alone would provide benefits to NVOCCs or their customers that are as timely or significant as this final rule.

[6] Section 16, 46 U.S.C. 40103.

[7] *See* Executive Order No. 13534, 75 FR 37756 (March 10, 2010).

[8] Objections by commenters to certain of the conditions imposed on NRAs in the NPR are discussed, *infra.*

[9] Indeed, VOCCs are ocean common carriers even when most of their business is done under service contracts.

[10] The Shipping Act defines a common carrier as a person who holds 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; assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and uses, 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 foreign port. 46 U.S.C. 40102(6). Similarly, Black's Law Dictionary defines a common carrier as a commercial enterprise that holds itself out to the public as offering to transport freight or passengers for a fee. Black's Law Dictionary (8th ed. 2004). A common carrier is "bound to take all goods of the kind which he usually carries, unless his conveyance is full, or the goods be specially dangerous; but may charge different rates to different customers." Thomas E. Holland, *The Elements of Jurisprudence* 299 (13th ed. 1924).

moving cargo under a published tariff rate, and to assess different rates to different customers, does not disqualify an NVOCC as a common carrier. The responsibilities associated with common carriage remain and NVOCCs entering into NRAs continue to be subject to the applicable requirements and strictures of the Shipping Act, including oversight by the Commission. For example, NVOCCs will continue to be subject to requirements that they establish and observe "just and reasonable regulations and practices," 46 U.S.C. 41102(c), and prohibitions against false billing, false classification, false weighing or measurement, retaliating against shippers, engaging in unfair practices, and unreasonably refusing to deal or negotiate, 46 U.S.C. 41104(1), (3), (4), and (10).

The Commission recognizes the rapidly changing nature of the current shipping environment and believes that the ability of NVOCCs to enter into NRAs may increase competition and promote commerce by allowing NVOCCs to better serve their shipper customers. Based on the comments received and the Commission's experience, it appears that a vast majority of shippers obtain information regarding rates directly from NVOCCs without consulting published tariffs. It also appears that the systems used by NVOCCs to generate rate quotations are duplicated by those necessary to comply with tariff publishing requirements and the continuing requirement to publish rate tariffs may result in unnecessary costs to NVOCCs and their shipper customers. The decision to enter into an NRA rests with each shipper and NVOCC and is purely voluntary. Those licensed NVOCCs who find it more advantageous to use published tariff rates for some or all of their business may continue to do so, while those licensed NVOCCs and shippers who believe it will be more advantageous to enter into negotiated rate arrangements may choose to do so, within the requirements of the NRA regulations.

Allowing licensed NVOCCs to enter into NRAs in lieu of publishing tariff rates will not result in substantial reduction in competition among NVOCCs, between NVOCCs and VOCCs, among VOCCs, or among shippers. The Commission has also found that use of NRAs by licensed NVOCCs will not be detrimental to commerce. It is, therefore, within the authority of the Commission to permit licensed NVOCCs to enter into NRAs with their customers subject to the terms and conditions set forth in this regulation.

III. The Scope of an NRA

The Commission received a large number of comments and questions concerning the scope of an NRA.

a. Cargo Quantity

Commenters questioned the meaning of "cargo quantity" in the definition of rate,[11] specifically whether a single NRA could cover more than one shipment. Pursuant to Proposed Section 532.5(d), an NRA must clearly specify the rate and to which shipment[12] or shipments such rate will apply. Therefore, the term "cargo quantity" contemplates that an NRA may cover more than one shipment so long as all shipments are specified in the NRA.

b. Election To Use Exemption

A number of commenters questioned whether an NVOCC that elects to use NRAs may also move cargo pursuant to tariff rates. Under the final rule, NVOCCs are not required to choose to move all of their cargo under either NRAs or tariff rates. Eligible NVOCCs may choose to use NRAs on whatever basis best suits the market they serve. In order to ensure clarity as to whether an NVOCC is moving cargo under either an NRA or a tariff rate for a particular cargo quantity, Proposed Section 532.6(a)(1) has been modified to include a requirement that an NVOCC moving cargo pursuant to an NRA for a particular cargo quantity (either shipment or shipments), must place a prominent notice to that effect on its bills of lading or equivalent documents for that cargo quantity, in addition to the general notice in its rules tariff and its FMC–1 filed with the Commission. All licensed NVOCCs will need to access the Commission's FMC–1 form in order to make an initial choice[13] among (1) Moving all cargo pursuant to tariff rates; (2) moving all cargo pursuant to NRAs; or (3) moving cargo either via tariff rates or via NRAs. The Commission intends to modify the FMC–1 form to allow NVOCCs to notify the Commission of their intentions in advance of the effective date of the Final Rule and will make an announcement via its Web site when the ability to do so is available.

c. Rate: Base and Surcharge

There were also numerous comments filed regarding the meaning of "rate" in an NRA and its relationship to surcharges, accessorials, and rules tariffs. A number of commenters recommended including in the NRA all components of the transportation costs and argued NVOCCs should have the flexibility to structure NRAs from one extreme of merely containing base rates (with all other terms left to the rules tariff) to inclusion in the NRA of all terms. Commenters recommended that the NRA include information as to which surcharges are to be added to the rate, either in the NRA itself or by reference to the NVOCC's rules tariff. The NIT League opined that parties to an NRA should be able to negotiate an all-inclusive rate or a base rate with itemized surcharges, or should be required to specifically incorporate and identify which surcharges or accessorials from the rules tariff will apply. In a related comment, NYNJFFF&BA questioned how an NVOCC would implement general rate increases in the context of an NRA.

The Commission believes that NVOCCs and their shipper customers should have flexibility in structuring NRAs. As is the case with respect to tariff rates, the rate stated in an NRA may specify the inclusion of all charges (an "all-in" rate) or specify the inclusion of only certain accessorials or surcharges. Without specifying otherwise, the NRA would only replace the base ocean freight rate or published tariff rate. If the rate contained in an NRA is not an all-in rate, the NRA must specify which surcharges and accessorials from the rules tariff will apply. To the extent surcharges or accessorials published in the NVOCC's rules tariff will apply, the NRA must state that the amount of such surcharges and accessorials is fixed once the first shipment has been received by the NVOCC, until the last shipment is delivered. Rates stated in an NRA may not be increased via a GRI.

d. Terms of an NRA

The NCBFAA's petition and the Commission's proposed rule suggested an NRA accompanied by an exemption from the published tariff rate upon satisfaction of certain conditions. Neither proposed changes to rules tariffs, NSAs, or service contracts. One commenter on the proposed rule suggested that an NRA should be expanded to include such economic terms as credit and payment terms, late payment interest, freight collect or prepay, rate methodology, including

[11] The NPR defined "rate" for the purposes of NRAs as the "price stated for providing a specified level of transportation service for a stated cargo quantity". Proposed Section 532.3(b).

[12] A shipment, as defined in 46 CFR 520.2, is "all of the cargo carried under the terms of a single bill of lading."

[13] This initial choice may be modified by a licensed NVOCC at any time thereafter by further amendment of its FMC–1.

minimum quantities, time/volume arrangements, penalties or incentives, the methods for implementation of rate changes, or provisions for arbitration, forum selection for disputes and variance of per-package liability limits. Commission Staff raised concerns that expanding the scope of the NRA beyond rates could cause overlap and confusion between NRAs and NSAs, which must be filed with the Commission. At this time, the Commissioners hold differing views on the commenter's proposal and the concerns raised by Commission Staff. Accordingly, the Commission will move forward with the current rule as proposed (and as requested in the Petition), under which an NRA is an alternative to a published rate and does not include other economic terms. Nor can an NRA under this final rule contain a volume commitment, minimum quantity commitment, or a penalty provision for failure to meet a minimum quantity.[14] The Commission will commence proceedings to obtain and consider additional public comments on potential modifications to the final rule, including possible expansion of the terms that can be included in an NRA. The record in this proceeding will be incorporated into a new Commission proceeding.

e. Affiliates

Although treatment of affiliates was not a focus of the commenters, the Commission finds no reason to treat affiliates differently under NRAs than they are treated under NSAs. Accordingly, a definition of affiliate has been added to Proposed Section 532.3. With the mutual concurrence of the NRA parties, affiliates of the shipper are entitled to access the NRA rates, in which case, the names and addresses of eligible affiliates shall be identified in the NRA. Proposed Section 532.5(b) has been modified accordingly.

f. Household Goods and Other Limitations

The Commission received other comments regarding the scope of an NRA. One commenter, Mr. Levy, suggested that rates covering shipment of household goods and personal effects should not be exempted from tariff rate publication, citing the Surface Transportation Board's rules governing domestic household goods carriage which require the publication of tariffs. Without opining on the merits of this suggestion, in light of the Commission's ongoing Fact-Finding Investigation concerning household goods shipments,[15] the Commission has determined not to adopt the suggestion at this time as it may be more appropriate to revisit this issue after the Commission has the benefit of the Fact-Finding Officer's Final Report. Ms. Zack-Olson suggested that exemptions should be awarded on an individual basis based on certain criteria. The Commission notes that awarding the exemption on an NVOCC-by-NVOCC or customer-by-customer basis, based on specific criteria, would require an unnecessarily large expenditure of resources by both NVOCCs and the Commission and declines to adopt this suggestion.

IV. Extension of the Exemption to Foreign, Bonded, Unlicensed NVOCCS

The NPR proposed granting the exemption only to licensed NVOCCs, but requested comments on whether the exemption should be extended to foreign-based NVOCCs who are unlicensed, but bonded pursuant to 46 CFR 515.21(a)(3) (hereinafter "foreign unlicensed NVOCCs").[16] A large number of comments were received by the Commission in response to its query, with the strong majority of commenters supporting extension of the exemption to foreign unlicensed NVOCCs. Commenters mainly alleged adverse effects on competition and fears of discrimination or retaliation by regulators in other countries.

Commenters argued that foreign unlicensed NVOCCs will be disadvantaged because they will continue to be required to publish rates. The Commission recognizes there are, and would continue to be, under this final rule, differences between licensed and foreign unlicensed NVOCCs, not just in tariff publication costs, but also licensing costs and bonding costs. However, the Commission does not believe that the balance of such differences would be of such a magnitude that it would lead to a substantial reduction in competition.

Commenters also argued that, if the exemption is limited to licensed NVOCCs, discrimination against United States-based NVOCCs operating in foreign countries will occur. Commenters cited these specific examples of possible discrimination: the levying of special retaliatory customs tariffs or duties on American products; a new requirement that United States-based NVOCCs file tariffs; a requirement for United States-based NVOCCs to hold bonds in higher amounts than currently required; and a requirement that United States-based NVOCCs be licensed in foreign countries. Commission Staff, however, provided the Commissioners their view that these predictions of discrimination against United States-based NVOCCs operating in foreign countries are speculative, because the path to licensure is readily available to foreign-based NVOCCs to the same extent as United States-based entities. Foreign unlicensed NVOCCs may apply for and, if qualified, obtain an NVOCC license. Not only would this provide the benefit of NRAs but also reduced bond costs. Currently, fifty-five foreign-based NVOCCs hold FMC-issued licenses.

Commission Staff raised concerns that extending the exemption to foreign unlicensed NVOCCs could hamper their ability to protect the shipping public, as the exemption is predicated, among other things, on the prompt availability of records. The Commission Staff reports that the ability of the Commission and some private disputants[17] to obtain NRA documentation from foreign unlicensed NVOCCs is likely to be adversely impacted by the foreign situs and unlicensed status of such companies. Presently, both the Commission and private litigants are able to access a foreign unlicensed NVOCC's rates and rules tariffs. If such foreign unlicensed NVOCCs are permitted to use NRAs, the Commission would have less timely access to the rate information for those cargo quantities moving pursuant to NRAs. The Commission could be reduced to obtaining such information only with the cooperation of the foreign unlicensed NVOCC or its customer, or through a Commission issued subpoena or order,[18] and those private parties without their own copies may only be

[14] An NRA may contain a maximum quantity limit in the case of an NRA covering multiple shipments.

[15] *See* Fact Finding Investigation No. 27, Potentially Unlawful, Unfair or Deceptive Ocean Transportation Practices Related to the Movement of Household Goods or Personal Property in U.S.-Foreign Oceanborne Trades, Order issued June 23, 2010.

[16] The Commission's Bureau of Licensing and Certification's records, as of February 10, 2011, show a total of 5,576 entities operating in the U.S. trade as ocean transportation intermediaries: 1,083 licensed freight forwarders, 1,724 licensed NVOCCs, 1,589 entities licensed as both freight forwarders and NVOCCs, 1,125 foreign unlicensed NVOCCs and 55 licensed foreign-based NVOCCs operating in the U.S. trade.

[17] In a typical dispute between a shipper and a foreign unlicensed NVOCC, the shipper is likely to have its own copy of the NRA documentation that would be at issue. Commission Staff reports that some disputes involving foreign unlicensed NVOCCs, however, can involve VOCCs, freight consignees, freight forwarders, notify parties, and other affected parties who may be listed on a bill of lading for a shipment, but who may not have their own copy of NRA documentation.

[18] The issuance of a subpoena presupposes an active Commission investigation into violations of the Shipping Act. *See* 46 U.S.C. 41303.

able to obtain such information through the discovery process.[19]

Commission Staff raised several other concerns about extending this exemption to foreign unlicensed NVOCCs in the absence of published tariff rates. For foreign unlicensed NVOCCs, there is no application and approval process as there is for United States-based NVOCCs. The licensing process for United States-based companies includes a detailed review of the experience and character of the application's Qualified Individual (QI) and the character, not only of the QI, but also of the major officers and shareholders. The QI must have a minimum of three years of qualifying NVOCC experience as verified by previous employers and personal references with knowledge of the QI's qualifications, who are interviewed by telephone or via e-mail by the Commission's Bureau of Certification and Licensing (BCL). BCL's review of applicants includes a thorough vetting of the Commission's complaint and enforcement records systems as well as commercial databases to analyze the applicant's financial background, including unsatisfied liens and judgments and any criminal history. Any information not consistent with that provided by the applicant is investigated and may result in denial of the application.

Accordingly, when the Commission approves a license for a United States-based applicant, it is acting upon substantive, verified information under the experience and character standards of Section 19 of the Shipping Act. By contrast, a foreign unlicensed NVOCC is not required to have a QI or anyone in its employ who has any experience shipping in the United States trades. Similarly, foreign unlicensed NVOCCs are not required to have the character necessary to provide NVOCC services to United States importers and exporters, as United States based companies do. The Commission knows little more than the name and address of such persons and the identity of their agent for service of process in the United States.

Commenters suggested various methods to address this concern, including requiring all participating NVOCCs to agree in writing to produce NRA records as reasonably requested by the Bureau of Enforcement; requiring that foreign unlicensed NVOCCs maintain their NRA files at the offices of their U.S. agents or a third party Web site; or requiring that all foreign based NVOCCs place a statement in their rules tariff regarding the location of records and contact information. Another commenter suggested that the exemption be extended to unlicensed NVOCCs that are affiliates with licensed NVOCCs in good standing. Alternatively, one commenter suggested that the tariff rate exemption be limited to exports from the United States.

These suggestions did not fully address the concerns raised by Commission Staff at this time. Congress, in providing for foreign-based companies to operate as NVOCCs, without being required to be licensed or vetted, recognized possible regulatory differences between United States and foreign-based NVOCCs. Congress directed the Commission to take into account that foreign-based unlicensed companies had not been reviewed as to experience and character and "to consider the difference in potential for claims against the bonds between licensed and unlicensed intermediaries when developing bond requirements." Congress recognized the "diversity of activities" conducted by ocean transportation intermediaries and directed the Commission "to establish a range of licensing and financial responsibility requirements commensurate with the scope of activities conducted by different ocean transportation intermediaries and the past fitness of ocean transportation intermediaries in the performance of intermediary services." S. R. Rep. No. 105–61, at 30–32 (1997). Accordingly, Congress recognized that not all NVOCCs were to be treated equally from a regulatory perspective and that the Commission was to take into account those factors necessary to ensure the public is protected.

Commission Staff has raised further concerns over its ability to protect the shipping public with respect to possible exempted operations of foreign unlicensed NVOCCs. The proposed rule provides that NRAs and associated records are subject to inspection and reproduction requests under 46 CFR 515.31(g). However that provision only applies to a "licensee."

Absent that limitation, obtaining records located overseas can be difficult and may involve considerable delay. *The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters*[20] (Convention) provides procedures for obtaining evidence from entities in certain countries, but those procedures are time consuming and uncertain, at best. Moreover, while the United States is a signatory to the Convention, many of our trading partners are not.[21] And, even among those nations party to the Convention, most have executed a "declaration" that they will not honor requests to obtain pre-trial discovery of documentary evidence.[22] The Commission Staff has raised concerns that Commission requests for documentation could be subject to delay due to the requirements of the Convention.

Schenkerocean Limited cited the requirement that foreign unlicensed NVOCCs may only provide ocean transportation intermediary services in the United States through a licensed ocean transportation intermediary as support for the proposition that the Commission would have regulatory access to the bonds of both entities. If the licensed OTI in the United States acts as an agent, however, it is likely

[19] The Commission's decisions (both before and after the passage of OSRA with its requirement that United States-based NVOCCs be licensed), have noted repeatedly "the fact that foreign-based NVOCCs often ignore Commission proceedings and orders to furnish answers to BOE's discovery requests." *Ever Freight Int'l. Ltd. et al.,* 28 S.R.R. 329, 335 (1998); *see also Refrigerated Container Carriers Pty. Ltd.,* 28 Continued * * * S.R.R. 799 (1999) ("BOE has had to deal with the practical problem of obtaining evidence * * * when respondents are located overseas, do not cooperate, and, indeed, ignore Commission proceedings altogether."); *Kin Bridge Express Inc. and Kin Bridge Express, (U.S.A.) Inc.,* 28 S.R.R. 971 (1999). In *Universal Logistics Forwarding Co., Ltd.,* 29 S.R.R. 36, 37 (2001), a foreign NVOCC refused to respond to discovery requests or the Administrative Law Judge's discovery order. The NVOCC was assessed civil penalties of $1,237,500. 29 S.R.R. 474, 475 (2002). In *Transglobal Forwarding Co., Ltd,* 29 S.R.R. 815, 821 (2002), a foreign NVOCC did not respond to Bureau of Enforcement discovery requests, and then failed to respond fully to an Administrative Law Judge order. The NVOCC was assessed civil penalties of $1,440,000. In *Hudson Shipping (Hong Kong), Ltd. d/b/a Hudson Express Lines,* 29 S.R.R. 702 (2002), a Hong Kong-based NVOCC refused to respond to Bureau of Enforcement discovery requests or an Administrative Law Judge order. Ultimately, the NVOCC was assessed $7.9 million in civil penalties.

[20] Hague Conference on Private International Law, Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters, (Entered into force October 7, 1972), U.N.T.S. 37/1976.

[21] For example, neither Japan, Taiwan nor Brazil is a signatory to the Convention.

[22] Most countries who are party to the Convention (with the exception of the Czech Republic, Israel, the Slovak Republic and the United States), have executed a declaration under Article 23 of the Convention that they will not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents. These declarations are meant to prevent general requests whereby one party seeks to find out what documents are in the possession of another party. The countries who have executed some form of declaration under Article 23 include Argentina, Australia, Bulgaria, China, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, India, Italy, Lithuania, Luxembourg, Mexico, Monaco, Continued * * * Netherlands, Norway, Poland, Portugal, Romania, South Africa, Seychelles, Singapore, Spain, Sri Lanka, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, and Venezuela. Hague Conference on Private International Law (2011) available at *http://www.hcch.net/index_en.php?act=conventions.status &cid=82.*

only the bond of the foreign NVOCC would be available to satisfy any civil penalty or reparation awards, not the bond of the United States-based company acting in an agency capacity.

Commission Staff has raised concerns that the difficulties facing the Commission in compelling production of pertinent documentation and, what may be the inability of a private litigant to obtain documentation, could reduce the Commission's ability to protect the shipping public. At this time, Commissioners hold differing views on the concerns the Staff has raised, and on the relevance and weight those concerns should be given in the Commission's decision whether or not to extend the exemption to foreign unlicensed NVOCCs. Accordingly, the Commission will move forward with the current rule as proposed for licensed NVOCCs, but as noted above, will commence proceedings to obtain and consider additional public comment on potential modifications to the final rule, including possible extension of the exemption to include foreign unlicensed NVOCCs. The record in this proceeding will be incorporated into the new Commission proceeding.

V. Memorialization of NRAs and Recordkeeping Requirements

Several commenters asked for clarification as to whether an NRA could consist of an electronic communication such as an e-mail or a facsimile with one commenter arguing that both methods of communication are internationally acceptable. It is the Commission's view that both may be satisfactory forms of NRA memorialization.[23] UPS objected to the requirement of Proposed Section 532.7(a) to retain associated records, and argued the regulation should require only the retention of those specific documents constituting the contract between the NVOCC and shipper and any document necessary to interpret and enforce the contract. The Commission notes that the wording in Proposed Section 532.7(a) is similar to that contained in the recordkeeping requirements for NSAs at 46 CFR 530.15(a) and believes the requirement that NVOCCs maintain original NRAs and associated records is appropriate. RateWave Tariff Services, Inc. sought guidance on what the Commission means in Proposed Section 532.7(a) by "associated records," and recommended that the Commission provide a list of possible documents. Given the variety of documents which may be utilized by NVOCCs, it is impossible to provide a comprehensive list of documents and therefore, the Commission declines to do so.

UPS argued that the required retention period for documentation should be shortened to three years. The requirement to maintain documentation for five years is, however, consistent with the statute of limitations for violations of the Shipping Act found at 46 U.S.C. 41109(e). Therefore, the Commission believes it is necessary that documentation be available for five years. UPS also requested that the Commission clarify that the requirements of 46 CFR 515.33 do not apply to NRAs. That provision contains detailed requirements regarding the retention of financial data and shipment records by ocean freight forwarders. Since the requirements of 46 CFR 515.33 apply only to freight forwarders, they would not apply to any NVOCC.

Panalpina, Inc. recommended against a requirement for centralized record keeping and urged the Commission to model the NRA recordkeeping requirements on 46 CFR 515.33. Another commenter, Ms. Zack-Olson, argued that, for ease of access to documents by the Commission, the documents should be stored both in the shipping file and at a remote location such as a third-party Web site. Yet another commenter, Mr. Levy, also suggested that NRAs be filed with the Commission at no cost, arguing this would lead to better uniformity and access. The Commission declines to adopt these suggestions. Each NVOCC appears to be best able to determine the most suitable, efficient way for it to ensure compliance with the documentation, retention and access requirements of the Commission's regulations.

RateWave Tariff Services, Inc. requested that the Commission clarify when the five-year period for retaining NRAs and associated documents begins. CASA suggested the 5-year record keeping period be measured commencing from the date upon which the last shipment covered by an NRA is received by the NVOCC or its agent (including the originating carrier in the case of an NRA rate for through transportation). As discussed above, an NRA may cover a period of time and involve multiple shipments. In order to ensure availability of documentation, the Commission has determined that the 5-year record keeping period should commence from the completion date of performance of the NRA by an NVOCC, rather than the date when the initial shipment is received by the carrier or its agent. Proposed Section 532.7(a) is modified accordingly.

Mr. Levy recommended changing the wording of Proposed Section 532.7(b) to be consistent with the NSA regulations at 46 CFR 531.12(a), which state that records must be readily available and usable to the Commission. The Commission has modified Proposed Section 532.7(b) slightly in accord with this suggestion. Several commenters suggested that the Commission should specify that all NRA records be in English or contain a certified English translation.[24] While it may not be necessary to require that the documentation for all NRA shipments be in English, Proposed Section 532.7(b) is modified to include a requirement that any records produced in response to a Commission request must be in English or accompanied by a certified English translation.

Distribution Publications, Inc. asserted that, under Proposed Section 532.2 (Scope and Applicability), NVOCCs who satisfy the requirements of the proposed regulations are exempt from 46 CFR 520.6. The Commission notes that Proposed Section 532.2 exempts NVOCCs solely from the requirements of 46 CFR 520.6(e), which relates to rates, and not its other requirements.[25] Dart Maritime Services, Inc. expressed a concern that data may cease to become available if the NPR is adopted without the continued requirements of 46 CFR 520.10(a). The Commission notes that an NVOCC's rules tariff will continue to be subject to the history requirements of 46 CFR 520.10(a) and NRAs will be subject to these requirements. Therefore, all documentation should be covered and consistent as to recordkeeping.

RateWave Tariff Services, Inc. expressed concerns with the burden if

[23] For example, the International Chamber of Commerce *ICC eTerms 2004* provides a framework so that parties can agree to contract electronically. International Chamber of Commerce (2011), available at *http://iccwbo.org/policy/law/id3668/index.html*. Similarly, the Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation (eUCP), a supplement to the Uniform Customs and Practice for Documentary Credits (2007 Revision ICC Publication No. 600) (UCP) exists to accommodate presentation of electronic records alone or in combination with paper documents. The E-Sign Act of 2000, with some exceptions, prohibits the denial of legal effect, validity, or enforcement of a document solely because it is in electronic form. 15 U.S.C. 7001 *et seq.*

[24] This suggestion is similar to the requirement in 46 CFR 502.7 that documents written in a foreign language other than English, filed with the Commission or offered in evidence in any proceeding before the Commission, be filed or offered in the language in which it is written and shall be accompanied by an English translation duly verified under oath to be an accurate translation.

[25] The other requirements of 46 CFR 520.6 generally address search capabilities and retriever selections.

an NVOCC had to recreate an NRA every time anything in the original NRA changes. The Commission notes that an NRA, by definition, is a written and binding arrangement between a shipper and an NVOCC to provide specific transportation service for a stated cargo quantity from origin to destination and therefore, an NVOCC must enter into a new NRA for each specific transportation service and cargo quantity. An NVOCC may use a form agreement for an NRA and, in as much as an NRA may not contain other contractual terms, the requirement to enter into a new NRA for each stated cargo quantity should not be a significant burden.

VI. Access to Rules Tariffs

The NPR provided licensed NVOCCs offering NRAs the option of providing their rules tariff free of charge to the public or providing each prospective shipper with a copy of all the applicable terms set forth in its rules tariff. Upon further review and consideration of the comments received, which generally did not object to providing access to rules tariffs free of charge, Proposed Section 532.4 has been amended to require licensed NVOCCs, as a condition to offering NRAs, to provide their rules tariffs to the public free of charge. UPS expressed concerns that shippers moving cargo in the absence of a tariff rate could shop through an NVOCC's effective NRAs looking for the most advantageous rate. The rule only requires that access to an NVOCC's rules tariff be available to the public and does not require public access to an NVOCC's effective or proposed NRAs.

VII. Terms of an NRA

A number of commenters recommended that Proposed Section 532.5(d) be changed to allow modification of the rate in an NRA at any time, as long as it is clearly stated in writing that the party to whom the request was made agrees to the change. The commenters argued that what was important is that a shipper and consignee agree to the rate and the effective date. The Commission disagrees. While NRAs are defined as "written and binding" arrangements, they function more like tariff rates and, like tariff rates, they may not be amended by the parties once the subject cargo has been received. The Commission believes maintaining the integrity of NRA rates protects both the shipper and the NVOCC. Accordingly, the Commission declines to modify the rule to allow for amendment of an NRA after receipt of the cargo by the carrier or its agent. To address situations where an NRA may cover multiple "shipments," the word "initial" is added to Proposed Section 532.5(e) to clarify that an NRA may not be modified after the time the initial shipment in an NRA is received by the carrier or its agent. RateWave Tariff Services, Inc. questioned whether an NRA may be canceled, (for example, if an NVOCC bases its NRA on the service of a specific VOCC which then changes its service level). By definition, an NRA is a written and binding arrangement between a shipper and an eligible NVOCC and therefore, could only be canceled by operation of law or by agreement of both parties prior to receipt of the cargo.

Several commenters recommended allowing an NRA to have an effective date. The definition of rate contained in the rule is "a price stated for providing a specified level of transportation service for a stated cargo quantity, from origin to destination, *on or after a stated date or within a defined time frame*." Proposed Section 532.3(b) (emphasis added). Accordingly, an NRA may have an effective date or cover a particular period of time.

Dart Maritime Services, Inc. questioned what methods or instruments will properly serve as acceptance by a shipper, given the use of generic e-mail addresses by NVOCC clients, and recommended that in order to have an "agreement" by both parties there must be some level of proof of identity from the authorizing party similar to that required in 46 CFR 531.6(b)(9). The Commission has modified Proposed Section 532.5 accordingly, requiring that an NRA contain the legal name and address of the parties and the names, title and addresses of the representatives of the parties agreeing to the NRA. RateWave Tariff Services, Inc. suggested that the Commission clarify that there is a requirement for a formal acceptance by the shipper before cargo begins moving under the NRA, noting that shippers often decide to use a rate quote before informing the NVOCC of their acceptance of the rate. This practice, they asserted, causes problems under current regulations and could also cause problems under the proposed regulation. While the Commission declines to specify in the rule what form the acceptance should take, as many processes can indicate acceptance, in order for a valid NRA to exist, Proposed Section 532.5(c) requires agreement by both shipper and NVOCC.

Dart Maritime Services, Inc. suggested that Proposed Section 532.5 be amended to include the filing requirements of 46 CFR 531.6(a) and selected requirements for NSA contents contained in 46 CFR 531.6(b) (46 CFR 531.6(b)(1), (2), (3), (6), (8), and (9)). Similarly, RateWave Tariff Services, Inc. provided an 11-point list of suggested items to require for inclusion in an NRA. The Commission has included in Section 532.5(a) the requirement in 46 CFR 531.6(b)(9) that the arrangement be in writing. The other requirements and suggestions are already included or adequately addressed in the rule.

Distribution Publications, Inc. contended that the exemptions in the Proposed Section 532.2 do not include 46 CFR 520.5, Standard Tariff Terminology or its Appendix A, and argued that these standards should also be used in NRAs. The Commission notes that the purpose of the use of Standard Tariff Terminology per 46 CFR 520.5 is to "facilitate retriever efficiency" which would not appear relevant for unfiled, unpublished NRAs.

Although not addressed by the commenters, the Commission wishes to make clear that it did not intend to preclude an eligible NVOCC from entering into an NRA with another NVOCC. Accordingly, the term "NRA shipper" has been added to Proposed Section 532.3—Definitions. An NRA shipper is defined as "a cargo owner, the person for whose account the ocean transportation is provided, the person to whom delivery is to be made, a shippers' association, or an ocean transportation intermediary, as defined in section 3(17)(B) of the Act (46 U.S.C. 40102(16)), that accepts responsibility for payment of all applicable charges under the NRA." Additionally, the definition of NRA in Proposed Section 532.3(a) has been modified to read a written and binding arrangement between an *NRA* shipper and an eligible NVOCC and Proposed Section 532.5(c) is modified to require agreement by both the *NRA* shipper and the NVOCC (emphasis added). This definition is consistent with the Commission's NSA regulations at 46 CFR 531.2.

VIII. NRA Disputes, Dispute Resolution Services and Safe Harbor Provisions

A number of commenters addressed the question of NRA disputes and the Commission's question of what rate should apply in the event of a dispute. CV International opined that the principles of contract law currently manage the relationship between shippers and NVOCCs and the proposed rule appropriately adopts that system. Several commenters argued that, because the NRA is a mutually agreed upon rate tailored to the requirements of both parties, it should take precedence over a tariff rate. Commenters suggested

that the final rule should clarify that, in the event of a discrepancy between the terms set forth in the NRA and the NVOCC rules tariff, the terms of the NRA will govern.

The TIA and NCBFAA pointed out that Section 13(f) of the Act, now codified at 46 U.S.C. 41109(d), makes the "amount billed and agreed upon in writing" between the carrier and the shipper controlling, even if the tariff for whatever reason does not conform to that rate. Both argued that this section answers the question asked in the NPRM as to whether the lower rate should prevail if there is a conflict between the tariff rate and the NRA rate. The Commission agrees with the commenters that, in the event of a dispute, the NRA rate will apply. Also, as with tariffs, to the extent the language of an NVOCC-drafted NRA is found to be unclear, that language is to be interpreted in favor of the shipper.

With regard to disputes, commenters stated that most disputes are quickly resolved commercially between shipper and carrier, particularly when a long-term customer relationship is at stake, and disagreements under NRAs should be resolved like other commercial disputes, i.e., without the need for intervention by the Commission. Similarly, the NCBFAA did not believe there is a need to mandate that parties with NRA disputes bring them to the Commission's Office of Consumer Affairs and Dispute Resolution Services (CADRS), as most disputes are resolved quickly and it is possible that a dispute may not be a potential violation of the Act, leaving the Commission without jurisdiction. The NCBFAA also argued that while parties may elect to use the services of CADRS, it is more appropriate to leave the choice of forum to the parties. The TIA stated that, if a dispute is brought to the Commission because it involves an alleged violation of the Shipping Act, in accordance with Commission regulations which strongly encourage alternative dispute resolution (ADR) procedures, they would not object to continuing such a requirement for complaints involving NRAs.

The Commission concurs that the parties themselves are best able to resolve most disputes, quickly and without recourse to an outside party. Accordingly, the Commission does not impose, as some commenters appear to suggest, a requirement that all disputes be referred to CADRS. The Commission does note, however, that its current regulations, which allow disputes to be brought before the Commission at the discretion of the parties, and which encourage alternative dispute resolution, are equally applicable to NRAs. Some commenters, though, appear to misunderstand CADRS' role in dispute resolution. CADRS provides a variety of ADR services. Some of these services, such as mediation, are ideal in situations where parties have a longstanding, commercial relationship and it is in their interest to continue that relationship. The parties themselves, in consultation with CADRS, decide which process is best for their situation. Ultimately, the parties determine the terms of any resolution; CADRS merely assists them in arriving at agreement. CADRS' role is not limited to disputes involving possible violations of the Shipping Act. Rather, the full panoply of CADRS dispute resolution procedures, formal and informal, are available to assist the parties to resolve any dispute involving liner ocean transport, even when a Shipping Act violation is not involved.

The Commission requested comments as to which elements should be required to qualify the NRA for a "safe harbor" status that would afford a presumption that the corresponding shipment is not subject to the tariff rate publication requirement. In response, the NIT League stated they supported the incorporation of a "safe harbor" provision, noting that shippers may already be entitled to protection pursuant to 46 U.S.C. 41109(d), while acknowledging the possibility that the Commission could determine that an NRA is defective prior to the issuance of an invoice for a particular shipment. The TIA, on the other hand, argued it is unnecessary in their view to prescribe a "safe harbor" for the form and content of NRAs as NVOCCs need flexibility. In light of the comments, the Commission declines to incorporate a "safe harbor" provision in the final rule. The Commission intends that the parties should have flexibility in tailoring the NRA to their specific situation.

IX. Extending the Exemption to Sections 10(b)(4) and 10(b)(8), 46 U.S.C. 41104(4) and (8)

The Commission also sought public comment in the NPR as to whether the final rule should exempt NVOCCs entering into NRAs from the prohibitions contained in Sections 10(b)(4) and 10(b)(8). Section 10(b)(4), 46 U.S.C. 41104(4), prohibits a common carrier, for service pursuant to a tariff, from engaging in any unfair or unjustly discriminatory practice in the matter of rates or charges; cargo classifications; cargo space accommodations or other facilities, loading and landing of freight; or adjustment and settlement of claims. Section 10(b)(8), 46 U.S.C. 41104(8), prohibits a common carrier, for service pursuant to a tariff, from giving any undue or unreasonable preference or advantage or imposing any undue or unreasonable prejudice or disadvantage. Most commenters supported extending the exemption to both sections. As justification, some argued that the high level of competition between NVOCCs would make it difficult for them to discriminate and therefore these prohibitions were not necessary for NVOCCs entering into NRAs. Others argued that prohibiting NVOCCs from discriminating or providing preferences in NRAs would be inconsistent with the stated purpose of NRAs and contract-based shipping practices and NVOCCs entering into NRAs will by definition be discriminating.

As a preliminary matter, the Commission Staff point out that cargo moving pursuant to an NRA may properly be interpreted as service pursuant to a tariff; tariff rules will apply, as will the prohibitions contained in Sections 10(b)(4) and 10(b)(8). An NVOCC entering into an NRA is still a common carrier. As discussed above, an NRA is not a service contract or an NSA. An NRA merely replaces the requirement in the Commission's regulations that an NVOCC publish a tariff rate.

Commenters argue that, because an NVOCC may enter into NRAs with different shippers at different rates and will be discriminating, it needs to be exempt from Sections 10(b)(4) and 10(b)(8). Section 10(b)(4) does not prohibit an NVOCC from discriminating by entering into or offering an NRA with different rates to different shippers, but rather prohibits any *unfair or unjustly discriminatory practice* by a common carrier in the matter of rate or charges; cargo classifications; cargo space accommodations or other facilities, loading and landing of freight; or adjustment and settlement of claims. (emphasis added). The Commission Staff is concerned that these provisions apply to more matters than just rate level whereas only the requirement to publish the rate is relieved by this exemption. Similarly, Section 10(b)(8) does not prohibit *all* preferences or advantages but rather prohibits giving any *undue or unreasonable* preference or advantage or imposing any *undue or unreasonable* prejudice or disadvantage. (emphasis added). Neither of these prohibitions prevents an NVOCC from entering into an NRA with different shippers at different rates. The Commission Staff is concerned that, despite entering into an NRA, a shipper may still need the protections offered by the prohibitions contained in these two sections and, therefore, as common

carriers, NVOCCs will still be subject to the prohibitions contained in them. At this time, Commissioners hold differing views on the concerns the Staff raised, and on the relevance and weight those concerns should be given in the Commission's decision. Accordingly, the Commission will move forward with the current rule as proposed, which will not exempt NVOCCs entering into NRAs from the prohibitions contained in section 10(b)(4) and 10(b)(8). However, as noted above, the Commission will commence proceedings to obtain and consider additional comments on potential modifications to the final rule, including whether to exempt NVOCCs entering into NRAs from the prohibitions contained in section 10(b)(4) and 10(b)(8). The record in this proceeding will be incorporated into the new Commission proceeding.

X. Regulatory Flexibility Act

One commenter complained, with regard to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq,* that the Commission's explanation in the NPR was unclear as to whether small business entities meant importers and exporters, the companies who use NVOCCs or the NVOCCs themselves. The commenter further argued that the NPR's statement that the economic impact will be small, seems to contradict the NCBFAA's petition, which claimed that the regulatory cost is huge. The Regulatory Flexibility Act directs agencies to give particular attention to the potential impact of regulation on small businesses and other small entities and requires consideration of regulatory alternatives that are less burdensome to small entities. The Commission's comments on the Regulatory Flexibility Act in its NPR were directed to NVOCCs as the regulated entities affected by the rule. NVOCCs are free to choose whether or not to take advantage of this rulemaking. Therefore, the Commission concludes the economic impact of the rule will be minor and it will not have a significant economic impact on a substantial number of small entities (i.e. NVOCCs). To the extent there is substantial economic impact, it would improve the economic condition of NVOCCs.

VI. Statutory Reviews

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* the Chairman of the Federal Maritime Commission has certified to the Chief Counsel for Advocacy, Small Business Administration, that the Final Rule will not have a significant economic impact on a substantial number of small entities. Although NVOCCs as an industry include small entities, the Final Rule establishes 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 Act when such entities comply with the rules set forth herein and will have a positive impact.

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

In accordance with the Paperwork Reduction Act, 44 U.S.C. 3507, the Commission has submitted estimated burdens of collection of information authorized by this Final Rule to the Office of Management and Budget. The estimated annual burden for the estimated 3,242 annual respondents is $865,343.00. No comments were received on this estimate. 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 3072–0071.

List of Subjects

46 CFR Part 520

Common carrier, Freight, Intermodal transportation, Maritime carrier, Reporting and recordkeeping requirements.

46 CFR Part 532

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

Accordingly, the Federal Maritime Commission amends 46 CFR part 520 and adds 46 CFR Part 532 as follows:

PART 520—CARRIER AUTOMATED TARIFFS

■ 1. The authority for part 520 continues to read as follows:

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

■ 2. In 520.13, add a new section (e) to read as follows:

§ 520.13 Exemptions and exceptions.

* * * * *

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

■ 3. Add part 532 to read as follows:

PART 532—NVOCC NEGOTIATED RATE ARRANGEMENTS

Subpart A—General Provisions

Subpart B—Procedures Related to NVOCC Negotiated Rate Arrangements

Subpart C—Recordkeeping Requirements

Authority: 46 U.S.C. 40103.

Subpart A—General Provisions

§ 532.1 Purpose.

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

§ 532.2 Scope and applicability.

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

(a) The requirement in 46 U.S.C. 40501(a)–(c) that the NVOCC include its rates in a tariff open to public inspection in an automated tariff system;

(b) 46 U.S.C. 40501(d);

(c) 46 U.S.C. 40501(e)

(d) 46 U.S.C. 40503;

(e) the prohibition in 46 U.S.C. 41104(2)(A);

(f) the Commission's corresponding regulation at 46 CFR 520.3(a) that the NVOCC include its rates in a tariff open for public inspection in an automated tariff system; and

(g) the Commission's corresponding regulations at 46 CFR 520.4(a)(4), 520.4(f), 520.6(e), 520.7(c), (d), 520.8(a), 520.12, and 520.14. Any NVOCC failing to maintain its bond or license as set forth above, or who has had its tariff suspended by the Commission, shall not be eligible to invoke this exemption.

§ 532.3 Definitions.

When used in this part,

(a) "NVOCC Negotiated Rate Arrangement" or "NRA" means a written and binding arrangement between an NRA shipper and an eligible NVOCC to provide specific transportation service for a stated cargo quantity, from origin to destination, on and after receipt of the cargo by the carrier or its agent (or the originating carrier in the case of through transportation).

(b) "Rate" means a price stated for providing a specified level of transportation service for a stated cargo quantity, from origin to destination, on and after a stated date or within a defined time frame.

(c) "Rules tariff" means a tariff or the portion of a tariff, as defined by 46 CFR 520.2, containing the terms and conditions governing the charges, classifications, rules, regulations and practices of an NVOCC, but does not include a rate.

(d) "NRA shipper" means a cargo owner, the person for whose account the ocean transportation is provided, the person to whom delivery is to be made, a shippers' association, or an ocean transportation intermediary, as defined in section 3(17)(B) of the Act (46 U.S.C. 40102(16)), that accepts responsibility for payment of all applicable charges under the NRA.

(e) "Affiliate" means two or more entities which are under common ownership or control by reason of being parent and subsidiary or entities associated with, under common control with or otherwise related to each other through common stock ownership or common directors or officers.

Subpart B—Procedures Related to NVOCC Negotiated Rate Arrangements

§ 532.4 NVOCC rules tariff.

Before entering into NRAs under this Part, an NVOCC must provide electronic access to its rules tariffs to the public free of charge.

§ 532.5 Requirements for NVOCC negotiated rate arrangements.

In order to qualify for the exemptions to the general rate publication requirement as set forth in section 532.2, an NRA must:

(a) Be in writing;

(b) contain the legal name and address of the parties and any affiliates; and contain the names, title and addresses of the representatives of the parties agreeing to the NRA;

(c) be agreed to by both NRA shipper and NVOCC, prior to the date on which the cargo is received by the common carrier or its agent (including originating carriers in the case of through transportation);

(d) clearly specify the rate and the shipment or shipments to which such rate will apply; and

(e) may not be modified after the time the initial shipment is received by the carrier or its agent (including originating carriers in the case of through transportation).

§ 532.6 Notices.

(a) An NVOCC wishing to invoke an exemption pursuant to this part must indicate that intention to the Commission and to the public by:

(1) A prominent notice in its rules tariff and bills of lading or equivalent shipping documents; and

(2) By so indicating on its Form FMC–1 on file with the Commission.

Subpart C—Recordkeeping

§ 532.7 Recordkeeping and audit.

(a) An NVOCC invoking an exemption pursuant to this part must maintain original NRAs and all associated records, including written communications, in an organized, readily accessible or retrievable manner for 5 years from the completion date of performance of the NRA by an NVOCC, in a format easily produced to the Commission.

(b) NRAs and all associated records and written communications are subject to inspection and reproduction requests under section 515.31(g) of this chapter. An NVOCC shall produce the requested NRAs and associated records, including written communications, promptly in response to a Commission request. All records produced must be in English or be accompanied by a certified English translation.

(c) Failure to keep or timely produce original NRAs and associated records and written communications will disqualify an NVOCC from the operation of the exemption provided pursuant to this part, regardless of whether it has been invoked by notice as set forth above, and may result in a Commission finding of a violation of 46 U.S.C. 41104(1), 41104(2)(A) or other acts prohibited by the Shipping Act.

§ 532.91 OMB control number issued 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 3072–0071.

By the Commission.

Karen V. Gregory,

Secretary.

[FR Doc. 2011–4599 Filed 3–1–11; 8:45 am]

BILLING CODE 6730–01–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 207

RIN 0750–AG45

Defense Federal Acquisition Regulation Supplement; Preservation of Tooling for Major Defense Acquisition Programs (DFARS Case 2008–D042)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 815 of the National Defense Authorization Act for Fiscal Year 2009. Section 815 addresses the preservation of tooling for major defense acquisition programs.

DATES: *Effective Date:* March 2, 2011.

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, 703–602–1302.

SUPPLEMENTARY INFORMATION:

I. Background

Section 815 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417) impacts the acquisition planning process. Section 815, entitled "Preservation of Tooling for Major Defense Acquisition Programs," mandates the publication of guidance requiring the "preservation and storage of unique tooling associated with the production of hardware for a major defense acquisition program through the end of the service life of the end item associated with such a program." The statute states that the guidance must—

- Require that the milestone decision authority (MDA) approve a plan for the preservation and storage of "such tooling prior to Milestone C approval;"
- Require the MDA to periodically review the plan to ensure that it remains adequate and in the best interest of DoD; and
- Provide a mechanism for the Secretary of Defense to waive the requirement under certain circumstances.

DoD published a proposed rule in the **Federal Register** (75 FR 25159) on May