FEDERAL MARITIME COMMISSION

46 CFR PARTS 585, 587 AND 588

[DOCKET NO. 88-24]

REGULATIONS TO ADJUST OR MEET CONDITIONS UNFAVORABLE TO SHIPPING IN THE FOREIGN TRADE OF THE UNITED STATES

ACTIONS TO ADDRESS CONDITIONS UNDULY IMPAIRING ACCESS OF U.S.-FLAG VESSELS TO OCEAN TRADE BETWEEN FOREIGN PORTS

ACTIONS TO ADDRESS ADVERSE CONDITIONS AFFECTING U.S.-FLAG CARRIERS THAT DO NOT EXIST FOR FOREIGN CARRIERS IN THE UNITED STATES

AGENCY: Federal Maritime Commission.

ACTION: Final Rule.

SUMMARY: The Commission is adopting a Final Rule adding a new part to its regulations to implement the Foreign Shipping Practices Act of 1988. The new part sets forth general procedures for investigatory proceedings to address adverse foreign conditions affecting U.S.-flag carriers that do not exist for foreign carriers in the United States. The Commission is also amending its rules implementing section 19(1)(b) of the Merchant Marine Act, 1920 and section 13(b)(5) of the Shipping Act of 1984, to add new sanctions made available to the Commission in proceedings under those statutes, pursuant to the Foreign Shipping Practices Act.

DATES: Effective 30 days after publication in the Federal Register.

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SUPPLEMENTARY INFORMATION:

The Commission initiated this proceeding by issuing a Proposed Rule (53 FR 44039, November 1, 1988) to implement the Foreign Shipping Practices Act of 1988 ("1988 Act"). The 1988 Act is contained at Title X, Subtitle A of the Omnibus Trade and Competitiveness Act of 1988, which became effective on August 23, 1988. The 1988 Act directs the Commission to address adverse foreign conditions affecting United States carriers in U.S.-foreign oceanborne trades, which conditions do not exist for carriers of those countries in the United States, either under U.S. law or as a result of acts of U.S. carriers or others providing maritime or maritime-related services in the U.S. The 1988 Act prescribes an investigatory-type proceeding, an information-gathering mechanism, and actions, or sanctions, which the Commission is directed to take to offset any adverse conditions found to exist. The sanctions authorized for the administration of the 1988 Act are also made applicable by that statute to the administration and enforcement of section 13(b)(5) ("Section 13(b)(5)") of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. 1712(b)(5), and section 19(1)(b) ("Section 19") of the Merchant Marine Act, 1920 ("1920 Act"), 46 U.S.C. app. 876(1)(b). The Commission regulations implementing those provisions are codified at 46 CFR Parts 585 and 587.

The Proposed Rule largely tracked the language of the 1988 Act and paralleled the regulations implementing

Sections 19 and 13(b)(5). The more significant departures from the language of those regulations or the 1988 Act included: language added to the definition of "U.S. carrier" to dichotomize more clearly the definitions of U.S. carrier and foreign carrier contained in the 1988 Act; a definition of the term "voyage" as used in the sanctions provision of the 1988 Act; a general, rather than a specific, requirement as to evidence and documentation supporting a petition for an investigation under the 1988 Act, in order to reflect the statute's allowance of "any person," not just an injured party, to file such a petition; provisions to allow persons submitting comments in the course of a 1988 Act proceeding to advise the Commission of their preferences and positions on the confidentiality of their submissions; and reorganization of the sanctions provisions in the Sections 19 and 13(b)(5) regulations to better incorporate the additional sanctions authorized by the 1988 Act.

Comments on the Proposed Rule were received from ten parties: the United Shipowners of America ("USA");[1] Sea-Land Service, Inc. ("Sea-Land"); American President Lines, Ltd. ("APL");[2] Crowley Maritime Corporation ("Crowley");[2] Shippers for Competitive Ocean Transportation ("SCOT"); the

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[1] USA's member companies purportedly "own and operate over 97% of all U.S.-flag liner capacity in international trade."

[2] APL and Crowley also join in the comments of USA.

Governments represented in the Consultative Shipping Group ("CSG");[3] the Council of European and Japanese National Shipowners' Associations ("CENSA"); the North Atlantic Ports Association ("NAPA"); the Office of the U.S. Trade Representative ("USTR"); and the U.S. Department of State ("DOS").

SUMMARY AND DISCUSSION OF COMMENTS

Inasmuch as many of the comments addressed the same issues, they will be discussed herein organized by subject matter -- where applicable, by section of the rules -- rather than organized by individual commenter. Also, to the extent commenters made similar arguments, those arguments may be attributed collectively to a group of parties rather than to individuals.

Section 588.2 - Definitions

The four commenters representing U.S. carrier interests -- USA, Sea-Land, APL and Crowley -- all take issue with the Proposed Rule's definition of U.S. carrier.[4]

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[3] I.e., the Governments of Belgium, Denmark, Finland, France, the Federal Republic of Germany, Greece, Italy, Japan, the Netherlands, Norway, Portugal, Spain, Sweden, the United Kingdom and the Commission of the European Communities.

[4] The Proposed Rule notes that the definitions of foreign and U.S. carriers are worded such that the two may overlap, in that a U.S. carrier "operates vessels documented under the laws of the United States," and a foreign carrier is one "a majority of whose vessels are documented under" foreign laws. Thus, a carrier operating some U.S.-flag vessels but even more foreign-flag vessels could be argued to fit both definitions. The Proposed Rule provides that a carrier meeting both definitions shall be considered a foreign carrier.

The U.S. carrier interests note that U.S. carriers may be deemed, for the purpose of the 1988 Act, a "foreign carrier" under the Proposed Rule. They indicate that U.S. carriers frequently support their U.S.-flag operations with foreign-flag vessels, such as small feeder vessels, when, as APL explains, U.S.-flag vessels cannot be employed competitively. Crowley, for example, states that one of its subsidiaries, Trailer Marine Transport Corporation, employs seventeen vessels, most of which are U.S.-flag, but that of those used in foreign commerce, the majority are foreign-flag. The U.S. carrier interests are generally concerned that depending on the number of foreign-flag vessels it owns or charters, a bona fide U.S. carrier could jeopardize its standing as a carrier entitled to protections under the 1988 Act.

The U.S. carrier interests argue that Congress did not intend that recognized U.S.-flag carriers lose the protections afforded them by the new legislation by adding to their foreign-flag fleet. Rather, they contend, the "majority" language in the foreign carrier definition was adopted by Congress to prevent a foreign carrier from evading sanctions under the 1988 Act by reflagging a few of its vessels under U.S. laws. The foreign carrier definition was not, they argue, intended to constitute a "fleet composition test" or to "scrutinize or circumscribe the composition of U.S. carrier fleets." Sea-Land comments, at 4-5.

USA and the U.S. carriers all propose slightly different solutions to the question of how to define U.S. and foreign carriers. Each suggests two alternative approaches, one being simply to adopt the statutory definitions and to resolve any uncertainties as to application on a case-by-case basis. Each also suggests that an amendment of some sort may serve to clarify the matter. Crowley, for instance, proposes basing the definition of U.S. carrier on "all vessels operated by that carrier and by companies affiliated with that carrier by common control or ownership in both foreign and domestic offshore commerce," thereby solving its own problem of its foreign-flag-based subsidiaries. Crowley comments, at 2. USA suggests that a more "flexible rule" for defining U.S. carrier could be substituted, based on "U.S.-flag capacity" and corporate citizenship, rather than a "simplistic 'vessel count'." USA comments, at 3-4. Sea-Land's proposal focuses on amplifying the foreign carrier definition to disregard post-petition reflagging and to exclude carriers qualifying as U.S. citizens under section 2(a) of the Shipping Act, 1916, 46 U.S.C. 802(a). APL suggests, more generally, adopting a rule which "builds in flexibility." APL comments, at 2.

The legislative history of the 1988 Act suggests that there is some merit in the argument of the U.S. carrier interests that Congress intended its restrictive definition of foreign carriers to prevent their evading the law via

reflagging, and not to attempt to circumscribe the range of U.S. carriers which may derive benefit from administration of the statute. Yet the definitions of U.S. and foreign carriers in the 1988 Act are, notwithstanding arguments to the contrary, overlapping, an issue which appears to have been implicitly left for the FMC to resolve at its discretion.

Each of the commenting U.S. carrier interests suggests that the statute's version of the definitions, however imperfect, be preserved in the Commission's rule, and that any questions be resolved on a case-by-case, "flexible" basis. The problem with this approach is that, with a statutorily imposed 120-day time limit on investigatory proceedings, an additional "sub-proceeding" to determine whether a particular carrier should be considered U.S. or foreign for the purposes of the 1988 Act could render a timely resolution of the major proceeding impossible. It will be difficult enough to complete even one 1988 Act proceeding in the allotted time.

Accordingly, the Commission is not persuaded by the suggestions that the statutory definitions be adopted for the regulations, and that an ad hoc resolution of definitions controversies be attempted in the course of each proceeding. Rather, the Commission considers it desirable to be able to define fairly clearly the carriers whose interests qualify for protection and the carriers who may be subject to sanctions, or at least the standards or criteria to be applied in making those determinations.

The alternative approaches suggested by the U.S. carrier interests appear to be worthy of further consideration, debate and analysis. However, each one of the alternative approaches differs from the other and, given the normal rulemaking procedure employed, none of the parties commenting in this rulemaking has had the opportunity to reply to the specific concerns and suggestions of the U.S. carrier interests. Also, the definitions of U.S. and foreign carrier are a fundamental and critical aspect of the rules, in that they will, in turn, determine the scope, efficacy, and the very nature of the proceedings conducted under the rules, and will affect the expeditiousness of those proceedings as well. For these reasons, the Commission has determined to obtain further input from interested parties on the definitions.

Rather than to delay the implementation of a Final Rule until the definitions issue is resolved, the Commission intends to proceed with the issuance of a Final Rule and to address the definitions matter in a separate rulemaking proceeding. No other aspect of the Proposed Rule, as discussed below, has presented the Commission with any justification for not proceeding expeditiously to a Final Rule. The Final Rule adopted herein will, for the time being, mirror the statutory definitions of U.S. and foreign carriers. When the separate rulemaking is completed, Part 588 may subsequently be amended should clearer definitions be decided upon. The Commission anticipates that that

proceeding will be instituted shortly by issuance of a notice of inquiry.

The only other variation from the statute's list of definitions is the Commission's addition of a definition for "voyage". That definition received only favorable comment and has been preserved in the Final Rule.

Section 588.4 - Petitions

The CSG Governments request the Commission to reconsider the absence of a requirement in the rule that a petitioner allege harm to itself or produce statistical data demonstrating harm, as this absence could result in "the possibility of a large number of petitions being filed," including "frivolous petitions which could be vexatious." As noted in the Proposed Rule, however, the Commission believes that a requirement that petitioners show actual harm or produce statistical data of such would appear to circumvent the intent of the statute to allow any person, not just injured parties, to petition for action under the 1988 Act. Shippers or forwarders, for example, or interested U.S. government officials, may not be in a position to document the extent of harm caused a U.S. carrier by some foreign government's actions. Thus, the requirement urged by the CSG Governments could have a chilling effect on the filing of otherwise legitimate complaints, and has not been adopted in the Final Rule.

An addition which has been made to the Final Rule in this section is an additional paragraph at section 588.4(b),

requiring a petitioner to identify each U.S. carrier alleged to be harmed and describing and documenting why it is considered by petitioner to be a U.S. carrier. This requirement may be further amended as necessary when the definitions matter is resolved.

CENSA proposes an amendment to section 588.4(c), which states that petitions which fail to comply with the requirements of the previous paragraph will be rejected. CENSA requests that the Final Rule expressly state that: "Frivolous or harassing petitions will not be entertained." CENSA comments, at 2. The Commission does not find this language necessary. The requirements of section 588.4(b) for an acceptable petition constitute the applicable standard, and do not appear to want a separate criterion or test for frivolousness or harassment. A petition which meets the 588.4(b) standards would not likely be considered frivolous or harassing. Similarly, the CSG Governments' suggestion that the Final Rule state that petitions unaccompanied by sufficient evidence will be immediately dismissed is superfluous to the language already to that effect in section 588.4(c).

Section 588.6(c) - Information demands and subpoenas

Several comments address the issue of confidentiality of submissions made in the course of a 1988 Act proceeding. Section 588.6(c) of the Proposed Rule states that "persons submitting information for consideration in a proceeding or investigation under this part may indicate in writing any

factors they wish the Commission to consider relevant to a decision on confidentiality," and that if the Commission determines not to afford confidentiality when requested, it will advise the requester before any disclosure occurs. Thus, SCOT's suggestion that persons have an opportunity "beyond mere notice" to emphasize to the Commission the consequences of disclosure (SCOT comments, at 2) seems to overlook the opportunity already explicitly provided in the rule.

With respect to submissions made in proceedings under the 1988 Act, USA proposes that persons be afforded opportunity to withdraw or modify submissions prior to public disclosure. This is the Commission's intended practice, as relates to voluntary submissions, and is implicit in the rule's statement that notice to submitters will be given prior to disclosure. Thus, no amendment to the Final Rule in this regard appears necessary.

No right of modification or withdrawal can be afforded, however, with respect to submissions made in response to section 588.6 information demands by the Commission. Any confidentiality issues arising from mandatory submissions will be handled on a case-by-case basis.[5]

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[5] Mandatory submissions may be exempt from disclosure under the Freedom of Information Act, as commercially sensitive financial data or trade secrets, 5 U.S.C. 552(b)(4), or as exempt investigatory records, 5 U.S.C. 552(b)(7)(A),(D). Submissions may also be made the subject of a protective order under Rule 167 of the Commission's Rules of Practice and Procedure, 46 CFR 502.167.

CENSA requests that the Final Rule state that the Commission will not "consider, as part of the record upon which it makes findings, any information which is not made known to a party which is under investigation and as to which its right to reply is denied." Disclosure of the facts and information upon which the Commission relies to make findings and take actions is generally required under constitutional concepts of due process and provisions of the Administrative Procedure Act.[6] The Commission therefore considers it unnecessary to adopt specific procedural safeguards for matters already governed by general principles of administrative law and constitutional considerations. Moreover, the Commission disfavors adopting in advance a course of action without regard to the relevant facts and circumstances in a particular case. Such determinations are best made on an ad hoc basis.

Section 588.7 - Notification to Secretary of State

USTR notes that the Proposed Rule provides that the Commission will notify DOS of the initiation of an investigation and may request action to seek resolution of the matter through diplomatic channels. USTR states that because it "also has responsibilities with respect to various unfair trade practices affecting trade in goods and services", it should also "be notified at the same time as

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[6] Also, the provisions of the Freedom of Information Act could apply to require disclosure of documents.

the State Department under this procedure."

While such a course of action may in certain instances be appropriate, the Commission will not amend section 588.7 to require notification to USTR of the initiation of an investigation in every instance. We believe that DOS, as the U.S. executive agency charged with diplomatic functions, should be notified routinely, but that other agencies, such as USTR, should formally be advised as circumstances warrant.

Section 588.8 - Action against foreign carriers

USA requests that a new action or "sanction" be added to the Final Rule, in which the Commission could condition the filing of foreign carriers' tariffs on certain reciprocal responses, such as ceasing to offer rail and truck services in the U.S. when U.S. carriers face foreign-imposed restrictions on those activities. The Commission finds such an amendment to be superfluous, in that the list of sanctions at section 588.8 of the rule is expressly not all-inclusive (section 588.8(a) states: "[s]uch action may include, but is not limited to: . . . "), and a "conditional" suspension of tariffs would be but a type of suspension already prescribed at section 588.8(a)(3). The Commission deliberately avoided attempting to list every possible remedy, lest an inadvertent omission mistakenly be deemed an intended restriction, and also in order to retain the highest degree of flexibility.

CENSA and the CSG Governments cite with approval language in the Supplementary Information section of the

Proposed Rule which states:

> It is the Commission's intention to impose, to the extent administratively feasible, sanctions under this section which are carefully crafted so as to meet effectively the adverse foreign shipping practices, while minimizing the likelihood of causing undue or unnecessary disruption to the trade or harm to innocent third parties.

CENSA and the CSG Governments request that this statement be codified in the Final Rule itself. While the Commission is committed to careful and responsible craftsmanship in taking actions pursuant to the 1988 Act, codifying this commitment as a procedural requirement might undermine the overall efficacy of the rule by limiting the Commission's discretion and flexibility and injecting yet another issue to be addressed and litigated in each, already time-constrained proceeding. This suggestion has not, therefore, been adopted.

General comments

Other comments on the Proposed Rule are of a more general nature, and do not require any amendments in the Final Rule. DOS notes that it "finds acceptable" the Proposed Rule, and that it trusts the "existing close cooperative relationship" between the Commission and DOS "will not only continue but will be strengthened under the new Act." As the instant rules are similar to the Commission's Section 19 rules with respect to notification to DOS, the Commission anticipates that the cooperative relationship between it and DOS will continue, although the time constraints of the 1988 Act will impose additional challenges to both agencies.

USA urges that the Commission act promptly in taking action under the 1988 Act, and that it not delay initiating individual proceedings pending the finalization of this rulemaking. The 1988 Act does not require that a Final Rule serve as a condition precedent to any actions taken pursuant to the Act, and thus this rulemaking will not serve to delay the initiation of any such proceedings.

NAPA generally expresses concern with the impact of possible sanctions under the 1988 Act on U.S. ports, and does not directly address the Proposed Rule itself. NAPA also questions whether the remedies provided by the 1988 Act are not already available under the "United Nations Code of Trade and Development"[7] or bilateral trade agreements. NAPA comments, at 2. NAPA's comments on the 1988 Act itself, rather than the Proposed Rule, and its unexplained references to UNCTAD and unspecified bilateral agreements, were not deemed germane to this rulemaking.

Finally, Sea-Land opines that the sanctions made applicable to the 1920 and 1984 Acts by the 1988 Act have been "accurately incorporated" into Parts 585 and 587 of the Commission's regulations, but fears that the "authority citation" listing the 1988 Act in Part 585 (implementing section 19 of the 1920 Act) may be "misconstrued to alter the current 'flag-blind' scope" of the 1920 Act. Sea-Land

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[7] Actually, the United Nations Conference on Trade and Development's Code of Conduct for Liner Conferences.

suggests this matter be addressed and clarified in the Final Rule. We fail to see how citing the 1988 Act in the 1920 Act rules could somehow be erroneously construed as amending the substance of the 1920 Act itself. The only purpose for the authority citation was to note, as the Federal Register requires, the source of the new sanctions added to the 1920 Act rules.

The Federal Maritime Commission has determined that this Final Rule is not a "major rule" as defined in Executive Order 12291, 46 FR 12193, February 27, 1981, because it will not result in: (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effect on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Chairman of the Commission certifies, pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., that this Final Rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units, and small governmental jurisdictions.

In accordance with 44 U.S.C. 3518(c)(1)(B), and except for investigations undertaken with reference to a category of individuals or entities (e.g., an entire industry), any

information request or requirement in this part is not subject to the requirements of section 3507(f) of the Paperwork Reduction Act because such collection of information is pursuant to a civil, administrative action or investigation by an agency of the United States against specific individuals or entities.

List of Subjects

46 CFR Part 585

Administrative practice and procedure, Maritime carriers.

46 CFR Part 587

Administrative practice and procedure, Maritime carriers.

46 CFR Part 588

Administrative practice and procedure, Confidential business information, Foreign trade, Maritime carriers, Trade practices, Transportation.

Therefore, pursuant to 5 U.S.C. 553; section 19(1)(b) of the Merchant Marine Act, 1920, 46 U.S.C. app. 876(1)(b); sections 13(b)(5), 15 and 17 of the Shipping Act of 1984, 46 U.S.C. app. 1712(b)(5), 1714 and 1716; Reorganization Plan No. 7 of 1961, 75 Stat. 840; and section 10002 of the Foreign Shipping Practices Act of 1988, the Federal Maritime Commission amends parts 585 and 587 and adds a new part 588 to Title 46 of the Code of Federal Regulations as follows:

1. The authority citation for Part 585 is revised to read as follows:

AUTHORITY: 5 U.S.C. 553; sec. 19(1)(b) of the Merchant Marine Act, 1920, 46 U.S.C. app. 876(1)(b); secs. 15 and 17 of the Shipping Act of 1984, 46 U.S.C. app. 1714 and 1716; Reorganization Plan No. 7 of 1961, 75 Stat. 840; sec. 10002 of the Foreign Shipping Practices Act of 1988 (46 U.S.C. app. 1710a).

2. In section 585.9, paragraphs (b), (c), and (d) are revised and paragraphs (e), (f), (g) and (h) are added to read as follows:

Section 585.9 Actions to meet conditions unfavorable to shipping in the foreign trade of the United States

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(b) Limitations on sailings to and from United States ports or on the amount or type of cargo carried;

(c) Suspension, in whole or in part, of any or all tariffs filed with the Commission, including the right of an ocean common carrier to use any or all tariffs of conferences in United States trades of which it is a member for such period as the Commission specifies;

(d) Suspension, in whole or in part, of the right of an ocean common carrier to operate under any agreement filed with the Commission, including agreements authorizing preferential treatment at terminals, preferential terminal leases, space chartering, or pooling of cargo or revenues with other ocean common carriers;

(e) Imposition of a charge, not to exceed $1,000,000 per inbound or outbound movement between a foreign country

and the United States by a vessel engaged in the United States oceanborne trade;

(f) A request to the collector of customs at any port or place of destination in the United States to refuse the clearance required by section 4197 of the Revised Statutes, 46 U.S.C. app. 91, to any vessel of a foreign carrier which is or whose government is identified as contributing to the unfavorable conditions described in section 585.3 of this part;

(g) A request to the Secretary of the department in which the Coast Guard is operating to deny entry, for purposes of oceanborne trade, of any vessel of a foreign carrier which is or whose government is identified as contributing to the unfavorable conditions described in section 585.3 of this part to any port or place in the United States or the navigable waters of the United States, or to detain any such vessel at the port or place in the United States from which it is about to depart for any other port or place in the United States; and

(h) Any other action the Commission finds necessary and appropriate in the public interest to adjust or meet any condition unfavorable to shipping in the foreign trade of the United States.

3. The authority citation for Part 587 is revised to read as follows:

AUTHORITY: 5 U.S.C. 553; secs. 13(b)(5), 15 and 17 of the Shipping Act of 1984, 46 U.S.C. app. 1712(b)(5), 1714, and 1716; sec. 10002 of the Foreign Shipping Practices Act of 1988 (46 U.S.C. app. 1710a).

4. In section 587.7, paragraphs (b)(2) and (4) are revised and paragraphs (b)(5), (6), (7) and (8) are added to read as follows:

Section 587.7 Decision; sanctions; effective date.

* * * * *

(b) * * *

(2) Limitations on sailings to and from United States ports or on the amount or type of cargo carried;

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(4) Suspension, in whole or in part, of the right of an ocean common carrier to operate under any agreement filed with the Commission, including agreements authorizing preferential treatment at terminals, preferential terminal leases, space chartering, or pooling of cargo or revenues with other ocean common carriers;

(5) Imposition of a charge not to exceed $1,000,000 per inbound or outbound movement between a foreign country and the United States by a vessel engaged in the United States oceanborne trade;

(6) A request to the collector of customs at any port or place of destination in the United States to refuse the clearance required by section 4197 of the Revised Statutes, 46 U.S.C. app. 91, to any vessel of a foreign carrier which is or whose government is identified as contributing to the conditions described in section 587.2 of this part;

(7) A request to the Secretary of the department in which the Coast Guard is operating to deny entry, for purposes of oceanborne trade, of any vessel of a foreign carrier which is or whose government is identified as contributing to the conditions described in section 587.2 of this part to any port or place in the United States or the navigable waters of the United States, or to detain any such vessel at the port or place in the United States from which it is about to depart for any other port or place in the United States; and

(8) Any other action the Commission finds necessary and appropriate to address conditions unduly impairing access of a U.S.-flag vessel to trade between foreign ports.

5. A new part 588 is added to Subchapter D to read as follows:

PART 588 - ACTIONS TO ADDRESS ADVERSE CONDITIONS AFFECTING U.S.-FLAG CARRIERS THAT DO NOT EXIST FOR FOREIGN CARRIERS IN THE UNITED STATES

Sec.

AUTHORITY: 5 U.S.C. 553; sec. 10002 of the Foreign Shipping Practices Act of 1988 (46 U.S.C. app. 1710a).

Section 588.1 Purpose.

It is the purpose of the regulations of this part to establish procedures to implement the Foreign Shipping Practices Act of 1988, which authorizes the Commission to take action against foreign carriers, whose practices or whose government's practices result in adverse conditions affecting the operations of United States carriers, which adverse conditions do not exist for those foreign carriers in the United States. The regulations of this part provide procedures for investigating such practices and for obtaining information relevant to the investigations, and also afford notice of the types of actions included among those that the Commission is authorized to take.

Section 588.2 Definitions.

For the purposes of this part:

(a) "common carrier," "marine terminal operator," "non-vessel-operating common carrier", "ocean common carrier," "person," "shipper," "shippers' association," and "United States" have the meanings given each such term, respectively, in section 3 of the Shipping Act of 1984 (46 U.S.C. app. 1702);

(b) "foreign carrier" means an ocean common carrier a majority of whose vessels are documented under the laws of a country other than the United States;

(c) "maritime services" means port-to-port carriage of cargo by the vessels operated by ocean common carriers;

(d) "maritime-related services" means intermodal operations, terminal operations, cargo solicitation, forwarding and agency services, non-vessel-operating common carrier operations, and all other activities and services integral to total transportation systems of ocean common carriers and their foreign domiciled affiliates on their own and others' behalf;

(e) "United States carrier" means an ocean common carrier which operates vessels documented under the laws of the United States;

(f) "United States oceanborne trade" means the carriage of cargo between the United States and a foreign country, whether direct or indirect, by an ocean common carrier;

(g) "voyage" means an inbound or outbound movement between a foreign country and the United States by a vessel engaged in the United States oceanborne trade. Each inbound or outbound movement constitutes a separate voyage.

Section 588.3 Scope.

The Commission shall take such action under this part as it considers necessary and appropriate when it determines that any laws, rules, regulations, policies, or practices of foreign governments, or any practices of foreign carriers or other persons providing maritime or maritime-related services in a foreign country, result in conditions that adversely affect the operations of United States carriers in United States oceanborne trade, and do not exist for foreign carriers of that country in the United States under the laws of the United States or as a result of acts of United States carriers or other persons providing maritime or maritime-related services in the United States.

Section 588.4 Petitions.

(a) A petition for investigation to determine the existence of adverse conditions as described in section 588.3 may be submitted by any person, including any common carrier, shipper, shippers' association, ocean freight forwarder, or marine terminal operator, or any branch, department, agency, or other component of the Government of the United States. Petitions for relief under this part shall be in writing, and filed in the form of an original and fifteen copies with the Secretary, Federal Maritime Commission, Washington, D.C. 20573.

(b) Petitions shall set forth the following:

(1) the name and address of the petitioner;

(2) the name and address of each party (foreign government, agency or instrumentality thereof, carrier, or other person) against whom the petition is made, a statement as to whether the party is a foreign government, agency or instrumentality thereof, and a brief statement describing the party's function, business or operation;

(3) the name and address of each United States carrier alleged to be adversely affected, and a description, and if possible, documentation, of why each is considered by petitioner to be a United States carrier;

(4) a precise description and, if applicable, citation of any law, rule, regulation, policy or practice of a foreign government or practice of a foreign carrier or other person causing the conditions complained of;

(5) a certified copy of any law, rule, regulation or other document involved and, if not in English, a certified English translation thereof;

(6) any other evidence of the existence of such laws and practices, evidence of the alleged adverse effects on the operations of United States carriers in United States oceanborne trade, and evidence that foreign carriers of the country involved are not subjected to similar adverse conditions in the United States;

(7) with respect to the harm already caused, or which may reasonably be expected to be caused, the following information, if available to petitioner:

(i) statistical data documenting present or prospective cargo loss by United States carriers due to foreign government or commercial practices for a representative period, if harm is alleged on that basis, and the sources of the statistical data;

(ii) statistical data or other information documenting the impact of the foreign government or commercial practices causing the conditions complained of, and the sources of those data; and

(iii) a statement as to why the period used is representative.

(8) a separate memorandum of law or a discussion of the relevant legal issues; and

(9) a recommended action, including any of those enumerated in section 588.8, the result of which will, in the view of the petitioner, address the conditions complained of.

(c) A petition which the Commission determines fails to comply substantially with the requirements of paragraph (b) of this section shall be rejected promptly and the person filing the petition shall be notified of the reasons for such rejection. Rejection is without prejudice to filing of an amended petition.

Section 588.5 Investigations.

(a) An investigation to determine the existence of adverse conditions as described in section 588.3 may be

initiated by the Commission on its own motion or on the petition of any person pursuant to section 588.4. An investigation shall be considered to have been initiated for the purposes of the time limits imposed by the Foreign Shipping Practices Act of 1988 upon the publication in the Federal Register of the Commission's notice of investigation, which shall announce the initiation of the proceeding upon either the Commission's own motion or the filing of a petition.

(b) The provisions of Part 502 of this chapter (Rules of Practice and Procedure) shall not apply to this part except for those provisions governing ex parte contacts (section 502.11 of this chapter) and except as the Commission may otherwise determine by order. The precise procedures and timetables for participation in investigations initiated under this part will be established on an ad hoc basis as appropriate and set forth in the notice. Proceedings may include oral evidentiary hearings, but only when the Commission determines that there are likely to be genuine issues of material fact that cannot be resolved on the basis of written submissions, or that the nature of the matter in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record. In any event, investigations initiated under this part shall proceed expeditiously, consistent with due process, to conform with the time limits specified in the Foreign Shipping Practices Act and to identify promptly the conditions described in section 588.3 of this part.

(c) Upon initiation of an investigation, interested persons will be given the opportunity to participate in the proceeding pursuant to the procedures set forth in the notice. Submissions filed in response to a notice of investigation may include written data and statistics, views, and legal arguments. Factual information submitted shall be certified under oath. An original and 15 copies of such submissions will be filed with the Secretary, Federal Maritime Commission, Washington, D.C. 20573. Persons who receive information requests from the Commission pursuant to section 588.6 of this part are not precluded from filing additional voluntary submissions in accordance with this paragraph.

(d) An investigation shall be completed and a decision rendered within 120 days after it has commenced as defined in paragraph (a) of this section, unless the Commission determines that an additional 90-day period is necessary in order to obtain sufficient information on which to render a decision. When the Commission determines to extend the investigation period for an additional 90 days, it shall issue a notice clearly stating the reasons therefor.

Section 588.6 Information demands and subpoenas.

(a) In furtherance of this part, the Commission may, by order, require any person (including any common carrier, shipper, shippers' association, ocean freight forwarder, or marine terminal operator, or any officer, receiver, trustee,

lessee, agent or employee thereof) to file with the Commission any periodic or special report, answers to questions, documentary material, or other information which the Commission considers necessary or appropriate, and in the form and within the time prescribed by the Commission. Responses to such orders may be required by the Commission to be made under oath.

(b) The Commission may issue subpoenas to compel the attendance and testimony of witnesses and the production of records or other evidence as it deems necessary and appropriate in conducting an investigation under section 588.5 of this part.

(c) The Commission may, in its discretion, determine that any information submitted to it in response to a request (including a subpoena) under this section, or accompanying a petition under section 588.4, or voluntarily submitted by any person pursuant to section 588.5(c), shall not be disclosed to the public. To this end, persons submitting information for consideration in a proceeding or investigation under this part may indicate in writing any factors they wish the Commission to consider relevant to a decision on confidentiality under this section; however, such information will be advisory only, and the actual determination will be made by the Commission. In the event that a request for confidentiality is not accommodated, the person making the request will be so advised before any disclosure occurs.

Section 588.7 Notification to Secretary of State.

Upon the publication of a petition in the Federal Register, or on its own motion should it determine to initiate an investigation pursuant to section 588.5, the Commission will notify the Secretary of State of same, and may request action to seek resolution of the matter through diplomatic channels. The Commission may request the Secretary to report the results of such efforts at a specified time.

Section 588.8 Action against foreign carriers.

(a) Whenever, after notice and opportunity for comment or hearing, the Commission determines that the conditions specified in section 588.3 of this part exist, the Commission shall take such action as it considers necessary and appropriate against any foreign carrier which it identifies as a contributing cause to, or whose government is a contributing cause to, such conditions, in order to offset such conditions. Such action may include, but is not limited to:

(1) limitations on sailings to and from United States ports or on the amount or type of cargo carried;

(2) suspension, in whole or in part, of any or all tariffs filed with the Commission, including the right of an ocean common carrier to use any or all tariffs of conferences in United States trades of which it is a member for such period as the Commission specifies;

(3) suspension, in whole or in part, of the right of an ocean common carrier to operate under any agreement filed with the Commission, including agreements authorizing preferential treatment at terminals, preferential terminal leases, space chartering, or pooling of cargo or revenues with other ocean common carriers;

(4) imposition of a charge, not to exceed $1,000,000 per voyage;

(5) a request to the collector of customs at any port or place of destination in the United States to refuse the clearance required by section 4197 of the Revised Statutes, 46 U.S.C. app. 91, to any vessel of a foreign carrier that is identified by the Commission under this section;

(6) a request to the Secretary of the department in which the Coast Guard is operating to deny entry, for purposes of oceanborne trade, of any vessel of a foreign carrier that is identified by the Commission under this section to any port or place in the United States or the navigable waters of the United States, or to detain any such vessel at the port or place in the United States from which it is about to depart for any other port or place in the United States; and

(7) any other action the Commission finds necessary and appropriate to address adverse foreign shipping practices as described in section 588.3 of this part.

(b) The Commission may consult with, seek the cooperation of, or make recommendations to other appropriate

U.S. Government agencies prior to taking any action under this section.

(c) Before any action against foreign carriers under this section becomes effective or a request under this section is made, the Commission's determination as to adverse conditions and its proposed actions and/or requests shall be submitted immediately to the President. Such actions will not become effective nor requests made if, within 10 days of receipt of the Commission's determination and proposal, the President disapproves it in writing, setting forth the reasons for the disapproval, if the President finds that disapproval is required for reasons of the national defense or the foreign policy of the United States.

By the Commission.

Joseph C. Polking
Secretary