WORLD SHIPPING COUNCIL
PARTNERS IN TRADE

Before the
FEDERAL MARITIME COMMISSION
Washington, DC 20573

Docket No. 18-06

Interpretive Rule, Shipping Act of 1984

Comments of the World Shipping Council

The World Shipping Council ("WSC" or the "Council") files these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in Docket No. 18-06, *Interpretive Rule, Shipping Act of 1984*.

WSC's members are ocean common carriers. As such, WSC's members may be, and have been, both claimants and respondents in cases before the Commission involving 46 U.S.C. § 41102(c) and its predecessors. For example, a shipper may make a section 41102(c) claim against an ocean common carrier, or an ocean common carrier may make such a claim against another entity that is subject to this statutory requirement, such as an NVOCC or a marine terminal operator. Because WSC's members may find themselves on either side of a claim involving section 41102(c), their interest in this proceeding is not in favoring claimants or respondents. Instead, the interest of WSC's members is in having the Federal Maritime Commission apply the law in a fair, predictable manner that is consistent with the statute from which the Commission derives its authority. The interpretive rule proposed by the Commission would fulfill that objective, and the Council supports adoption of the proposed interpretation.

A review of the cases cited in the NPRM – and the cases cited in those cases – supports the NPRM's characterization of the development of the Commission's section 41102(c) jurisprudence. Specifically, from approximately 1935 through 2001, the Commission was consistent in holding that in order for a violation of section 41102(c) to occur a respondent must engage in a practice or regulation on a "normal, customary, and continuous basis . . . ." Then, beginning in 2010, through a series of cases that made individually incremental changes to the Commission's interpretation, the Commission arrived ultimately at a reading of section 41102(c) that supported a finding of violation for single, even inadvertent actions that were found to be detrimental to the complainant.

During the transformation of the Commission's reading between 2010 and 2013, the shift in interpretation from one case to the next was arguably subtle, and no one case constituted a wholesale shift in interpretation. When the beginning and end points are viewed without the intermediate steps, however, the size of the change becomes apparent. Prior to *Houben v. World Moving Services*, 31 SRR 1400 (2010), the Commission had been clear that isolated actions would not support a section 41102(c) claim. By the time the Commission decided *Kobel v. Hapag-Lloyd A.G.*, 32 SRR 1720 (2013), the rule had become that a single incident – even one in which the respondent acted in good faith – could support a violation. Nowhere during that multi-step but fundamental change in interpretation did the Commission squarely address the fact of what it had done or acknowledge and explain the basis for its change in interpretation.

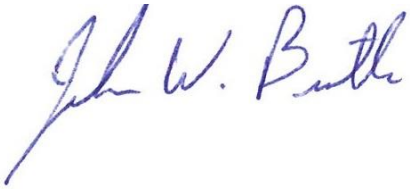
Administrative agencies have the discretion to interpret the statutes under which they act either through adjudication or through rulemaking. *SEC v. Chenery Corp*., 332 U.S. 194, 202-203 (1947). In this instance, the Commission reversed its interpretation of the Shipping Act through a series of adjudications. Whichever mechanism – adjudication or rulemaking – the Commission may choose to change its interpretation of the Shipping Act, it is well-settled that it must explain why it has changed its mind. *See, e.g. FCC v. Fox TV Stations, Inc*., 556 U.S. 502, 515 (2009). With respect to section 41102(c), the Commission never provided that explanation, and the fact that the Commission made the change incrementally through a series of adjudications changes neither the duty to explain nor the fact that the Commission failed to do so.

The recent history of Commission adjudications described above leaves us today with a handful of Commission cases that starkly diverge from prior precedent, but that have not been subjected to judicial review. For a litigant considering filing a claim, or for a respondent defending against a claim, it is quite difficult today to know what the law is. The Commission's proposed interpretive rule in this NPRM would remove that uncertainty. Equally important, the proposed interpretation would strike the right balance between encouraging meritorious Shipping Act cases on the one hand, and on the other hand discouraging litigants from filing with the Commission cases that should instead be brought in other fora. For those reasons, the World Shipping Council supports the Commission's proposed interpretative rule.

As a final point, the Commission has expressly asked whether adoption of the proposed interpretation would cause litigants to be without a remedy for meritorious claims. It is not

necessary to speculate in order to answer that question. Prior to the Commission's change in interpretation between 2010 and 2013 there was no complaint that courts and arbitration panels were inadequate to handle the many commercial claims that arise out of international ocean transportation but that do not fall within the Commission's Shipping Act jurisdiction. In short, lack of a forum was not a problem before the Commission's recent change of interpretation, and it will not be a problem after the Commission returns its interpretation to its prior status.

Respectfully submitted,



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