



FMC Adopts Tariff Exemption for U.S. Licensed NVOCCs

- By David P. Street -

At an open meeting yesterday, the Federal Maritime Commission voted to adopt a limited exemption from tariff filing for NVOCCs. This vote was in response to a petition filed by the National Customs Brokers and Forwarders Association of America (NCBFAA). The exemption adopted by the FMC should allow eligible NVOCCs more flexibility in dealing with shippers and represents a major success in a decades long effort by NVOCCs and the NCBFAA to eliminate the burdens of tariff filing.

The exemption, at least for the next year, will not apply to foreign-based NVOCCs that are only registered with the FMC and do not have NVOCC licenses. Thus, the only NVOCCs eligible to take advantage of the exemption are U.S. based, licensed NVOCCs. The exemption will create a new tool for NVOCCs called a Negotiated Rate Arrangement (“NRA”). When eligible NVOCCs use NRA’s for their rate arrangements with customers, they will not have to file the rates covered by the NRA in their tariffs. Pursuant to this exemption, eligible NVOCCs will be able to negotiate rates with their customers for a shipment or series of shipments. So long as the negotiated rates (which may include accessorial and surcharges) are memorialized in a writing prior to the date the cargo is received by the NVOCC for shipment, they will qualify as NRA’s and will not have to be published in the NVOCC’s tariff. This writing may consist of an exchange of emails and must contain the shipper’s name and address and the name(s) and title(s) of its authorized representative(s) who agree to the rate. NRA’s may be applicable to the shipper’s affiliated companies specifically identified in the NRA and NVOCC to NVOCC NRA’s will be permitted.

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This exemption contains a number of limitations, which are as follows:

- As noted above, foreign based NVOCCs are not eligible at this time for use of NRA's. NRA's may contain only the rates that are agreed; other terms of the parties' agreement (e.g., credit) cannot be included in the NRA, but must be published in the NVOCC's Rules Tariff. As a practical matter, this means that NVOCCs that wish to make distinctions between shippers on non-rate terms will find it easier to use Negotiated Service Arrangements.
- Once agreed to, NRA's cannot be amended during their term.
- While NRA's can include maximum volume levels, they cannot include minimum volume requirements.
- NVOCCs using an NRA must state that fact on the bills of lading issued for NRA shipments.
- NRA rates may not be subject to GRI's published in the NVOCC's tariff.
- All NRA records must be kept by the NVOCC for five years from the date the NRA terminates. When requested by the FMC, NRA records will have to be in English or translated into English via a certified translation.
- NVOCCs will still be required to publish Rules Tariffs and, as part of the exemption, will have to make those Rules Tariffs available to the public free of charge.

During the Commission's meeting to adopt this exemption, it was clear that the most controversial topic was the refusal to extend the exemption to foreign based NVOCCs. The Commissioners clearly understand the sensitivity of this issue and the possibility that foreign governments may retaliate against United States NVOCCs. The Commissioners however and, in particular, Chairman Lidinsky, were unwilling to overrule concerns by the FMC's staff that (1) the FMC has little information or regulatory control over foreign NVOCCs because they do not have to go through the licensing process, and (2) the FMC has traditionally had trouble obtaining documents from foreign countries. The Chairman did indicate at the meeting that the FMC will continue to look at this issue and try to determine if there are ways to address the staff concerns while extending the exemption to foreign based NVOCCs. Commissioner Khouri, supported by Commissioner Dye, made it clear that he is determined to keep working to make sure this exemption is broadened in the future to include all NVOCCs and eliminate some of the current restrictions. In the meantime, there are a number of options for foreign based NVOCCs who wish to take advantage of this exemption now. These include the following:

- If the foreign NVOCC already has offices in the United States, it can get one of those offices licensed as a U.S. based NVOCC eligible to use NRA's.
- Foreign NVOCCs can establish an office in the United States and have that office obtain a license.
- Foreign NVOCCs can purchase a U.S. licensed NVOCC

Please contact me if you have any questions or comments about this exemption.

