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VIA FEDEX AND E-MAIL

April 29, 2013

U.S. Customs and Border Protection
Office of International Trade
Regulations and Rulings
Trade and Commercial Regulations Branch
90 K Street, NE 10th Floor
Washington, D.C. 20229-1177

Re: Establishment of Due Process Procedures on License-Like Processes
Comments on NPRM Docket No. USCBP-2013-0009
Our Reference: 10900-0290037 I

Dear Sir or Madam:

The National Customs Brokers and Forwarders Association of America ("NCBFAA") submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") involving the "Establishment of Due Process Procedures on License-Like Processes." The NPRM seeks to establish procedures for suspending or revoking an assigned entry filer code and for discontinuing immediate delivery and remote location filing privileges. While immediate delivery and remote location filing are privileges which facilitate the entry process, the entry filer code is part of a licensed property right that cannot be summarily revoked or suspended. We recognize that U.S. Customs and Border Protection ("CBP") proposes these amendments ostensibly to protect the due process rights of customs brokers, importers and other electronic filers. To the extent that regulatory changes can help ensure that brokers' rights are not violated, we welcome the prospect of modifications. However, we believe that an objective comparison of the current proposal with the relevant statutory and constitutional protections *already* granted to customs brokers reveals serious inadequacies in the suggested modifications.

Entry filer codes are essential to the business operations of our members. The suspension or revocation of an entry filer code poses a disproportionately grave threat to licensed customs brokers because a filer code is required to file entries electronically or manually. 19 C.F.R. § 142.3a(a). In the highly competitive customs brokerage business, the inability to file entries and obtain real time release of shipments means the inability to compete. Roadblocks on

this order of magnitude are a death knell to a customs broker. While an importer self-filer whose entry filer code is suspended or revoked can always utilize the services of a licensed customs broker to continue its underlying business, a customs broker whose entry filer code is revoked has no comparable recourse to remain in operation. In the corporate context, for brokers that operate pursuant to a single license and filer code, that will mean the loss of jobs for all employees, at all locations, regardless of whether such individuals were directly involved with any alleged wrongdoing. Absent a situation where CBP could demonstrate that the entire enterprise was involved in a coordinated scheme to put the public health and/or safety at risk, it is difficult to imagine a scenario which would justify such an extraordinary and catastrophic result.

The property interest that customs brokers possess in the entry filer code and the liberty interest they have in pursuing their profession are protected by the Due Process Clause of the Fifth Amendment to the U.S. Constitution, Section 641 of the Tariff Act of 1930, as amended (19 U.S.C. § 1641), the Administrative Procedure Act ("APA"), and a litany of presently existing federal regulations (e.g., 19 C.F.R. §§ 111.50–111.81, 143.6–143.8). These protections exist *independently* of the regulatory modifications proposed by CBP, and they constrain the discretion of the agency[1]; CBP has a duty to craft regulations that do not violate importers' and customs brokers' independently existing legal rights. Because the present NPRM fails to provide adequate due process protection, we respectfully submit that it should be reconsidered and withdrawn.

I. EXECUTIVE SUMMARY

CBP's proposal to allow for the rapid or immediate suspension or revocation of entry filer codes is an *extraordinary* remedy for which CBP has not established a need. We respectfully submit that the proposed regulations are defective on at least three separate legal

[1] Indeed, CBP acknowledged as much when it conceded judgment in Lizarraga v. Bureau of Customs and Border Protection, 2010 Ct. Intl. Trade LEXIS 116 (Oct. 4, 2010). Although the text of 19 C.F.R. § 142.3a at that time would have allowed CBP to revoke a broker's entry filer code without any form of notice or hearing, CBP was compelled to admit in court that its discretion was not unlimited because the regulation in question was statutorily and constitutionally infirm.

grounds. First, the proposal to authorize immediate suspension in the event of "willfulness" violates the constitutional minimum guarantee of due process and must be revised. Second, once issued, an entry filer code is an inseparable component of a broker's license. Thus, the proposal as a whole, which would effectively permit CBP to terminate any customs broker's operations with a bare minimum of due process, violates the stringent due process requirements of 19 U.S.C. § 1641(d). Third, the proposed regulations do not comport with the requirements of the Administrative Procedure Act, and should be modified to ensure that the protections of the APA are not neglected.

CBP should clearly define the condition of "misuse," under which filer code suspension or revocation may be effectuated. The protections afforded to entry filers should include, at a minimum, a probationary status as an interim step prior to suspension, as is afforded to Automated Broker Interface participants. We also disagree with CBP's determination that the proposed regulations will not have a substantial impact on a significant number of small business entities, and we request that CBP conduct a regulatory flexibility analysis as required by the Regulatory Flexibility Act to determine the viability of alternative proposals that could accomplish similar goals without the threat of economic catastrophe.

We respectfully request that the portion of the NPRM which addresses the suspension or revocation of a licensed customs broker's entry filer code be withdrawn. In the event that CBP determines to move forward with this proposed rulemaking, the final regulations will require significant modification in order to recognize and preserve the broker's rights to due process *regardless* of the circumstances offered to justify such extraordinary action.

II. GENERAL COMMENTS

A. The Proposed Regulations Fail To Recognize or Preserve Customs Brokers' Constitutional Rights

Although the NPRM gives off every appearance that it concerns itself with the constitutional right to due process, in fact, it altogether fails to consider the constitutional implications of these revisions. The NPRM is entitled "Establishment of Due Process

Procedures on License-Like Processes," and commences the background discussion with an overview of the Supreme Court precedent regarding the due process the government must provide to individuals that are being deprived of property interests by the United States, Matthews v. Eldridge, 424 U.S. 319 (1976). In spite of this promising introduction, though, the proposal fails to further evaluate the constitutional questions in any way.

There is no discussion of the factors set forth in Matthews; no weighing or balancing of the competing interests in play. The NPRM does not acknowledge the importance of the liberty and property interests being impaired, there is no contemplation of the risks posed by erroneous deprivation, and no explanation of the type of governmental and societal interests that might justify CBP's revocation of brokers' entry filer codes without prior notice and hearing. Instead, the analysis abruptly shifts to a consideration of the Administrative Procedure Act's (the "APA's") restrictions on agency license revocation, found in 5 U.S.C. § 558(c).

In short, the NPRM fails to articulate with any degree of specificity or certainty those instances in which the need to suspend or revoke a broker's entry filer code would outweigh the broker's constitutionally protected and legislatively mandated rights to due process.

It is not enough for CBP merely to recite the Matthews factors; it must ultimately craft regulations that respect and preserve customs brokers' constitutional right to due process. In the NPRM, the result of CBP's failure to contemplate the Matthews factors is a regulatory proposal that doesn't even *attempt* to preserve customs brokers' constitutional due process rights, but instead only aims at the APA requirements, and even then, with limited success. (See below for further discussion of the APA.) It would appear that CBP has relied exclusively upon the APA as a proxy for determining the process which brokers and other entry filers are due when facing filer code revocation, but it has cited no authority for the notion that a regulatory regime that satisfies the requirements of the APA *ipso facto* satisfies the due process requirements of the Fifth Amendment. In reality, procedures that satisfy the APA may or may not pass constitutional muster. The USCIT explicitly recognized as much when permitting CBP to concede judgment in Lizarraga. Lizarraga, 2010 Ct. Int'l Trade LEXIS 116 at *19 ("It is important to note, however, that the court is not finding that the due process afforded by 5 U.S.C. § 558 will necessarily be legally sufficient under the facts or circumstances of a future case. Thus, the court is not

determining whether the provisions of § 558 will provide adequate legal due process under circumstances yet unknown.").

In the absence of any analysis of the Matthews factors by CBP, we present the following analysis for your consideration. Careful consideration of the factors set out below reveals that the most significant constitutional infirmities in CBP's proposal is the authorization of summary suspension of entry filer codes without any prior notice, predicated upon the undefined grounds of "willfulness."

1. *Matthews* establishes the rubric for evaluating the adequacy of procedural due process

In the nearly three decades since the Supreme Court decided Matthews v. Eldridge, the rubric set out in that case has been applied by dozens of courts in countless contexts to determine what process is due when government action threatens incursion on some private interest of life, liberty or property. Simply put, Matthews is *the* legal benchmark for constitutional procedural due process analysis, and CBP's proposed rulemaking—which quotes but does not analyze the Matthews factors—is fundamentally flawed.

Matthews held that to determine the scope of constitutionally mandated due process protection requires consideration of three factors: (1) the nature of "the private interest that will be affected by the official action," and the magnitude of potential deprivation that may result, (2) the fairness and reliability of pre-termination procedures, including any procedural safeguards, and the risk that the procedures might result in an erroneous deprivation, and (3) the Government's and public's interests in efficient and cost effective administration. Matthews, 424 U.S. at 335–48. In other words, Matthews established a balancing test whereby, in our case, customs brokers' property and liberty interests must be contrasted with the government's interests in expedited administrative procedures, while bearing in mind the catastrophic consequences that would inevitably stem from an erroneous deprivation.

2. Application of *Matthews* factors to NPRM reveals significant constitutional flaws

a. First Matthews Factor: Brokers Possess Significant Property and Liberty Interests

Regarding the first Matthews factor, the interests that customs brokers possess in the entry filer code are extraordinary. First, as CBP acknowledges, customs brokers possess a property interest in the entry filer code as a type of government benefit in the form of a professional license. See RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.5(c) (5th ed. 2012) ("Government licenses are also a form of property insofar as they constitute an entitlement to engage in a valuable activity." (citing cases)). Additionally, customs brokers possess a constitutionally protected *liberty* interest in the licenses that permit them to perform their chosen occupation. Id. § 17.4(d)(ii). As described above, the impact that would result from the deprivation of these property and liberty interests is enormous. Entry filer codes are not *pro forma*, but essential; they enable performance of the most basic functions of a customs broker's business.

It bears noting that all licenses are not created equal. Just as government issued licenses authorize engagement in a wide range of activities, the range of consequences that stem from revocation of such licenses is equally broad. Consequences may vary from mere inconvenience and the loss of certain limited privileges, to financial losses of varying magnitude, and at the extreme end, personal economic catastrophe—the destruction of the licensees' capacity for gainful employment. Thus while the APA's license revocation provisions, if followed, may be enough to provide the requisite constitutional protections in some instances, there are also licenses that confer rights of such gravitas that the licensees may not be deprived without being extended a more measured and thoroughgoing process. Customs brokers' licenses, permits and entry filer codes, conferring, as they do, numerous property and liberty interests, fall into this category.

b. Second Matthews Factor: Summary Suspension of Licenses Unconstitutional

The second Matthews factor calls for an evaluation of the fairness and reliability of pre-termination procedures. The fact that in this NPRM, CBP tries to preserve the right to suspend the entry filer code without any notice to the customs broker is unacceptable, even if such suspensions are conditioned on the existence of "willfulness" or a threat to the "public health, interest, or safety." The Supreme Court has repeatedly ruled that the government may not deprive individuals of liberty and property interests without *some form* of prior notice and opportunity to be heard.

For instance, in Fuentes v. Shevin, 407 U.S. 67 (1962), the Court ruled that statutes which enabled state governments to seize private possessions upon nothing more than the *ex parte* application of another party who claimed a right to those possessions and posted a security bond, violated procedural due process. The court expressed objection that under these statutory schemes, "[t]here is no opportunity for a prior hearing and no prior notice to the other party." Fuentes, 407 U.S. at 77. In North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), the court invalidated a statute that permitted wage garnishment under similar conditions—ex parte affidavit plus security—on the grounds that constitutional due process requires notice and an opportunity to be heard *prior* to deprivation of protected interests. North Georgia, 419 U.S. at 602, 607–08.

CBP's present proposal is arguably more extreme than the statutes struck down in Fuentes and North Georgia. While an individual subject to seizure or garnishment in those cases at least had protection against monetary losses in the form of a security bond posted by the applicant, there is *no mechanism* for ensuring that a broker who suffers immediate un-noticed suspension of an entry filer code will not incur a massive economic loss. If suspended immediately, without notice and an opportunity to be heard, a customs broker could spend weeks in limbo without knowing whether the code might be restored or not, and the post termination procedures in such cases offer no insurance against that monumental economic risk. As the Supreme Court stated in Fuentes, "[i]f the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be

prevented." Id. at 81. The Court went on to reiterate that it "has not . . . embraced the general proposition that a wrong may be done if it can be undone." Id. at 82 (citation omitted).

A similar result was reached in Bell v. Burson, 402 U.S. 535 (1971). In Bell, the Court invalidated a statute that authorized summary suspension of a driver's license post-accident without even minimal consideration of the motorist's fault or liability. While acknowledging that a full-fledged trial need not be performed before suspension could be effectuated, the Court emphasized that "[t]he hearing required by the Due Process Clause must be 'meaningful' and 'appropriate to the nature of the case,'" and held that "before the State may deprive [an individual] of his driver's license . . . it must provide a forum" for determining fault. Bell, 402 U.S. at 542–43. The application to the present context is self-evident: the Constitution prohibits CBP from depriving a customs broker of any protected liberty or property interest (such as an entry filer code) without notice and a meaningful hearing. Thus, while CBP has attempted to reserve for itself the right to exercise summary pre-termination suspensions, the Constitution does not permit it.

c. Third Matthews Factor: CBP's Stated Interests Do Not Justify Summary Suspension

The third Matthews factor requires consideration of the government's and the public's interest in efficient and cost effective administration. While there may exist circumstances in which the United States has some justifiable interest in expeditiously revoking an entry filer code, we respectfully submit that those interests are not so strong as to justify summary suspension without notice. Justification is also not obtained by conditioning such action on circumstances involving "willfulness" and threats to the "public health, interest, or safety."

The mere fact that an individual may have acted "willfully," as opposed to having acted unintentionally or accidentally, is no reason to dispense with constitutionally mandated due process protections. CBP cites no authority for the proposition that the existence of willfulness acts as an escape clause from ordinary due process obligations. Indeed, exporting the concept to existing case law renders absurdity. Were the Supreme Court to have recognized a willfulness exception to due process requirements in Fuentes, for instance, it would have recognized that a

party could execute an un-noticed seizure on another's personal property so long as the former could allege that the latter had acted *intentionally*. Similarly, if a willfulness exception existed in Bell, the Court would have held that the issue of liability was irrelevant, and that the facts need only have shown that the driver in question had *willfully* driven his car. Such exceptions would be unacceptably large, and are clearly not contemplated by the case law. The point is that willfulness is a concept borrowed from the Administrative Procedure Act that is wholly irrelevant to the question of constitutional procedural due process requirements.

The courts have, on occasion, found that threats to the public health, interest or safety warranted dispensing with ordinary constitutional due process protections. However, such circumstances are rare, and it is not immediately evident that they *even could* arise in the context of a customs broker's use of an entry filer code. For instance, in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), the Court ruled that a Puerto Rican statute providing without prior notice or hearing for seizure and forfeiture of vessels used for unlawful purposes was constitutional. The Court cited the risk that the seized property (a yacht) might otherwise be removed, destroyed, or concealed if advance notice was provided, and noted that enforcing criminal sanctions was a significant public interest. Calero-Toledo, 416 U.S. at 679. The Court emphasized that immediate termination of a property interest without notice is justified only in very limited circumstances. Such a termination must be "directly necessary to secure an important governmental or general public interest," and "there has [to be] a special need for very prompt action." Id. at 678 (quoting Fuentes, 407 U.S. at 91). Other instances implicating public health, interest or safety were the necessity of protecting the public from contaminated food, a bank failure or misbranded drugs. Id. at 679.

Although it is possible that the filing of an entry (and the use of an entry filer code) could implicate the public health, interest or safety, such instances would be admittedly rare.[2] If CBP wishes to reserve the right to execute an immediate suspension, it should articulate precisely what types of conditions would rise to this type of threat. See, e.g., 7 C.F.R. § 28.23(c) (in the context of licenses issued to warehouses or gins to sample cotton, the conditions for summary

[2] It is even harder to imagine a situation where the suspension or revocation of immediate delivery rights or remote location filing privileges could be premised upon a threat the public health, interest or safety.

suspension are limited to "any situation where the integrity of sampling procedures would be seriously jeopardized if a license remained valid pending formal adjudication").

Immediate suspension or revocation should be limited to circumstances in which the entry filer has been convicted of a crime involving importation of goods that threaten the public health, interest or safety. CBP must recognize the other remedies it has at its disposal apart from filer code suspension or revocation, such as seizure, forfeiture and 100% inspection. CBP always has the right to monitor a broker's entries, reject entries or refuse freight movements that it believes to be noncompliant. Moreover, in the instance of suspected criminal conduct, the tools of law enforcement may always be used to force termination of offensive conduct, including the arrest of the alleged violator and the use of warrants authorizing the search and seizure of property to secure evidence of an alleged crime. The bottom line is that the consequences stemming from the suspension or revocation of an entry filer code are so great that such actions should be a remedy of last resort, only utilized after affording due process of law, and after all other remedies have been exhausted.

B. Revocation or Suspension of an Entry Filer Code Implicates 19 U.S.C. § 1641

We submit that it is well understood, by both CBP and the trade, that the revocation of an entry filer code is tantamount to a license revocation. Notwithstanding the claim that it is theoretically possible for a broker to purchase and file pre-printed machine readable entry forms, 19 C.F.R. § 142.3a(e), there can be little dispute that the practical implication of suspending or revoking an entry filer code is to terminate the customs brokerage operation.

The ordinary process by which CBP can prevent a customs broker from engaging in customs business is packed with constitutional and statutory protections: rights to fair notice, a substantial and equitable hearing, and a well-reasoned decision by an unbiased decision maker, with the clear opportunity for judicial review at the U.S. Court of International Trade. See 19 U.S.C. § 1641(d)–(e). CBP is proposing to grant itself the authority to work around the statutory requirements of § 1641 and thereby render this statute a nullity. If the NPRM is enacted as proposed, there would be little incentive for CBP ever to pursue a formal license and permit

revocation via § 1641. Instead, the agency could simply pull the filer code and wait for the broker to go out of business. This administrative workaround is clearly unacceptable.

In 1910, when Congress passed the first law providing for the licensure of custom-house brokers, it included many of the same due process protections that remain present in the statute today.[3] It required Customs to provide notice to the broker of any proposed revocation, and a hearing based upon the contents of said notice at which the broker could be represented by counsel. Act of June 10, 1910, ch. 283, § 2, 36 Sta. 464. The right of cross-examination at such hearing was explicitly reserved, as was the right to a stenographic record of the proceeding, upon which the Secretary of the Treasury was required to make his decision regarding suspension or revocation. Id. This is an unambiguous indication of the seriousness with which Congress regarded the termination of a customs broker's right to engage in their chosen profession.

Importantly, these due process procedures were established at a time when the *only* license (or license-like privilege) required to function as a customs broker was a customs brokerage license. Congress intentionally crafted a single mechanism of licensing, with the expectation that no customs broker would be prevented from engaging in his profession without being afforded these very specific due process protections. Congress certainly did not contemplate that Customs could or would create a derivative license that would be essential for engaging in customs business, and which could be permanently revoked 10 days after notice was sent by first class mail. A mechanism that achieves the same goal as broker license revocation without complying with any of the statutory requirements of 19 U.S.C. § 1641(d) is *ultra vires*.

The plain reality is that the filer code is an inseparable component of the customs broker's license. Pursuant to 19 C.F.R. § 142.3a(b)(1), an entry filer code is automatically assigned to "all licensed brokers filing CBP entries." The filer code is the mechanism through which a customs broker exercises the rights afforded to them by the broker's license. CBP should thus explain why it believes it has the authority to take action which effectively terminates the broker's ability to function as licensed customs broker without following the procedures statutorily required to be followed for license revocation.

[3] Those same due process protections carried over to the original version of Section 641, in the Tariff Act of 1930. Tariff Act of 1930, ch. 497, Title IV, § 641, 465 Stat. 590, 759 (1930) (current version at 19 U.S.C. § 1641 (2006)).

C. Proposed Regulations Do Not Adequately Track With the Requirements of the Administrative Procedure Act

While it is clear that the NPRM fails adequately to address the constitutional implications of the proposed regulatory revisions, and is entirely silent on the implications of 19 U.S.C. § 1641, the same cannot be said about the APA. To the contrary, the APA is actually the *only* statutory mechanism around which CBP attempted to shape its proposed regulations. While we agree that customs brokers, when faced with the threat of license suspension or revocation, are entitled to the protections afforded by the APA, we wish to point out that the proposed regulations do not adequately track the language of the APA, and thus omit some of the APA's most significant protections, such as the so-called "right to cure." According to 5 U.S.C. § 558(c)(2), a licensee threatened with revocation is entitled to an "opportunity to demonstrate or achieve compliance with all lawful requirements." At a minimum, CBP's regulatory changes should reflect this right.

To be clear, any customs broker that faces suspension and revocation under "ordinary circumstances" (*i.e.*, absent willfulness or a threat to the public health, interest or safety) is *statutorily entitled* to the opportunity to demonstrate or achieve compliance. This provision has been uniformly understood to provide the licensee with a right to cure the deficiency pointed out by the agency's notice. See, e.g., U.S. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, VIII – Section 9(b) (1947) ("under ordinary circumstances . . . the agency which has granted him the license must inform him in writing of such conduct and afford him an opportunity to comply with the requirements of the agency before it can revoke, withdraw, suspend or annul his license.") The proposed regulations would be considerably strengthened, however, by the inclusion of specific language to this effect.

At a minimum, quoting the language of 5 U.S.C. § 558(c)(2) would help ensure that whatever CBP official is charged with making the determination on suspension/revocation does not inadvertently neglect this important statutory right. It is not uncommon for federal regulations providing for suspension or revocation of licenses to quote this provision explicitly. See, e.g., 17 C.F.R. § 28.23(b)(2) ("In all cases except those involving willfulness, or in which the public health, interest, or safety otherwise requires, prior to the institution of a formal

proceeding, the Administrator shall give written notice to the licensee of facts or conduct which appear to warrant institution of such a proceeding and **shall afford the licensee the opportunity, within a reasonable time, to demonstrate or achieve compliance with the Act and regulations**.") (emphasis added).

D. CBP Should Provide Guidance Regarding What Constitutes "Misuse" of an Entry Filer Code

The NPRM does not clearly establish the basis upon which an entry filer code may be revoked or suspended. In contrast with CBP's proposals regarding the termination of immediate delivery and remote location filing privileges, both of which are predicated upon the occurrence of certain clearly defined circumstances (see 19 C.F.R. § 145.25, specifically enumerating the conditions that warrant discontinuation of immediate delivery privileges, and proposed 19 C.F.R. § 143.46(a), setting forth the conditions under which a port director will discontinue remote location filing privileges), CBP proposes to permit suspension and termination of an entry filer code simply on the grounds of "misuse." The scope of activity that could be interpreted as entry filer code misuse is incredibly broad, and leaves open the possibility that a customs broker's entry filer code could be unjustifiably suspended or revoked.

CBP should take advantage of the opportunity presented by these proposed amendments to clarify the meaning of "misuse." While CBP has long reserved the right to revoke a filer code in the instance of *unspecified* "misuse," this issue has recently re-emerged as a priority in the wake of CBP's efforts to exercise this authority. See, e.g., Lizarraga, 2010 Ct. Intl. Trade LEXIS 116. We are aware of one only instance in which CBP issued a formal statement of any sort clarifying the scope of entry filer code misuse. Broker Compliance: Misuse of Licenses and Filer Codes, *available at* http://www.cbp.gov/linkhandler/cgov/trade/trade_programs/broker/misuse_licences.ctt/misuse_licences.doc ("Misuse Document"). In the Misuse Document, CBP explained that the use of a filer code by an unlicensed person could result in the suspension or revocation of the filer code. Id. CBP should provide the trade with additional guidance regarding what additional behavior, if any, would trigger suspension or revocation.

Ideally, CBP should specify what constitutes "misuse" in the regulation itself, in the same manner as it has for immediate delivery and remote location filing privileges. By setting forth a clear regulatory framework according to which a filer code may be suspended or revoked, CBP would minimize the risk of an erroneous or unjustified suspension or revocation. Alternatively, CBP could issue additional written guidance similar to the Misuse Document or address these comments at the time the final rule is issued.[4]

Regardless of the method CBP selects to provide guidance regarding filer code misuse, it is imperative that the term not remain in its present state of ambiguity.

E. The Protections Afforded Brokers Facing Suspension or Revocation of Entry Filer Codes Should Not Be Less Than Protections for Participation in ABI

In the same way that Automated Broker Interface ("ABI") participants are afforded the protections of a "probational" status prior to the suspension or revocation of ABI privileges, CBP should provide comparable protections prior to the suspension or revocation of a broker's entry filer code. Pursuant to 19 C.F.R. § 143.6(a), an ABI participant that does not adhere to the requirements and standards of the ABI system can be placed on probation before their privileges are suspended or revoked. An ABI participant may only be placed on probation after having received notice and been given an opportunity to show cause why such status is unnecessary. 19 C.F.R. § 143.6(a). During the probationary period, "participation [in ABI] will not be suspended or revoked," and "[t]he participant's performance will be closely monitored." Id. This

[4] By way of reference, the Broker Management Handbook provides a useful example for the categorization of various violations that a broker may commit. See, Broker Management Handbook at 111–13 (Jan. 2002). The Broker Management Handbook distinguishes between non-egregious violations, for which "Customs will first attempt to work with the broker through the informed compliance process of communication and education" in "an attempt to improve the broker's performance," from egregious violations which "show[] irresponsibility beyond that of a nonrepetitive clerical mistake or a good-faith oversight," and which will result in "an immediate issuance of a Customs penalty or . . . proceedings to suspend or revoke the violating broker's license." Id. at 111–12. In the Broker Management Handbook, CBP provides nine examples of egregious violations (citing a statutory or regulatory basis for each), and provides for examples of violations that may or may not be egregious depending upon the facts and circumstances. Id. at 112–13.

monitoring will involve CBP "working with the participant and providing any necessary guidance to assist the participant in bringing his performance back to standard." Id. In the event that such probationary treatment is unable to bring about desired levels of compliance, CBP is authorized to commence proceedings to suspend or revoke the ABI privileges in full. 19 C.F.R. §§ 143.6(b) (providing for suspension), (c) (providing for conditional reinstatement after suspension), 143.7 (providing for revocation of ABI participation). In light of the particularly close relationship between the entry filer code and the Automated Broker Interface, there would seem to be no reason for treating the termination of such property rights differently in this case.

F. CBP Should Perform A Regulatory Flexibility Analysis

We object to CBP's conclusion that a regulatory flexibility analysis is not required for this rulemaking under the Regulatory Flexibility Act, as amended ("RFA"). The RFA requires federal agencies to consider the impact of proposed regulations on small businesses. We disagree with CBP's conclusion that the proposed regulations are unlikely to have a substantial impact on a significant number of small business entities. The customs broker industry is overwhelmingly comprised of small businesses. It defies logic to suggest that the impact of the proposed rule changes will be minimal.

Even accepting CBP's characterization that the proposed regulations will only affect 10 or fewer businesses each year, the fact remains that the vast majority of those affected are likely to be small businesses. Under the standards of the RFA, a "significant number" of small businesses may be determined either in absolute terms, or in relation to the total number of affected entities. Thus, even if the absolute number of affected entities is few, when small businesses make up most or all of the affected entities, the "substantial number" criterion is satisfied. See SMALL BUSINESS ADMINISTRATION, A GUIDE FOR GOVERNMENT AGENCIES: HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT 21 (May 2012). Moreover, there can be no dispute about the magnitude of the impact of this rule on businesses that are affected. As previously discussed, a customs broker whose entry filer code is suspended or revoked faces nothing short of cataclysmic economic consequences which clearly qualify as a "significant

impact." Thus, with both of the triggering conditions satisfied, we submit that a proper regulatory flexibility analysis is required.

There are numerous modifications that CBP might adopt before issuing a final rule which would permit the agency to achieve its goals while substantially reducing the burden on small business customs brokers. For instance, by eliminating the proposal to immediately suspend an entry filer code without notice, CBP would help ensure that no small business is inadvertently and unjustifiably harmed by such action. Similarly, by conditioning the suspension or revocation of an entry filer code upon the detailed due process procedures prescribed by 19 U.S.C. § 1641(d), CBP could all but ensure that filer code suspension or revocation would not disproportionately harm small businesses. A comparable result could be achieved by allowing for a probationary status as an interim measure prior to suspension or revocation of the filer code.

We offer these proposals by way of demonstrating the wide range of options CBP has at its disposal; there is more than one way to achieve the enforcement objectives of these regulations without harming small businesses as the current proposal threatens to do.

III. SPECIFIC COMMENTS

A. Issues CBP Should Address When Publishing the Final Rule

In light of the significant legal deficiencies identified above, we submit that CBP should withdraw the NPRM and engage the trade in a meaningful discourse on this issue. Because the current proposal reflects constitutional and statutory deficiencies, it will be beneficial for all parties involved, including CBP, if a revised proposal seeking to cure these shortcomings is developed and released for further comment before the final rule.

In the event that CBP moves forward with this proposal notwithstanding the objections set forth in this correspondence, there are several issues that must be addressed in any final rule.

1. CBP should explain its views on the right to judicial review.

The mechanism for judicial review of a suspension or revocation under the proposed regulations is not clear. CBP should make known its views regarding what court(s) would have jurisdiction over a challenge to a final agency determination revoking an entry filer code, immediate delivery privileges or remote location filing privileges. If CBP believes that the U.S. Court of International Trade has jurisdiction, CBP should make explicit which subsection (and, if applicable, which paragraph) of 28 U.S.C. § 1581 would give that court jurisdiction. If CBP believes that these actions could only be challenged in federal district court, it should make that clear as well.

2. CBP should address the economic impact of the proposed rule

CBP should address the potential impact of a filer code revocation on a corporate customs broker. The livelihoods of untold individuals who may have had nothing to do with the alleged improprieties would be threatened or terminated by the suspension or revocation of a corporate customs broker's entry filer code.

CBP is well aware that the customs brokerage industry is comprised of hundreds of small and medium sized businesses as well as large multi-national logistics providers. CBP is also well aware of the critical role that customs brokers play in facilitating international trade and supporting CBP in its critical mission at our nation's borders. The loss of any of these "license-like" processes would dramatically impact these businesses and affect the international supply chains that they service. As noted earlier, CBP's draft commentary does not articulate or justify the need for the extraordinary power being sought via this NPRM. Nor does it address the potential economic impact of the threatened action. We respectfully submit that an economic impact study would demonstrate that the interests of the individuals impacted by the potential suspension or revocation of the entry filer code outweigh the potential law enforcement gains.

3. CBP should explain what constitutes "misuse" of an entry filer code

CBP should clarify what actions may constitute the "misuse" of an entry filer code and trigger a suspension or revocation. If misuse is intended to encompass violations other than the use of an entry filer code by someone other than the designated user, CBP should specify this. CBP should define "misuse" by regulation or some alternative form of publication. If CBP takes the position that the meaning of the term "misuse" may evolve over time, it should nevertheless commit to issuing additional directives explaining such later identified meanings before acting to revoke filer codes on such bases.

4. CBP should allow for the probationary use of an entry filer code prior to suspension or revocation

CBP should allow for the use of an entry filer code under a probationary status similar to that provided for ABI participation, as set out in 19 C.F.R. § 143.6(a). Such probationary status should be distinct from a suspension, and should be accompanied by the efforts of CBP to aid the offending broker in obtaining full compliance. In the event CBP refuses to allow for probationary treatment, it should explain the reasons for treating the entry filer code differently than ABI participation, particularly when these property rights overlap so significantly.

5. CBP should explain how the proposed regulations protect customs brokers' constitutional liberty and property interests

In light of the critique set forth above, when publishing the final rule, CBP should take up the task of explaining how the regulations preserve the procedural due process rights of customs brokers. Specifically, it should perform the analysis left unfinished in the NPRM—evaluating the Matthews factors—and explain how the final version of the regulations satisfies the constitutional requirements for procedural due process.

6. CBP should address how the protections established by 19 U.S.C. § 1641(d) implicate entry filer code revocations

Assuming that CBP does not agree that the protections of § 1641(d) apply to entry filer code revocation, it should explain its position. CBP should explain why it now believes it has the statutory authority to effectively terminate a customs broker's license without following the statutorily mandated procedures.

7. CBP should explain what constitutes a threat to public health, interest or safety

In the event CBP wishes to preserve the right to summarily suspend or revoke entry filer codes on the basis of a threat to public health, interest or safety, it should elaborate on the types of circumstances that would qualify as such threats in this context. CBP should also explain why the existence of such threats is not sufficiently ameliorated by existing remedies such as seizure, forfeiture, inspection etc.

8. CBP decisionmaking regarding the suspension or revocation of an entry filer code should be made by CBP Headquarters

As proposed, the revised regulations would permit decisions on suspension or revocation of an entry filer code will be made by the Assistant Commissioner, Office of International Trade, "or his designee." Before issuing the final rule, CBP should modify the proposal to ensure that the decision to suspend or revoke an entry filer code is made by the Assistant Commissioner, Office of International Trade. Under no circumstances should decisions carrying such significant consequences be delegated to the discretion of the individual ports.

B. Changes that CBP Should Make in the Final Regulations

1. CBP should bring the proposed regulations into conformity with constitutional standards of Due Process

To bring the regulations into conformity with constitutional standards for due process, CBP will need to abandon the right to suspend entry filer codes absent any notice and hearing to the license holder. This means striking proposed sections 19 C.F.R. §§ 142.3a(d)(2). At a minimum, it would mean eliminating the language that purports to authorize immediate suspensions in the case of "willfulness." Should CBP seek to preserve the right to summarily suspend entry filer codes on the basis of a threat to public health, interest or safety, it should clarify *in the regulation* the types of conditions that would constitute such threats.

2. CBP should amend 19 C.F.R. § 142.3a(d) to conform with the standards found in 19 C.F.R. § 1641(d)

CBP should establish standards for entry filer code revocation that comport with the existing regulations and statutory standards for suspending or revoking a customs brokerage license or permit.

3. CBP should alter the proposed regulations to reflect the guarantees of the Administrative Procedure Act in 5 U.S.C. § 558(c)

To bring the regulations into conformity with the APA provisions found in 5 U.S.C. § 558(c), CBP should amend proposed sections 19 C.F.R. §§ 142.3a(d)(1), 142.25(c)(1), and 143.46(a)(1) to reflect that in addition to being provided with written notice, the affected customs broker (or importer) will be entitled to the "opportunity to demonstrate or achieve compliance with all lawful requirements."

4. CBP should provide additional time for a customs broker or importer to respond to a proposed revocation or suspension

We have several concerns regarding the time frame as proposed for customs brokers and importers to respond to the notice of suspension or revocation in sections 19 C.F.R. §§ 142.3a(d)(1), 142.25(c)(1), and 143.46(a)(1). First, the time frame for a licensee to respond to such notice should be measured comparably to the time frame for CBP to respond—both should be spelled out in working days. Second, even if measured in working days, the time for a licensee to respond is too short. This is especially true since the broker or importer involved will likely need to involve counsel to respond to such a serious threat. There is no basis to distinguish between the time afforded to the broker or importer to respond to the allegations and the time afforded to CBP to consider the merits of any appeal. Accordingly, we propose that licensees will have 30 working days from the date of receipt to respond to CBP, and that CBP will have 30 working days from receiving the response to issue a decision.

IV. CONCLUSION

The entry filer code is a critical component to every customs broker's core business. Suspension or revocation of the entry filer code is the death knell to a customs broker and a result which can only be countenanced when all other remedies have been exhausted and the broker has had an opportunity to fully exercise his due process rights.

Despite the outcome in Lizarraga, CBP has not explained why a broker's entry filer code should be treated differently than a customs brokerage license. The two are inseparable and the broker's property interest in the entry filer code is no different than the property interest in the brokerage license. Simply put, the NPRM does not afford the licensed customs broker with the due process required before the entry filer code can be suspended or revoked.

We therefore respectfully request that the portion of the NPRM which addresses the suspension or revocation of a licensed customs broker's entry filer code be withdrawn. In the event that CBP determines to move forward with this proposed rulemaking, the final regulations addressing the suspension or revocation of a broker's entry filer code require significant

modification in order to recognize the broker's rights to due process *regardless* of the circumstances alleged to support such extraordinary action.

Sincerely,

NATIONAL CUSTOMS BROKERS &
FORWARDERS ASSOCIATION OF AMERICA

Alan R. Klestadt
Customs Counsel

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BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 11-22

NON-VESSEL-OPERATING COMMON CARRIER NEGOTIATED RATE ARRANGEMENTS – TARIFF PUBLICATION EXEMPTION

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

In a Notice of Proposed Rulemaking ("NPRM") issued February 21, 2013, the Commission sought comments from the public concerning its proposal to extend the exemptions in 46 C.F.R. Part 532 pertaining to NVOCC negotiated rate arrangements ("NRAs') to foreign-based unlicensed NVOCCs. The National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA") is pleased to submit its view in support of this proposal.

I. BACKGROUND

As the Commission is well-aware, the NCBFAA urged for a number of years that NVOCCs should be exempted from the mandatory publication requirements otherwise applicable for rate tariffs. (*See, e.g.*, the NCBFAA's Petition for Exemption in Docket P1-08, filed July 31, 2008.) Those efforts ultimately bore fruit when the Commission issued its decision in early 2011 that implemented the NRA procedure that is codified in 46 C.F.R. Part 532 and made this exemption available to U.S.-based, licensed NVOCCs.[1]

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[1] Docket No. 10-03, *Non-Vessel Operating Common Carrier Negotiated Rate Arrangements*, decision issued February 25, 2011.

Parenthetically, although it has now been in effect for almost two years, there are still a large number of domestic NVOCCs that have not yet sought to take advantage of the exemption. The NCBFAA believes that the transition from tariffs to NRAs has been slower than expected due in large part to industry perceptions about the complexity and technical requirements of the existing regulations. As the existing regulations in Part 532 could be

II. THE PROPOSAL SHOULD BE ADOPTED

From the outset, the NCBFAA consistently urged the Commission to make the NRA exemption applicable to all lawfully operating NVOCCs. The Association contended, and the Commission agreed, that the continued existence of NVOCC rate tariff publication no longer serves a useful purpose. Shippers don't use or rely on them and are well able to conduct their commercial relationships with NVOCCs through the private negotiation process that has evolved since the enactment of the Ocean Shipping Reform Act of 1998 ("OSRA"). The only support for the continued requirement of mandatory tariff publication has come from several tariff publishers, who understandably are not pleased to lose a significant source of revenue. That some NVOCCs are domiciled abroad and are therefore registered, rather than licensed, does not alter the reality that NVOCC rate tariffs are a throwback, a burdensome regulatory requirement that has no redeeming public benefit. And, as mandatory tariff publication unnecessarily increases NVOCC transaction costs, the requirement adversely affects the competitiveness of this industry.

For various reasons, the Commission decided in 2011 not to extend the NRA exemption to foreign-based unlicensed NVOCCs. According to the NPRM, this was attributable to the fact that some in FMC Staff apparently were concerned that broadening the exemption "could hamper the Commission's ability to protect the shipping public." (NPRM at 3.) The Association did not then, and still does not, agree that this concern was an appropriate basis – even if well-founded – to withhold the exemption from foreign-based entities.

Until the enactment of OSRA, one of the affirmative prerequisites to the issuance of an exemption was the requirement that the proponent of an exemption demonstrate that it would

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simplified without harming the shipping public, further simplification would expand those benefits to more companies.

"not substantially impair effective regulation by the Commission." (Former Section 16 of the Shipping Act of 1984.) But that criterion was eliminated with the enactment of OSRA. The issuance of an exemption now is dependent only on a showing that proposal will not result in a substantial reduction in competition or otherwise be detrimental to commerce. 46 U.S.C. §40103. Thus, while the NCBFAA agrees that the Commission should not issue exemptions that adversely affect the shipping public, there was no record or other evidence produced in Docket 11-22 or its predecessor dockets indicating that eliminating mandatory NVOCC tariff publication would likely have such an effect.

Nonetheless, and turning to the situation today, relieving foreign-registered NVOCCs from the obligation to publish rate tariffs will not result in a substantial reduction in competition. To the contrary, extending this relief would increase competition in the ocean transportation industry by freeing foreign-based companies from the same unnecessary formalities and costs that once burdened their U.S. counterparts. There being no harm to shippers, extending the exemption would increase, rather than reduce, the overall level of competition in this industry. Similarly, lifting these regulatory burdens would not adversely affect competition between NVOCCs, since it would be available to all companies regardless of size. And, since no shipper or carrier has objected to granting the exemption even to allege that there might be some perceived economic harm resulting from this, going forward with the proposal would clearly further the competitive policy added by OSRA.

The record is clear that eliminating the unnecessary and unproductive costs of tariff publication for foreign-registered NVOCCs can only serve to increase economic efficiency in the ocean transportation industry. These companies will be able to react more timely to the rapidly

changing rates and services provided by the vessel operating common carriers, and will thus be better positioned to serve their customers.

In addition, relieving foreign-based NVOCCs of these publication obligations will also have the salutary effect of making United States regulation of ocean transportation intermediaries more closely aligned with the practices of all our major international trading partners. At the same time, removing the artificial distinction between U.S. and foreign NVOCCs will avoid possible regulatory measures of foreign governments seeking to level the playing field between their nationals and those of the U.S.

Extending the exemption will not remove any protection available to shippers through the Shipping Act. No NVOCC or shipper is required to rely on negotiated rates, as they can continue to do business based on published tariffs. To the extent the foreign NVOCCs do use NRAs, the proposed exemption would not disturb or remove protections in the Act that prohibit false billings, classifications or other unfair or unjust efforts to either obtain transportation at inappropriate rates or to otherwise engage in fraudulent billing practices to the detriment of shippers. Instead, the exemption would apply only to how rate quotes established through bilateral negotiations are published and agreed to, so that the prohibitions against fraudulent practices embodied in the Act would continue to exist.

The NCBFAA believes that the four conditions suggested in the NPRM as a prerequisite for use of the exemption are reasonable, appropriate and will serve to provide adequate assurance both to the Commission and the shipping public that the exemption is not being misused. As we understand it, the four conditions are as follows:

1. the exemption will be extended only to those foreign-based unlicensed NVOCCs that are properly registered, bonded and tariffed;

2. these registrations are to be effective for a period of three years, but can then be renewed;
3. the registrations can be terminated or suspended if there is non-compliance; and
4. any NVOCCs taking advantage of the NRAs are subject to the Commission's normal inspection and record production requests.

These conditions will put U.S.-licensed and foreign registered NVOCCs on a level playing field and do not impose any burden on foreign entities that is greater than that currently borne by domestic NVOCCs.

The basic registration process proposed in what would be new § 515.19 seems reasonable and would appear to would give the Commission the information it deems necessary to carry out its regulatory responsibilities. The NCBFAA does not believe that providing basic information about a foreign company's identity, appointing an agent for service of process or agreeing to comply with legitimate document requests is an inappropriate prerequisite to companies that are doing business in the US trades. Other countries may impose similar requirements on foreign companies doing business there,[2] so there is nothing unusual in now having entities engaged in business that affects US commercial interests providing the FMC with the same minimal information required of US NVOCCs.

As the Commission is well aware, US. licensed OTIs are required to advise the Commission of any changes in their addresses, corporate structure, qualifying individual or other management within thirty (30) days after the occurrence of any of these events. (*See* 46 C.F.R. §

[2] See, for example, the Implementing Rules of the Regulations of the People's Republic of China on International Maritime Transportation, Article 11.

515.12(d).)[3] As the FMC is charged with regulating the OTI industry, the agency has a legitimate need for current and accurate information about the companies engaged in this business. Consequently, the NCBFAA believes that the proposed three (3) year renewal registration requirement for all foreign-based NVOCCs is neither burdensome nor inappropriate.

The NCBFAA also feels that the method proposed by the FMC to implement this renewal requirement is reasonable, in that it will impose the least amount of cost and burden on companies electing to conduct business as NVOCCs in the US trades. As proposed, the registration renewal process is to be accomplished using a simplified format that is to be submitted electronically without the imposition of any filing fee. The NCBFAA believes that this procedure provides the necessary information without imposing unnecessary costs on the industry or having paper documents that then need to be organized, reviewed, and filed pile up at the agency.

This proposed rulemaking is a positive and important step, and the NCBFAA appreciates the Commission's willingness to broaden the NRA exemption. The proposal will benefit the entire NVOCC community by simplifying the regulatory procedures so that all NVOCCs play by a single set of rules. And, those rules will permit the NVOCC industry to dispense with costly and useless rate tariff publication, free scarce NVOCC resources in order to provide more effective and efficient service, thus benefiting shippers and NVOCCs alike.

Accordingly, the NCBFAA supports broadening the NRA exemption and the proposed new rules so as to make it applicable also to properly register foreign-based NVOCCs.

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[3] Of course, the Commission's regulations impose many other significant requirements on US OTI licensees than just providing descriptive corporate information and maintaining surety bonds.

Respectfully submitted,

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