BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 19-07

DELEGATIONS TO BUREAU OF ENFORCEMENT
AND ENFORCEMENT PROCEDURES

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

On behalf of the National Customs Brokers & Forwarders Association of America, Inc. ("NCBFAA"), we are submitting these comments in response to the direct final rule issued by the Commission in the above-referenced docket.

As the trade association for the nation's ocean freight forwarders and non-vessel operating common carriers ("NVOCCs"), the NCBFAA appreciates having the opportunity to comment in support of the final rule. In addition, at the end of its supporting comments, the NCBFAA respectfully suggests that the Commission consider taking further action with respect to its enforcement program.

At the outset, the Association wants to make it clear that these comments are not intended to criticize the Bureau of Enforcement ("BOE") or the Commission's enforcement program. To the contrary, the NCBFAA endorses and supports robust enforcement of the Shipping Act in order to preclude malpractices that are detrimental to commerce or otherwise create conditions that are unfavorable to competition and shipping in the international ocean trades. But there have been significant changes in the regulatory structure affecting ocean trade since the enactment of the Ocean Shipping Reform Act of 1998 ("OSRA"), which has also resulted in a changing shipping environment. Just as it is appropriate to review how the Commission's regulations may need to be revised to reflect changes in the shipping industry, it is also

appropriate for the Commission to consider and adopt enforcement procedures that are more appropriately tailored to this changed environment and that adopt enforcement processes that other regulatory agencies have considered and found to be appropriate.

I. THE FINAL RULE SHOULD GO INTO EFFECT

As the NCBFAA understands the proposal, the new rules would establish a process by which BOE would send targets of a potential enforcement action a notice indicating that a preliminary determination has been made to recommend that the Commission initiate enforcement action and identify the specific alleged violations. That notice would give a target the opportunity to make a written submission to BOE concerning the proposed recommendation. Only after considering that written statement would the Commission determine whether to go forward with any enforcement action and, if so, what type of proceeding should be initiated.

For example, the Commission could authorize BOE to initiate informal compromise procedures, looking to assess civil penalties. Alternatively, the Commission might determine to initiate an investigation to determine whether the alleged conduct does violate the Act and, if so, whether the respondent's actions should be subject to a cease and desist order. That alternative would seem particularly appropriate where the alleged misconduct raises novel legal issues.

Similarly, in egregious cases, the Commission could determine that civil penalties or a cease and desist order might be an insufficient sanction. In that instance, the Commission might look to other types of sanctions that could possibly include restitution to injured parties.

As is the case with the so-called Wells Process used by the Securities and Exchange Commission, the proposed notice would offer the benefit of providing a putative respondent with a clear explanation of the nature of the charges that BOE might bring as well as the legal basis for doing so. If the proposed target wished to do so, it would then have the opportunity to respond to the proposed charges, knowing that its response and explanation would be reviewed

not just by BOE but also by the Commissioners. Notwithstanding this response, BOE might still determine an enforcement proceeding was appropriate and would submit its recommendation for doing so to the Commission along with whatever response the putative respondent has offered. At that point, if the Commissioners believed an enforcement action was appropriate, the Commission could then authorize BOE to initiate informal compromise procedures, subject to the agency's approval of any final compromise agreement. Alternatively, and as noted above, the Commission could elect instead to initiate an investigation under 46 U.S.C. 41302 to determine whether any conduct did violate the Shipping Act.

The NCBFAA believes that the delegation to BOE will likely have a number of beneficial effects. As the members of the Commission would necessarily be involved at the outset, it seems more likely that potential enforcement cases would focus on issues that have a material adverse effect on trade or competition and minimize the initiation of cases that are based on relatively minor or technical infringements of regulations. In those situations where it authorizes BOE to go forward with some enforcement action, the Commissioners will necessarily have found there to be a reasonable basis to believe a violation of the Act had been committed, thus putting the proposed respondent on notice that there is a sound basis for BOE's allegations. And, by approving any compromise agreement before it becomes effective, the Commission and the respondent can be satisfied that the proposed resolution is appropriate and consistent with Commission policy, equitable to the parties involved and that satisfies the deterrence objective that is a key element of any punitive action.

In appropriate circumstances, the Commission might elect to initiate a Section 41302 investigation to address a specific fact situation rather than authorize BOE to go forward with civil forfeiture negotiations. The NCBFAA believes that not all questionable activities warrant

the imposition of penalties. To the contrary, there may be legitimate differences of opinion concerning commercial operations and how those activities fit within the construction or interpretation of the Act or the Commission's regulations. That is often the situation with respect to, for example, alleged violations of the co-loading regulations or allegations pertaining to the so-called misuse of service contracts.

The changes to the shipping industry resulting from the enactment of OSRA have significantly changed, among other things, the contracting practices and operations of vessel operators and NVOCCs. The Association believes, however, that BOE enforcement cases have at times not reflected these changes. By having the Commission itself authorize future enforcement actions and possibly initiate investigations rather than civil penalty proceedings, the Commission would have an opportunity to enunciate its view of the law and policy as they affect the shipping industry. It would accordingly be less likely that there would be an anecdotal approach to enforcement where only BOE and a respondent know what the issues in any prosecution actually involved. And, even if there is no formal investigation, by having the Commissioners determine whether an action warrants prosecution the industry would learn what conduct is or is not consistent with the Shipping Act.

The NCBFAA believes that not all disputes concerning the legitimacy of challenged practices should or need to be settled by the imposition of a monetary penalty. If there is a legitimate issue as to whether the challenged conduct violates the Act, the Commission would have the ability to determine whether the practice is lawful and, if not, issue a cease and desist order. Under the current system, however, virtually all alleged violations are dealt with by monetary penalties. And, most of those are settled because of the risk and cost of litigation and penalties, not because the respondent necessarily agrees that it violated the Act.

The NCBFAA recognizes that there could be a downside to adoption of the new rule. The rule would initiate a more formal process than currently exists. As such, unlike the informal discussions and negotiations that go on during the current civil forfeiture process, the written response of the putative respondent could be deemed to be an admission against interest in any proceeding that might ultimately be initiated. On balance, however, this potential consequence does not negate the benefit of the proposed changes. There is no requirement that the target of a proposed enforcement action provide a written response, in which case it would seem likely that BOE's proposal to the Commission would be adopted and matters would go forward in the future much as they have in the past – *i.e.*, through the negotiation of penalties between BOE and the respondent, subject to approval by the Commission. Regardless, the changed procedure would ensure that the proposed action is consistent with Commission policy objectives.

II. THE COMMISSION COULD SHOULD CONSIDER ADDITIONAL ADJUSTMENTS TO ENFORCEMENT POLICY

NVOCCs regulated by the Commission are also subject to the statutory and regulatory requirements of a myriad of other government agencies, including Customs and Border Protection ("CBP"), the Bureau Of Industry and Security ("BIS"), the Office of Foreign Assets Controls, and various other agencies within the Department of Transportation (such as the Federal Aviation Administration, Federal Motor Carrier Safety Administration ("FMCSA"), and the U.S. Coast Guard). Yet, the FMC is the only one of these agencies that has not adopted published guidelines on determining how proposed penalties should be determined.

For example, under its Informed Compliance Procedures, CBP has published a manual entitled "Mitigation Guidelines: Fines, Penalties, Forfeitures and Liquidated Damages" that explain the ranges of penalties applicable to various types of malpractices within its jurisdiction and how respondents can seek mitigation or even rescission of any proposed penalties. BIS has

promulgated regulations providing guidance on establishing penalties for violations of the statutes and regulations subject to its jurisdiction (*see* 15 C.F.R. Part 766, Supplement and Nos. 1 and 2). The FMCSA has promulgated a Uniform Fine Assessment Publication, available on its website, to help the industry understand how that agency assesses penalties. Similarly, the U.S. Coast Guard has promulgated a Civil Penalty Case Guide that addresses how that agency determines appropriate penalty amounts.

All of these guidelines, while differing in their approach, have one thing in common – to advise the members of the various industries they regulate as to what factors are to be considered in determining the amounts of proposed penalties. The NCBFAA believes that the shipping public would be well-served by having similar guidelines established for matters initiated under the Shipping Act.

In addition to giving guidance to the members of the shipping industry, adopting this policy would give the Commission the opportunity to determine appropriate penalty ranges. Because of indexation, the penalty provisions of 46 U.S.C. §41107, which are set forth as $5,000 or $25,000, depending upon whether the violations were willfully and knowingly committed, have been increased to a level where they are now $12,007 and $67,039, respectively. Given the fact that virtually every alleged violation of the act is routinely considered to be both "willfully and knowingly" committed, any violation of the Act leaves an NVOCC or carrier subject to penalties in excess of $60,000 per violation. As it is likely that any challenged practice would have been performed on numerous occasions, the potential penalty for even minor or technical violations of the act or the Commission's regulations are extraordinarily high.

Without Commission-approved guidelines that can set reasonable ranges and guidelines for mitigation, the current process remains far too opaque. As just one example, what weight

should be given to a company who comes forward with a voluntary self-disclosure ("VSD")? The Transportation Security Administration has a process by which a VSD filed by a carrier or air forwarder subject to its jurisdiction might justify no penalties even if the malpractice involved a serious breach of its regulations. Many other agencies have similar procedures. But, without any guidance that an NVOCC or vessel operator would receive either no penalty or significant mitigation of any proposed penalty, the existing system is a disincentive to the trade coming forward to disclose malpractices or even to raise questions about whether certain conduct is a malpractice. This is not in the interest of Commission or the industry.

Accordingly, while the NCBFAA believes that additional steps could be taken to improve the Commission's enforcement policy, the proposed direct final rule is a significant step forward and should be allowed to go into effect.

Respectfully submitted,

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