

Ringed in 2024, the Federal Maritime Commission (FMC) issued a final rule that made several significant changes to the rules applicable to automated tariffs filed by ocean carriers. The first FMC rule of 2024 may indicate that the FMC will take additional steps over the course of the year to implement additional provisions of the Ocean Shipping Reform Act of 2022 (OSRA), which is the most significant change in US shipping legislation since 1998.

The FMC is an independent federal agency that regulates ocean transportation in the US. Under the FMC's regulations, all common carriers, which includes ocean carriers and Non-Vessel Operating Common Carriers (NVOCC¹) (e.g., third-party logistics providers), are required to file tariffs with the FMC. This system is designed to provide transparency in the services and pricing offered by ocean carriers and NVOCCs.

FMC regulations require that all common carriers publish a tariff in an automated tariff system and provide the location of that tariff to the FMC prior to the commencement of common carrier service.² The FMC website contains links to the various tariffs on file, which are typically housed on either a third-party tariff publisher's website, or on the common carrier's website. Generally, a fee is charged to access these sites.

On April 8, 2021, the FMC issued an Advance Notice of Proposed Rulemaking (ANPRM) seeking information on how common carriers interpret and apply the regulations set forth in 46 CFR part 520, which govern "Carrier Automated Tariffs."³ Following the receipt of comments from various stakeholders, including trade associations, the FMC issued a Notice of Proposed Rulemaking on May 10, 2022.⁴ The final rule was issued on January 2, 2024.

The FMC recently amended its regulations governing Carrier Automated Tariffs, which go into effect on February 1, 2024.⁵ Highlights of the final rule revising the regulations governing common carrier tariffs are:

- Ocean carriers and conferences can no longer charge a fee to access their tariffs. Free access is now required.
- NVOCCs are allowed to cross-reference an ocean carrier's tariff, but only for those charges being passed through to the shipper at cost.
- NVOCCs, like ocean carriers, can pass through to shippers (without markup) charges not under the control of the carrier.
- The final regulations clarify the types of relationships that are allowable for the co-loading of cargo among NVOCCs.
- The failure to maintain a tariff will result in the revocation of an NVOCC's license or the suspension of a foreign-based NVOCC's registration.

In the final rule, the FMC declined to include proposed changes that would have updated the definition of co-loading to limit the definition of the term to the "act of combining less-than-container loads."

Further, the FMC declined to implement a rule requiring NVOCCs that tender cargo to another NVOCC to annotate each applicable bill of lading with the identify of any other NVOCC to which the shipment was tendered. The proposed annotation requirement faced significant opposition from multiple trade groups and logistics companies.

The FMC first considered revising the rules governing carriers automated tariffs in 2021, which is well before the bipartisan passage of OSRA 22. During the pandemic, ocean shipping's role in the supply chain was the focus of significant public attention. Congress responded by enacting OSRA 22. Since OSRA 22's passage, the FMC has been very active in issuing several notices of rulemaking to implement OSRA 22. At the same time, the FMC has seen a significant increase in the number of private party complaints filed with the commission and fines imposed by the FMC on common carriers.

It remains to be seen whether the FMC will issue any additional final rules implementing OSRA 22. In particular, the FMC's currently pending proposed rule on what constitutes an ocean carriers' unreasonable refusal to deal or negotiate with respect to vessel space garnered significant industry attention in 2023. However, given the sustained congressional interest in the timely implementation of OSRA and the potential impact of the FMC's action, stakeholders should strive to ensure their concerns are heard by the FMC and likewise review their FMC compliance strategy, particularly given the potential for civil liability for OSRA 22 violations.

Contacts

Michael Wray

Of Counsel, Houston
T +1 713 546 3330
E michael.wray@squirepb.com

Michael Kaye

Partner, Washington DC
T +1 202 457 6545
E michael.kaye@squirepb.com

Darrien Flowers

Principal, Washington DC
T +1 202 457 5336
E darrien.flowers@squirepb.com

Michelle Story

Associate, Washington DC
T +1 202 457 5546
E michelle.story@squirepb.com

¹ An ocean carrier will own and operate a vessel. In contrast, a NVOCC will serve a common carrier but will not own or operate vessels. Both ocean carriers and NVOCCs will issue bills of lading to shippers and are considered common carriers.

² 46 C.F.R. § 520.3(d).

³ 86 Fed. Reg. 18240 (April 8, 2021).

⁴ 87 Fed. Reg. (27971) (May 10, 2022).

⁵ 89 Fed. Reg. 25 (January 2, 2024).