October 21, 2022

William Cody
Secretary
Federal Maritime Commission
800 North Capitol Street NW
Washington, DC 20573

Transmitted electronically via email to: secretary@fmc.gov.

Re: Docket No. 22-24, Notice of Proposed Rulemaking

Dear Mr. Cody:

The International Dairy Foods Association ("IDFA") represents the United States' dairy manufacturing and marketing industry, which supports more than 3 million jobs that generate $159 billion in wages and $620 billion in overall economic impact. IDFA's diverse membership ranges from multinational organizations to single-plant companies, from dairy companies and cooperatives to food retailers and suppliers, all on the cutting edge of innovation and sustainable business practices. Together, they represent 90 percent of the milk, cheese, ice cream, yogurt and cultured products, and dairy ingredients produced and marketed in the United States and sold throughout the world. The United States exports over $7.6 billion in dairy products to 141 countries around the world every year: currently, more than one day's worth of U.S. milk production each week – about 17% of all production.

With this context, IDFA welcomes the opportunity to submit these comments concerning the Federal Maritime Commission's ("FMC" or "Commission") Notice of Proposed Rulemaking ("NPRM" or "proposed rule") regarding the *Definition of Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier*.[1]

I. GENERAL COMMENTS

In its September 14, 2022 comments in response to the Commission's Request for Information ("RFI") on the potential issuance of an emergency order pursuant to Section 18 of the Ocean Shipping Reform Act ("OSRA 2022"), IDFA detailed the negative impacts on U.S. dairy exporters caused by the unprecedented supply chain congestion relating to COVID. IDFA continues to hear from its members that, despite the recent easing of West Coast port congestion – which we believe may again easily return – supply chain issues persist, and these issues have a negative impact on the reliability and competitiveness of U.S. exports of dairy foods. Indeed, U.S. dairy exporters are still being told that contracts with Asian customers will go to their

[1] 87 Fed. Reg. 57674 (September 21, 2022).

overseas competitors, even when U.S. products are priced lowest, because those customers will not risk dealing with an unreliable product supply chain in the United States.

As such, IDFA welcomes the Commission's recognition that one basis for some of the OSRA 2022 provisions:

> "were the challenges expressed by U.S. exporters trying to obtain vessel space to ship their products… This export-focus arguably is also supported by the amendments to the "Purposes" section of the Commission's overall authority contained in 46 U.S.C. 40101. Specifically, Section 40101(4) ratified the purpose to 'promote the growth and development of United States exports through a competitive and efficient system for the carriage of goods by water.'"[2]

But it bears emphasis that much of the problem is caused by a *de facto* unreasonable refusal to deal or negotiate – effectuated through general policies and procedures that the major Vessel Operating Common Carriers (VOCCs) have utilized to reduce the volume of exports they carry – rather than through unreasonable refusals to deal in transaction- or shipper-specific negotiations. IDFA welcomes the Commission's implicit recognition of the export problem:

> "VOCCs should offer service in both directions within the trade lanes in which they operate in common carriage, regardless of trade lane, length of time active in the trade, or vessel size."[3]

This de facto unreasonable refusal to deal is operationalized by certain VOCCs through numerous means, including: skipping or cancelling services to certain ports; changing the port of loading;[4] calling on such ports but not alerting exporters to their presence; poorly communicating when vessel schedules change;[5] providing windows for loading that are impractical due to their short length; blank sailings without providing sufficient notice to exporters; not pre-positioning containers inland close to export customers; providing inaccurate and unreliable vessel, shipment and tracking information; and continually rolling export bookings, which amounts to an effective denial of service.[6] The result is a shipping environment where there is no schedule reliability,

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[2] *Id*. at 57674-57675.
[3] *Id*. at 57675.
[4] For example, one of the standard VOCC terms and conditions is that a VOCC can decide to load and unload goods at any place or port, even if the port is not named in the contract, and such a change, and any delay it causes, is deemed to be compliant with the contract terms. See, e.g., paragraph 19 of the Maersk Line Terms for Carriage and paragraph 9 of the MSC Bill of Lading.
[5] Poor communication could be effectuated by, e.g., including overly restrictive contract terms and conditions that prevent shippers from receiving information regarding their shipments directly from VOCCs if they use an NVOCC to make a booking.
[6] VOCCs often complain about "lack of mutual commitment between shippers and common carriers leading to cancellations of vessel space by either party." NPRM at 57675. However, any lack of commitment by cargo owners, which may be manifested in the form of "ghost bookings," is the direct and entirely foreseeable result of the VOCCs' de facto unreasonable refusal to deal in many instances. In the case of ghost bookings, the complete lack

which harms the competitiveness of U.S. exports in overseas markets. Major exporting IDFA members point to rates of 90-100% of their bookings being rolled or rebooked multiple times.

Unfortunately, the proposed rule and the preamble appear preoccupied with solving unreasonable refusals to deal in specific negotiation and discussion contexts, which is not the heart of the problem. The NPRM specifically indicates that "this proposed rule concerns the negotiations or discussions that lead up to a decision about whether an import or export load is accepted for transportation."[7] In order to address the bulk of the unreasonable refusal to deal issue, a Commission rule must target the VOCC policies and procedures that systematize and operationalize the de facto unreasonable refusal to deal or negotiate with cargo owners. We will discuss potential revisions to the NPRM that help to resolve this issue in the next section.

II. COMMENTS ON THE NPRM

A. <u>The burden of persuasion should be placed on the VOCCs.</u>

The burden of persuasion, as articulated in the preamble to the NPRM, is problematic because it places the ultimate burden on the complainant. As described in the preamble:

> "This proposed rule also sets forth a framework for an ocean common carrier to establish that its efforts to consider an entity's proposal or efforts at negotiation were done in good faith based on the criteria above. Once a complainant (or the BEIC [Bureau of Enforcement, Investigations, and Compliance]) has established a prima facie case for each of the three elements above, the ocean common carrier will have the burden of production to show or justify why its refusal was reasonable. *However, the ultimate burden of persuasion remains with the complainant to show that the refusal to deal or negotiate was unreasonable.*[8] (emphasis added)

It is curious that the Commission is proposing to place the ultimate burden of persuasion on the complainant – in many cases, the cargo owner – rather than on the VOCCs. As noted by the Commission itself in the preamble:

> "[O]cean common carriers and those with whom they contract to operate and load/unload their vessels, have the best information on the ability of any particular vessel to accept cargo for import or export. Shippers generally do not have access to this information."[9]

As a result, this approach would prevent any realistic enforcement of the statutory language: "prohibit a common carrier, either alone or in conjunction with any other person, directly or

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of schedule integrity and reliability has forced some cargo owners and/or their representatives to make multiple bookings for their cargo, in the hopes that one of them will come through so that the cargo reaches its ultimate destination by the contract deadline and the cargo owner does not lose the sale and/or the customer.

[7] NPRM at 57676.

[8] NPRM at 57677.

[9] *Id*. at 57675-57676.

indirectly, from unreasonably refusing to deal or negotiate, including with respect to vessel space accommodations provided by an ocean common carrier."

In sum, the VOCCs – in the Commission's own words – have the best information, and shippers generally do not have this information. The Commission clearly recognizes in the recent RFI on the potential issuance of an emergency order that the lack of appropriate data sharing is another serious problem that needs to be addressed. Thus, placing the burden of persuasion on shippers could make it impossible for them to obtain relief. This provision should be removed from the proposed rule before it is finalized.

In addition, the Commission needs to institute strict time limits for a VOCC to provide evidence that its refusal was not unreasonable, taking into account the nature of the cargo. In the case of perishable cargo, a shipper may have only a few days to deliver the goods to their final destination before the cargo spoils. For other food products that have a limited shelf life, they can lose much of their value if they are held up for months due to continuous rolled bookings. Perishable goods shippers therefore stand to lose the entirety of their export business if there is not a mechanism available for timely enforcement of recurring unreasonable refusals to carry said cargo.

B. <u>The factors that the Commission identifies as informing its decision on whether a refusal to deal is unreasonable are phrased, or could be implemented in a manner, such that potentially no refusal to deal would be found unreasonable.</u>

Despite its title, the NPRM does not actually define an "unreasonable" refusal to deal. Instead, it notes that every situation is case- and fact-specific and subject to an analysis of several listed factors, as well as potentially other factors that are not listed but which the Commission could find relevant.

Depending on how the analysis is applied, the three elucidated factors that the Commission would consider, among others, in deciding whether a refusal to deal or negotiate is unreasonable are phrased and/or explained by the Commission in such a way that virtually no refusal to deal would be found "unreasonable."

The first such factor is "whether the ocean common carrier follows a documented export strategy that enables the efficient movement of export cargo". In the preamble to the proposed rule, the Commission provides guidance on what such an export strategy should contain, but also provides that:

> "a situation where an ocean common carrier categorically excludes U.S. exports from its backhaul trip will create a presumption of an unreasonable refusal to deal."[10]

[10] *Id*. at 57676.

This presumption is not found in the text of the proposed rule so the status of this Commission statement is unclear. Nevertheless, if it were included in the regulatory text the presumption would apply only to a *categorical* exclusion of U.S. exports. As previously discussed, a VOCC would not need to state that it intends to exclude all exports or exports from a specific sector; rather, it could effectively exclude exports as it sees fit through application of its internal policies and procedures, thereby creating a de facto unreasonable refusal to deal or negotiate. Thus, the Commission's presumption of unreasonableness could be interpreted as applying to a null set of scenarios.

The second enumerated factor in the Commission's analysis of whether a refusal to deal was unreasonable is "whether the ocean common carrier engaged in good-faith negotiations, and made business decisions that were subsequently applied in a fair and consistent manner". This language appears to exclude booking requests for spot moves. In addition, as previously mentioned this factor does not cover the bulk of unreasonable refusals to deal, which are *de facto* refusals to deal, implemented by VOCCs in their conduct of normal business under their standard policies and procedures. For instance, there will likely not be a VOCC-cargo owner negotiation – done in good faith or otherwise – if a VOCC simply stops service to the Port of Oakland, even though it is clear there is substantial demand for vessel space accommodations for U.S. agricultural exports to Asia from that port. And even where there have been negotiations with a VOCC but bookings are continually rolled – one of our members noted that her cargo had once been rolled *over 15 times* by a VOCC – the end result is that the cargo never makes it onto the ship.

Even in instances where there is a negotiation between a VOCC and a cargo owner, however, the Commission's elaboration of how it intends to interpret the proposed text does not provide confidence that the rule will improve the situation for U.S. exporters. For example, the Commission notes that it:

- "previously found reasonable those decisions that are connected to a legitimate business decision";[11]

- "has a history of recognizing that it is appropriate to defer to a party's reasonable business decisions and not to substitute its business judgement for that of an entity conducting negotiations";[12] and

- earlier found that "[a]n ocean common carrier may be viewed as having acted reasonably in exercising its business discretion to proceed with a certain arrangement over another by taking into account such factors as profitability and compatibility with its business development strategy".[13]

[11] *Id*. at 57676.
[12] *Id*. at 57677.
[13] *Id*. at 57677.

Taken to the extreme, a VOCC could apparently decide to accept only the most profitable cargo shipments and still be in compliance with the proposed rule.

The Commission also cites with approval a case in which it found that the term "reasonable" may mean "ordinary or usual."[14] Under such an interpretation, a VOCC could argue, for example, that its practices over the last two and half years are reasonable on the grounds that they are "ordinary or usual" for the industry.

Further, the proposed rule appears to be focused almost exclusively on what is reasonable from the perspective of a VOCC. But what may be reasonable to a VOCC may not be reasonable when viewed through the eyes of a shipper. As a good business practice, U.S. dairy exporters honor their contracts, even at a loss, in order to keep their customers. For example, when faced with repeated rolled bookings by VOCCs, some IDFA members have resorted to shipping their products to customers in Asia by air freight. While this is incredibly expensive and unprofitable over the long term, members have found it necessary to meet contract deadlines, maintain product quality, and not lose their customers. A Commission rule that places this burden solely on the exporter by allowing VOCCs to wave the flag of "profitability" as an affirmative defense to unreasonable commercial practices is patently unfair. It would also appear contrary to the intent of Congress in enacting OSRA 2022 to promulgate a rule that tilts the playing field further in the direction of VOCCs.

In sum, if the Commission takes the hands-off approach to VOCC decision-making in its analysis that it is suggesting in the preamble and fails to consider the shipper perspective, the rule would be heavily biased in favor of the VOCCs, under which they will seemingly enjoy the blessing of the FMC to self-judge compliance with the Shipping Act, to the continued disadvantage of U.S. exporters.

The third enumerated criterion in the reasonableness analysis is "the existence of legitimate transportation factors." The Commission notes that it "previously found reasonable those decisions that are "motivated by" such factors,[15] which could include "the character of the cargo, operational schedules, and the adequacy of facilities."[16] The Commission mentions "illegitimate transportation factors" in the preamble,[17] but it neither describes what those might be nor differentiates "legitimate" from "illegitimate" transportation factors. Again, the Commission's discussion appears to provide more than sufficient room for a VOCC to undertake discriminatory refusals based on cargo characteristics, by claiming that a specific refusal to deal or negotiate – for instance, where the cargo is perishable or "less profitable" or an exporter is too far inland -- is reasonable, or by continuing policies that amount to a blanket de facto refusal to deal, which is inherently unreasonable. And IDFA is concerned that the language on "adequacy of facilities" could be used as a rationale by a VOCC for changing its schedule and rolling

[14] *Id*. at 57676.
[15] *Id*. at 57676.
[16] *Id*. at 57677.
[17] *Id*. at 57677.

bookings, based on a claim – which is very difficult to disprove – that there are insufficient numbers of containers or chassis at a given port.

Thus, the proposed rule as drafted appears to be heavily weighted in favor of the VOCCs, contrary to the intent of Congress with regard to OSRA 2022 "to promote the growth and development of United States exports."[18] As the Commission cites in the preamble, "[i]t is well-established, however, that '[t]he primary objective of the shipping laws administered by the FMC is to protect the shipping industry's customers, not members of the industry.'"[19] The proposed rule should be modified to eliminate references to subjective terms such as profitability, legitimate transportation factors, and business decisions and strategy that provide unfettered discretion to the VOCCs. Instead, the rule should contain objective criteria that would encourage VOCCs to meet the needs of U.S. exporters, and to provide accessible and reliable transportation services that strengthen the competitiveness of U.S. exports. The following sections detail how the proposed rule could be modified to protect the legitimate interests of cargo owners, especially U.S. exporters.

C. <u>The Commission should clearly define certain types of conduct that would be considered an unreasonable refusal to deal or negotiate.</u>

IDFA recognizes that what is or is not an unreasonable refusal to deal or negotiate is going to be a fact-specific inquiry. However, in order to achieve the objective of the statute, the text of the proposed rule needs to clearly delineate certain types of conduct or actions that would constitute unreasonable behavior.

The following VOCC conduct should be deemed presumptively unreasonable under the refusal to deal rule:

- a blank sailing with less than six weeks' notice;
- not providing at least 72 hours' notice to load a vessel;
- skipping, suspending, or discontinuing services to ports or changing the port of loading despite export demand at such ports;
- not clearly communicating or providing consistent, accurate information directly to cargo owners when ships come into port or vessel schedules change;
- rolling a valid export booking; and
- refusing a booking for perishable cargo.

The presumption of unreasonableness could be overcome by a VOCC, but only by showing through "clear and convincing evidence" that the refusal to deal was reasonable. In any case where the Commission were to side with a VOCC and find that the clear and convincing evidence standard has been met, the Commission would need to submit a report to Congress justifying its decision.

[18] 46 U.S.C. 41104(4).
[19] NPRM at 57676.

The Commission should also include a new factor under the reasonableness analysis, namely the impact of the VOCC's refusal to deal on the cargo owner in the form of lost sales, costs incurred, and availability of alternative carriers to the same routes (or lack thereof) and the steps taken, if any, by the VOCC to mitigate those impacts and make the exporter whole.

The Commission should also qualify prong (ii) of the reasonableness test and indicate that it applies only when there are actual negotiations between VOCCs and cargo owners. As discussed, there are numerous other ways that VOCCs have operationalized an unreasonable refusal to deal or negotiate through their day-to-day business conduct and that this rule must address in order to satisfy congressional intent.

D. The Commission should set out minimum standards for a documented export strategy that is informed by shipper recommendations.

In the NPRM preamble, the Commission indicates that VOCCs operating in the United States should have a documented export strategy enabling the efficient movement of export cargo and notes that effective export strategies:

> "should be tailored to specific categories, such as programs, customers, markets, or commodities, and include documented policies on export business practices, including equipment provisioning, free time, outreach plans for contingencies and instances of imbalance in equipment availability, clearly defined and tracked performance metrics, identification of key export staff, and regular internal review of such policies. The Commission presumes that every ocean carrier operating in the U.S. market will have the ability to transport exports in addition to imports until further information is provided. In other words, an ocean carrier may not categorically exclude U.S. exports from a backhaul trip without showing how this action is reasonable."[20]

In the proposed rule text itself, "whether the ocean common carrier follows a documented export strategy that enables the efficient movement of export cargo" is one of the factors that the Commission would consider in determining whether there was an unreasonable refusal to deal or negotiate.

As mentioned in the prior discussion, prohibiting VOCCs from categorically excluding U.S. exports is insufficient to change the way VOCCs conduct business. Even absent a categorical exclusion, a policy that amounts to a *de facto* refusal to deal in certain circumstances can have a serious negative impact on U.S. exporters. Similarly, maintaining "the ability to transport exports" is not a high threshold to meet, since it does not require the *actual* transportation of exports. In addition, the parameters of a documented export strategy that are included in the preamble are not contained in the rule text itself, are not detailed enough to alter

[20] *Id*. at 57675.

behavior, and are only illustrative, not binding.[21] Moreover, having an export strategy is but one prong of a multi-factor test under the NPRM; consequently, the Commission could find that other factors outweigh the lack of a documented export strategy in certain instances and determine that a refusal to deal was not unreasonable.

Because the export strategy prong is the most important factor in the Commission's determination for addressing the de facto refusal to deal issue, it needs to be strengthened. To this end, the Commission should initiate a supplementary rulemaking to develop mandatory minimum standards to be contained in a documented VOCC export strategy pursuant to the Refusal to Deal NPRM. The standards should provide detailed guidance on how to tailor such strategies to specific categories, deal with contingencies, pre-position equipment, track performance, and communicate with cargo owners. In addition to seeking input on such minimum standards from the public, the Commission should solicit formal recommendations from the exporters on the National Shippers Advisory Committee, as well as USDA's Agricultural Technical Advisory Committees, and incorporate those recommendations in the supplementary rulemaking.

Finally, the Commission should modify the proposed rule to include a provision indicating that failure by a VOCC to develop and implement a documented export strategy that is consistent with the minimum standards is sufficient, in and of itself, to establish that there is an unreasonable refusal to deal or negotiate, irrespective of the outcome of the Commission's analysis of the other factors set out in the regulatory text.

E. The Commission should require continuous, independent third-party certification that a VOCC's documented export strategy meets the minimum standards and is being implemented in accordance with the Refusal to Deal rule.

In the NPRM, the Commission proposes that once a complainant makes out a *prima facie* case of an unreasonable refusal to deal, the burden would shift to the VOCC to justify that its actions were reasonable. The Commission then provides that:

> "[t]his justification may take the form of a certification by an appropriate representative of the ocean common carrier to attest that the decision and supporting evidence is correct and complete. An appropriate representative can include the ocean common carrier's compliance officer."[22]

In the regulatory preamble, the Commission notes that the certification "should document the ocean common carrier's decision in a specific matter, the good faith consideration of an entity's proposal or request to negotiate, and the specific criteria considered by the ocean common carrier to reach its decision."[23]

[21] IDFA would add one more element to the list: VOCCs should include intended route schedules in their documented export strategy as well.
[22] *Id*. at 57679.
[23] *Id*. at 57677.

Unfortunately, a self-certification requirement is not sufficiently robust to ensure that the minimum standards in a documented export strategy are satisfied and, as a result, is inappropriate in this case. A representative that is employed by a VOCC will simply serve as a rubber stamp to provide an ex post justification of an unreasonable refusal to deal. Certification by a VOCC that its decisions were justified and supporting evidence was correct and complete is no substitute for an independent assessment of the facts, including the relevant documents and records and the impacts of the VOCC's refusal to deal on the cargo owner.

OMB Circular A-119 ("Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities") provides a list of factors for U.S. regulators to consider when designing conformity assessment procedures. Among those factors are:

- "the level of confidence required by the agency to ensure that the agency objective(s) has/have been achieved, weighing the risk of non-compliance and its associated consequences with the anticipated costs of demonstrating compliance (including time and resources) to the producers, suppliers, consumers, and the agency;" and

- "relevant industry practice and experience, and the industry's history of compliance."[24]

Based on the history of VOCCs' de facto unreasonable refusal to deal, self-certification by a VOCC that its actions are reasonable and comply with regulatory requirements will not provide the level of confidence that the Commission requires to ensure that Congress' objective of promoting U.S. exports has been met. Not only are the risks of non-compliance high, but the consequences to U.S. exporters would be devastating as the enactment of OSRA 2022 would not address the de facto unreasonable refusal to deal problem, continuing to impede U.S. exports and undermine their competitiveness.

Instead of a self-certification regime, the Commission should institute a requirement for independent third-party certification through a supplementary rulemaking:

- The Commission should establish a Roster of accredited certification bodies that have the requisite subject matter expertise within the scope of their respective accreditations;

- Every VOCC would need to obtain an annual certificate of compliance with the Refusal to Deal rule. For each VOCC, the Commission would select an independent third-party certification body from the Roster at random to conduct an annual certification on, e.g., whether the VOCC has met the minimum standards for a documented export strategy. As part of the certification process, the certification body would solicit input from

[24] See also NIST Special Publication 2000-02, Conformity Assessment Considerations for Federal Agencies, Lisa Carnahan and Amy Phelps, Standards Coordination Office, September 2018.

relevant exporters, associations, carriers, and other supply chain actors, on a confidential basis; and

- In the event that a complaint is filed against a VOCC with regard to an unreasonable refusal to deal allegation, the Commission would appoint an independent third-party certification body from the Roster to undertake an investigation and present findings to the Commission.

Due to the history of non-compliance, and the risks and negative consequences for exporters that are associated with such non-compliance, a Commission requirement for independent third-party certification is both necessary and appropriate to ensure VOCC compliance with the Refusal to Deal rule.

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Ultimately, it is a privilege – not a right – for VOCCs to have access to U.S. seaports. To enjoy such access, VOCCs need to carry both imports and exports and not discriminate between them. Congress made this clear when it passed OSRA 2022. Unfortunately, the Commission's current draft does nothing to address present VOCC discrimination against export cargo and, in fact, provides VOCCs with a legal safe harbor to continue and even double down on their unreasonable business practices that harm U.S. exporters and their competitiveness in foreign markets. As a result, the Commission needs to revamp its initial proposal to eliminate subjective language that would be used by VOCCs to justify unreasonable refusals to deal, and instead develop objective criteria that outlaw unreasonable VOCC practices and take into account the negative impacts of such practices on U.S. exporters.

IDFA appreciates the Commission's work on this important issue to our industry, and welcomes the opportunity to discuss these concerns and recommendations in greater depth.

Respectfully submitted,

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