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FMC Votes to Grant NVOCCs Relief from Current Tariff Publishing Requirements

On February 18, 2010, the Federal Maritime Commission (FMC) voted 3-1 in favor of initiating a rulemaking that would grant licensed Non-Vessel Operating Common Carriers (NVOCCs) an exemption from the current requirements for publishing in tariffs the rates they charge for shipments. Chairman Richard A. Lidinsky, Jr., Commissioner Rebecca F. Dye, and Commissioner Michael A. Khouri voted in favor of granting the exemption, while Commissioner Joseph E. Brennan voted in opposition. The exemption was requested originally in a petition submitted by the National Customs Brokers and Freight Forwarders Association.

If ultimately approved, the final rule will relieve licensed NVOCCs of the requirement to publish and adhere to rates in tariffs. The FMC outlined the following parameters for the exemption:

1. The exemption would be voluntary – i.e., NVOCCs may choose whether to utilize the exemption;
2. The voluntary exemption only applies to **licensed** NVOCCs (foreign-based, unlicensed NVOCCs would not be permitted to utilize the proposed tariff publication relief); and
3. The exemption is limited to rates. An NVOCC that opts in to the exemption must continue to publish a rules tariff that otherwise complies with Section 8(a) of the Shipping Act of 1984.

Importantly, however, the FMC indicated that the rule will include a number of conditions which will apply to NVOCC tariffs, terms and conditions, and rates:

1. NVOCCs would continue to publish standard rules tariffs containing contractual terms and conditions governing shipments. Additionally, notice must be published in a prominent place within the rules tariff that the NVOCC has chosen to operate under the exemption and opt out of publishing tariff rates;
2. NVOCCs would be required to provide those rules to the public free of charge;
3. Rates charged by NVOCCs must be agreed to and memorialized in writing by the date cargo is received for shipment; and
4. NVOCCs must retain documentation of the agreed rate and terms for each shipment for a period of five years, and must make that documentation available promptly to the FMC on request.

Timeline and Next Steps

Following this decision, FMC staff will now prepare a notice of proposed rulemaking, which will likely be completed and published in the Federal Register within weeks. After the publication of the proposed rule, a 30 or 45 day period will follow, during which the FMC will accept comments on the proposed rule. After the comment period expires, FMC staff will review the comments received, confer internally, and prepare a final rule to be issued by the FMC.

Interested parties should consider the exemption, its parameters, and the four conditions identified by the FMC to evaluate how these changes will affect your business, as well as areas in which the contours of the rule might benefit from modification before a final rule is adopted. If any such issues with the proposed rule are identified, consider submitting written comments on the proposed rule after it is published in the Federal Register.

Foreign-based, unlicensed NVOCCs should pay particular attention to the proposed rule and consider whether to submit comments calling on the FMC to provide "tariff reform parity," so that there is no disparity between the different classifications of NVOCCs.

Vessel-Operating Common Carriers (VOCCs) should also examine the proposed rule, with emphasis on whether the FMC should consider revising the service contract rules (if appropriate) to mirror the proposed NVOCC tariff relief rule. Based on the FMC's recent action, private deals between NVOCCs and shippers (including other NVOCCs, acting as shippers) would not need to file the confidential rate, where as service contracts with VOCCs would still be subject to the filing requirements currently in place.

Venable attorneys are prepared to supplement this advisory with further analysis and strategic guidance pertaining to this rulemaking and what it means for your business. For more information, please contact a member of Venable's [International Trade group](#).

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