The US Federal Maritime Commission, which regulates ocean liner shipping in the US foreign commerce, recently issued two final rules that significantly reduce the regulatory burden on certain carrier and marine terminal operator agreements and create new commercial opportunities for non-vessel-operating common carriers.

The first rule completely restates the FMC’s regulations governing ocean common carrier and marine terminal operator agreements subject to the Shipping Act of 1984. In doing so, the FMC has significantly reduced the regulatory burden associated with a new class of agreements called “low market share agreements”. With the exception of certain new requirements related to monitoring reports, these new regulations became effective on January 3, 2005.

The second rule allows NVOCCs to enter into “NVOCC Service Arrangements” or “NSAs” with their shipper customers. Essentially, an NSA is a service contract between an NVOCC, as carrier, and one or more of its customers as shipper parties.

Allowing NVOCCs to enter into private, negotiated contracts with their shipper customers removes a competitive disadvantage to which NVOCCs were formerly subject.

The Shipping Act of 1984 requires ocean common carriers and marine terminal operators to file certain types of agreements with the FMC. The FMC reviews these agreements to determine the potential impact on competition in the US foreign trade.

This review process usually includes publication of the agreement in the Federal Register and the imposition of a 45-day waiting period before the agreement may take effect.

The FMC’s new regulations create the new low market share agreements. These agreements, and amendments to these agreements, are exempt from the 45-day waiting period requirement.

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The FMC’s new regulations create the new low market share agreements. These agreements, and amendments to these agreements, are exempt from the 45-day waiting period requirement.

They are also exempt from the periodic monitoring report requirement and the new regulations regarding the filing of meeting minutes.

These new exemptions will make it easier for carriers to put effective agreements in place in time to meet urgent operating requirements.

They will also reduce the ongoing regulatory burden associated with these agreements. A carrier agreement will qualify as a low market share agreement if:

(1) the agreement does not include authority to:
   (i) discuss or agree on rates or charges,
   (ii) discuss or agree on capacity rationalisation,
   (iii) establish a joint service,
   (iv) pool or divide cargo, earnings, revenue or losses, or
   (v) discuss or agree on any service contract matter;

and

(2) the combined market share of the agreement parties in each sub-trade (a defined term) in which the agreement operates is less than 35% (30% if all parties to the agreement are also party
to another agreement in the sub-trade that includes authority to do one or more of the things listed above).

"Sub-trades" covered by the agreement include the trades between each US port range and each foreign country within the scope of the agreement.

For this purpose, there are only two US port ranges: the Atlantic/Gulf port range and the Pacific port range.

Therefore, it is necessary to determine the combined market share of all parties to the agreement in the separate trades between the US Atlantic/Gulf port range and each country covered by the agreement, and the US Pacific port range and each country covered by the agreement.

In determining their combined market share, the parties should use market share data from the latest available calendar quarter.

In response to these new regulations, carriers should review their existing agreements to determine which of them qualifies as a low market share agreement.

Those that qualify as low market share agreements may now be amended immediately upon filing the amendment with the FMC.

In addition, there is no longer any requirement that periodic monitoring reports be filed with respect to these low market share agreements.

The new regulations also include a new requirement that the FMC be notified prior to implementation of a "significant reduction in vessel capacity" under certain types of agreements.

Essentially, the types of agreements subject to this requirement are those containing "vessel capacity rationalisation" authority.

An agreement includes vessel capacity rationalisation authority if the agreement has the effect of reducing, stabilising, withholding or limiting the size or number of vessels or available space offered collectively or individually by the parties in any trade covered by the agreement.

Capacity rationalisation authority can be avoided by including in the agreement an affirmative statement that the agreement shall not limit or restrict the right of agreement members to operate other vessels or enter into other agreements in the trades covered by the agreement.

The narrative report must be submitted to the director, Bureau of Trade Analysis no later than 15 days after the capacity rationalisation has been agreed, and before it is implemented.

Carriers should review their existing agreements to determine whether any of them is an agreement that would require the reporting of a "significant reduction in vessel capacity."

The new regulations also clarify the kinds of "secondary activities" that can be undertaken under general authority contained in an agreement without a further filing with the FMC.

Carriers should review their existing agreements to see whether the general authorising language is broad enough to take full advantage of the new regulations but, at the same time, is not overly broad.

On October 28, 2004, the FMC issued proposed regulations that would allow NVOCs to enter into "NVOC Service Arrangements" or "NSAs" with their shipper customers. Essentially, an NSA is a service contract between a single NVOC, as carrier, and one or more of its customers as shipper.

The regulations governing NSAs are nearly identical to the regulations governing services contracts, except that:

(i) there may be only one NVOC carrier party to an NSA (a service contract may have more than one VOCC carrier party); and

(ii) an NVOC may not enter into an NSA with another NVOC or with a shippers association that includes an NVOC as a member.

Like service contracts, NSAs (and amendments to NSAs) must be filed with the FMC and may not become effective prior to filing.

Filing may be done electronically by an authorised agent of the NVOC. In order to file NSAs with the FMC, the NVOC must register with the FMC Bureau of Trade Analysis by submitting an NSA Registration Form, Form FMC-78.

In addition, the NVOC must publish the "essential terms" of the NSA, just as VOCCs publish the essential terms of their service contracts.

The regulations also require that the original signed NSA, any amendments to the NSA and associated records be kept in a readily retrievable manner for a period of five years.

The FMC Bureau of Enforcement may request copies of the records related to any NSA and the NVOCs must produce those records within 30 days of such a request.

Through its new regulations, the FMC has significantly reduced the regulatory burden on a large class of agreements that do not include pricing or capacity rationalisation authority and whose parties do not have a large combined market share in any sub-trade covered by the agreement.

The FMC has also removed the most significant commercial disadvantage to which NVOCs were subject by allowing NVOCs to enter into private, negotiated NSAs with their shipper customers.

These new regulations provide potential benefits to nearly all parties subject to regulation by the FMC.

Brett Esber is a partner in the maritime and international trade practice at Blank Rome LLP in Washington DC.