



A SHIPPER'S GUIDE TO

# negotiated rate arrangements

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SHIPPING

# background

## THE SHIPPING ACT OF 1984

The Shipping Act of 1984 expanded the options for pricing liner services by introducing **the concept of carriage under service contracts** filed with the Federal Maritime Commission (FMC). [Pub. L. No. 98-237, section 8\(c\)](#). Liner services could be priced via negotiated contracts between ocean common carriers and their shipper customers, rather than solely by public tariffs. Per the Shipping Act and FMC regulations, ocean freight rates, surcharges, and assessorial charges had to be published in tariffs or agreed to via service contracts filed with the Commission. Just as with the filing of service contracts, ocean carriers were required to make publicly available statements of essential terms in tariff format.

The Ocean Shipping Reform Act of 1998 (OSRA) amended the Shipping Act of 1984 as it related to service contracts. [Pub. L. No. 105-258, section 106](#). No longer did contract rates need to be published in the tariff publication, and the essential terms publication was limited to: origin and destination port ranges, commodities, minimum volume or portion, and duration. Nevertheless, though the Shipping Act and its amendments provided for more efficiency and flexibility for ocean common carriers through the use of service contracts, similar relief was not extended to NVOCCs, which were still required to publish tariffs and adhere to those tariffs when transporting cargo.

## REGULATORY ACTION

In 2008, the National Customs Brokers & Forwarders Association of America (NCBFAA) filed a petition with the FMC seeking exemption from mandatory rate tariff publication. [See Docket No. P1-08, Petition of the National Customs Brokers and Forwarders Association of America, Inc. for Exemption from Mandatory Rate Tariff Publication](#). The proposal sought to exempt NVOCCs from the provisions of the Shipping Act of 1984 requiring them to publish and/or adhere to rate tariffs “in those instances where they have individually negotiated rates with their shipping customers and memorialized those rates in writing.” NCBFAA Pet. in Docket No. P1-08, at 10.

On May 7, 2010, the Commission proposed to permit the use of negotiated rate arrangements (NRA) in lieu of publishing rates in tariffs, subject to conditions, including:

- (1) a requirement for NVOCCs to continue publishing standard rules tariffs with contractual terms and conditions governing shipments, including any assessorial charges and surcharges;
- (2) a requirement to make available NVOCC rules tariffs to shippers free of charge;
- (3) a requirement that NRA rates be mutually agreed to and memorialized in writing by the date the cargo is received for shipment; and
- (4) a requirement that NVOCCs who use NRAs must retain, and make available upon request to the Commission, documentation confirming the terms, and agreed rate, for each shipment for a period of five years.

NVOCC Negotiated Rate Arrangements, 75 FR 25150, 25154 (May 7, 2010). In this notice of proposed rulemaking (NPRM), the Commission also determined that under 46 U.S.C. 40103, the exemption could be granted as doing so would not result in a substantial reduction in competition or be detrimental to commerce. 75 FR at 25153.

## NVOCC NEGOTIATED RATE ARRANGEMENTS (NRA)

The primary differences between NRAs and NVOCC service arrangements (NSA) are the formality and the scope of terms covered. Currently, **NRAs must be in writing, and shipper acceptance must be in writing, such as by email**. See NPRM: Amendments to Regulations Governing NVOCC Negotiated Rate Arrangements and NVOCC Service Arrangements, [82 FR 56781, 56786 \(Nov. 30, 2017\)](#). **NRAs have a “stated cargo quantity,” with no minimum volume or quantity commitment**. See 46 CFR 532.3(a). **NRAs cover specific points of origin and destination and include rates effective on and after a stated date or within a defined time frame**. See § 532.3(a)-(b). **The rates and applicable shipments must be specified as well as the names of the parties**. § 532.5(b).

Non-rate economic terms, including liquidated damages, are not currently permitted in NRAs. See 76 FR at 11355. Instead,

such terms are included in the **NVOCC's "rules tariff," which must be made available electronically and free of charge.** See §§ 532.3(c) and 532.4.

NRAs 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). § 532.5(e). **NRAs are not required to be filed with the FMC, but they must be maintained for a 5-year period and made available to the Commission upon request.** See § 532.7(a)-(b).

#### **FINAL RULING EFFECTIVE AUGUST 22, 2018**

**The Federal Maritime Commission by Final Rule issued July 19, 2018** simplifies freight pricing requirements for Non-vessel Operating Common Carriers ("NVOCCs") by establishing changes to Negotiated Rate Arrangements (NRAs) and NVOCC Service Arrangements (NSAs), **effective August 22, 2018.**

**(1) Allow NRA's to be amended at any time.** Under the old rule, it was not possible to amend an NRA. Under the new rule, NVOCCs and their customers will be able to freely amend NRAs, subject to the condition that amendments can only apply prospectively.

**(2) Allow the inclusion of non-rate economic terms.** NRA's can now include "non-economic" terms not previously allowed such as liquidated damages, volume commitments, credit terms, pass through of accessorial fees without a specific reference to particular charges, and so forth.

**(3) Allow an NVOCC to provide for shipper's acceptance of the NRA by booking a shipment.** In other words, when your customer book the shipment to you, this constitutes their acceptance of the NRA. Under the old rule, it was technically necessary for the shipper to acknowledge and agree to the terms of the NRA in writing. However, in many instances, the shippers simply accepted the terms of the NRA by booking cargo, thus raising the question as to the legality of the arrangements.

Under the new rule, an NRA is deemed to be accepted:

**(a)** if there is a signed agreement;

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**(b)** the shipper sends a written confirmation of its acceptance of the terms; or

**(c)** if the shipper books cargo in reliance upon the NRA.

However, it is important to note that in order for the booking of cargo by itself to constitute valid acceptance, the terms of the NRA must include the following notice language, in bold and uppercase letters:

**"THE SHIPPER'S BOOKING OF CARGO AFTER RECEIVING THE TERMS OF THIS NRA OR NRA AMENDMENT CONSTITUTES ACCEPTANCE OF THE RATES AND TERMS OF THIS NRA OR NRA AMENDMENT."**

ATLANTA CHICAGO DALLAS DENVER HOUSTON

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