

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C 20554**

In the Matter of	)	
	)	
Amendment of Parts 0, 1, 2, 15 and 18	)	
of the Commission's Rules Regarding	)	ET Docket No. 15-170
Authorization of Radiofrequency	)	
Equipment	)	
	)	

**PETITION FOR RECONSIDERATION OF  
THE NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION**

December 1, 2017

The National Customs Brokers and Forwarders Association (NCBFAA)<sup>1</sup> hereby seeks reconsideration of the Commission's Memorandum Opinion and Order in the above-captioned proceeding, in which the Commission approved a comprehensive set of proposals to update the Commission's radiofrequency equipment authorization processes, including modification of the rules applicable to the importation of radiofrequency devices.

## **I. Introduction**

NCBFAA's primary objection is to the provisions relating to the importation of radiofrequency devices, specifically, the revised Section 2.1203, which reads:

"(a) No radio frequency device may be imported into the Customs territory of the United States unless the importer or ultimate consignee, or their designated customs broker, determines that the device meets one of the conditions of entry set out in this section.

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"(c) Whoever makes a determination pursuant to Section 2.1203(a) must provide, upon request made within one year of the date of entry, documentation on how an imported radio frequency device was determined to be in compliance with Commission requirements."

This rule inappropriately equates the broker with the importer and consignee, both of whom have an ownership interest in the product, are primary parties to the transaction and are most likely to be familiar with the product's technical characteristics. As such, it imposes unreasonable responsibilities on a customs broker and creates uncertainty as to who made the determination of FCC

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<sup>1</sup> The National Customs Brokers and Forwarders Association of America (NCBFAA) represents licensed customs brokers of all sizes located in widespread U.S. geographic locations, and its members account for a vast majority

compliance. The rule also fails to consider the growing e-commerce environment, where often a customs broker-importer relationship does not exist. With these deficiencies, the rule will not achieve the desired level of safety for imported RF devices.

## **II. The Role of a Customs Broker**

A customs broker is not an importer. Confusing the two is like confusing the travel agent with the traveler. A customs broker is licensed by the U.S. Customs and Border Protection (CBP) to transact “customs business” on behalf of third parties.<sup>2</sup> Customs Brokers prepare the paperwork and electronically transmit the declarations and representations made by their client, the importer (who is generally the U.S. owner of the goods or the ultimate consignee), using a high standard of care and reasonable due diligence. But the customs broker does not own the product, does not have detailed knowledge of the product's design and only on rare occasions does the customs broker physically see the merchandise. The customs broker is dependent upon the information it receives from the importer.

As thousands upon thousands of customs entries are processed daily, the customs broker's understanding of the transaction and knowledge of the specifics is necessarily based on the representations of his client, unless he has good reason to

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<sup>2</sup> Customs business is defined as “those activities involving transactions with U.S. Customs and Border Protection concerning the entry and admissibility of merchandise, its classification and valuation, the payment of duties, taxes, or other charges assessed or collected by U.S. Customs and Border Protection upon merchandise by reason of its importation . . . It also includes the preparation of documents or forms in any format and the electronic transmission of documents, invoices, bills, or parts thereof, intended to be filed with U.S. Customs and Border Protection in furtherance of such activities...” 19 USC 1641(a)(2)

believe otherwise, and is generally limited to information related to the movement of the merchandise rather than its technical specifications. In short, customs brokers do not have the same level of visibility into the commercial transaction as the importer of the product, nor do they have the commercial standing to gain such visibility.

In the ordinary course, customs brokers simply do not receive sufficient information about the product's specifications to enable them to independently have knowledge of FCC-required technical characteristics of the product. Customs brokers also lack the familiarity, training and experience that would be required for them to be knowledgeable at a technical level. In fact, most brokers are totally unaware of how an imported radio frequency device would be determined to be in compliance with Commission requirements.

It is important for the FCC to recognize this distinction between the importer and the filer: as filers, customs brokers are responsible for the accurate *transmittal of* data; the importer, is responsible to develop the data and for the accuracy of that data.

### **III. The Order Imposes Unreasonable Responsibilities On Customs Brokers**

Section 2.1203 identifies the customs broker as one of the persons potentially responsible for *determining compliance* with FCC requirements, even though

customs brokers are intermediaries in the supply chain and do not have the knowledge or expertise to make this determination.

The FCC itself acknowledged this fact in the comments to the Order, stating "*While customs brokers may not have the expertise to determine the compliance of devices with FCC technical compliance rules.....*"<sup>3</sup> [Emphasis added.] It is patently unreasonable for the Commission to impose substantive technical requirements on a party whom they know is not in a position to comply. Moreover, it is ineffective to design an enforcement scheme that assigns responsibility so disproportionate to a party's position or scope of knowledge.

The FCC offhandedly dismisses customs brokers' concern, saying in their June 22, 2017 First Report and Order that, even though customs brokers may lack the expertise to determine FCC compliance, "*they can decline to broker shipments for which no other party will take responsibility, and they can take measures to ensure that their clients follow our rules that they do broker by, for example, requiring a compliance statement by their client, relying on their business relationship with their client, by specific indemnification agreement, or with bonding measures to protect themselves from loss.*"<sup>4</sup>

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<sup>3</sup> See *Amendment of Parts 0, 1, 2, 15 and 18 of the Commission's Rules Regarding Authorization of Radiofrequency Equipment*, ET Docket No. 15-170, First Report and Order, FCC-CIRC1707-06 at 27, para. 57 (2017).

<sup>4</sup> *Id.*

On this last point, the FCC refers to Customs Bonds, which they say "*are required by CBP in many importation situations and because the broker/importer relationship is already contractual, customs brokers should have the wherewithal to identify and take appropriate measures to protect their interests.*"<sup>5</sup>

These are not realistic solutions. In fact, the reference to Customs Bonds is completely misplaced. CBP requires every importer to maintain a customs surety bond, which is a contract used for guaranteeing that a specific obligation will be fulfilled between CBP and an importer for any given import transaction.<sup>6</sup> The main purpose of a customs surety bond is to ensure the payment of import duties, taxes and fees owed to the federal government. *A customs broker cannot use a Customs bond to guarantee an importer's obligation to the broker.*

Nor does FCC have a realistic view of the dynamics of the supply chain. A customs broker does not have the leverage to be the "enforcer" as FCC seems to envision. A customs broker informs the importer of the requirements for entry of the importer's products to the extent that the broker is aware of the specific product requirements, collects the needed data for entry and transmits the same to CBP through ACE. The broker is necessarily reliant upon the importer to identify products with special clearance requirements such as pharmaceuticals, automotive parts, products with wildlife components, toys and electronics. In this aspect the Commission is correct: once the broker is provided with specific details about the

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<sup>5</sup> *Id.*, footnote 204.

<sup>6</sup> *See* 19 USC 1623

product, the broker can provide the importer with regulatory guidance. What the broker cannot do is make technical compliance determinations.

Under the prior rule, importers were required to sign a declaration (Form 740) that RF devices comply with FCC rules. Without the 740 declaration, the product could not enter the U.S. The role of customs brokers was to inform clients that government regulations required a signed Form 740 to certify compliance with FCC regulations when the Harmonized Tariff System flag so indicated and to transmit the declaration as part of the entry process.

That previous process is a far cry from the new rule, which demands the broker make a technical determination which he is not in a position to make.

#### **IV. The Order Creates Uncertainty As To Who Made the Determination**

With FCC's new approach, where no one party is charged with the primary responsibility for making a compliance determination, it becomes critically important that the "determining party" be explicitly identified at the time of entry. Otherwise, how will the FCC know who made the determination? How will they know who has the documentation when making a request for further information within a year after entry? If the responsible party for making the determination could be any one of three entities (i.e., the importer, the ultimate consignee or the customs broker, as the final rule provides), there is no certainty for the FCC or the

trade as to which party actually determined that the radio frequency device was in compliance. This leaves a potentially significant gap in affixing responsibility.

A customs broker should not be one of the potential parties named as being responsible for "determining" whether the product meets FCC technical requirements. For the reasons stated above, it would be counterproductive to the FCC's goals for consumer safety to expect a customs broker to fulfill this role.

During a November 2016 conference call with FCC staff, NCBFAA discussed the approach taken by the Food and Drug Administration (FDA) in its proposed rule on the Foreign Supplier Verification Program (FSVP) under the Food Safety Modernization Act (FSMA).<sup>7</sup> The FDA faced a similar challenge as the FCC, that is: who should be the responsible party for verifying the safety of the food supplier for imported foods? For purposes of food safety verification, the FDA defined the importer as: *"the U.S. owner of the food if there is one or the consignee if there is not a U.S. owner at the time of entry.....If the article has not been sold or consigned at the time of U.S. entry, the importer would be the U.S. agent or representative of the foreign owner or consignee at the time of entry."*<sup>8</sup> The FDA adopted this definition in its final rule, including a requirement that the U.S. agent must explicitly agree in writing to accept liability as the agent for the purposes of food safety. This was meant to

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<sup>7</sup> NCBFAA Notice of Ex Parte Communication, ET Docket No. FCC 15-170, November 10, 2016

<sup>8</sup> 21 CFR Part 1, Subpart L, 1500.



prevent a party from being unilaterally designated as an agent without their knowledge and consent.

In the discussion about the proposed definition, the FDA explained that the importer is "*the person who caused a food to be imported.....This person has a direct financial interest in the food and is most likely to have knowledge and control over the product's supply chain.*"<sup>9</sup> In rejecting the CBP definition of "importer of record," the FDA specifically pointed out in the preamble to the final rule that the FSVP importer "*might be, but would not necessarily be, the importer of record*"<sup>10</sup> (emphasis added), since the importer of record might well be an intermediary with little to no knowledge of the product. The FDA further explained, "The 'U.S. owner or consignee' of a food....is more likely to have knowledge of food safety practices and control over the supply chain of an imported product than a customs broker....Although the CBP definition of importer may be effective in ensuring collection of customs duties and otherwise meeting CBP requirements, that is not the purpose of the [Foreign Supplier Verification Program] regulation."<sup>11</sup>

To provide certainty as to who bears responsibility for imported food products, the FDA now requires the importer-of-record, through its customs broker, to specifically identify the "FSVP importer" on the customs entry. Thus, the final FDA

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<sup>9</sup> *NPRM*, 78 FR 45730 at 45743, para. 5.

<sup>10</sup> See 80 FR 74226 at 74239, Response 25.

<sup>11</sup> *Id.*

rule focuses on the person with actual knowledge of the product. The FCC may want to consider a similar approach.

## **V. The Order Does Not Account for the E-Commerce Environment**

The FCC rule seems to assume that every imported shipment involves a customs broker-importer relationship. For traditional freight shipments (air, ocean, rail, land border), this is largely true. But, FCC's assumption ignores the relatively new and formidable trade phenomenon: cross-border e-commerce. The explosion of B-to-C (business-to-consumer) e-commerce marks a significant shift in the way goods are conveyed in international trade -- moving from the traditional commercial shipment arriving in a 40-foot shipping container to many small packages shipped directly to the consumer likely via an express consignment carrier or through international mail. There is no customs broker-importer relationship in most of these micro-transactions. In fact, with the increase in the monetary threshold for the *de minimis* exemption from \$200 to \$800<sup>12</sup>, most of these e-commerce shipments qualify for this exemption (from duties, tax and regular entry processes), where no customs broker is involved at all. The parcel is cleared by CBP "off the manifest" which shows only a "Shipper" and a "Ship To" party.

In the express environment, approximately 70%-80% of the packages are consigned to individual e-commerce customers with no broker relationship and no insight into the regulatory requirements attendant to the importation of RF devices. Similarly, a

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<sup>12</sup> See the Trade Facilitation and Trade Enforcement Act, Section 901(c), (Public Law 114-125, enacted February 24, 2016).

very high volume of international mail shipments flow into the US each day with no broker-importer relationship. There will be a huge hole in the regulatory framework if the rule fails to impose the compliance requirement on the parties causing those shipments to enter the United States.

## **VI. A Better Way**

To the extent customs brokers are included in this rule, the responsibilities assigned to brokers should be reasonably proportionate to their function in the supply chain. For example, if the FCC wants the customs broker to collect a compliance statement from the importer, as it suggests, the regulation should so state and simultaneously impose a requirement on the importer to provide such a statement to their broker. Or, if the FCC wants the responsible party for determining compliance to be identified at entry, that should be an importer requirement with customs brokers responsible for transmitting that information through ACE.

This is not simply a matter of what is reasonable with respect to the customs broker. It bears squarely on the effectiveness of FCC's approach to assuring the safety of imported RF devices. Just as the Food and Drug Administration does not pin responsibility for verifying the safety of a food supplier or product on a customs broker or other intermediary in the supply chain who lacks the requisite expertise to meet this responsibility, the FCC should consider a similar approach. At the very least, we urge the FCC to reconsider the rule to ensure that the responsible party is a person positioned to know important details about the product and its supply chain.

## **VII. Conclusion**

NCBFAA is committed to working with the FCC and other stakeholders to find a more effective means to achieve the goal of RF device safety for imported products.

We believe there is still an opportunity to improve this rule so it recognizes the parties in the supply chain for what they do and assigns responsibilities accordingly.

Respectfully Submitted,



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