THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 17-10

AMENDMENTS TO REGULATIONS GOVERNING NVOCC NEGOTIATED RATE ARRANGEMENTS AND NVOCC SERVICE ARRANGEMENTS

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

The National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA" or "Association") submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") published in this docket on November 30, 2017 (82 Fed. Reg. 56781).

The NCBFAA is the national trade association representing the interests of freight forwarders, non-vessel operating common carriers ("NVOCCs") and customs brokers in the shipping industry. Members are involved in the transportation and/or logistical arrangements of approximately 90% of the cargo that moves into and out of the United States by ocean. Most of NCBFAA’s members are NVOCCs. As such, they are directly affected by the tariff requirements in the Shipping Act and the Commission’s regulations. Accordingly, the members of the NCBFAA have a significant interest to be heard concerning the proposed changes to the regulations of these Agreements.

As discussed below, the NCBFAA supports the FMC’s proposed revisions to Part 531 of the Commission’s regulations governing NVOCC Negotiated Service Arrangements ("NSAs") and the proposed revisions to Part 532 governing NVOCC Rate Arrangements ("NRAs"). While
the NCBFAA appreciates the Commission’s willingness to recognize that its regulations should evolve as the industry changes, we also respectfully suggest that the agency go further.

I. PREFATORY STATEMENT

Before addressing the specific issues raised in this NPRM, a few words of background may be helpful. This initiative is the most recent step in a lengthy, step-by-step process begun 15 years ago by the NCBFAA in recognition of the structural changes to liner shipping introduced by the Ocean Shipping Reform Act of 1998 ("OSRA"). Five years after its enactment, the Association filed (in Docket P5-03) its first petition seeking to exempt NVOCCs from having to publish rate tariffs, based on the incontrovertible fact that OSRA functionally eliminated classic notions of common carriage, that ocean shipping rates were now individually negotiated and that rate tariff publication and enforcement had become anachronistic at least for NVOCCs and that the Commission now had ample authority to issue a broad exemption to bring its regulation more in line with the realities of the marketplace. As the Commission then determined only to grant the lesser relief of the NSA exemption, the Association ultimately filed successive petitions in 2008 (P1-08) and 2015 (P2-15) that led to the issuance of the NRA and then, subsequently, to the instant proceeding. Throughout these 15 years, the evidence of record relating to NVOCC rate relationships with their shippers has remained unchanged – namely, rates and services are individually negotiated, shippers rarely if ever have occasion to review NVOCC rate tariffs, and disputes between NVOCCs and their customers are exceedingly rare for a number of reasons and are almost always resolved commercially.

Thus, the question posed by the NCBFAA 15 years ago remains: Why continue to deregulate an area of ocean shipping incrementally when it is inevitable that there will be additional petitions – with the attendant wasteful costs to the Association and its members, shippers, vessel operators and the Commission – in order to finally obtain a broad, unconditioned
exemption of NVOCC rate tariffs? Recognizing the inevitability of these incessant proceedings that are otherwise necessary to bring the Commission's regulatory responsibilities in line with commercial realities, former Chairman Lidinsky once addressed a meeting of the NCBFAA, stating -- and we paraphrase -- "You can always tell when it is April. The swallows return to Capistrano and the NCBFAA files another petition." That was said in jest, but as is often the case with jokes, it was stating a fact. And, so, this incremental process has continued.

Respectfully, the Association believes that it is time for the Commission to cut to the heart of the issue and avoid this burdensome, piecemeal deregulation. The NCBFAA believes that the Commission should itself initiate the steps, consistent with the President's directive to eliminate unnecessary regulations, to eliminate the remaining tariff-based requirements -- at least with respect to NVOCCs -- by using its ample exemption authority under 46 U.S.C. § 40103(a).

II. COMMENTS

A. **NCBFAA Supports The Proposal To Exempt NSAs From Both The Filing And Essential Terms Publication Requirements.**

The NCBFAA agrees that the proposed revisions to the NSA regulations set forth in the NRPM would both modernize and eliminate regulatory requirements that serve little purpose and provide no countervailing benefit to NVOCCs or its customers. While NSAs have had some limited utility for some NVOCCs, one of the issues with NSAs that has restricted their usage is that they need to be filed with the Commission. In that sense, the regulatory requirements of NSAs are no less burdensome than tariff publication. Indeed, since one needs to also publish the essential terms of NSAs in tariffs, the regulatory process required of NSAs perhaps makes them more burdensome than regular rate tariffs. In addition, under existing regulations, amendments to NSAs must also be filed, although the Commission recently permitted parties to publish amendments to NSAs (and service contracts) thirty days after publication (Docket No. 17-10).
Notwithstanding this recent relief, the NCBFAA has long believed that there has been little to no reason as to why NSAs have to be filed.

The NCBFAA is aware that when the NSA exemption was initially issued in 2004, the Commission was concerned that not filing NSAs “could substantially impact the competition between NVOCCs and VOCCs.” Docket No. 04-12, Non-Vessel Operating Common Carrier Service Arrangements, Final Rule-Errata (Decision served December 23, 2004, at 11). Respectfully, this concern has been shown to be without merit. Eliminating the filing requirement of NSAs does not provide a competitive advantage to NVOCCs. While both NVOCCs and VOCCs are treated as carriers under the Act, NVOCCs, unlike ocean carriers, do not enjoy or seek antitrust immunity. As a result, the terms of NRAs or NSAs, unlike service contracts, do not contain collectively established boilerplate terms and conditions or “voluntary guidelines” relating to pricing or service conditions. To the contrary, every NRA or NSA reflects private negotiations between a shipper and an NVOCC and covers their rate and service arrangements that typically pertain to traffic and logistical service for a specified volume of traffic over a stated period of time. While the filing of ocean carrier service contracts may be necessary or helpful for the FMC in ascertaining whether VOCCs 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 unnecessary NVOCC costs without any countervailing public benefit.

Moreover, as the Association has repeatedly pointed out, at the end of the day, NVOCCs are customers – not competitors – of the vessel operators. All NVOCC cargo necessarily moves on a vessel, and the vessel operators have control of that. It has never been explained why the rate negotiated by an NVOCC with its customer – whether that is a tariff, NRA or NSA – has
any effect on the vessel operator. Certainly no one has explained why eliminating NSA filing somehow gives NVOCCs some competitive advantage over vessel operators. That notion, for which there was never any logical foundation, should be laid to rest.

The NPRM states that “Shippers, who were identified by the Commission as beneficiaries of essential terms in the original 2003 NSA rulemaking, have not since commented on the continuing utility of essential terms publications, and thus maintaining the essential terms publication requirement appears to provide little regulatory benefit.” Docket No. 17-10, Amendments to Regulations Governing NVOCC Negotiated Rate Arrangements and NVOCC Service Arrangements (Decision served November 29, 2017, at 17). The Association agrees with that comment. As the record is clear that shippers virtually never access NVOCC tariffs, it necessarily follows that the essential terms publication requirement provides no benefit to shippers. There being no apparent purpose (other than to add a regulatory burden and risk) on NVOCCs, this requirement should also be eliminated.

The NPRM also cited UPS’s concern that the elimination of NSAs would create competitive conditions unfair to larger NVOCCs. The NCBFAA wants to make it clear that it is not seeking to preclude any NVOCC from using NSAs. In filing the Petition that led to this NPRM, the NCBFAA was only suggesting that if the Commission had elected to completely deregulate NVOCC rate tariffs, that would appear to have the effect of rendering NSAs unnecessary. That is the case, because the elimination of NVOCC rate tariffs or broadening the NRA exemption could cover everything that goes today into an NSA, but wouldn’t have the existing filing requirement. Nonetheless, if parties wish to continue to use formal NSAs, they should be free to do so. And, to facilitate that, the Commission should now eliminate both the filing and essential terms publication requirements.
B. **The NCBFAA Supports The Proposed Revisions To The NRA Regulations.**

The NCBFAA has continually pointed out that there does not appear to be any legitimate regulatory purpose to the current restriction that precludes an NRA from being modified even with the mutual agreement of NVOCCs and shippers. The NCBFAA agrees with the NPRM’s proposal to eliminate this restriction. Allowing NRAs to be amended will provide greater efficiency, eliminate unnecessary workarounds, and enhance the use and competitiveness of NRAs.

The fluidity of the marketplace has only increased the need for greater flexibility from both the NVOCC and the customer. Currently, if a NVOCC or customer wishes to make a modification to an NRA, a superseding NRA would need to be issued or the term of a particular NRA would need to be limited so that they expire and thus permit a new NRA to take the place of an old one. This creates inefficiencies and additional burdens on the NVOCC industry and has made the process of utilizing NRAs far more complicated than it should be. This raises the question as to why NVOCCs should be required to accomplish indirectly what they cannot do directly. The current restriction only impedes and restricts the marketplace at considerable cost to NVOCCs and customers. As one commenter stated in an earlier stage of this proceeding:

> Allowing NVOCCs and shippers to modify established Negotiated Rate Arrangements by mutual consent, rather than constantly replacing NRAs with new NRAs actually strengthens pricing clarity and minimizes shippers’ effort to document their rate levels.”


In the current environment, rates have become narrowly tailored and individually negotiated by NVOCCs both with their carrier contracting partners and their customers. And, due to the differing charges applied by the vessel operators, it has become virtually impossible for NVOCCs to be able to specifically tailor a “one size fits all” approach to their rates. As a
result, the constant fluctuation of rates, requires both NVOCCs and customers to be flexible in their pricing offers. By permitting amendments of NRAs, the Commission will foster a more efficient process.

As stated in the Commission’s notice, allowing for modification of NRAs would assist in the Commission’s intent to “facilitate a new business model conducive to those NVOCCs who could not then, and cannot now, utilize NSAs.” Docket No. 17-10, at 14. Modification of NRAs eliminates an unnecessary restriction, provides flexibility in a fluid marketplace, and allows NVOCC’s to be responsive to their customers.

C. The NCBFAA Agrees That No Written Reply Should Be Required.

The current regulation requires that there be a signature or written approval by both parties in order for an NRA to be valid. 46 C.F.R. §532.5(c). This may have seemed a reasonable requirement when the NRA exemption was initially promulgated. In that regard, in 2003 the NCBFAA (which had proposed the exemption) believed that the Commission would more likely accept the proposal if the agency's staff had access to written evidence (in case of an audit) that the shipper had agreed to the proposal. Based on the experience of NCBFAA’s members, however, it is often the case that shippers agreeing to a written NRA quote will simply tender their cargo without replying in writing. That of course is how shippers do business in air and surface transportation, as well as in other international trades and commerce in general.

In other words, shippers review proposals from their logistics suppliers and – unless a more formal contract involving, for example, the movement of so-called project cargo or a more comprehensive range of services is needed – simply agree and tender their cargo in reliance upon what has been proposed. This is the case even if the NVOCC's rate quote specifically requests that the shipper indicate its assent in writing.
The shipper's omission of a written response should not nullify the fact that a contractual relationship has been established once the shipper has tendered cargo for shipment. That is the case whether a single or multiple shipments are involved; once acceptance of an offer has taken place (i.e., by tendering cargo), a valid contract has been formed. The basic tenets of contract law provide that a valid contract is formed when an offer is made (i.e., the NVOCC provides a rate quote to the shipper) and the offeree accepts either in writing or by its actions (i.e., the shipper tendering cargo). Although a written response provides documentary evidence of the relationship, it is but one of the indicia of a contractual relationship and is not required to establish a binding contract.

Accordingly, the NCBFAA agrees that the validity of an NRA should not be dependent upon having a written approval by the shipper. The Association is not aware of any complaints by shippers that the lack of a responsive written acceptance has caused problems, or that their cargo should have moved by tariff rates or at prices and conditions other than as set forth in an NRA quote. It seems clear, accordingly, that there no reason for the government to maintain regulatory control on how independently negotiated contract are memorialized.

D. The Commission Should Allow NRAs To Include Economic Terms.

In this highly competitive industry NVOCCs need to be able to be responsive to the needs of their customers. On occasion, customers want to be able to have special credit, free time, volume-based considerations when negotiating with the NVOCCs that serve them. And, so, there is a reason why NRAs should be able to include non-rate economic terms that are desired by both parties. For reasons that have never been clear, the NRA exemption was hamstrung from the outset by this restriction that was imposed, apparently at the behest of agency staff, even though no commenting parties requested it. While those terms could be covered in the more formal NSA, the simplification and informality of NRAs makes them
preferable for the vast majority of NVOCCs and their customers. Indeed, the Association is not aware of any shipper or shipper organization that expressed the thought that these terms should only be includable in NSAs.

The record is clear that all traffic and rate arrangements between NVOCCs and their customers are separately negotiated on a one on one basis. And, those negotiated arrangements often apply to more than just base rates, as the contracting parties – and in this environment, the NVOCCs and shippers are contracting parties – often want to cover a variety of service terms, including:

- Minimum volumes or time/volume rates
- Allowances or Volume Incentive Payments
- Liquidated damages
- Credit terms
- Service guarantees and/or service benchmarks, measurements and penalties
- Surcharges, GRIs or other pass-through charges from the carriers or ports
- Free time, per diem and/or demurrage
- Rate amendment processes
- EDI services
- Dispute resolution
- Liability
- Rate or service amendments.

Each of these terms are relevant to some extent to most rate and service negotiations between an NVOCC and an existing or prospective customer. Yet, none of the items on this list can properly be included in an NRA due to the artificial restriction imposed in the decision that
led to the final NRA rule. As noted above, it appears that the sole reason for this restriction is the concern expressed by Commission staff, but not by the members of this industry, that NRAs may start to look like NSAs. While that may well be the case, as the NCBFAA has continually pointed out, that is not necessarily a bad result. The underlying rationale that led the Commission to grant the NRA exemption is that "the ability of NVOCCs to enter into NRAs may increase competition and promote commerce by allowing NVOCCs to better serve their shipper customers." Docket No. 10-03, Non-Vessel-Operating Common Carrier Negotiated Rate Arrangements, Final Rule (Decision served February 25, 2011, at 12; emphasis added.). Yet, by positing that some terms cannot be included in NRAs, the better service that the Commission had in mind has been artificially limited.

There is no rationale in this post-OSRA environment supporting the notion that a shipper and NVOCC should be artificially restricted from freely conducting their commercial affairs in a manner they see fit. Putting the matter simply, this limitation creates inconveniences for both parties and impedes their ability to negotiate a single comprehensive arrangement that would serve their respective interests in a way that the parties themselves desire.

What makes the restriction even harder to justify is that including these types of terms in a written NRA quote provides more transparency to shippers of the nature of the negotiated agreement and its requirements. Continuing to require that they either execute more formal NSAs or somehow agree that their relationship should be embodied in complex rate and rules tariffs makes little sense. It gives shippers the "Hobson's choice" of compelling them to enter into formal written contracts they don't want or using tariffs they can't access or won't understand,
Finally, a continuation of this restriction will result in additional future rulemaking. It is by now abundantly clear that there is no reason for the Commission to interpose arcane regulatory restrictions in an industry that is as dynamic and competitive as the NVOCC trade. Unless the restriction is addressed and corrected now, the Commission and interested parties will be re-visiting this topic in yet another petition and another rulemaking, wasting agency and industry resources and continuing the unnecessary restrictions that hamper the efficiency of service that NVOCCs can provide. It is time for the Commission to eliminate a restriction that never had a legitimate purpose and authorize the inclusion of non-rate economic terms in NRAs.

I. CONCLUSION

The NCBFAA greatly appreciates the steps the Commission has taken to ease the regulatory burden on NVOCCs and its customers. The NCBFAA believes that the adoption of the proposed revisions to the Commissions regulations on NSAs and NRAs is an important step in peeling away artificial constraints that have limited the utility of NSAs and NRAs.

The NCBFAA, however, urges the Commission to go a step further and (1) specifically authorize NRAs to include non-rate economic terms and (2) initiate rulemaking that would consider exemption NVOCC rate regulation entirely. The NCBFAA believes that those proposed revisions are wholly consistent with the prerequisites of Section 40103(a) of the Act, in that these changes would increase rather than decrease competition and would not be detrimental to commerce.
Respectfully submitted,

Edward D. Greenberg
Kristine O. Little
GKG Law, P.C.
1055 Thomas Jefferson St., NW
Suite 500
Washington, DC 20007
Telephone: 202-342-5277
Facsimile: 202-342-5219
egreenberg@gkglaw.com
klittle@gkglaw.com

Attorneys for
THE NATIONAL CUSTOMS BROKERS
AND FORWARDERS ASSOCIATION OF
AMERICA, INC.

Date: January 29, 2018