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BEFORE THE FEDERAL MARITIME COMMISSION

**COMMENTS OF THE FASHION ACCESSORIES
SHIPPERS ASSOCIATION, INC.**

DOCKET NO. 04-12

RIN 3072-AC30

**NON-VESSEL-OPERATING COMMON
CARRIER SERVICE ARRANGEMENTS**

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The Fashion Accessories Shippers Association, Inc., (“FASA”) a shippers’ association within the meaning of Section 3 (22) of the Shipping Act of 1984, as amended, 46 U.S.C. app. Sections 1701 – 1719) (“Shipping Act”) by its undersigned attorneys, submits its comments regarding the Notice of Proposed Rulemaking (“NPR” or “Proposed Rule”) in the above cited Docket dated October 28, 2004. FASA, in its comments to the Commission on the Petition of United Parcel Service (Docket No. P3-03) and in response to the Joint Supplemental Comments Requesting Expedited Adoption of a Conditional Exemption from Tariff Publication, has expressed its concern that exemption from the tariff publication requirements of the Shipping Act, whether conditional upon filing of NSAs or otherwise, and the execution of NSAs, are not appropriate for "exemption" under Section 16 of the Act, 46 U.S.C. app. Section 1715. Nevertheless, and while maintaining that position, FASA offers the following suggested addition to the Proposed Rule in deference to findings of fact and legal analysis reflected in the Commission’s decision to proceed with the NPR.

FASA suggests adding the following new paragraph (4) to Subpart B-- Filing Requirements; Sec. 531.6 NVOCC service arrangements (d) Other requirements:

“(4) for service pursuant to an NSA give any undo or unreasonable preference or advantage or impose any undo or unreasonable prejudice or disadvantage with respect to any locality, port or persons due to those persons’ status as shippers’ associations or ocean transportation intermediaries other than non-vessel-operating common carriers”

The suggested addition is obviously based on Section 10 (c) (8), 46 U.S.C. app. Section 1709 (c) (8) of the Shipping Act and, FASA believes, is consistent with the Commission’s approach to NSAs as reflected in the NPR. We note the Commission’s stated belief that the prohibitions of Section 10 were intended to apply to coordination between ocean carriers (NPR page 23). Literally, Section 10 (c) extends to common carriers; NVOCCs are defined as common carriers by Section 3 (17) (B) of the Shipping Act. Thus, Section 10 (c) would reach action by a group of two or more NVOCCs. However, FASA believes it is now necessary to extend the same restrictions contained in Section 10 (c) (8) to individual NVOCCs offering NSAs for the following reasons:

1. It has been acknowledged that NVOCCs act in a dual capacity of common carrier and shipper. As shipper, NVOCCs compete with beneficial cargo owner (“BCO”) shippers for cargo space in relation to VOCCs and, could, on an individual basis deny NSAs to BCO shippers who have formed a shippers association. NVOCCs often operate as components of larger, commonly owned logistics entities (with, for example, ocean freight forwarders) as part of a “logistic controlled group”. Such NVOCC units might

discriminate against shippers' associations based on status in order to reach their BCO members directly through NSAs. The NPR recognizes that some NVOCCs have evolved into large, "asset based" entities "that are highly competitive, multinational companies with integrated logistics services", (NPR page 16) holding, in some cases, enormous market power. These entities could easily engage in discriminatory tactics against target BCO associations.

2. As emphasized throughout the petition process and as mentioned in the NPR, some NVOCCs are either controlled by, or serve as affiliates of, VOCCs. Thus, ostensibly individual actions by NVOCCs in furtherance of affiliated VOCC objectives might escape the reach of Section 10 (c) (8).

3. The implications of Section 7(a) and "Tucor" (United States v. Tucor, 189 F.3d 834 (9th Cir. 1999)). The Commission has expressed concern that "[u]nder Tucor, the [antitrust] immunity [under Section 7(a)] would likely be interpreted to include an NSA entered into between an NVOCC acting as a carrier and an NVOCC acting as a shipper". (NPR page 24). The Commission considers this concern satisfied by the proposed administrative barring of NVOCCs from NSAs as joint carriers or from carrier/shipper relationships. The suggested addition to the Proposed Rule closes the gap by applying the protections of Section 10(c) (8) to individual actions involving NSAs that might otherwise be deemed immune under the antitrust laws as well as beyond the scope of both the Proposed Rule and Section 10 (c)(8).

FASA favors the proposed administrative extension of certain provisions of Section 10 to NSAs in order to avoid the loss of Commission oversight resulting from the interplay of Section 7(a) and Tucor. However, it supports such exclusions from a

different perspective. FASA views the authorization of NSAs as an outright grant of de facto service contracting rights to NVOCCs cast in the form of a “specified activity” exempted from a “requirement of” the Shipping Act. The underlying premise is that because the exemption from tariff publication (a distinct statutory requirement) is granted conditional upon the filing of an NSA, the NSA becomes an exempt activity or shares the tariff filing exemption. In FASA’s view, the NSA (“an instrument akin to a service contract” NPR page 13) whether in conjunction with the exemption from tariff publication or otherwise is not a matter properly addressed under Section 16. Therefore, the exclusion of NVOCCs from joint NSA activities becomes necessary in order to smooth over the awkward dovetailing of the grant of NSA activity with Section 7 (a). As the NPR observes, without a trace of irony, an NVOCC/VOCC service contract would not have antitrust immunity because it is not exempt but an NSA between two NVOCCs would. (NPR page 25). We believe that the protections proposed by the NPR while necessary and useful are incomplete and warrant the adoption of the suggested addition contained herein.

FASA thanks the Commission for the opportunity to present these Comments.

Dated: November 19, 2004

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 19th day of November, 2004, I have served the foregoing Comments of Fashion Accessories Shippers Association, Inc., Docket No. 04-12 RIN 3072-AC30 Non-Vessel-Operating Common Carrier Service Arrangements by (1) e-mail to the FMC; Secretary@FMC.gov and (2) by depositing the original plus 15 copies via overnight mail, postage prepaid, addressed to "Secretary, Federal Maritime Commission, 800 North Capital St., NW, Washington, D.C. 20573-0001".

s/Christine Culberson
CHRISTINE CULBERSON