

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 11-22**

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**NON-VESSEL OPERATING COMMON CARRIER NEGOTIATED RATE  
ARRANGEMENTS; TARIFF FILING EXEMPTION**

**COMMENTS OF THE NATIONAL CUSTOMS BROKERS AND FORWARDERS  
ASSOCIATION OF AMERICA, INC.**

In a Notice of Inquiry (“NOI”) issued December 20, 2011, the Commission sought comments from the public on ways to make the tariff filing exemption which is currently available only to licensed non-vessel operating common carriers (“NVOCCs”) more useful. The National Customs Brokers and Forwarders Association of America, Inc. (“NCBFAA”) is pleased to submit its views on this topic which is of great importance to the shipping industry.

**I. BACKGROUND**

As the Commission is well aware, the NCBFAA has urged that NVOCCs should be exempted from the mandatory publication requirements otherwise applicable for rate tariffs for a number of years. Those efforts bore fruit when the Commission issued its decision last year exempting license NVOCCs from the tariff rate publication requirements, subject to compliance with certain regulatory requirements.<sup>1</sup> The NCBFAA greatly appreciates the consideration the Commission gave and the action it took when deciding to take the steps necessary to free NVOCCs and their customers from burdensome regulatory requirements that are no longer relevant to how the industry functions.

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<sup>1</sup> Docket No. 10-03, Non-Vessel Operating Common Carrier Negotiated Rate Arrangements, decision issued February 25, 2011 (“Exemption Decision”).

While this exemption has important potential benefits for the NVOCC and shipper industries, it has unfortunately been little utilized. The Commission's records indicate that there are over 3,600 licensed NVOCCs.<sup>2</sup> Yet, the NCBFAA is advised that as of this date only 150 (approximately 4%) of the licensed NVOCCs have elected to avail themselves of the exemption despite the fact that the final rule has been in place for almost a full year. In light of the meager utilization rate, it is understandable that the Commission is now seeking to better understand the situation by seeking comments in this NOI. If the NRA process does in fact significantly reduce NVOCC operating costs, why has the industry not widely embraced the exemption?

In attempting to answer this question, the NCBFAA believes it is useful to briefly recite some of the conclusions reached by the Commission in the Exemption Decision.

The Commission initially found that granting the requested exemption would not result in a substantial reduction in competition or be detrimental to commerce. To the contrary, the Commission concluded that permitting NVOCCs to avoid rate tariff publication would enhance, rather than reduce, competition among NVOCCs. Importantly, the Commission noted that the exemption would have the benefit of reducing entry costs for potential competitors and necessarily increase competition for the benefit of the shipping public. The Commission found particularly significant the fact that no shipper, NVOCC or vessel operator objected to exempting the NVOCCs from tariff publication. Nor did any parties providing or using NVOCC services allege that the exemption might even potentially result in economic harm.

And, during the Commission's meeting on February 16, 2011 to discuss the draft final rule for NRAs, Commissioner Khouri did a rough calculation of the public benefits that would be realized if the exemption was implemented by the NVOCC industry. Using a flat \$10,000 per NVO as the estimated cost savings that would be realized by no longer having to publish rate

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<sup>2</sup> This does not include registered foreign NVOCCs.

tariffs, Commissioner Khouri estimated the cost savings to the entire NVOCC industry at approximately \$44 Million per year.<sup>3</sup> And, since the Commission also concluded, correctly, that “any cost savings realized through use of NRAs will be passed through to shippers in the form of more competitive rates,”<sup>4</sup> it is clear that the NRA exemption has the potential for significantly reducing ocean transportation costs for American shippers and making U.S. exporters significantly more competitive.

With the exception of several tariff publishing companies that understandably were reluctant to see an end to NVOCC rate tariffs, every one of the numerous parties that submitted comments in the proceeding stated without reservation that NVOCC rate tariffs serve no purpose, were not used by shippers, vessel operators or even other NVOCCs for any purpose (including rate comparison shopping). The record conclusively establishes that NVOCC rates are based on private negotiations with their customers, and that these negotiations can take many forms. For example, some NVOs may individually negotiate rates for specific shipments for a single customer on a shipment by shipment basis. Others may enter into an agreement to assess rates for certain shippers on a longer term or multi-shipment basis. And, some NVOCCs may establish rate matrices that are available to groups of customers, in which proposed rates are established for a set period of time, to be replaced in the future with other matrices as the underlying carrier rates in given trades change over time.

Since the entire industry agreed that the exemption would be beneficial in reducing costs, making NVOCCs more competitive and significantly lowering the risk of non-compliance with technical tariff regulatory requirements, what happened? What are the impediments that instead

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<sup>3</sup> Commission Hearing transcript, February 16, 2011 (“Transcript”), at 102-04.

<sup>4</sup> Exemption Decision, at 76 F.R. 11353.

have apparently led the vast majority of NVOCCs to continue the expensive, useless process of publishing rate tariffs rather than taking advantage of the exemption?

## II. THE EXEMPTION PROCEDURE IS CONFUSING AND OVERLY REGULATORY

One answer relates to the regulatory nature of the exemption. While the granting of the exemption was a significant step in the right direction of creating a more efficient and competitive environment for NVOCCs and their customers, its benefits have been held back by confusion caused by the retention and/or imposition of regulatory restrictions. Commissioner Dye was remarkably prescient when stating her concerns that the granting of the exemption, while a step forward, was still unduly restrictive:

In 1998, Congress amended Section 16 of the Shipping Act to require the FMC to look out and consider the economic realities of the marketplace in considering exemptions, rather than focus on our enforcement issues, whether we make those arguments through the front door or the back door. Tariffs impose a costly burden on the international ocean shipping system while serving no commercial purpose.

While I am concerned by the limited application of this exemption, I support acting today to provide relief to all licensed and non-vessel-operating common carriers. I am very concerned, however, that we may have underestimated the adverse effects or actions that they have on certain licensed intermediaries.<sup>5</sup>

While the exemption is a significant deregulatory step, the fact remains that even this new structure is an anachronism. At least since the enactment of the Ocean Shipping Reform Act of 1998, the entire ocean shipping industry has evolved from the rigid tariff-based structure embodied by the old system of tariffs to privately-negotiated rates between shippers on the one hand and NVOCCs and vessel operators on the other. And, at least with respect to NVOCC rates to their customers, it is clear that rate tariffs no longer have any useful purpose. For that reason, the NCBFAA, with the support of the entire shipping industry, sought the rate tariff exemption.

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<sup>5</sup> Transcript, at 54.

Now that the Commission has fully considered the matter and agreed that granting the exemption was in the public interest, there seems little need for the agency to impose regulations to act as a technical prerequisite that NVOCCs must satisfy in order to be eligible to use the exemption.

**A. The Notice Issue**

As one example, the Exemption Decision requires that NVOCCs wishing to take advantage of the rule must take certain preliminary steps. They are required to “place a prominent notice” on their bills of lading that they are using an NRA for a particular shipment. They also need, initially, to place a notice to that effect in their rules tariff and in their form FMC-1. In retrospect, it is not clear what purpose is served by these requirements.

The Association’s experience with other regulatory exemptions issued by the Federal Maritime Commission or other regulatory agencies has been that the exemption simply goes into effect and the parties are able to take advantage of it, without having to notify the government or other parties of their intention to do so. For example, it is not necessary for NVOCCS to notify the Commission that they are handling bulk cargo, forest products or used military household goods. The tariff exemption is automatically applicable, so that the parties don’t need to satisfy any regulatory preconditions. (*See* 46 C.F.R. §520.13(c)(1) and (3).)

Comments received from the members of the NCBFAA indicate that the initial notification process is both confusing and unwieldy. (*See, e.g.*, Comments of Melzana Wilson of Mallory Alexander Int’l Logistics; Jim Shapiro of Thunderbolt Global Logistics, LLC.) It is complicated operationally to enter the required notice annotation on bills of lading for just the specific shipments for which an NRA would be applicable. The data entry clerks are rarely the same people who negotiate the rates, so that the required process creates internal communication problems. So, while requiring this notice may help the Commission keep track of the number of

NVOCCs that utilize the exemption, the procedures – particularly the requirement to annotate bills of lading – are confusing and operationally difficult to satisfy. Consequently, the NCBFAA suggests that the notice requirement in section 532.6 of the regulations be eliminated.

**B. The Flexibility Issue**

Although the Commission properly concluded that NVOCCs and their shipper customers should have flexibility in structuring NRAs, that flexibility was restricted in several ways. For example, the decision stated that the rates in an NRA “may not be increased via a GRI.” While it is appropriate for a customer’s rates to be established by the four corners of an NRA that has been negotiated by the parties, it is not clear why an NRA that is intended to cover a specific term should not be subject to a GRI that is implemented by the vessel operators during that period if the parties agree this is appropriate. Many, if not most, commercial shippers are sufficiently knowledgeable of the ocean shipping industry to be aware that the underlying vessel operator rates charge frequently due to surcharges and GRIs. And, they are not surprised when their NVOCC partners seek to pass those increases along, as they understand that their service providers could not long remain in business if they failed to do so.

The key to any commercial relationship is that there must be a meeting of the minds on the key aspects of the service that is being provided. If the customer understands that its rates are subject to increase if the underlying vessel operators file GRIs and is willing to accept that, it is not clear why the government should limit the parties’ agreement or place regulatory obstacles just because surcharges and GRIs used to be included in rules rather than rate tariffs. The thrust of the sought exemption was to eliminate unnecessary regulatory procedures. By artificially separating out base rates vs. surcharges, etc., the resulting hybrid procedures become less efficient and more complex.

Similarly, the discussion in the Exemption Decision that precludes inclusion of economic terms such as credit and payment terms, minimum quantities, penalties or incentives, etc. again restrict the very flexibility that the Commission recognized as being important. It is not clear why it matters if including such terms might overlap with the procedure for NVOCC Service Arrangements (“NSAs”).

The NCBFAA has previously pointed out that the formality of the NSA process is unnecessarily expensive and burdensome, in that filing an NSA and publishing an essential terms tariff does not appear to be necessary or justified. Unlike service contracts, where the Commission’s oversight of vessel operator contractual arrangements may be necessary to prevent abuse of their antitrust immunity, NVOCCs do not have any such immunity. As the Commission recognizes, NVOCCs operate in a highly competitive, diverse and unconcentrated environment in which there is no realistic likelihood that concerted action will be possible or effective in constraining capacity or controlling prices.<sup>6</sup> It is accordingly not at all clear why NVOCC contractual arrangements with their customers need to be treated in precisely the same manner as those of the vessel operators. Certainly, the answer should not be that this is only “fair,” that NVOCCs should not enjoy the advantage of exempt contracts if the vessel operators still must file theirs. If NSAs are being kept in FMC filing drawers that no one ever reviews, surely there is no point in continuing those regulatory requirements. To the contrary, under the circumstances, the requirement to continue to require the formalities associated with NSAs should be eliminated.

Regardless, the continued existence of NSA procedures should not reasonably serve as the basis for denying NVOCCs and shippers from entering into bilateral, consensual

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<sup>6</sup> See Comments of the National Customs Brokers and Forwarders Association of America, Inc. to the petitions seeking such relief in Docket No. P3-03, *et al.* (filed October 10, 2003, at 17-18.)

arrangements to cover any and all economic terms through the exempt NRA process. This only acts as an impediment to realizing the full potential of the exemption.

**C. The Amendment Issue**

Although the Commission indicated that NVOCCs and their customers should have flexibility in structuring NRAs, and although it agreed that an NRA is a “written and binding” arrangement between the parties, it nonetheless concluded that “they function more like tariff rates and, like tariff rates, they may not be amended by the parties once the subject cargo has been received.”<sup>7</sup> So, with respect to an agreement covering a specific period of time or series of shipments, the regulation precludes any modification of the rate “after the time the initial shipment is received.” *See* 46 C.F.R. §532.5(e).

This regulation and the discussion in the Decision has created a significant amount of confusion in the industry. Due to the language in the Exemption Decision and the text of the regulation, many NVOCCs believe, albeit incorrectly, that they are locked into an NRA for a specific period of time and thus will not be able to respond to the frequent rate and surcharge changes by the vessel operators that occur on virtually a daily basis. Consequently, many NVOCCs won’t enter into NRAs specifically because they believe they have less flexibility than they would under rate tariffs, which clearly can be amended at any time (on 30 days’ notice if rate increases are involved). (*See, e.g.*, Statements of David Powell of C.H. Powell, at 2; Lori Fleissner of Global Fairways Inc. at 2-3; Richard Roche of Mohawk Global Logistics at 2.) The fact that this commonly held view is not entirely accurate, and that NRAs can be constructed to give flexibility, is beside the point.

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<sup>7</sup> Exemption Decision, at 76 F.R. 11358.

The NCBFAA's intent in seeking this exemption was not to make NRAs the functional equivalent of rate tariffs. Rather, the Association believed then, as it does now, that there is no functional difference between the way intermediaries relate to their customers and service providers in the ocean industry than they do in the air and surface transportation fields, neither of which require rate tariff filing or publication. In all instances, the NVOCC (or air or domestic surface freight forwarder) negotiates rates with its customers that are presumably acceptable or they do not get the business. And, in all instances, these rates are subject to frequent change because all parties are functioning in an extraordinarily dynamic marketplace, where the rates of their underlying carriers change frequently.

Consequently, as long as the parties do agree on the rate to be assessed for the services being provided, it is difficult to understand why they should be estopped from amending that agreement at any time, even after the "initial shipment" is received. Again, as long as both parties agree, if that is what is necessary and appropriate for the service being provided, the parties should be free to determine whether the business relationship should continue and, if so, on what basis.

The NCBFAA recognizes the Commission's role in protecting the shipping public from inappropriate trade practices. However, in the event a shipper feels that an NVOCC has not abided by their negotiated arrangement, it is not without remedy. Aside from the fact that an NVOCC that breaches an agreement is unlikely to get any repeat business from that shipper, the shipper is able to properly enforce its agreement whether this takes the form of an NRA or a published tariff. The fact that the parties may have agreed to modify or amend the rate after the first in a series of shipments has been received does not in any way compromise the shipper's rights.

Consequently, the NCBFAA believes that the Commission should reconsider its approach, eliminate the regulatory aspects of the exemption and truly exempt NVOCC tariff rates from the tariff publication requirements.

**D. Signature Issue**

Although the NCBFAA originally believed in filing its initiating petition, that NVOCCs and shippers would have no problem memorializing their negotiated agreement in writing, experience over the past year demonstrates that this is not necessarily so. In many cases, the exchange of communications between an NVOCC and a shipper involving the negotiations for the movement of traffic will not contain the title and address of either of the parties. While they certainly know with whom they are negotiating, many companies do not set up their email system to contain a comprehensive signature block that includes the individual's name, title and address. (See Fleissner Statement, at 2; Statement of Dennis Rowles for DJR Logistics, at 2; Roche Statement, at 1; Wilson Statement, at 2; Shapiro Statement, at 1.) Yet, the regulation technically requires that all of that information be included in order for the NRA to be valid (46 C.F.R. §532.5(b)).

In many instances, shippers evidence their acceptance of the NVOCC's proffered rate by simply tendering traffic. In other words, shippers do not always respond to a rate offer by sending back a written communication to that effect, but instead simply begin tendering traffic that they expect to be rated in accordance with the NVOCC's offer. That is still legally binding on the parties; there has been an offer, acceptance and performance has commenced. Yet, that does comply with the technical requirements of the regulation.

It is clear that the technical requirements of the regulation – that there be written evidence from both parties containing the required personal information of the representatives – is a major

reason why NRAs have not been widely used. Companies are not likely to embrace use of this exemption if they believe their noncompliance with the literal dictates of the regulation may lead to the imposition of sanctions.

Accordingly, it is appropriate for the Commission to now eliminate this part of the regulation as well. Just as they do business in other less regulated environments, shippers and NVOCCs well know the rates and services that have been negotiated and will, in the event that there is a dispute, be able to support their respective positions even if the documentary aspects of the arrangement are not memorialized as neatly as was originally envisioned when the exemption was promulgated.

### **III. THE EXEMPTION SHOULD BE EXTENDED TO ALL LAWFULLY OPERATING NVOCCS**

As it has throughout this proceeding, the NCBFAA urges the Commission to make the exemption applicable to all lawfully operating NVOCCs, whether they are domiciled in the United States and operating pursuant to a license or located overseas and functioning pursuant to registration. In both situations, the companies are operating in accordance with statutory and regulatory requirements, so that the shipping public is protected by the financial responsibility bonds that the Commission has established. And, as the Commission is well-aware, the amount of the bond required for foreign-based, registered NVOCCS is even higher than that required for U.S.-licensed companies -- \$150,000 versus \$75,000. 46 C.F.R. §515.21.

The NCBFAA understands that the Commission made this distinction based upon concerns expressed by its staff, who apparently feared that providing foreign unlicensed NVOCCs might hamper their ability to protect the shipping public. With respect, the NCBFAA believes that these concerns are misplaced for a number of reasons.

Initially, as noted at the outset, the Commission has found, correctly, that the continued existence of NVOCC rate tariff publication serves no useful purpose. Shippers don't use or rely on them and are well able to conduct their commercial relationships with NVOCCs through the private negotiation process that has evolved since the enactment of the Ocean Shipping Reform Act of 1998 ("OSRA"). By electing not to extend the exemption benefits to foreign-based NVOCCs, the Commission is essentially requiring that they bear the added burden and costs of a system that serves no purpose solely because they might engage in some malpractice for which the Commission's enforcement processes may need to be implemented. Even if that is the case, it is not clear how the presence or absence of a rate tariff for a particular shipment would aide or inhibit those enforcement activities. Presumably, any shipper booking cargo with that NVO would have a record of the basis on which it believed the traffic was to move, so that this information should provide the same data to Commission staff as would any published rate tariff.

More to the point, the vast majority of foreign NVOCCs, which the Commission determined to be approximately 1,125 in number as of March, 2011, do comply with applicable legal requirements. They are properly registered and bonded. As such, by being deprived of the benefits of the exemption, they are essentially being unfairly singled out due to the possible malfeasance of a relatively few number of companies. Moreover, withholding the benefits of exemption from foreign NVOCCs is not likely to have the desired effect of preventing malpractices from the relatively few "bad actors". A company that cuts corners with respect to its dealings with its customers is unlikely to be concerned about strict compliance with the existing rate tariff publication requirements. Consequently, this disparate treatment of foreign companies only punishes a large majority of foreign-based NVOCCs that deal responsibly and honestly with their shipper customers.

Moreover, the Commission has the ability to remedy malpractices by foreign NVOCCs even if they do not publish rate tariffs. Every foreign NVOCC is required to maintain a \$150,000 bond, which is both a significant inducement to comply with all appropriate regulatory obligations and a source of funds that is responsive to any Commission order finding the principal to have engaged in some malpractice, including one of ignoring a Commission order. And, if the Commission is concerned that this is insufficient, it can condition the continued availability of the exemption for any company with a commitment to respond to appropriate orders, failing which a company's registration could be suspended or revoked, thus precluding them from further participation in the U.S. ocean trade.

In the words of Ms. Lori Fleissner of Global Fairways, Inc.:

The main point is . . . commercial disputes between NVOCCs are relatively rare. To the extent a foreign NVOCC engages in malpractices, that is likely to happen whether or not the 99.99% of responsible NVOCCs are burdened with archaic, unnecessary restrictions. In other words, retaining existing tariff regulations that burden compliant NVOCCs will not preclude those companies that don't comply from engaging in malpractices. All that happens is that the compliant NVOCCs are unnecessarily burdened by retaining the old system. And, this again ultimately hurts the U.S. exporter and receiver.

Comments at 3.

It is worth noting that when Congress amended Section 16 of the Act, now 46 U.S.C. §40103, with respect to the statutory prerequisites for issuing an exemption, it specifically deleted any requirement that the agency find that "the exemption will not substantially impair effective regulation by the Commission." As such, refusing to extend the benefits of the exemption to foreign NVOCCs due solely to the possibility that this may somehow adversely affect the Commission's regulatory function flies in the face of what Congress wanted to achieve.

On the other hand, continuing this discriminatory application of the exemption adversely affects U.S. shippers and licensed NVOCCs almost as much as it does foreign companies. To the extent an NVOCC is able to reduce its operating costs, those savings are ultimately passed along to the shippers. Thus the cost savings approximated by Commissioner Khouri can be expected to flow through to their customers whether the NVOCCs are U.S. licensed or foreign registered. By depriving a quarter of the NVOCC population from eliminating the burden of rate tariff application, the benefits to American shippers and receivers of cargo will also be proportionally reduced.

In addition, while the exemption decision indicated that any concerns of possible retaliation by other foreign governments was not likely, the NCBFAA is not as sanguine. It seems rather clear that People's Republic of China ("PRC") at least has mirrored the FMC's implementation of the Shipping Act as its model for regulating carriers and NVOCCs alike. At present, not only must U.S.-licensed NVOCCs register their bills of lading in the PRC as a precondition to doing business there, they are also now required to publish tariffs with the Shanghai Shipping Exchange. In the most recent Maritime Bilateral Negotiations, the PRC delegation insisted that the amount of the Supplemental Bond the FMC uses for licensed NVOCCs to do business in China be increased.<sup>8</sup> It is abundantly clear, accordingly, that the PRC government pays close attention to the Commission's regulatory practices and may at some point take umbrage at the fact that PRC-based NVOCCs have to shoulder the burden rate tariff publication while their competitors in the United States do not.<sup>9</sup>

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<sup>8</sup> The Commission is in the process of acceding to that request. *See* Docket No. 11-09.

<sup>9</sup> Contrary to the contention that foreign-based NVOCCs can easily apply for an NVOCC license, that is not necessarily the case. Although it is possible to do so, that action also raises unnecessary costs, tax and jurisdiction issues that are not necessary to confront unless the company actually wishes to do business here. Just as U.S. NVOCCs prefer for a number of reasons not to open their own branch offices in and seek licenses from the PRC, the NCBFAA suspects that relatively few foreign companies will choose to go through these steps just to avoid having to publish their rate tariffs.

As such, the NCBFAA remains concerned that it is just a matter of time before the PRC does react and take actions that would create the same, if not greater, disadvantages for U.S.-licensed NVOCCs doing business in China as this restriction imposes on their nationals. This is not a risk that the Commission should take lightly.

Moreover, many small and medium sized U.S.-licensed NVOCCs have in effect entered into partnership-type relationships with foreign-based NVOCCs. In this way, they are able to handle traffic that is controlled by their overseas partners or agents and are thus able to provide balanced, competitive service from shippers and receivers of cargo in the United States. To the extent the traffic moves on the paper (*i.e.*, house bills of lading) of their overseas partners, the U.S.-licensed NVOCC is acting only as the receiving agent in the United States. Under the present circumstances, although the U.S. company is participating in the traffic, the foreign entity still bears the burden of rate tariff publication, so that the resulting cost for these types of arrangements remain artificially high.

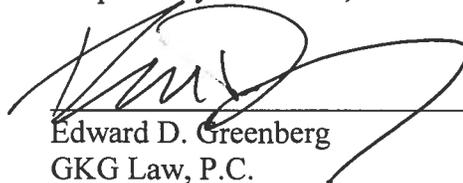
It is not surprising, accordingly, that even U.S.-licensed NVOCCs are uniformly calling for the Commission to end the distinction between licensed and registered NVOCCs. (*See, e.g.*, Statements of Fleissner, Roche, Powell and Rowles; *see also* the letter from Ronald Doyle of CEVA Freight, LLC.)

In closing on this issue, it is worth reiterating the basic conclusion that the Commission made with respect to the exemption – namely, that NVOCC tariffs no longer serve any meaningful purpose and that the exemption would be both pro-competitive and not be detrimental to commerce. As such, there is no reason to arbitrarily refuse to extend the benefits of the exemption to the entire industry.

#### IV. CONCLUSION

The NCBFAA greatly appreciates the steps the Commission has taken to harmonize its regulatory oversight with the contemporary operating practices and needs of the shipping industry. The Association suspects that both it and the Commission have learned a great deal about how the NVOCC industry functions in the post-OSRA environment and it is appreciative of the steps the Commission has taken to date. For the reasons stated above, the NCBFAA requests that the Commission now go further and eliminate the existing impediments to making the exemption more meaningful and useful for U.S.- and foreign-based NVOCCs alike.

Respectfully submitted,



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