

Issued: October 9, 2019

FEDERAL MARITIME COMMISSION

46 CFR Parts 501 and 502

Docket No. 19-07

RIN: 3072-AC78

Delegations to Bureau of Enforcement and Enforcement Procedures

AGENCY: Federal Maritime Commission

ACTION: Direct final rule; request for comments.

SUMMARY: The Federal Maritime Commission (Commission) is revising its delegations to the Bureau of Enforcement and its procedures for initiating enforcement action in order to facilitate Commission oversight.

DATES: The rule is effective without further action on December 23, 2019, unless significant adverse comments are filed prior to November 8, 2019. If significant adverse comments are received, the Commission will publish a timely withdrawal of the rule in the Federal Register no later than November 25, 2019.

ADDRESSES: You may submit comments, identified by Docket No. 19-07, by the following methods:

- *Email: secretary@fmc.gov.* For comments, include in the subject line: “Docket No. 19-07, Comments on Delegations to Bureau of Enforcement and Enforcement Procedures.” Comments should be attached to the email as a Microsoft Word or text-searchable PDF document. Only non-confidential and public versions of confidential comments should be submitted by email.

- *Mail:* Rachel E. Dickon, Secretary, Federal Maritime Commission, 800 North Capitol Street NW, Washington, DC 20573–0001.

Instructions: For detailed instructions on submitting comments, including requesting confidential treatment of comments, and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document. Note that all comments received will be posted without change to the Commission's website, unless the commenter has requested confidential treatment.

Docket: For access to the docket to read background documents or comments received, go to the Commission's Electronic Reading Room at:

<https://www2.fmc.gov/readingroom/proceeding/19-07/>, or to the Docket Activity Library at 800 North Capitol Street NW, Washington, DC 20573, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. Telephone: (202) 523-5725.

FOR FURTHER INFORMATION CONTACT: Rachel E. Dickon, Secretary; Phone: (202) 523-5725; Email: secretary@fmc.gov.

SUPPLEMENTARY INFORMATION:

I. INTRODUCTION

The Commission's Bureau of Enforcement (BOE) is responsible for investigating potential violations of the Shipping Act of 1984 and Commission regulations, and initiating enforcement actions. Such actions include formal Commission proceedings and informal compromises of civil penalties. While Commission approval is necessary to initiate formal Commission proceedings, BOE currently has broad delegated authority with respect to informal enforcement action. Specifically, BOE has the authority, with the approval of the Commission's Managing Director, to send out Notice and Demand Letters (NDLs) describing alleged violations and demanding civil penalties, and to enter into agreements with the respondents compromising the penalties (compromise agreements).

These activities may currently be conducted without input from or approval by the Commission, thereby denying the Commissioners – the policy officers for the Commission – the opportunity to provide ongoing oversight and guidance to BOE enforcement priorities or to approve final settlement agreements. In order to improve such oversight, the Commission is revising the delegations to BOE and the regulations governing formal enforcement action and informal compromise procedures.

These revised procedures include a single pre-enforcement process that will: (1) provide notice to the subjects of investigations that BOE intends to recommend that the Commission initiate enforcement proceedings and allow them an opportunity to respond before BOE submits those recommendations; (2) require Commission approval before formal or informal enforcement action is undertaken; and (3) require Commission approval of any proposed compromise agreements.

II. BACKGROUND

The Commission regulations currently provide for two types of enforcement actions seeking civil penalties, formal enforcement action under 46 CFR 502.63 and informal compromise procedures under 46 CFR 502.604. Both types of actions begin with a BOE investigation of potential violations.

BOE does not have delegated authority to initiate formal enforcement action under § 502.63; when BOE determines that such action is warranted, BOE recommends to the Commission that it issue an Order of Investigation and Hearing initiating an adjudicatory investigation before a Commission Administrative Law Judge. The Commission then votes on the recommendation. There is no current requirement, however, that BOE notify the subject of

the investigation or allow them to submit their written views on the investigation prior to BOE making a recommendation to the Commission.

BOE does, however, have delegated authority under §§ 501.5(i)(2), 501.28, and 502.604(g) to initiate informal compromise procedures under § 502.604, subject to the prior approval of the Commission's Managing Director. Those procedures begin with the issuance of an NDL to the person believed to have committed one or more violations. *See* § 502.604(b). The NDL describes: (1) the specific violation(s) on which the claim is based, including the particular facts, dates, and other elements necessary for the respondent to identify the specific conduct constituting the alleged violation; (2) the amount of the penalty demanded; (3) the availability of alternative dispute resolution; and (4) the names of Commission personnel with whom the demand may be discussed, if the person desires to compromise the penalty. *Id.* The NDL also states the deadlines for the institution and completion of compromise negotiations and the consequences of failure to compromise. *Id.*

Any person receiving an NDL may, within the time period specified in the NDL, deny the violation or submit matters explaining, mitigating or showing extenuating circumstances, and may also make voluntary disclosures of information and documents. § 502.604(c). Civil penalties demanded by an NDL may be compromised based on specific criteria, and the person receiving the NDL may enter into a compromise agreement with the Commission that includes certain specified terms. § 502.604(d)–(e). BOE currently has delegated authority to negotiate the terms of compromise agreements, but both the BOE Director and the Managing Director must approve and sign the compromise agreement for it to be effective. § 502.604(g).

III. REGULATORY CHANGES

As described briefly above, the Commission is amending its delegations of authority and enforcement procedures in order to increase Commission oversight over the institution of enforcement proceedings and to allow the subjects of investigations an opportunity to respond to BOE's allegations prior to a recommendation for enforcement action being submitted to the Commission. This process is based on the Wells Process used by the Securities and Exchange Commission's (SEC) Division of Enforcement. *See* SEC, Division of Enforcement, *Enforcement Manual* § 2.4 (Nov. 28, 2017).¹

A. Delegation of Authority to BOE

Similar to the current process for formal Commission enforcement action, the Commission is revising its delegations of authority in §§ 501.5(i), 501.28, and 502.604 to require Commission approval to initiate informal compromise procedures and Commission approval of any compromise agreement before it becomes effective.

B. Pre-Enforcement Process

The Commission is adding a new paragraph to § 502.63 to reflect a new pre-enforcement process that includes notice to the subject of an investigation that BOE is planning to recommend that the Commission initiate enforcement action, and an opportunity for the subject of the investigation to submit a written statement to BOE that will be included in BOE's recommendation to the Commission. The regulatory changes are intended to provide a basic framework for the new process; the Commission may issue additional guidance or internal enforcement policies to facilitate implementation.

¹ Available at <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

Because the new process includes notice and an opportunity to respond, the Commission is eliminating the NDL and response provisions in § 502.604(b) and (c) as duplicative. The Commission is making other conforming amendments to §§ 502.603 and 502.604 to reflect the changes in § 502.63.

IV. PUBLIC PARTICIPATION

How do I prepare and submit comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the docket, please include the docket number of this document in your comments.

You may submit your comments via email to the email address listed above under ADDRESSES. Please include the docket number associated with this notice and the subject matter in the subject line of the email. Comments should be attached to the email as a Microsoft Word or text-searchable PDF document. Only non-confidential and public versions of confidential comments should be submitted by email.

You may also submit comments by mail to the address listed above under ADDRESSES.

How do I submit confidential business information?

The Commission will provide confidential treatment for identified confidential information to the extent allowed by law. If your comments contain confidential information, you must submit the following by mail to the address listed above under ADDRESSES:

- A transmittal letter requesting confidential treatment that identifies the specific information in the comments for which protection is sought and demonstrates that the information is a trade secret or other confidential research, development, or commercial information.
- A confidential copy of your comments, consisting of the complete filing with a cover page

marked “Confidential-Restricted,” and the confidential material clearly marked on each page. You should submit the confidential copy to the Commission by mail.

- A public version of your comments with the confidential information excluded. The public version must state “Public Version—confidential materials excluded” on the cover page and on each affected page, and must clearly indicate any information withheld. You may submit the public version to the Commission by email or mail.

Will the Commission consider late comments?

The Commission will consider all comments received before the close of business on the comment closing date indicated above under DATES. Because this is a direct final rule that will go into effect as specified in the DATES section in the absence of significant adverse comment received during the comment period, the Commission will not consider any comments filed after the comment closing date.

How can I read comments submitted by other people?

You may read the comments received by the Commission at the Commission’s Electronic Reading Room or the Docket Activity Library at the addresses listed above under ADDRESSES.

V. RULEMAKING ANALYSES AND NOTICES

Direct Final Rule Justification

Under the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(A), rules of agency organization, procedure, or practice do not require notice and comment. This Direct Final Rule relates to the Commission’s organization, procedures, and practices; it revises internal Commission delegations of authority to BOE and the regulations governing enforcement procedures.

This rule will therefore become effective on the date listed in the DATES section, unless the Commission receives significant adverse comments within the specified period. The Commission recognizes that parties may have information that could impact the Commission's views and intentions with respect to the revised regulations, and the Commission intends to consider any comments filed. Filed comments that are not adverse may be considered for modifications to the Commission's regulations at a future date. If no significant adverse comments are received, the rule will become effective without additional action by the Commission. If significant adverse comments are received, the Commission will withdraw the rule by the date specified in the DATES section.

Congressional Review Act

The Direct Final Rule is not a "rule" as defined by the Congressional Review Act (CRA), codified at 5 U.S.C. 801 *et seq.*, and is not subject to the provisions of the CRA. The CRA adopts the Administrative Procedure Act's definition of a "rule" in 5 U.S.C. 551, subject to certain exclusions. *See* 5 U.S.C. 804(3). In particular, the CRA does not apply to rules relating to agency management and personnel and rules of agency organization, procedure, and practice that do not substantially affect the rights or obligations of non-agency parties. *Id.* This Direct Final Rule relates to agency management and personnel as well as agency organization, procedures, and practices. Specifically, the Direct Final Rule revises internal Commission delegations of authority to BOE and the regulations governing enforcement procedures. The only effect the changes have with respect to non-agency parties is to provide parties with notice of alleged violations and an opportunity to respond prior to the initiation of enforcement action by the Commission. The Commission already provides notice and an opportunity to respond in both formal and informal enforcement procedures. For formal enforcement action, the rule merely

adds an additional opportunity for parties to respond prior to the Commission decision on whether to initiate enforcement action. For informal compromise actions, the rule merely shifts the timing of the notice and opportunity for response so that these steps occur prior to the Commission's decision to pursue a compromise agreement. Accordingly, although the Direct Final Rule may affect the timing and manner of non-agency parties' interactions with the Commission, it does not affect their underlying rights and obligations under the Shipping Act and the Commission's regulations. Therefore, the Direct Final Rule is not a "rule" under the CRA and is not subject to the CRA's requirements.

Regulatory Flexibility Act

The Regulatory Flexibility Act (codified as amended at 5 U.S.C. 601–612) provides that whenever an agency promulgates a final rule after being required to publish a notice of proposed rulemaking under the APA (5 U.S.C. 553), the agency must prepare and make available a final regulatory flexibility analysis (FRFA) describing the impact of the rule on small entities. 5 U.S.C. 604. An agency is not required to publish an FRFA, however, for the following types of rules, which are excluded from the APA's notice-and-comment requirement: interpretative rules; general statements of policy; rules of agency organization, procedure, or practice; and rules for which the agency for good cause finds that notice and comment is impracticable, unnecessary, or contrary to public interest. See 5 U.S.C. 553(b).

As discussed above, this Direct Final Rule is a rule of agency organization, procedure, or practice. Therefore, the APA does not require publication of a notice of proposed rulemaking in this instance, and the Commission is not required to prepare an FRFA.

National Environmental Policy Act

The Commission's regulations categorically exclude certain rulemakings from any

requirement to prepare an environmental assessment or an environmental impact statement because they do not increase or decrease air, water or noise pollution or the use of fossil fuels, recyclables, or energy. 46 CFR 504.4. The Direct Final Rule revises internal Commission delegations of authority to BOE and the regulations governing enforcement procedures with respect to potential Shipping Act violations. This rulemaking thus falls within the categorical exclusions for procedural rules pursuant to 46 CFR part 502 (§ 504.4(a)(4)), investigatory and adjudicatory proceedings, the purpose of which is to ascertain past violations of the Shipping Act of 1984 (§ 504.4(a)(22)), and matters related to Commission personnel (§ 504.4(a)(28)). Therefore, no environmental assessment or environmental impact statement is required.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521) (PRA) requires an agency to seek and receive approval from the Office of Management and Budget (OMB) before collecting information from the public. 44 U.S.C. 3507. The agency must submit collections of information in rules to OMB in conjunction with the publication of the notice of proposed rulemaking. 5 CFR 1320.11. This Direct Final Rule does not contain any collections of information as defined by 44 U.S.C. 3502(3) and 5 CFR 1320.3(c).

Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards in E.O. 12988 titled, “Civil Justice Reform,” to minimize litigation, eliminate ambiguity, and reduce burden.

Regulation Identifier Number

The Commission assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda). The Regulatory Information Service Center publishes the Unified Agenda in April and October

of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda, available at

<http://www.reginfo.gov/public/do/eAgendaMain>.

List of Subjects

46 CFR part 501

Administrative practice and procedure, Authority delegations (Government agencies), Organization and functions (Government agencies).

46 CFR part 502

Administrative practice and procedure, Claims, Equal access to justice, Investigations, Lawyers, Maritime carriers, Penalties, Reporting and recordkeeping requirements.

For the reasons set forth above, the Federal Maritime Commission amends 46 CFR parts 501 and 502 as follows:

PART 501—THE FEDERAL MARITIME COMMISSION—GENERAL

1. The authority citation for part 501 continues to read as follows:

Authority: 5 U.S.C. 551-557, 701-706, 2903 and 6304; 31 U.S.C. 3721; 41 U.S.C. 414 and 418; 44 U.S.C. 501-520 and 3501-3520; 46 U.S.C. 301-307, 40101-41309, 42101-42109, 44101-44106; Pub. L. 89-56, 70 Stat. 195; 5 CFR Part 2638; Pub. L. 104-320, 110 Stat. 3870.

2. Amend § 501.5 by:

a. Revising paragraph (i)(2);

b. Redesignating paragraphs (i)(4) and (i)(5) as paragraphs (i)(3) and (i)(4), respectively; and

c. Revising newly redesignated paragraphs (i)(3) and (i)(4).

The revisions read as follows:

§ 501.5 Functions of the organizational components of the Federal Maritime Commission.

* * * * *

(i) * * *

(2) Subject to the prior approval of the Commission, negotiates the informal compromise of civil penalties under § 502.604 of this chapter, prepares and presents compromise agreements for Commission approval, and represents the Commission in proceedings and circumstances as designated;

(3) Subject to consultation with and guidance of the General Counsel, coordinates with other bureaus and offices to provide legal advice, attorney liaison, and prosecution, as warranted, in connection with enforcement matters;

(4) Conducts investigations and recommends enforcement action.

* * * * *

§ 501.28 [Removed]

3. Remove § 501.28

PART 502—RULES OF PRACTICE AND PROCEDURE

4. The authority citation for part 502 continues to read as follows:

Authority: 5 U.S.C. 504, 551, 552, 553, 556(c), 559, 561-569, 571-596; 5 U.S.C. 571-584; 18 U.S.C. 207; 28 U.S.C. 2112(a); 31 U.S.C. 9701; 46 U.S.C. 305, 40103-40104, 40304, 40306, 40501-40503, 40701-40706, 41101-41109, 41301-41309, 44101-44106; 5 CFR part 2635.

5. Amend § 502.63 by revising paragraph (c)(4)(ii) and adding paragraph (d) to read as follows:

§ 502.63 Commission enforcement action.

* * * * *

(c) * * *

(4) * * *

(ii) The Bureau of Enforcement may make a motion for decision on default.

(d) *Pre-enforcement process.* (1) Prior to recommending formal enforcement action under this section or informal compromise procedures under § 502.604, the Bureau of Enforcement will advise the person or persons who are the subject of an investigation that:

(i) the Bureau of Enforcement has made a preliminary determination to recommend that the Commission initiate enforcement action against them;

(ii) identifies the specific violations that the Bureau of Enforcement has preliminarily determined to include in the recommendation; and

(iii) provides notice that the person may make a written submission to the Bureau of Enforcement concerning the proposed recommendation, including the deadline for the submission and any other relevant information (e.g., how and where to send such statements).

(2) Persons notified of such investigations may submit a written statement to the Bureau of Enforcement setting forth their interests and positions regarding the subject matter of the investigation.

(3) The Bureau of Enforcement will consider any written statements submitted under paragraph (d)(2) of this section when making recommendations to the Commission and will attach such written statements to the Bureau's recommendations. [Rule 63.]

§ 502.603 [Amended]

6. Amend § 502.603(c) by removing the citation “§ 502.604(e)” and adding in its place the citation “§ 502.604”.

7. Amend § 502.604 by:

- a. Revising paragraph (a);
- b. Removing paragraphs (b), (c), and (g);
- c. Redesignating paragraphs (d), (e), and (f) as paragraphs (b), (c), and (d),

respectively.

The revisions read as follows:

§ 502.604 Compromise of penalties: Relation to assessment proceedings.

(a) *Scope.* Except in pending civil penalty assessment proceedings provided for in § 502.603, the Commission, when it has reason to believe a violation has occurred, may invoke the informal compromise procedures of this section after observing the procedures in § 502.63(d).

* * * * *

By the Commission.

Rachel Dickon,
Secretary