

Prepared Remarks of
Federal Maritime Commission Chairman Richard A. Lidinsky, Jr.
at the
38th Annual Conference of the National Customs Brokers & Forwarders Association of America
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I'm pleased to be here this morning to share an update on what the FMC has been doing, and to share my views on what I'd like to see us do going forward. But more importantly, I'm pleased to be able to hear from you during this conference and afterwards. NVOCCs and forwarders are such an important part of the maritime industry we support, and each year you grow both in number and importance.

I want to hear from you because right now we are at a key moment for regulation of NVOCCs. In the coming months, the FMC will be working to modernize the rules for NVOCCs, from top to bottom. At our May meeting, we will start considering updates to our regulations for licensing and financial responsibility. Last week, we began the process of improving our tariff rate publication exemption for Negotiated Rate Arrangements (NRAs). Also last week, we issued a Notice of Inquiry seeking comments on ways to improve our 2005 rules for NVOCC Service Arrangements (NSAs).

Historical Context

Before getting into the details of each of these projects, I want to start with a brief history.

In a series of cases between 1941 and 1961, the FMC's predecessor agency, the Federal Maritime Board, struggled with how to handle intermediaries. The Board decided that "express companies" or consolidators who took possession of cargo and acted as shippers should be considered common carriers, and in a case in 1961 the legal status of "NVOCC" was born.

NVOCCs were treated like carriers, which meant that beginning in 1961 they were required to file tariffs, but unlike freight forwarders they were not licensed.

Later, at the behest of many NVOCCs (and over opposition of others), Congress added a bonding requirement in 1990, and a license requirement in 1998.

Meanwhile, in 1990, a debate began at the FMC over whether to exempt NVOCCs from the obligation to file tariffs.

In December 2004, the FMC took a first step to give some relief from tariff requirements, by allowing NVOCCs to enter into confidential service contracts, called NSAs, which they have to file and for which they publish essential terms. In the seven years since NSAs began, 179 NVOCCs have used NSAs, some quite successfully. But that's a small portion of our more than 3,500 licensed NVOCCs and 1,100 foreign unlicensed NVOCCs.

So the debates continued, and after 20 years, and three years spent on proceedings following a petition by this group, the Commission exempted licensed NVOCCs from publishing

rates in tariffs if they use a simpler device called a Negotiated Rate Arrangement, or NRA, which does not have to be published or filed. The NRA exemption went into effect in April 2011. After one year, we've seen 454 NVOCCs note in their tariffs that they are using NRAs, and 179 of those are using NRAs exclusively.

At the beginning of this year, we asked for comments on how we could expand and improve the NRA exemption to make it more useful. I appreciate that many in this room shared their thoughtful comments.

Kennedy Message

Before I move on from this history, I want to note that this month is a 50-year anniversary:

In April 1962, President Kennedy, who created the current FMC in 1961, delivered an historic Special Message to Congress on Transportation. In that message, President Kennedy criticized regulation that “does not fully reflect either the dramatic changes in technology of the past half-century or the parallel changes in the structure of competition.” He also observed that “[t]he management of the various modes of transportation is subjected to excessive, cumbersome and time-consuming regulatory supervision that shackles and distorts managerial initiative.” He then called for “greater reliance on the forces of competition and less reliance on the restraints of regulation.”

As the Commission works with you to update and improve regulation of NVOCCs this year, I plan to keep President Kennedy's message in mind. I hope we show a similar spirit of reform and modernization, as we did last year in developing the NRA exemption.

President Obama gave us similar guidance when he issued executive orders to “consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.”

As we look at how to modernize licensing and make NRAs and NSAs work better, I'm committed to implementing President Kennedy's and President Obama's guidance to reform and reduce burdens, even where it requires our agency to embrace change and move beyond our comfort zones. Now I'll share with you some specifics.

OTI Licensing Rules

At next month's Commission meeting, we will begin the process of modernizing our regulations for NVOCC and Freight Forwarder licensing, registration, and proof of financial responsibility. Procedurally, my goal is for the Commission to issue an advance notice of rulemaking that seeks your input and feedback on a wide range of issues this Summer.

NRA Improvement

We will also be busy trying to improve our two tariff exemptions – for NRAs and NSAs. At our Commission meeting last week, I outlined a plan to approach the NRA improvement process in two stages.

First, the comments you submitted raised some technical requirements that cause NVOCCs problems without adding much value, and I instructed FMC staff to prepare a draft final rule to change them if a majority of the Commission agrees. Specifically:

- I want to drop the requirement that an NVOCC must include notice of invocation of the NRA in its bill of lading.
- I also want to drop the requirement that NRA documentation include titles, addresses, or affiliates of the shipper representative who accepts the rate.
- And I want to tighten or drop the vague requirement that NVOCCs retain “all associated records” with their NRA documents.

I hope a majority of the Commission will agree, and that we can issue a targeted final rule to make these changes very quickly – in the next few weeks. I don’t want this regulatory relief and simplification to wait while we work through proposals for deeper changes or expansions.

For the **second** step, I asked FMC Staff to prepare and provide an assessment of options for the Commission to consider in response to the comments suggesting deeper changes.

- One option I would like to be analyzed is expanding the NRA exemption to foreign, unlicensed NVOCCs, with proposed conditions or procedural changes that ensure that they respond in a full and timely manner to any Commission process, document requests, or orders – even if their country has a so-called “blocking statute.”
- An additional option for analysis is expanding beyond a “rate” the terms that can be included in NRAs.
- I also want us to look at whether to trim the NRA rule’s current prohibition on amendments so that it only applies to a particular shipment that has already been received by the NVO.

I look forward to working through these issues and questions to make NRAs more available and useful in the coming months.

NSA Notice of Inquiry

Last week we asked for similar suggestions on NSAs. The comment period runs through June 18th, and I look forward to your comments and insights.

In our request for comments, we flagged an issue that was a subject of debate back in 2005 – whether to allow NVOCCs to jointly enter into NSAs. But I also would like input on other ideas, such as whether to keep or drop such requirements as publishing essential terms of NSAs.

Approach to Issues

On each of these topics, I want to make sure the Commission hears from our NVOCC community. I will be focused on the tension between two concerns:

On one hand, regulatory burdens should be reduced for NVOCCs. They do not have antitrust immunity, are highly competitive, with low barriers to entry, bonding to protect their

customers, many are small businesses, and they are critical to our exports and our economy. They generally are not subject to tariff or filing requirements in other transportation modes, or in other countries besides one.

On the other hand, a large portion of the complaints we receive are about some problem NVOCCs, particularly foreign unlicensed NVOCCs, and many complaints are that all of someone's personal household goods are stranded or held hostage, in a place where normal legal processes and remedies are impractical.

I'll be focused on this question: what are the minimum requirements necessary to (1) retain the Commission's ability to assist shippers in resolving disputes and getting their cargo or compensation quickly; (2) prevent unfair or unreasonable practices based on hostage cargo; and (3) protect unsophisticated household goods movers and small shippers against practices that are deceptive or fraudulent.

But I also want us to keep in mind that many of these concerns may be better addressed by improving the Commission's procedural rules, updating licensing and bond requirements, giving some guidance on what is a failure to observe "reasonable practices," or differentiating between household and non-household goods movers.

China

Finally, I just want to say a few words about our relationship with China and their approach to NVOCC regulation. Upon taking office, I heard several complaints about China's maritime regime, particularly as it related to shippers and NVOCCs. China's primary interface with American maritime interests is the Shanghai Shipping Exchange (SSE), which in coordination with the Ministry of Transport possesses many features and powers of the FMC. In late 2010, we began direct visits and dialogues with the SSE to better understand, attempt to harmonize, and work out any potential conflicts. I believe this is the proper method to address any problems and I'm pleased that this direct approach has already solved some misunderstandings and is a valuable tool for the future. We have a good relationship, and I will continue to urge them to work with us to lift burdens on NVOCCs, rather than to impose new ones.

Conclusion

Once again, I look forward to working with the NCBFAA and its members on this process of improving and modernizing regulations. We want to hear from you and thank you for this opportunity to speak and meet with you. With me here are FMC General Counsel Rebecca Fenneman, Bureau of Certification & Licensing Director Vern Hill, and our South Florida Area Representatives Andrew Margolis and Eric Mintz, so please approach them with any questions or concerns you may have.