



46 CFR Part 520

[Docket No. FMC-2022-0067]

RIN 3072-AC86

Carrier Automated Tariffs

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission (Commission) amends its regulations governing Carrier Automated Tariffs. The final rule removes the option for common carriers to charge a fee to access their tariff; allow non-vessel-operating common carriers (NVOCCs) to cross-reference certain aspects of other carriers' terms in their tariffs; clarify the ability for NVOCCs to reflect increases in certain charges passed-through by other entities without notice; revise regulations to specify permissible relationships between NVOCCs for the co-loading of cargo, and makes other miscellaneous updates and clarifications to the regulation, including removing outdated citations.

DATES: This final rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may use the Federal eRulemaking Portal at www.regulations.gov to view background documents or comments received in Docket No. FMC-2022-0067.

FOR FURTHER INFORMATION CONTACT: Amy Strauss, Acting Secretary; Phone: (202) 523-5725; Email: secretary@fmc.gov.

SUPPLEMENTARY INFORMATION:

I. Discussion

On May 10, 2022, the Commission issued a Notice of Proposed Rulemaking (NPRM) seeking comment on proposed changes to Commission regulations in 46 CFR

part 520.¹ In response to the NPRM, the Commission received ten sets of comments from interested parties: The National Customs Brokers and Forwarders Association of America, Inc (NCBFAA); New York New Jersey Foreign Freight Forwarders & Brokers Association, Inc. (NYNJFFF&BA); Charles E. Schmidt; Kintetsu World Express (U.S.A.), Inc., an NVOCC; Yang Ming Marine Transport Corp., a vessel-operating common carrier (VOCC); Mohawk Global, an NVOCC; UWL, an NVOCC; C.H. Powell, an NVOCC; APL Logistics, Ltd., an NVOCC; and Ascent Global Logistics, an NVOCC. These comments are addressed in the discussion that follows.

A. Tariff Access Fees

With one exception, commenters that addressed the proposed rule requiring common carriers to provide free access to their tariff systems supported the rule. Kintetsu World Express favored continuing to allow a fee to be assessed, asserting that tariff publishers that currently charge an access fee to the public will likely attempt to recover lost revenue from their common carrier customer if they can no longer charge a third party for tariff access. Kintetsu at 2. *See also* NYNJFFF&BA at 2 (noting that carriers who use third party providers will most likely assess a fee to cover cost of access to their service). The Commission considered Kintetsu's concern that the proposed rule may lead to higher fees from its tariff publisher because the tariff publisher can no longer charge a third party for access. However, the Commission is not persuaded by Kintetsu's concern. Carriers have been required to publish tariffs for decades. *See* 46 U.S.C. 40501. Some carriers choose to publish these tariffs on their own website, and some choose to use a tariff publisher – and in Kintetsu's case, it decided that the best way to comply with the

¹ Notice of Proposed Rulemaking – Carrier Automated Tariffs, 87 FR 27971 (May 10, 2022). Prior to the publication of the May 2022 proposal, the Commission published an Advance Notice of Proposed Rulemaking seeking input on how to revise its tariff regulations to help address the inconsistent manner in which carriers were interpreting and applying these regulations. *See* Advance Notice of Proposed Rulemaking (ANPRM) – Carrier Automated Tariffs, 86 FR 18240 (April 8, 2021).

Commission's requirements was to pay a tariff publisher.² Kintetsu did not provide information about what it would cost to publish the tariffs on Kintetsu's own website³ or a comparison of how much more Kintetsu would pay a tariff publisher if the tariff publisher could not charge a fee for access. Further, Kintetsu's concerns were not supported by similar concerns from NCBFAA or NYNJFFF&BA, entities that represent many similar NVOCCs. Based on this record, the Commission is not persuaded by Kintetsu's concern and maintains its position that it is reasonable to not charge a fee for tariff access. The Commission continues to believe that cost barriers to public tariff access are contrary to the goal of ensuring the availability of shipping information, and advances in technology since the regulation was implemented over two decades ago mean that free tariff access is now reasonable. Accordingly, the Commission amends its regulations to remove the option to charge a fee for tariff access currently found at 46 CFR 520.9(e)(3).

B. Cross-referencing tariffs

With respect to its proposal regarding the cross-referencing of tariffs that would be part of 46 CFR 520.7(a)(3)(iv), commenters NYNJFFF&BA; NCBFAA; C.H. Powell; Ascent Global Logistics; and Mohawk Global expressed concern with allowing an NVOCC to cross-reference an ocean common carrier tariff in its own tariff for the purpose of charging its shipper the ocean common carrier's surcharges and assessorial charges. These concerns centered on two main issues. First, the asserted burden placed on the NVOCC to list in its tariff all named VOCC surcharges and provide links to those VOCC tariffs would be too great. Second, NVOCC commenters expressed an

² It appears that the benefits of using a tariff publisher go beyond simply providing a website for publication as tariff publishers advertise expert help in complying with Commission regulations and cost efficiency from outsourcing for that expertise. Thus, the decision to use a tariff publisher may include more considerations than simply the cheapest way to post tariffs publicly.

³ Kintetsu does have a public website that appears to be maintained and up to date, as there are articles from August 2023. *See* <https://www.kwe.com/> (last accessed August 16, 2023).

unwillingness to disclose to their shippers the identities of the VOCCs they use. *See* NYNJFF&BA at 2-3; NCBFAA at 2-3; C.H. Powell at 2; Ascent Global Logistics at 1; and Mohawk Global at 4-5.

The Commission addresses these comments by clarifying that under the new § 520.7(a)(3)(iv), when an NVOCC cross-references a VOCC tariff, the requirement to list the charges which may be passed through is satisfied by publishing in the NVOCC tariff a list of names which may encompass a category of charges — for example, a “Bunker Surcharge” may include Low Sulphur Fuel Charges and Fuel Recovery Surcharges. In addition, the NVOCC tariff need only reference that these charges may be assessed at cost per the underlying VOCC’s governing tariff, rather than cite a specific VOCC name and/or tariff. To ensure the clarity of the filing requirement, the Commission has revised the wording of the new rule to state that categories of charges may be listed in the NVOCC’s tariff.

The Commission also notes the comment by NYNJFF&BA that shipper transparency would be served by including a statement on a Negotiated Rate Arrangement (NRA) quotation, or in the NVOCC Rules tariff that verification of pass-through charges can be provided upon request. NYNJFF&BA at 3. While not in the scope of this rulemaking, the Commission nonetheless encourages NVOCCs to implement this practice as a means of providing confirmation of the type and amount of charge(s) passed through for payment by the shipper.

C. Charges passed through to NVOCCs by VOCCs

A comment received by NYNJFF&BA with respect to charges passed through by NVOCCs to their shipper after being imposed on a VOCC by an outside entity reflects the same concern in reference to the name and type of VOCC-originated charges passed through to NVOCCs discussed in Section B. NYNJFF&BA at 3-4. The Commission

therefore is making the same revision to the new rule at § 520.7(h) to state that categories of charges may be listed.

1. General Rate Increases

As discussed in the NPRM, the Commission has historically classified General Rate Increases (GRIs) as a component of the base ocean freight assessed by the common carrier, not a charge or surcharge, and therefore would not be subject to an exemption under § 520.7(a)(3)(iv) as proposed in the NPRM. In its comments, the NYNJFF&BA opposed the exclusion of GRIs as a charge that may be passed through by an NVOCC. NYNJFF&BA at 4-5. The NYNJFF&BA asserted that VOCC GRIs should be allowed to be passed through in the same way as other “rapidly changing and proliferating VOCC charges.” NYNJFF&BA also notes that current regulations governing NRAs allow an NVOCC to apply GRIs in the same way as surcharges and accessorial charges. NYNJFF&BA at 4. Comments from the NYNJFF&BA and NCBFAA added that VOCC GRIs are often announced with the required 30-day notice but are reduced or delayed just prior to the effective date. NYNJFF&BA at 4-5; NCBFAA ANPRM Comment at 6. These comments also indicated that, should the NVOCC publish an increase in line with the VOCC’s published GRI, the underlying shipper may be subject to the increase, regardless of a last-minute reduction or delay in effective date by the VOCC, if the NVOCC does not file a coinciding reduction or delay in its own tariff. Based on comments received and the current regulation at § 532.5(d)(2), which allows VOCC GRIs to apply to an NRA, the Commission is revising its regulation at § 520.7(a)(3)(iv) to specify that an NVOCC has the option to pass through a VOCC GRI to its shipper.

2. Fees Connected to Pass-Through Charges

In its NPRM, the Commission stated that regulations that would allow an NVOCC to pass through increases in certain charges without advance notice under specified conditions are not intended to allow a markup of charges above what the third

party has billed. Several commenters asserted that NVOCCs should be allowed to charge a “nominal” fee to recover the cost of the outlay of charges assessed by an outside entity. *See* NCBFAA at 4; UWL at 2; C.H. Powell at 2; Ascent Global Logistics at 1; Mohawk Global at 6; and NYNJFF&BA at 6. The Commission agrees that NVOCCs are entitled to receive compensation for services provided, including a fee for the advance payment of charges on behalf of its customer. However, the Commission’s intent in this regard is to ensure it is clear what service charges are being charged to the shipper, rather than allowing the NVOCC to simply mark up the charges assessed by the VOCC. Therefore, the regulation at § 520.7(a)(3)(iv) has been revised to specify that fees from the NVOCC should be separate and distinguished from charges that are passed through from the VOCC without markup, and named for the service provided (*e.g.*, an “advance payment charge”).

D. Co-Loaded Cargo

The Commission received comments on its proposal to revise the definition of “co-loading” to limit this term to the act of combining of less-than-container-loads (LCL) of cargo. *See generally* APL Logistics at 1-2; Ascent Global at 2; C.H. Powell at 3; Kintetsu at 1; Mohawk Global at 6-8; NCBFAA at 6; NYNJFF&BA at 7-12; and UWL at 3. While some commenters suggested that limiting the definition of co-loading to LCL would prevent full container load (FCL) co-loading, (*see, e.g.*, APL Logistics at 1 and C.H. Powell at 3), this was not the Commission’s intent. Most commenters largely favored adding a definition for FCL co-loading, including those supporting the laying out of a “set of expectations” for both LCL and FCL co-loading situations. *See generally* APL Logistics at 1-2; Ascent Global at 2; C.H. Powell at 3; Kintetsu at 1; Mohawk Global at 6-8; NCBFAA NPRM Comment at 6; and UWL at 3.

The Commission recognizes that the term co-loading has come to encompass both 1) the combining of LCL cargo by two or more NVOCCs in a container, and 2) the re-

selling of space for FCL cargo by one NVOCC to another NVOCC. In proposing to limit the regulatory definition of co-loading to LCL, the Commission did not intend to prevent arrangements between NVOCCs involving FCL. Instead, the purpose was to accurately describe co-loading in its traditional meaning as the physical combining of cargo in a single shipping container. The Commission could then differentiate regulations that apply to NVOCC co-loading arrangements that involve LCL cargo from those that involve FCL cargo. The Commission has ultimately decided that the definition of co-loading will remain unchanged, and the differentiations between FCL and LCL co-loaded cargo will instead be made through the revision of the current co-loading regulations at section 520.11(c), which limit the co-loading of FCL to shipper-to-carrier relationships only. The Commission also proposed to require that an NVOCC that tenders cargo to another NVOCC must annotate each applicable bill of lading with the identity of any other NVOCC to which the shipment was tendered. This proposal received unanimous opposition that fell into two categories. First, tendering NVOCCs opposed disclosing to their shipper clients the names of the other NVOCCs with whom they work out of concern for the impact on their competitive commercial interests. *See* Yang Ming at 1; Mohawk at 9-10; Ascent at 2; NYNJFF&BA at 9; NCBFAA at 7; APL Logistics at 2-3; and Kintetsu at 1. Second, NVOCCs do not necessarily know the names of all NVOCCs to which the shipment has been passed before it reaches a final master NVOCC that contracts with the VOCC for ocean transport. *See* Mohawk at 10; Ascent at 2; and NYNJFF&BA at 9. Commenters added that annotation will result in a delay of documentation release as annotation would need to be input manually. *See* Yang Ming at 1 and NCBFAA at 7. APL Logistics and Mohawk Global also commented that they were unaware of any circumstance where annotation would have provided a benefit to a beneficiary cargo owner (BCO). *See* APL Logistics at 3 and Mohawk Global at 12. Overall, the commenters asserted that any benefit to the BCO gained from annotation is

outweighed by the burden it places on the NVOCC. *See generally* APL Logistics at 3 and Mohawk Global at 12. *See also* NYNJFFF&BA at 9; NCBFAA at 6; and C.H. Powell at 4.

The Commission notes that the requirement to annotate already applies to co-loaded cargo pursuant to § 520.11(c)(2). The final rule does not change Commission regulations in this regard. However, regulations that govern the co-loading of cargo will be augmented to clarify the types of relationships that are allowable for the co-loading of cargo among NVOCCs. Specifically, current regulations make reference to carrier-to-carrier relationships and shipper-to-carrier relationships between NVOCCs in a co-loading situation. These relationships establish the responsibility of each NVOCC as they relate to each other and to the beneficial cargo owner. In a shipper-to-carrier relationship, a master NVOCC receives cargo from a tendering NVOCC and acts as carrier to the tendering NVOCC in issuing its house bill of lading and assuming legal responsibility as carrier for the cargo. The revisions to new paragraph 520.11(c)(2) clarify that this arrangement may be used for the shipment of either LCL or FCL cargo. In a carrier-to-carrier relationship, the NVOCCs enter into an agreement which establishes the terms under which the NVOCCs will share container space for consolidated cargo. Each NVOCC will issue its house bill of lading for its portion of the cargo and act as carrier to its own customer. The revisions to new paragraph 520.11(c)(2) clarify that carrier-to-carrier arrangements will limit this type of arrangement to LCL cargo only.

E. Other Proposed Changes to Part 520

In addition to these changes, the Commission also made a number of other changes to 46 CFR 520.2-520.14 as detailed below.

1. The Commission is updating citations throughout Part 520.

The Commission is removing legacy parallel citations that provided the public with useful information after the codification of the Commission's authorities in Title 46

of the United States Code. The Commission is also deleting the definition of “Act” from the definition section. These citations and definition are no longer necessary or accurate, and the Commission is removing them.

2. Clarifying Revisions

The Commission revises several provisions within part 520 to clarify when the regulations are expressing a requirement or obligation. Among these changes include replacing the term “shall” with the term “must” to clearly indicate that certain acts are required and to identify regulatory obligations. Similarly, the Commission also replaces certain usages of the term “may” with the term “must” to identify requirements or obligations. In addition, the Commission made other clarifying edits.

3. § 520.2 Definitions

To clarify the definitions in § 520.2, the Commission: adds clarifying language to the definition of “bulk cargo” to explain that bulk “containerized cargo tendered by the shipper” is subject to mark and count and is, therefore, subject to the requirements of this part; amends the definition of combination rate to spell out the abbreviation for Tariff Rate Item; amends the definition of commodity description to require the description to be identified by a specific number; amends the definition of “harmonized system” to remove an outdated reference to the U.S. Customs Service; amends the definition of “publisher” to mean a person rather than an organization, and specify that a publisher is authorized to act by a common carrier; amends the definition of “retrieval” to remove outdated references to dial-up telecommunications and a network link; amends the definition of “rules” to clarify that a common carrier or a conference of common carriers set the tariff terms and conditions; amends the definition of “shipper” to specify that ocean transportation refers to the transportation of cargo, to specify that the person to whom delivery is to be made may be a consignee, and to include the meaning of shippers’ association; and amends the definition of “through transportation” to make it

consistent with the Shipping Act's revised definition. The Commission also adds definitions for "destination scope" and "inland division" to its regulations. Finally, the Commission removes as unnecessary the definitions of "joint rates," "commodity description number," "local rates," "point of rest," and "shippers' association."

4. § 520.3 Publication Responsibilities

Pursuant to § 520.3(d), the Commission requires that all common carriers publish a tariff in an automated tariff system and provide the location of that tariff to the Commission prior to the commencement of common carrier service. However, some NVOCCs will publish a tariff upon initially being licensed, but later allow the tariff to lapse and fall out of compliance. The Commission stated its belief that adding notice in § 520.3 of the consequences which already exist pursuant to 46 CFR 515.1 and 515.14 for failure to maintain a tariff could improve tariff compliance. 87 FR 27971, 27974 (May 10, 2021). To this end, the Commission adds a provision to § 520.3 to specify that failing to maintain a tariff will result in the revocation of an NVOCC's license or suspension of a foreign-based unlicensed NVOCC's registration. In addition, the Commission: changes the term used for the person a common carrier may use to meet their publication requirements from "agent" to "publisher"; includes the common carrier's email address in the list of items provided to the Commission prior to commencement of common carrier service pursuant to a published tariff; and defines the time period allowed for the common carrier to provide changes to its Form FMC-1 to the Commission as within 30 calendar days.

The Commission received one comment regarding this proposal. That comment stated that the proposed rule seemed excessively harsh, since tariffs are quite complex and to subject a carrier to the penalty of a loss of operating authority for an inadvertent updating error would be excessive. *See* NYNJFF&BA at 13. Further, the commenter asserted that the industry would be better served if the Commission issued a warning to

those NVOCCs whose tariffs are found to be non-compliant and provide an opportunity to remediate any failing, and that the goal is to bring the industry into compliance. *See* NYNJFF&BA at 13. The Commission does not accept the commenter's premise and notes that while a carrier may be afforded the opportunity to remedy a particular situation depending on the circumstances at hand, the inclusion of this provision is intended to convey the seriousness of the consequences that may follow should the common carrier fail to take action in response to the Commission's efforts to induce compliance. Accordingly, the Commission is not persuaded to revise the language in the proposed rule.

The Commission also received general comments regarding the requirement to publish and maintain a tariff. These comments argued that tariffs are no longer relevant in light of the prevalence of privately negotiated agreements, and that tariffs are complex and difficult to navigate and do not provide transparency of rates and surcharges. *See* Mohawk Global at 1-2; NYNJFF&BA at 1-2. The Commission notes that the Shipping Act requires the publication of tariffs, and tariff publication is still necessary to protect the shipping public and ensure compliance with the Shipping Act.

5. § 520.4 Tariff Contents

The Commission revises § 520.4(a)(3) to clarify that the ocean transportation intermediary that may receive compensation paid by a common carrier or conference is an ocean freight forwarder as defined by 46 U.S.C. 40102(19). In addition, the Commission uses plain language to reword the regulation at § 520.4(a)(4) requiring that a tariff state each charge separately; revises § 520.4(a)(5) to state that sample copies of bills of lading must be legible; and revises § 520.4(a)(8) to state that commodity tariffs must contain a retrievable commodity index.

The Commission also deletes § 520.4(e)(1), which describes voluntary coding for commodity descriptions. To streamline the rule and remove a non-mandatory regulation,

the Commission deletes paragraph (e)(1). The Commission notes that, even with the adoption of this change to section 520.4, tariff publishers are still not required to use any numeric code to identify commodities and the Commission still encourages the use of the Harmonized Tariff Schedule of the United States for both the commodity coding and associated terminology (definitions). In addition, the regulations still address the use of numeric codes to identify commodities.

The Commission also makes a variety of other changes to sections 520.5 through 520.14. These changes are listed below:

- Section 520.5 (standard tariff terminology): updates the source for geographic names listed in tariffs.

- Section 520.6 (retrieval of information): revises the search capability requirement for the retrieval of tariff information to specify that a search for a commodity description must result in a commodity or retrievable commodity index list.

- Section 520.7 (tariff limitations): clarifies the date on which a new conference member's participation in the conference tariff becomes effective; specifies that the minimum time allowed to file an overage claim with a common carrier applies to claims filed by a shipper; removes a provision stipulating the methods to be used to compute the weight of green salted hides, in light of requirements mandated by the International Maritime Organization; adds a new paragraph (h) to § 520.7 to specify that NVOCCs may pass through certain charges received from ocean common carriers that are not under the control of the ocean common carrier or conferences; and clarifies that the charges must be clearly listed in the NVOCC's tariffs and not marked up above cost.

- Section 520.8 (effective dates): replaces the term "destination grouping" with "destination scope" in § 520.8(b)(3) to be consistent with other references to "destination scope" used in 46 CFR part 520.

-- Section 520.9 (access to tariffs): updates this section to remove references to obsolete technologies.

-- Section 520.10 (integrity of tariffs): revises the requirement to maintain historical tariff data in § 520.10(a) by defining the time period that data must be made available to the Commission as generally being within 45 days of a request and making certain grammatical corrections to the requirement that common carriers provide tariff access to the Commission.

-- Section 520.11 (non-vessel-operating common carriers): removes as unnecessary the requirement that an NVOCC must note in its tariff that it does not tender cargo for co-loading; removes as unnecessary the requirement in 520.11(c) that an NVOCC may not offer special co-loading rates for the exclusive use of other NVOCCs, since published tariff rates are available to all shippers.

-- Section 520.12 (time/volume rates): clarifies the time/volume rate requirements and that common carriers or conferences may cancel time/volume rates when no shipper accepts these rates within 30 days after the rates are published.

-- Section 520.13 (exemptions and exceptions): updates the governing rules of this part and the requirements for Department of Defense cargo, updating references to a military component.

-- Section 520.14 (special permission): specifies the documents required when requesting confidential treatment of an application for special permission and updates the process for submission and payment of applications for special permission.

Except for those comments already noted in the preceding paragraphs in this section (Section E), the Commission received no comments opposing these proposed changes, and one comment supporting the proposed changes. *See Mohawk Global* at 12. The Commission therefore adopts these changes in this final rule.

II. Rulemaking Analyses and Notices

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601-612, provides that whenever an agency is required to publish a notice of proposed rulemaking under the Administrative Procedure Act, 5 U.S.C. 553, the agency must prepare and make available for public comment an initial regulatory flexibility analysis (IRFA) describing the impact of the proposed rule on small entities. When an agency promulgates a final rule after being required to publish a notice of proposed rulemaking, the agency must prepare and make available to the public the final regulatory flexibility analysis (FRFA) or its summary. The IRFA and FRFA requirements, however, do not apply if the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. To avoid duplicative or unnecessary analyses, the agency must publish such certification either at the time of publication of a notice of proposed rulemaking or at the time of publication of the final rule. 5 U.S.C. 605. The Commission published such certification at the time of the publication of the notice of proposed rulemaking, along with a statement providing the factual basis for the certification. 87 FR at 27975-27976.

Congressional Review Act

The rule is not a “major rule” as defined by the Congressional Review Act, codified at 5 U.S.C. 801 *et seq.* The rule will not result in: (1) an annual effect on the economy of \$100,000,000 or more; (2) a major increase in costs or prices; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign based companies. 5 U.S.C. 804(2).

National Environmental Policy Act

The National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321-4347) requires Federal agencies to consider the environmental impacts of proposed major Federal actions significantly affecting the quality of the human environment, as well as

the impacts of alternatives to the proposed action. When a Federal agency prepares an environmental assessment, the NEPA implementing regulation requires it to “include brief discussions of the need for the proposal, of alternatives [. . .], of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.” 40 CFR 1508.9(b). After an environmental assessment, the Commission issued a Finding of No Significant Impact (FONSI) which became final 10 days after publication of the NPRM as the Commission received no petition for review. The FONSI and environmental assessment are available for inspection on the docket at www.regulations.gov.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521) (PRA) requires an agency to seek and receive approval from the Office of Management and Budget (OMB) before collecting information from the public. 44 U.S.C. 3507. The agency must submit collections of information in proposed rules to OMB in conjunction with the publication of the notice of proposed rulemaking. 5 CFR 1320.11.

The information collection requirements in part 520 are currently authorized under OMB Control Number 3072-0064. In compliance with the PRA, the Commission submitted the proposed revised information collection to the OMB. Notice of the revised information collections was published in the Federal Register and public comments were invited. *See* 87 FR 27971 (May 10, 2021). No comments specifically addressed the revised information collection in part 520. The burden calculations were updated as part of the evaluation of the final rule. While the estimated burden to the public for each component remained the same, the total burden hours increased. The burden hour increase is due to an increase in the number of entities, particularly NVOCCs, entering the industry. In the NPRM the Commission estimated the total person-hour burden at

2,509 person-hours. In this Final Rule, the total person-hour burden is estimated at 2,931 person-hours.

Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards in E.O. 12988 titled, “Civil Justice Reform,” to minimize litigation, eliminate ambiguity, and reduce burden. Section 3(b) of E.O. 12988 requires agencies to make every reasonable effort to ensure that each new regulation: (1) clearly specifies the preemptive effect; (2) clearly specifies the effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct, while promoting simplification and burden reduction; (4) clearly specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. This document is consistent with that requirement.

Regulation Identifier Number

The Commission assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda). The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda, available at <http://www.reginfo.gov/public/do/eAgendaMain>.

List of Subjects in 46 CFR Part 520

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

For the reasons set forth in the preamble, the Federal Maritime Commission amends 46 CFR part 520 as follows:

PART 520-CARRIER AUTOMATED TARIFFS

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

AUTHORITY: 5 U.S.C. 553; 46 U.S.C. 40101-40102, 40501-40503, 40701-40706, 41101-41109, 46105.

2. Amend § 520.1 by revising the last sentence of paragraph (a) and paragraphs (b)(2) through (4) to read as follows:

§ 520.1 Scope and purpose.

(a) * * * They implement the tariff publication requirements of 46 U.S.C. 40501–40503.

(b) * * *

(2) Carriers and conferences to meet their publication requirements pursuant to 46 U.S.C. 40501–40503;

(3) The Commission to ensure that carrier tariff publications are accurate and accessible and to protect the public from violations by carriers of 46 U.S.C. 41101–41106; and

(4) The Commission to review and monitor the activities of controlled carriers pursuant to 46 U.S.C. 40701–40706.

3. Amend § 520.2 by:

- a. Removing the word “shall” from the introductory text;
- b. Removing the definition of “Act”;
- c. Revising the definitions of “Bulk cargo”, “Combination rate”, and “Commodity description”;
- d. Removing the definition of “Commodity description number”;
- e. Revising introductory text of the definition of “Controlled carrier”;
- f. Adding in alphabetical order a definition for “Destination scope”;
- g. Revising the definitions of “Foreign commerce” and “Harmonized System”;
- h. Adding in alphabetical order a definition for “Inland division”;
- i. Removing the definitions of “Joint rates” and “Local rates”;

- j. Revising the definition of “Location group,”
- k. Removing the definition of “Point of rest”;
- l. Revising the definitions of “Publisher,” “Retrieval”, “Rules”, and “Shipper”;
- m. Removing definition of “Shippers’ association”;
- n. Revising the definitions of “Tariff number” and “Tariff rate item”;
- o. Adding in alphabetical order a definition for “Through date”;
- p. Revising the definition of “Through transportation”; and
- q. Removing the definition of “Thru date”.

The revisions and additions read as follows.:

§ 520.2 Definitions.

* * * * *

Bulk cargo means cargo that is loaded and carried in bulk without mark or count in a loose unpackaged form, having homogeneous characteristics. Bulk containerized cargo tendered by the shipper is subject to mark and count and is, therefore, subject to the requirements of this part.

* * * * *

Combination rate means a rate for a shipment moving under intermodal transportation which is computed by the addition of a tariff rate item (“TRI”) and an inland rate applicable from/to inland points not covered by the TRI.

* * * * *

Commodity description means a comprehensive description of a commodity listed in a tariff, including a brief definition of the commodity, that may be identified by a specific number.

* * * * *

Controlled carrier means an ocean common carrier that is, or whose operating assets are, directly or indirectly owned or controlled by a government; ownership or control by a government will be deemed to exist with respect to any common carrier if:

* * * * *

Destination scope means a location group defining the geographic range of cargo destinations covered by a tariff.

* * * * *

Foreign commerce means that commerce under the jurisdiction of title 46 of the United States Code.

* * * * *

Harmonized System means the Harmonized Tariff Schedule of the United States, published by the U.S. International Trade Commission, and Schedule B, administered by the U.S. Census Bureau.

Inland division means the amount paid by a common carrier to an inland carrier for the inland portion of through transportation offered to the public by the common carrier.

* * * * *

Location group means a logical collection of geographic points, ports, states/provinces, countries, or combinations thereof, which is primarily used to identify, by location group name, a group that represents tariff origin and/or destination scope and TRI origin and/or destination.

* * * * *

Publisher means a person authorized by a common carrier to publish or amend tariff information.

* * * * *

Retrieval means the process by which a person accesses a tariff and interacts with the carrier's or publisher's system on a transaction-by-transaction basis to retrieve published tariff matter.

Rules means the stated terms and conditions set by a common carrier or a conference of common carriers which govern the application of tariff rates, charges, and other matters.

* * * * *

Shipper means:

- (1) A cargo owner;
- (2) The person for whose account the ocean transportation of cargo is provided;
- (3) The person to whom delivery is to be made (*e.g.*, consignee);
- (4) A shippers' association, meaning a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group to obtain carload, truckload, or other volume rates or service contracts; or
- (5) An NVOCC that accepts responsibility for payment of all charges applicable under the tariff or service contract.

* * * * *

Tariff number means a unique three-digit number assigned by the publisher to distinguish it from other tariffs. Tariffs must be identified by the six-digit organization number plus the user-assigned tariff number (*e.g.*, 999999-001) or a Standard Carrier Alpha Code ("SCAC") plus the user-assigned tariff number.

Tariff rate item ("TRI") means a single freight rate, in effect on and after a specific date or for a specific time period, for the transportation of a stated cargo quantity, which moves from origin to destination under a single specified set of transportation conditions, such as container size or temperature.

* * * * *

Through date means the date after which an amendment to a tariff element is designated by the publisher to be unavailable for use and the previously effective tariff element automatically goes back into effect.

* * * * *

Through transportation means continuous transportation between origin and destination, for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which is a common carrier, between a United States port or point and a foreign port or point.

* * * * *

4. Revise § 520.3 to read as follows:

§ 520.3 Publication responsibilities.

(a) *General.* Unless otherwise exempted or excepted by § 520.13, all common carriers and conferences must keep open for public inspection in automated tariff systems tariffs showing all rates, charges, classifications, rules, and practices between all points or ports on their own routes and on any through transportation route that has been established.

(b) *Conferences.* Conferences must publish in their automated tariff systems rates offered pursuant to independent action by their members and may publish any open rates offered by their members. Alternatively, open rates may be published in individual tariffs of conference members.

(c) *Publishers.* Common carriers or conferences can use publishers to meet their publication requirements under this part.

(d) *Notification.* (1) Prior to the commencement of common carrier service pursuant to a published tariff, each common carrier and conference must electronically submit to BTA Form FMC-1 via the Commission's website www.fmc.gov.

(2) The common carrier and conference must include on Form FMC-1 its organization name, organization number, home office address, name and e-mail address and telephone number of the firm's representative, the location of its tariffs, and the publisher, if any, used to maintain its tariffs.

(3) Any changes to the above information must be transmitted to BTA within 30 calendar days.

(4) The Commission will provide a unique organization number to new entities operating as common carriers or conferences in the U.S. foreign commerce.

(e) *Location of tariffs.* The Commission will publish on its website, www.fmc.gov, a list of the locations of all common carrier and conference tariffs.

(f) *NVOCC failure to maintain tariff.* Failure to maintain a tariff will result in revocation of an NVOCC's license or suspension of a foreign-based unlicensed NVOCC's registration.

5. Amend § 520.4 by:

a. Removing the word "shall" wherever it appears and adding in its place the word "must";

b. Revising paragraphs (a)(3) through (5) and (8);

c. Removing paragraph (e)(1);

d. Redesignating paragraphs (e)(2) and (3) as paragraphs (e)(1) and (2); and

e. Revising newly redesignated paragraph (e)(2)(i) and paragraphs (f)(5), (g), and

(i).

The revisions read as follows:

§ 520.4 Tariff contents.

(a) * * *

(3) State the level of compensation, if any, to be paid by a carrier or conference to an ocean freight forwarder, as defined by 46 U.S.C. 40102(19);

(4) State separately each terminal or other charge, privilege, or facility under the control of the carrier or conference and any rules that in any way change, affect, or determine any part or the total of the rates or charges;

(5) Include sample copies of any bill of lading showing legible terms and conditions, contract of affreightment, and/or other document evidencing the transportation agreement;

* * * * *

(8) For commodity tariffs, also contain a retrievable commodity index, commodity descriptions, and tariff rate items.

* * * * *

(e) * * *

(2) * * *

(i) Common carriers or their publishers must have at least one similar index entry which will logically represent the commodity within the alphabetical index for each commodity description it creates under this section. Common carriers or their publishers must create multiple entries in the index for articles with equally valid common use names, such as “Sodium Chloride,” “Salt, common,” etc.

* * * * *

(f) * * *

(5) Origin and destination scopes or location groups;

* * * * *

(g) *Location groups.* In the primary tariff or in a governing tariff, a publisher may define and create groups of cities, states, provinces, and countries (*e.g.*, location groups) or groups of ports (*e.g.*, port groups), which can be used in the construction of TRIs and other tariff objects, in lieu of specifying particular place names in each tariff item or creating multiple tariff items which are identical in all ways except for place names.

* * * * *

(i) *Shipper requests.* Conference tariffs must contain clear and complete instructions, in accordance with the agreement's provisions, stating where and by what method shippers can file requests and complaints and how they can engage in consultation pursuant to 46 U.S.C. 40303(b)(6)-(7), together with a sample rate request form or a description of the information necessary for processing the request or complaint.

* * * * *

6. Revise § 520.5 to read as follows:

§ 520.5 Standard tariff terminology.

(a) *Approved codes.* The Standard Terminology Appendix contains codes for rate bases, container sizes, service, etc., and units for weight, measure and distance. They are intended to provide a standard terminology baseline for tariffs to facilitate retriever efficiency. Tariff publishers can use additional codes, if they are clearly defined in their tariffs.

(b) *Geographic names.* Tariffs should employ locations (points) that are provided by the National Geospatial-Intelligence Agency or the Geographic Names Information System developed by the U.S. Geological Survey. Ports published or approved for publication in the World Port Index (Pub. 150) should also be used in tariffs. Tariff publishers can use geographic names that are currently in use and have not yet been included in these publications.

7. Amend § 520.6 by

a. In paragraphs (a) introductory text, (c), and (d), removing the word “shall” and adding in its place the word “must”; and

b. Revising paragraphs (b), (e), and (f).

The revisions read as follows:

§ 520.6 Retrieval of information.

* * * * *

(b) *Search capability.* Publisher must provide the capability to search for tariff matter by non-case sensitive text search. Text search matches for commodity descriptions must result in a commodity or retrievable commodity index list.

* * * * *

(e) *Basic ocean freight.* The minimum rate display for tariffs must consist of the basic ocean freight rate and a list of all assessorial charges and surcharges that apply for the retriever-entered shipment parameters. The tariff must indicate when other rules or charges apply to a shipment under certain circumstances.

(f) *Displays.* All displays of individual tariff matter must include the publication date, effective date, amendment code (use codes in appendix A to this part), and object name or number. When applicable, a through date or expiration date must also be displayed. Use of “S” as an amendment code must be accompanied by a Commission issued special permission number.

8. Amend § 520.7 by:

a. In paragraphs (a) introductory text, (b), and (c), removing the word “shall” and adding in its place the word “must”;

b. In paragraph (a)(3)(i), removing the comma at the end of the paragraph and adding a semicolon in its place;

c. **In paragraph (a)(3)(ii):**

i. Removing the word “may” and adding in its place the word “can”; and

ii. Removing “, and” at the end of the paragraph and adding a semicolon in its

place;

d. In paragraph (a)(3)(iii), removing the word “may” and adding in its place the word “can”;

- e. Adding paragraph (a)(3)(iv);
- d. Removing paragraph (e).
- e. Redesignating paragraphs (f) through (h) as paragraphs (e) through (g);
- f. Revising newly redesignated paragraphs (e) and (f); and
- g. Adding a new paragraph (h).

The revisions read as follows:

§ 520.7 Tariff limitations.

(a) * * *

(3) * * *

(iv) An NVOCC may cross-reference an ocean common carrier tariff for the purpose of charging its shipper the ocean common carrier's published and effective surcharges, assessorial charges, and general rate increases, but the NVOCC must clearly list the named charges or categories of charges in the NVOCC's tariff, and must not mark them up above cost. Any fee associated with services provided by the NVOCC to its shipper should be separate and distinguished from the vessel-operating common carrier's surcharges, assessorial charges, and general rate increases, and specify the service for which the shipper is being charged.

* * * * *

(e) *Conference situations.* (1) New members of a conference must cancel any independent tariffs applicable to the trades served by the conference within 90 days of membership in the conference. Individual conference members can publish their own separate open rate tariffs. A new member's participation in the conference tariff is effective on the date notice of membership is published in the conference tariff, unless a later effective date is specified.

(2) New conference agreements have ninety (90) days within which to publish a new tariff.

(f) *Overcharge claims.* (1) A tariff must not limit the filing of overcharge claims by a shipper with a common carrier to a period of less than 3 years from the accrual of the cause of action.

(2) The acceptance of any overcharge claim cannot be conditioned upon the payment of a fee or charge.

(3) A tariff must not require that overcharge claims based on alleged errors in weight, measurement, or description of cargo be filed before the cargo has left the custody of the common carrier.

* * * * *

(h) *Charges assessed by ocean common carriers to non-vessel-operating common carriers.* NVOCCs may pass through charges received from ocean common carriers for terminal services, canal tolls, additional charges, or other provisions which are not under the control of the ocean common carrier or conferences and for which the NVOCC merely acts as a collection agent. The charges or categories of charges must be clearly listed in the NVOCC's tariffs and not marked up above cost.

9. Amend § 520.8 by:

a. Revising paragraphs (b)(3) and (4); and

b. In paragraph (c), removing the words "shall be" and adding in their place the word "are".

The revisions read as follows:

§ 520.8 Effective dates.

* * * * *

(b) * * *

(3) The addition of a port or point to a previously existing origin or destination scope; or

(4) Changes in charges which are not under the control of the common carrier or conference (including terminal services, canal tolls, additional charges, or other provisions) for which the carrier or conference merely acts as a collection agent for such charges and the agency making such changes does so without notifying the common carrier or conference. Ocean common carriers and NVOCCs must not mark up these charges above cost.

* * * * *

10. Revise § 520.9 to read as follows:

§ 520.9 Access to tariffs.

(a) *Methods to access.* Carriers and conferences must provide access to their published tariffs via the internet.

(b) *Internet connection.* (1) The internet connection requires that systems provide a uniform resource locator (“URL”) internet address.

(2) Carriers or conferences must ensure that their Internet service providers provide static internet addresses.

(c) *Tariff availability.* (1) Tariffs must be made available to any person without time, quantity, or other limitations.

(2) Carriers and conferences must provide free access to their tariff publication system.

(3) Tariff publication systems must provide user instructions for access to tariff information.

(d) *Federal agencies.* Carriers and conferences must not assess any access charges against the Commission or any other Federal agency.

(e) *User identifications.* Carriers and conferences must provide the Commission with the requisite documentation and the number of user identifications and passwords

required to facilitate the Commission's access to their systems, if those systems require such identifications and passwords.

11. Amend § 520.10 by revising paragraphs (a), (b), and (d) to read as follows:

§ 520.10 Integrity of tariffs.

(a) *Historical data.* Carriers and conferences must keep the data that appeared in their tariff publication systems for a period of 5 years from the date such information is superseded, canceled, or withdrawn, and must provide online access to such data for 2 years. After 2 years, such data must be retained online or in other electronic form and must be made available to any person or the Commission upon request within 45 days, unless otherwise agreed. Carriers and conferences may charge a reasonable fee for the provision of historical data, not to exceed the fees for obtaining such data online. Carriers and conferences must not charge a fee to the Commission or any other Federal agency.

(b) *Access date capability.* Each tariff must provide the capability for a retriever to enter an access date, *i.e.*, a specific date for the retrieval of tariff data, so that only data in effect on that date would be directly retrievable. This capability would also align any rate adjustments and assessorial charges that were effective on the access date for rate calculations and designation of applicable surcharges. The access date also applies to the alignment of tariff objects for any governing tariffs.

* * * * *

(d) *Access to systems.* Carriers and conferences must provide the Commission reasonable access to their automated systems and records for the Commission's review.

12. Revise § 520.11 to read as follows:

§ 520.11 Non-vessel-operating common carriers.

(a) *Financial responsibility.* An ocean transportation intermediary that operates as a non-vessel-operating common carrier must state in its tariff publication:

- (1) That it has furnished the Commission proof of its financial responsibility in the manner and amount required by part 515 of this chapter;
- (2) The manner of its financial responsibility;
- (3) Whether it is relying on coverage provided by a group or association to which it is a member;
- (4) The name and address of the surety company, insurance company, or guarantor issuing the bond, insurance policy, or guaranty;
- (5) The number of its bond, insurance policy, or guaranty; and
- (6) Where applicable, the name and address of the group or association providing coverage.

(b) *Agent for service.* Every NVOCC not in the United States must state the name and address of the person in the United States designated under part 515 of this chapter as its legal agent for service of process, including subpoenas. The NVOCC must also state that in any instance in which the designated legal agent cannot be served because of death, disability, or unavailability, the Commission's Secretary will be deemed to be its legal agent for service of process.

(c) *Co-loading.* NVOCCs must address the following situations in their tariffs:

(1) If two or more NVOCCs enter into an agreement which establishes a carrier-to-carrier relationship for the co-loading of cargo, then the existence of such agreement must be noted in the tariff. Carrier-to-carrier relationships apply to the co-loading of less than container loads of cargo only.

(2) If two NVOCCs enter into a co-loading arrangement which results in a shipper-to-carrier relationship, the tendering NVOCC must describe its co-loading practices and specify its responsibility to pay any charges for the transportation of the cargo. A shipper-to-carrier relationship is presumed to exist where the receiving NVOCC issues a bill of lading to the tendering NVOCC for carriage of the co-loaded cargo.

Shipper-to-carrier relationships may apply to the co-loading of full container loads or less than container loads of cargo.

(3) An NVOCC which tenders cargo to another NVOCC for co-loading, whether under a shipper-to-carrier or carrier-to-carrier relationship, shall annotate each applicable bill of lading with the identity of any other NVOCC to which the shipment has been tendered for co-loading. Such annotation shall be shown on the face of the bill of lading in a clear and legible manner.

13. Amend § 520.12 by

a. Revising paragraph (a);

b. In paragraphs (b)(2) introductory text and (d), removing the word “shall” and adding in its place the word “must”; and

c. Revising paragraphs (c) and (e).

The revisions read as follows:

§ 520.12 Time/Volume rates.

(a) *General.* Common carriers or conferences must publish in their tariffs rates that are conditioned upon the receipt of a specified aggregate volume of cargo or aggregate freight revenue over a specified period of time.

* * * * *

(c) *Accepted rates.* Once a time/volume rate is accepted by one shipper, it will remain in effect for the time specified, without amendment. If no shipper gives notice within 30 days of publication, a common carrier or conference may cancel the time/volume rate.

* * * * *

(e) *Liquidated damages.* Time/volume rates must not impose or attempt to impose liquidated damages on any shipper that moves cargo under the rate. Carriers and

agreements must rerate cargo moved at the applicable tariff rate if a shipper fails to meet the requirements of the time/volume offer.

14. Amend § 520.13 by:

a. Revising paragraphs (a), (b)(2) introductory text, (b)(3) introductory text, (c)(4), (d)(2) introductory text, (d)(2)(ii)(A) introductory text, and (d)(2)(ii)(B)(1) and (2); and

b. Removing paragraph (d)(2)(iii).

The revisions read as follows:

§ 520.13 Exemptions and exceptions.

(a) *General.* Exemptions from the requirements of this part are governed by 46 U.S.C. 40103 and § 502.92 of this chapter.

(b) * * *

(2) *Controlled carriers in foreign commerce.* A controlled common carrier is exempt from the provisions of this part exclusively applicable to controlled carriers when:

* * * * *

(3) *Terminal barge operators in Pacific Slope states.* Transportation provided by terminal barge operators in Pacific Slope states barging containers and containerized cargo by barge between points in the United States are exempt from the tariff publication requirements of subtitle IV of title 46 of the United States Code and the rules of this part, where:

* * * * *

(c) * * *

(4) *Department of Defense cargo.* Transportation of U.S. Department of Defense cargo moving in foreign commerce under terms and conditions negotiated and approved by the Military Surface Deployment and Distribution Command and published in a universal service contract. An exact copy of the universal service contract, including any

amendments thereto, must be provided to the Commission in electronic format upon request.

* * * * *

(d) * * *

(2) *Between Canada and U.S.* The following services are exempt from the filing requirements of subtitle IV of title 46 of the United States Code and the rules of this part:

* * * * *

(ii) * * *

(A) *Through rates.* Transportation by water of cargo moving in rail cars between British Columbia, Canada, and United States ports on Puget Sound, and between British Columbia, Canada, and ports or points in Alaska, if the cargo does not originate in or is not destined to foreign countries other than Canada, and if:

* * * * *

(B) * * *

(1) This exemption does not apply to cargo originating in or destined to foreign countries other than Canada; and

(2) The carrier will remain subject to all other provisions of the subtitle IV of title 46 of the United States Code.

* * * * *

15. Amend § 520.14 by:

a. Revising paragraphs (a), (b), (c)(1) and (2), and (c)(3) introductory text;

b. Removing the word “and” at the end of paragraph (c)(3)(ii);

c. Removing the period at the end of paragraph (c)(3)(iii) and adding “; and” in its place;

d. Adding paragraph (c)(3)(iv); and

e. Revising paragraph (d).

The revisions and addition read as follows:

§520.14 Special permission.

(a) *General.* The statute at 46 U.S.C. 40501(e) authorizes the Commission, in its discretion and for good cause shown, to permit increases or decreases in rates, or the issuance of new or initial rates, on less than the statutory notice. The statutes at 46 U.S.C. 40703 and 40704(a) authorize the Commission to permit a controlled carrier's rates, charges, classifications, rules or regulations to become effective on less than 30 days' notice. The Commission may also in its discretion and for good cause shown, permit departures from the requirements of this part.

(b) *Clerical errors.* Typographical and/or clerical errors constitute good cause for the exercise of special permission authority. Every special permission application must plainly specify the error and present clear evidence of its existence. The special permission application must also include a full statement of the attending circumstances. The special permission application must be submitted with reasonable promptness after publishing the defective tariff material.

(c) * * *

(1) Applications for special permission to establish rate increases or decreases on less than statutory notice or for waiver of the provisions of this part must be made by the common carrier, conference, or agent for publishing. Every such application must be submitted to the Bureau of Trade Analysis and be accompanied by a filing fee of \$313.

(2) Applications for special permission must be made by letter, submitted via mail or e-mail, followed promptly by electronic payment of the filing fee.

(3) Applications for special permission must contain the following information:

* * * * *

(iv) A statement that identifies any part(s) of the application for which confidential treatment is sought and a justification for such confidential treatment. In

such cases, the applicant must provide both a confidential version and a public version of the application.

(d) *Implementation.* The authority granted by the Commission must be used in its entirety, including the prompt publishing of the material for which permission was requested. Applicants must use the special case number assigned by the Commission with the symbol “S.”

By the Commission.

Mary Thien Hoang

Acting Secretary

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