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November 21, 2011

VIA EMAIL: secretary@fmc.gov

Karen V. Gregory
Secretary
Federal Maritime Commission
800 North Capitol Street, NW
Washington, D.C. 20573

Re: Retrospective Review of Existing Rules

Dear Secretary Gregory:

As counsel for the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA"), we are submitting the Association's views in response to the Notice published by the Commission on November 4, 2011 ("the November Notice") which sought comments from the shipping public on how to improve the Commission's existing regulations.

The NCBFAA supports the Commission's effort to review and streamline its regulations and believes that several additional steps would significantly ease some of the obstacles that have hindered industry utilization of the agency's deregulatory efforts in the recent past. Taking additional steps at this point would produce significant and quantifiable cost savings and reduce paperwork burdens for both the Ocean Transportation Intermediary ("OTI") industry and the Commission itself. Since the Commission will issue appropriate notices of proposed rulemakings ("NPRMs") as it moves these initiatives forward, the NCBFAA will comment in more specific detail at the appropriate time. Nonetheless, we believe it would be helpful for the Commission to have a few comments with respect to several of the items that were discussed in the November 4 Notice.



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I. NVOCC RATE ARRANGEMENTS (“NRAs”)

In the November 4 Notice, the Commission quantified the potential benefits of the NRA process as allowing the average NVOCC to save approximately 187 person-hours, or \$4,680 per year, in reporting and recordkeeping requirements, as well as \$7,800 in payments to tariff publishers. While the NCBFAA believes that those figures are conservative and that the potential savings for NVOCCs are significantly higher, this initiative holds much promise as a way of encouraging industry-wide usage of this exemption.

At its recent Government Affairs Conference (“GAC”) that was held in September 2011, the NCBFAA sought comments from its members concerning how they perceived the benefits of the NRA process and why they either were or were not using the exemption from rate tariff publication. Since the members of the NCBFAA had overwhelmingly and favorably responded to the NPRM in Docket No. 10-03, *Non-Vessel Operating Common Carrier Negotiated Rate Arrangements*, the fact that so few members had apparently taken advantage of the tariff exemption was surprising. Based upon those discussions, it appears that the low utilization rate is attributable to several major factors.

First, the exemption is limited to U.S.-licensed NVOCCs. Yet, the record is clear that NVOCC rate tariffs are an anachronistic relic of an era that was ended by the Ocean Shipping Reform Act of 1998, and that they are not used or relied upon by NVOCCs, shippers, or carriers. Since then, the only beneficiaries of rate tariff publication have been the tariff publishing companies. And this is just as true for foreign-domiciled, registered NVOCCs as it is for U.S.-domiciled, licensed NVOCCs. Thus, the Commission’s decision to exclude foreign domiciled NVOCCs from eligibility significantly reduced the universe of companies who could receive these cost savings.

When the Commission voted to approve the NCBFAA’s petition to exempt NVOCC rate tariffs from mandatory publication, the Commission indicated that it would revisit its decision to restrict the benefits of the rule to U.S. entities. This is an appropriate time to do so, as it would significantly expand the number of companies that would be able to take advantage of the exemption and multiply the manpower and cost-saving benefits that the exemption promises.

Moreover, the NCBFAA remains concerned that any continued restriction of this procedure could be viewed by the People’s Republic of China (“PRC”) as an abrogation of the U.S. obligations under the existing U.S.-PRC Maritime Bilateral Treaty. Regardless, the members of the NCBFAA are concerned that the PRC authorities might seek to retaliate against U.S.-licensed NVOCCs by imposing reciprocal restrictions on their ability to do business in that country. Since the entire industry recognizes that rate tariffs serve no beneficial purpose, there is no reason to discriminate against foreign-based NVOCCs. To the extent foreign entities engage in malpractices that contravene the

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Shipping Act, it would seem likely that strict compliance with rate tariff publication would not seem to be a high priority for such companies any more than it is for U.S.-based companies that ignore their regulatory responsibilities. Withholding the benefits of the exemption would accordingly not seem a likely way to encourage greater compliance. Moreover, the Commission has ample tools to enforce any investigation order it may issue, so that expanding the benefit of the exemption to all properly authorized NVOCCs, the vast majority of whom comply with Shipping Act obligations, would outweigh any inconvenience that might arise in addressing malpractices of the few "bad actors."

Second, there appears to be considerable confusion in the NVOCC industry as to some of the regulatory requirements applicable to the NRA exemption process. For example, some believe that surcharges cannot be made part of an NRA unless the agreement relates to a lump sum rate, while others believe that surcharges can properly be made separate line items in the quotes that are provided to customers. Many NVOCCs apparently are concerned that the shipper is required to send a specific acknowledgment that accepts the rate quote offered by the NVOCC, while others believe that compliance with the rule is satisfied simply by tendering shipments in response to a rate quote. Similarly, although the NCBFAA believes the rule is clear and not inconsistent with industry practice, there is a great deal of confusion in the NVOCC community concerning what is meant by the "no modification" provision in 46 C.F.R. §532.5.

The NCBFAA believes that the shipping industry would benefit by revisiting the NRA regulations to both make them available to all appropriately licensed and registered NVOCCs and by simplifying and modifying the existing regulations. With these modifications, the NRA exemption would become a significantly more useful tool for establishing the applicable rates and services provided by NVOCCs to their shipper customers.

II. NVOCC SERVICE ARRANGEMENTS ("NSAs")

One of the items highlighted in the November 4 Notice relates to NSAs. With the advent of NRAs, it is not clear that the NSA procedures are likely to be much utilized in the future. Indeed, even without the availability of NRAs, the NSA procedures have not often been used by NVOCCs and shippers in the seven years since those regulations were promulgated.

The NCBFAA believes that one of the main impediments to any significant industry usage of this procedure was caused by the Commission's perceived need to regulate them in the identical manner as are ocean carrier service contracts. As a result, these privately and individually negotiated contracts between NVOCCs and their shipper customers necessarily have to follow the same filing and essential term tariff procedures as are applicable to ocean carrier agreements with their customers.

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But NVOCCs, unlike ocean carriers, do not seek or enjoy antitrust immunity. Consequently, the terms of NSAs, unlike service contracts, do not contain collectively established boilerplate terms and conditions or consider, let alone follow, "voluntary guidelines" relating to pricing or service conditions. Instead, each agreement of this nature reflects private negotiations between a shipper and an NVOCC covering rate and service arrangements that generally pertain to traffic and logistical services over an extended period of time. While the filing of ocean carrier service contracts may be helpful to assist the Commission in ascertaining whether carriers are abusing the terms of their antitrust immunized approved agreements, no such purpose is served by requiring NVOCCs to go through the same elaborate procedures. Instead, these procedures only add to the complexity and cost of utilizing NSAs. We suspect, moreover, that the various NSAs that have been filed with the Commission add little information that is of use to the agency.

Consequently, as there are situations where NVOCCs and their customers do wish to enter into more formal, long-term arrangements which cannot be appropriately dealt with through NRAs, the industry would benefit by having the Commission take a fresh look of the need for continuing the filing and essential term tariff publication requirements in NSAs. By doing so, the Commission would make this contract tool more useful.

III. OTI LICENSING/FINANCIAL RESPONSIBILITY

The NCBFAA supports amending the procedures required to review license applications in order to facilitate their processing. In view of the large number of OTI license applications that are filed each week, the review process is undoubtedly a significant burden on Commission resources, so that any procedures that would help streamline the review process would appear to be beneficial.

It is not clear, however, whether the Commission intends to propose increases in the current financial responsibility rules or to even increase the filing fees. The NCBFAA accordingly does not yet have sufficient information to know what position it would necessarily take in the event either of those topics is to be raised in an NPRM.

Nonetheless, the NCBFAA believes that it would be appropriate to significantly streamline the existing process and to emphasize the competence and expertise of applicants as part of the review process. The NCBFAA is not aware that any attempt is currently made, beyond checking the references of a potential Qualifying Individual application to determine if that person is familiar with the Shipping Act, the Commission's regulations, the rules and regulations of the various other agencies that govern the handling of international ocean transportation or is otherwise qualified to handle the logistics required for international ocean traffic.

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The NCBFAA believes that any licensed or registered NVOCC should have some demonstrable level of knowledge and competence about the regulatory and operational framework within which the shipping industry operates. With that in mind, the NCBFAA suggests that the Commission should consider requiring something in the form of a certification process for all licensed or registered NVOCCs. In that way, the shipping public and the involved governmental agencies can be assured that each OTI has the training and competence necessary to provide service in this industry.

As the Commission is already aware, the NCBFAA has developed certification programs that both train and certify the competency of customs brokers and OTIs. Indeed, the Commission previously delegated one of its staff officials to serve as liaison with the NCBFAA as one of these courses was developed. The NCBFAA would be pleased to work with the Commission to assist the agency in developing a program to ensure that licensed and registered NVOCCS have sufficient knowledge about the regulatory and operational requirements applicable to OTIs and are considered fit and competent to provide those services to the shipping public.

If you have any questions concerning this, please do not hesitate to contact me:

Very truly yours,

A handwritten signature in black ink, appearing to read 'Ed Greenberg', written over the typed name below it.

Edward D. Greenberg