

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. EP 704 (Sub-No. 1)

**REVIEW OF COMMODITY, BOXCAR,
AND TOFC/COFC EXEMPTIONS**

**REPLY COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

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TABLE OF CONTENTS

	<u>Page</u>
I. Introduction.....	1
II. The Board Should Incorporate Data into Its Decision-Making for Purposes of this Proceeding.....	3
A. Evidence-Based Decision-Making Is Used Widely and Can Be Done Effectively.	3
B. The Board Should Commission an Update to the 2007 Christensen Report as a Means of Incorporating Data Into Its Analysis.....	8
C. The Board Should Reject Objections to a Data-Based Framework on the Basis That It Is Too Costly.	10
III. Conclusion	12

Norfolk Southern Railway Company (“NS”) respectfully submits these reply comments in response to the Board’s new proposed approach for evaluating market conditions in the context of commodity exemption. *See* Ex Parte 704 (Sub-No. 1), Review of Commodity, Boxcar, and TOFC/COFC Exemptions (STB served Sept. 30, 2020) (“September 30 Decision”).

I. Introduction

The Board has committed itself to “evidence-based” decision-making. As it reported to Congress, “reliance on evidence-based decision-making is the responsibility of each Board office, from substantive matters of case adjudication and informal assistance regarding rail service metrics to administrative matters concerning IT modernization and budgeting.”¹ Charged with the economic oversight of the nation’s freight rail system, the Board has concluded evidence-based decision-making will advance its core mission: to exercise its statutory authority and resolve disputes “in support of an efficient, competitive, and economically viable surface transportation network that meets the needs of its users.”² As it explores reforms, the Board “will endeavor to analyze new proposals against historical data to evaluate these reform initiatives.”³

The wisdom of this approach is self-evident. The “evidence” in evidence-based decision-making refers to information produced by “statistical activities” with a “statistical purpose” that is potentially useful when evaluating government programs and policies.⁴ The Office of Economics (“OE”) has started the Board down

¹ Surface Transportation Board, *Budget Request Fiscal Year 2021*, at p. 10, available at <https://prod.stb.gov/wp-content/uploads/STB-FY-2021-Budget.pdf>.

² *Id.* at p. 1.

³ *Id.* at p. 10.

⁴ The U.S. Comm’n on Evidence-Based Policymaking, Report, *The Promise of Evidence-Based Policymaking*, at p. 8 (Sept. 7, 2017) (hereinafter “The Promise of Evidence-Based Policymaking”),

this path, and NS hopes the agency finds its competitive waterfall analysis a useful, second-generation concept.

The few trade associations to comment on the September 30 Decision all clamor for anything but evidence-based decision-making. Rather than build and improve on the exploratory data analysis proposed by OE, the various trade associations (who collectively represent the largest shipping companies in America) cast doubts on the entire endeavor. It is too costly, too complicated, too time consuming, they contend.⁵ They commend the Board to resurrect federal regulation of traffic that has been unregulated for decades without any evidence of serious market failure. NS, on the other hand, urges the Board to stay the course and explore both better empirical tools and better data sources to guide its inquiry. No one will ever say that shifting to evidence-based decision-making will be easy, cheap, or fast. But there is widespread and bipartisan understanding that harnessing data to guide the agency is the *only* path to sound decision-making in our complex society.⁶

Here, careful study of these unregulated markets is compulsory. The Board has several tools at its fingertips to regulate the economic relationship between freight railroads and rail customers. However, the Board is directed to use those tools sparingly, as Congress understood the old adage that “to a man with a hammer, everything looks like a nail.” The risk of unintended harm is simply too high. There is no regulatory “reform” that is more intrusive and risks greater harm

available at <https://bipartisanpolicy.org/wp-content/uploads/2019/03/Full-Report-The-Promise-of-Evidence-Based-Policymaking-Report-of-the-Commission-on-Evidence-based-Policymaking.pdf>.

⁵ See, e.g., Highroad Consulting Ltd. (“Highroad”) Cmt. at pp. 12-13 (Jan. 29, 2021); The Fertilizer Institute Cmt. at pp. 2-3 (Jan. 29, 2021); Portland Cement Ass’n Cmt. at pp. 8-9 (Jan. 29, 2021); The Institute of Scrap Recycling Indus., Inc., the Am. Forest & Paper Ass’n, and the Nat’l Industrial Transportation League Cmt. at pp. 8-10 (Jan. 29, 2021) (hereinafter “ISRI, *et al.* Cmt.”).

⁶ See, e.g., The Promise of Evidence-Based Policymaking at pp. 3-4.

to the surface transportation network than thrusting federal economic regulation into well-functioning, competitive markets. The Board should only take that step after a careful analysis of all relevant data, with particular scrutiny of truck modal share data, which offer the best visibility into the competitiveness of national transportation markets.

II. The Board Should Incorporate Data into Its Decision-Making for Purposes of this Proceeding.

While opening comments offered a diversity of viewpoints regarding the most granular details of the approach OE has developed, many commenters, including NS, generally were aligned in their support of the Board’s incorporation of relevant and reliable data sources into its decision-making for determining whether class-wide revocations of exemptions are warranted. In this section, NS sets out various means to achieve this end, including by improving upon the analysis OE has developed and by considering the use of independent data relevant to the questions at issue in this proceeding. Finally, NS responds to the arguments certain shippers made in their opening comments opposing data-based approaches to the question of whether re-regulation of any commodities is necessary.

A. Evidence-Based Decision-Making Is Used Widely and Can Be Done Effectively.

The Board’s September 30 Decision indicates a commitment to evidence-based decision-making for purposes of this proceeding that is laudable, and accords with approaches taken by many other federal agencies that use data to guide their own decision- and policy-making.⁷ Indeed, the Office of Management and Budget

⁷ See, e.g., U.S. Dep’t of Housing and Urban Development, Strategic Plan FY 2018-2022, at p. 5, available at <https://www.hud.gov/sites/dfiles/SPM/documents/HUDSTRATEGICPLAN2018-2022.pdf> (“The Department is committed to evidence-based policymaking to implement cost-effective solutions that support the mission.”); U.S. Dep’t of Transportation, Strategic Plan FY 2018-2022, at p. 12, available at <https://www.transportation.gov/sites/dot.gov/files/docs/mission/administrations/office->

developed an entire federal data strategy action plan last year to “leverage data as a strategic, long-term asset.”⁸ Data can drive value, increase operational efficiencies, reduce costs, and improve outcomes, and NS is confident that data, if properly harnessed, can deliver those same benefits for purposes of this proceeding as well.

There is also a reason, however, why many express hesitancy about diving into data: as some shippers have pointed out in their opening comments, data can be complex, complicated, and voluminous.⁹ While data can be complex, the answer is not for the Board to shy away from using data as a tool to guide its decision-making. Instead, there is a systematic roadmap the Board, like any decision-maker relying upon data, can use to simplify the process and alleviate concerns about the allegedly complicated nature of data: (1) identify and collect mission-critical data; (2) use analytics to move from data to insights; and, finally, (3) translate insights to action.¹⁰ The detailed recommendations that NS and other rail commenters made in their opening round of comments generally can be implemented within this straightforward framework for data-based decision-making.

1) Identify and collect mission-critical data. As NS observed in its opening comments on the September 30 Decision, OE’s proposal indicates a desire on the

[policy/304866/dot-strategic-planfy2018-2022508.pdf](https://www.transportation.gov/sites/dotgov/files/policy/304866/dot-strategic-planfy2018-2022508.pdf) (“DOT will integrate traditional data sources with new, external data sources; grow data analysis capabilities; and promote the use of safety and cybersecurity data to enable evidence-based policy-making.”); U.S. Dep’t of Education, Strategic Plan FY 2018-2022, at Objective 3.3, *available at* <https://www2.ed.gov/about/reports/strat/plan2018-22/strategic-plan.pdf> (“Increase access to, and use of, education data to make informed decisions both at the Department and in the education community.”).

⁸ Federal Data Strategy 2020 Action Plan, *available at* <https://strategy.data.gov/assets/docs/2020-federal-data-strategy-action-plan.pdf>.

⁹ See, e.g., Highroad Cmt. at pp. 12-13 (Jan. 29, 2021); The Fertilizer Institute Cmt. at pp. 2-3 (Jan. 29, 2021); Portland Cement Ass’n Cmt. at pp. 8-9 (Jan. 29, 2021); ISRI, *et al.* Cmt. at pp. 8-10 (Jan. 29, 2021).

¹⁰ See Deloitte Center for Government Insights, Mission Analytics: Data-driven decision making in government (Sept. 26, 2016), <https://www2.deloitte.com/us/en/insights/industry/public-sector/data-driven-decision-making-in-government.html>.

part of the Board to use real-world data to its advantage. But, as NS and other as commenters noted, the Board must first take a step back and reassess whether it has identified all of the available data sources that are relevant to the questions with which it is grappling. For example, NS and other commenters proposed that, in addition to the Confidential Carload Waybill Sample (“CCWS”), the Board should integrate into its analysis data regarding competitive alternatives and data that measure modal market shares, such as data contained in the Freight Analysis Framework, Transearch data, and/or data that shippers can provide about product and geographic competition.¹¹ NS urges the Board to expand the data sets it identifies for use in this proceeding with an aim towards properly addressing the underlying goal of understanding market conditions in order to consider commodity exemptions and revocation of commodity exemptions.

By the same token, if there is a single, overarching flaw in the data OE has identified as relevant to analyzing current exemptions, it is its use of and overemphasis on revenue-to-variable cost (“R/VC”) ratios as indicators of market power. This notion that R/VC ratios are a proxy for measuring market power is the proverbial bad penny—the predictable, unwanted, and continual return of a disreputable concept, no matter how often Congress, commenters, academics, and other independent organizations beat that concept back. In the Staggers Rail Act of

¹¹ See, e.g., Ass’n of Am. Railroads (“AAR”) Cmt. at pp. 14-15 (Jan. 29, 2021); NS Cmt. at pp. 15-19 and Verified Statement of Dr. Mark Israel (Jan. 29, 2021) (hereinafter “Israel V.S.”); Canadian Nat’l Ry. Co. (“CN”) Cmt. at pp. 10-13 and Verified Statement of Andreas Aeppli and Daniel Beagan (Jan. 29, 2021); see also Am. Council for Technology-Industry Advisory Council, Report, Advancing Data Driven Decisions Making in the Public Sector, at p. 6 (Oct. 2019), *available at* <https://www.actiac.org/system/files/Data%20Driven%20Decision%20Making%20Report.pdf> (For rapid and effective implementation of the Federal Data Strategy 1 Year Action Plan, some have advocated for “[l]eaders [to] not just break down internal silos as they seek to connect data assets that might be isolated within programs or offices, **they should also actively identify other public and private sector data assets that, when integrated with agency internal data assets, could fuel more powerful analytics across the organization.**”). Relatedly, OE could explore the feasibility of working with the Federal Highway Administration to collect and receive modal data at a more granular level of detail or a more disaggregated form.

1980, Congress expressly provided that no presumption or inference could be drawn from the fact that the R/VC ratio exceeds the threshold. Specifically, the Act instructs that:

A finding by the Commission that a rate charged by a rail carrier results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than the applicable percentage under paragraph (2) of this subsection *does not establish a presumption that (A) such rail carrier has or does not have market dominance over such transportation . . .*

49 U.S.C. § 10707(d)(2) (emphasis added). Parties repeatedly have raised concerns in this proceeding about overreliance on the Board's R/VC figures, arguing that R/VC ratios are not a reliable indicator of market power.¹² Independent experts and bodies agree, too, that R/VC ratios are not reliable indicators of whether rates are constrained by competition.¹³ Indeed, the level of an R/VC ratio—and changes in R/VC ratios—are driven by a number of possible factors, none of which involves the exercise of market power.¹⁴ For reasons that have been explained at length in this

¹² See, e.g., Verified Statement of John Asker, Kostis Hatzitaskos & Aviv Nevo in AAR Cmt. at p. 14 (Jan. 29, 2021); AAR Reply Cmt. at pp. 2-6 (Aug. 26, 2016); CSXT Reply Cmt. at pp. 2-3 (Aug. 26, 2016); NS Reply Cmt. at pp. 3-4, 16, 23-24 (Aug. 26, 2016); Verified Statement of Jonathan Orszag and Dr. Mark Israel in AAR Cmt. at pp. 9-14 (July 26, 2016); Verified Statement of Kevin M. Murphy in Union Pacific Railroad Co. Cmt. at p. 7 (July 26, 2016); Verified Statement of Professor Robert D. Willig in AAR Cmt. (Jan. 31, 2011). Even Highroad agrees: "RVC's do not prove market power." Highroad Cmt. at p. 9 (Jan. 29, 2021). Indeed, Highroad "do[es] not view R/VC's as relevant" at all to analyses of its "clients' competitive position in the respective markets." *Id.* at 10.

¹³ See, e.g., The National Academies of Sciences, Engineering, Medicine, Transportation Research Board, Committee for a Study of Freight Rail Transportation and Regulation, *Special Report 318: Modernizing Freight Rail Regulation*, Washington, DC (2015), available at <http://www.trb.org/Main/Blurbs/172736.aspx>; Robert H. Bork & J. Gregory Sidak, *The Misuse of Profit Margins to Infer Market Power*, 9 J. of Comp. L. & Econ. 511, 512 (2013) ("Significant concerns attend the use of a firm's profit margin to infer its market power."); Office of Fair Trading, Assessment of Market Power: Understanding Competition Law § 6.6 (2004) ("High prices or profits alone are not sufficient proof that an undertaking has market power.").

¹⁴ See, e.g., AAR Cmt. at p. 41 (Jan. 29, 2021) ("At most, R/VC ratios might prompt questions about whether market power might play some role in explaining observed patterns . . . but the R/VC data cannot answer any of those questions."); BNSF Ry. Co. Cmt. at p. 2 (Jan. 29, 2021) ("The Board has repeatedly heard from economists and rail experts that R/VC ratios are driven by many factors that have little or nothing to do with the exercise of market power by railroads."); NS Cmt. at pp. 23-25

proceeding and others, the Board and OE must abandon their reliance upon data related to R/VC ratios to draw inferences about a railroad's market power.

2) Use analytics to move from data to insights. Once the Board has identified appropriate data sources for use in this proceeding, the Board can then begin to analyze that data to begin to draw inferences from it. In its opening comments, NS and Dr. Israel explained certain shortcomings of OE's analytical approach that required correction and improvement.¹⁵ To develop a data-driven approach from which the Board can draw insights into the question of whether railroads have unconstrained market power for the movement of a particular commodity, any metrics that are being considered must have proven ties to competitive dynamics of a market, including market power.¹⁶ Perhaps most importantly, OE also must complement the exploratory data analysis framework it used with traditional, statistical methods that can confirm and test hypotheses, which will yield the actionable insights the Board can use to make decisions.¹⁷

3) Translate insights into action. After identifying and collecting relevant data to this proceeding and using analytics to move from data into insights, the Board can then use those insights to inform and guide revocation decisions at the heart of this proceeding. Again, as NS and Dr. Israel noted in their opening

(Jan. 29, 2021); Israel V.S. at ¶ 38 (Jan. 29, 2021) ("In particular, a change in relative RVC may be linked to a change in the universe of commodities making up the average and be unrelated to increased market power.").

¹⁵ NS Cmt. at pp. 15-25 (Jan. 29, 2021); Israel V.S. at Section IV.

¹⁶ NS Cmt. at pp. 19-20 (Jan. 29, 2021) ("If a detective has no fingerprint powder, he will fail to find fingerprints on most surfaces. If he does not understand where the criminal is likely to have put his fingers, he will not look in the right places.' Exploratory data analysis uninformed by economic knowledge of where competition will be detected will leave the Board adrift in a sea of data.) (citing Tukey, *EXPLORATORY DATA ANALYSIS*, at vii (1977)); *see also* AAR Cmt. at p. 12 (Jan. 29, 2021) ("The Board's focus should be on data that indicates whether railroads can abuse unconstrained market power."); CN Cmt. at pp. 10-11 (Jan. 29, 2021).

¹⁷ Tukey, *EXPLORATORY DATA ANALYSIS*, at vii (1977) ("[E]xploratory and confirmatory can—and should—proceed side by side.").

comments, the insights derived from the data will not serve as the be-all and end-all when it comes to making a revocation decisions, but those insights can at least serve as probative evidence that the Board should take into consideration alongside the full record of facts regarding the competitive conditions in the markets for the transport of these commodities.

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Ultimately, NS encourages the Board to embrace the use of data in this proceeding, but, to properly harness the benefits of data, OE's proposed approach requires revisions in line with the remedies NS offered in its initial round of comments. To that end, NS would welcome the opportunity to work collaboratively with OE to build upon the foundation OE laid with the exploratory data analysis it undertook. NS would happily make Dr. Israel available in technical workshops with OE to brainstorm and explore alternative approaches, debate econometric specifications and hypothesis tests, and consider new sources of useful data.

B. The Board Should Commission an Update to the 2007 Christensen Report as a Means of Incorporating Data Into Its Analysis.

In conjunction with any data-based approach the Board and OE develop for analyzing revocation decisions, the Board should retain an independent expert to update the 2007 report by Laurits R. Christensen Associates, Inc. ("Christensen") on the state of competition in the rail industry in order to inject data-based analysis into this proceeding. Christensen's Board-commissioned study explored, in part, the very question the Board is considering in EP 704, namely whether railroads exert market power over any commodity such that a revocation is warranted under 49 U.S.C. § 10502. Because of its direct relevance to this proceeding, it would be natural for the Board to recommission Christensen to update its original 2007

study,¹⁸ which is now over 13 years old, to refresh its analysis and reassess the state of competition in the rail industry today for purposes of examining the questions raised in EP 704. Alternatively, the Board could retain a different independent economic expert to revisit the 2007 study.

The concept of refreshing this study is not new: after Christensen released its original report in 2007, the Board subsequently directed Christensen to update its competition study to reflect Confidential Carload Waybill Sample (“CCWS”) data from the years 2007 and 2008.¹⁹ In the revised report, Christensen simply incorporated two additional years of data into its findings, and updated certain chapters of its original report. If the Board is concerned about the costs of updating the entire report for purposes of EP 704, the Board could limit the scope of engagement with Christensen to incorporate recent CCWS data into and update only Chapter 4 from its original study. This chapter examines the extent to which market power is a function of industry costs and revenue,²⁰ one of the key issues the Board and OE seemed to be exploring in the September 30 Decision. An update to this chapter would serve to test whether the hypothesis that “[t]here is no consistent relationship over time between changes in the exercise of market power and changes in cost conditions” remains true.²¹

An updated report by Christensen would be consistent with the Board’s interest in and commitment to data-based inquiries into the functioning of

¹⁸ Laurits R. Christensen Associates, Inc., Report, A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals that Might Enhance Competition (rev. Nov. 2009), available at <https://prod.stb.gov/reports-data/reports-studies/>.

¹⁹ Laurits R. Christensen Associates, Inc., Update to the Study of Competition in the U.S. Freight Railroad Industry (Jan. 2010), available at <https://prod.stb.gov/wp-content/uploads/files/docs/competitionStudy/January%202010%20Report.pdf>.

²⁰ *Id.* at Chapter 4.

²¹ *Id.* at i.

transport markets for certain commodities. In addition, although OE observed in the Technical Conference on January 15, 2021, that there exist plenty of trained economists who are equipped to *review* OE's work, those privately retained consultants are not replacements for an independent and unbiased outfit like Christensen that can *supplement* OE's work. Refreshing the Christensen study would provide the Board with additional observations from an independent source about the exercise of market power in the freight rail industry, or lack thereof.

C. The Board Should Reject Objections to a Data-Based Framework on the Basis That It Is Too Costly.

Many of the comments submitted by or on behalf of the shipping industry argued that a data-based approach to considering commodity exemptions would be too costly for interested stakeholders. This line of argument is a red herring that the Board should reject. In its September 30 Decision, the Board described in great detail the work OE conducted to develop a snapshot of the current state of a commodity's rail transportation market, and identify changes in certain market conditions since 1992.²² The Board specifically sought comments from interested stakeholders on whether and how that approach could be used in this proceeding to determine whether revocations should be made on class-wide bases. As evidenced by the comments that shippers and shipping industry associations submitted in response to this request, costs did not deter shippers from the task at hand, and they, like many other stakeholders, weighed in on the appropriateness of the new approach without the assistance of an expert economist.²³

²² September 30 Decision at 6.

²³ See, e.g., Highroad Cmt. at p. 8 (Jan. 29, 2021) ("I did not perform an in-depth analysis of the proposed model. However, I will comment on some of the proposed values, indicators, and thresholds."); see also The Fertilizer Institute Cmt. (Jan. 29, 2021) (no expert Verified Statement submitted); Portland Cement Ass'n Cmt. (Jan. 29, 2021) (no expert Verified Statement submitted); ISRI, *et al.* Cmt. and Verified Statement of Henry Julian Roman (Jan. 29, 2021) (retained consultant

If and when the Board decides to adopt a data-based approach as part of its analysis as to whether to revoke or grant new, class-wide exemptions, OE and OE alone will be responsible for running data through that model and publishing the results. Stakeholders will not need to retain economists to “assemble, process, and calculate various data points” or incur litigation costs to “analyze the application of the model to a given commodity.”²⁴ OE will be responsible for those tasks. Commodities will not be at risk of slipping through cracks “simply because shippers did not have sufficient funds to litigate the (complex and expensive) approach.”²⁵ OE will be the gatekeeper of the model as it applies to each exempt commodity class. Further, once adopted, the model and its various aspects should not be subject to re-litigation and challenge;²⁶ instead, the process of refining the model to appropriately measure competitive dynamics in certain transportation markets is occurring now, through this very comment process.

To the extent shippers’ comments reflect a concern about costs associated with individual revocation proceedings, NS respectfully submits that those

to estimate costs of replication of the proposed model but not to analyze the merits of the proposed model).

²⁴ The Fertilizer Institute Cmt. at pp. 2-3 (Jan. 29, 2021); *see also* Highroad Cmt. at pp. 7-8 (Jan. 29, 2021) (“[T]his new approach would create a costly process with little guarantee. Litigation costs may be incurred for an analysis not used in the Board’s decision.”). Highroad’s concern that costs may be incurred in connection with an analysis that is not guaranteed to have any influence on the outcome of the Board’s decision to revoke an exemption also misses the mark. *See id.* Even if costs needed to be incurred, no one is suggesting that OE apply its proposed approach until its use-case has been determined. The entire purpose of the Board’s September 30 request for comments seeks to explore what that use-case will be.

²⁵ The Fertilizer Institute Cmt. at pp. 2-3 (Jan. 29, 2021); *see also* Highroad Cmt. at pp. 7-8 (Jan. 29, 2021) (“It is unlikely that shippers will be willing to take on the costs, so it could become a moot issue. However, the additional risk is railroads could file for additional exemptions which would force shippers to incur those costs to defend their regulated traffic.”).

²⁶ ISRI, *et al.* Cmt. at p. 9 (“It is reasonable to expect that railroad experts would be hired to challenge as many aspects of the model as possible when applied to a given commodity, forcing the shipper proponent to likewise engage experts to respond, thereby making the proceeding cost prohibitive.”).

commenters have misunderstood OE's proposal.²⁷ No one is advocating for use of a data-based framework that should be applied universally in individual revocation proceedings; OE's framework is intended to be applied to the question of whether to revoke existing class exemptions under 49 C.F.R. part 1039.²⁸ The idea of a universal model to be applied in individual revocation proceedings would be antithetical to that process. And certainly no one is asking shippers or any other stakeholder to retain an expert and develop from scratch a data-based framework for approaching each and every individual revocation proceeding. Instead, individual revocation proceedings will continue to evaluate the totality of market-based evidence presented, in numerous forms. Thus, the costs associated with a data-based approach like the one OE has developed, or NS has suggested, will not prejudice the shipping industry.

III. Conclusion

The Board should stay true to its mission. It should continue to harness information from complex datasets to inform and guide its decision-making. To be sure, the work will be hard, the agency and stakeholders will explore dead ends, and it will take time to gather and analyze the relevant data. But the wisdom of pursuing evidence-based decision-making here, and in all its policy actions, cannot be seriously called into question.

In this rulemaking, NS is confident that using sound economic analysis of the most relevant data will show there is no reason to reinstate federal economic regulation of transportation markets that have been unregulated for generations. Instead, it will likely show the opposite: that well-functioning competitive markets

²⁷ See, e.g., ISRI, *et al.* Cmt. at pp. 11-12 (contemplating shippers filing "revocation requests" which implies the use of the individual revocation procedure).

²⁸ See September 30 Decision at p. 1.

exist for other regulated commodities that should be eligible for their own exemptions.

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