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FEDERAL MARITIME COMMISSION

46 CFR PART 502

[DOCKET NO. 93 - 06]

**RULES OF PRACTICE AND PROCEDURE;
ALTERNATIVE DISPUTE RESOLUTION**

AGENCY: Federal Maritime Commission.

ACTION: Proposed Rule.

SUMMARY: The Federal Maritime Commission proposes to amend its rules to incorporate procedures designed to implement the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act. These amendments will require timely consideration of the use of alternative dispute resolution techniques to resolve disputes without resort to more costly and time-consuming litigation.

DATES: Comments due [Insert date 45 days after date of publication in the Federal Register]

ADDRESSES: Send comments (original and fifteen copies) to:

Joseph C. Polking, Secretary
Federal Maritime Commission
800 N. Capitol Street, N.W.
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202-523-5725

FOR FURTHER INFORMATION CONTACT:

Joseph C. Polking, Secretary
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202-523-5725

SUPPLEMENTARY INFORMATION:

Public Law No. 101-552, the Administrative Dispute Resolution Act ("ADRA"), and Public Law No. 101-648, the Negotiated Rulemaking Act ("Reg-Neg"), amend the Administrative Procedure Act ("APA"), 5 U.S.C. 551 et. seq., to authorize and encourage administrative agencies to permit the voluntary use of consensual alternative dispute resolution ("ADR") techniques -- such as settlement negotiations, negotiated rulemaking, mediation and arbitration -- in order to achieve faster and procedurally less expensive results in agency adjudications, rulemakings, contract disputes and other actions.

In enacting the ADRA, Congress indicated that administrative proceedings have become too formal and lengthy and that alternative procedures may in some instances be more efficient. Because ADR procedures are not appropriate in every case, the ADRA sets forth situations in which the agency shall consider not using such procedures. These include precedent-setting cases, those where a formal record is essential, and those where maintenance of established policies is of special importance so that variation among individual decisions is not increased.

Similarly, in enacting Reg-Neg, Congress was concerned that traditional rulemaking procedures may discourage affected parties from meeting and communicating with each other. As a result, the parties may assume extreme conflicting positions, which can result in costly and time-consuming litigation. Reg-Neg is intended as an alternative process, under which the agency may establish and administer committees under the Federal Advisory Committee Act for the development of consensus positions regarding controversial

regulations and policies. Reg-Neg establishes several criteria for the use of negotiated rulemaking.

The ADRA requires agencies to adopt a policy that addresses the use of ADR and case management. The ADRA also amends provisions of the APA, at 5 U.S.C. 556(c), which address the role of agency employees presiding at agency hearings. These amendments to the APA prescribe that such presiding officials may (1) hold conferences for the settlement or simplification of the issues by the use of ADR, (2) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods, and (3) require the attendance at any conference held of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy.

The Federal Maritime Commission ("FMC" or "Commission"), by a separate notice published this date, is issuing an interim Commission policy on ADR, in keeping with the requirements of the ADRA that agencies adopt such a policy.

This proposed rulemaking further implements the ADRA and Reg-Neg by proposing amendments to the FMC's Rules of Practice and Procedure to implement the above-described amendments to the APA, and generally to encourage the use of ADR at the Commission to the fullest extent compatible with the law and the agency's mission and resources.

Specific proposed changes to the Rules of Practice are discussed below.

Scope of Rules.

Section 502.1 defines the scope of the rules and indicates that they apply to proceedings under the various shipping statutes administered by the Commission. This section already provides that the rules shall be construed to secure the just, speedy and inexpensive determination of every proceeding. This guideline thus applies essentially to all proceedings before the Commission conducted under Part 502. In order to emphasize the importance the Commission places on the use of ADR in appropriate circumstances, this rule is proposed to be amended to include a reference to the mandatory consideration of the use of ADR in all proceedings.

Negotiated Rulemaking.

A new §502.56 is proposed to be added indicating that the Commission, either upon petition of interested persons or upon its own motion, may establish a negotiated rulemaking committee to negotiate and develop consensus on a proposed rule, if, upon consideration of Reg-Neg Act criteria, use of such a committee is determined by the Commission to be in the public interest.

Orders initiating proceedings.

Section 502.61 currently requires that orders instituting formal proceedings specify dates for commencement of any hearing and for issuance of the initial and final decisions. The Commission also has had a long-standing policy of including a statement in such orders that oral hearings and cross-examination will be utilized only upon a proper showing that they are necessary for the development of an adequate record. See Informal Statement of Policy, 17 S.R.R. 457 (1977). In order to emphasize this policy of avoiding trial-type

hearings, it is proposed that §502.61 be amended to codify the requirement of inclusion of such a statement in orders initiating proceedings. It is additionally proposed that this policy be further emphasized by adding to the mandatory language a requirement that "prior to the commencement of oral hearings, consideration must be given by the parties and the presiding officer to the use of alternative forms of dispute resolution."

Opportunity for informal settlement.

Section 502.91 currently provides parties an opportunity to submit facts, argument and offers of settlement to the presiding officer without prejudice to their rights. It is proposed that this section be amended to further emphasize the availability of ADR procedures and to encourage their use. A specific provision would be added regarding use of mediators and settlement judges.

Prehearing conferences.

Section 502.94 currently provides that a presiding officer may direct the parties to a proceeding to attend a prehearing conference to consider various matters designed to expedite the completion of proceedings, including offers of settlement and simplification of the issues. This section is proposed to be amended to require that, at any prehearing conference which is called, consideration be given to whether the use of ADR would be appropriate or useful.

Functions and powers of presiding officers.

Section 502.147 of the FMC's rules describes the functions and powers of presiding officers in formal proceedings. This rule is proposed to be amended to indicate that the presiding officer has authority to inform the parties as to the availability of one or more

alternative means of dispute resolution, to encourage use of such methods, and to require consideration of their use at an early stage of the proceeding. As indicated above, the presiding officer has authority to hold conferences for the settlement or simplification of the issues by consent of the parties. This authority to promote settlements is proposed to be enhanced by inclusion in this section of a reference to the use of ADR and by including specific authority for transmittal of a request of parties for the appointment of a settlement judge or a mediator, as provided by section 502.91. The rule is further proposed to be amended to allow the presiding officer to require the attendance at any such conference, pursuant to the ADRA, of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy. Finally, the provision which allows the presiding officer to permit submissions of facts, arguments, and offers of settlement is proposed to be amended to permit the presiding officer, if the parties so request, to issue informal opinions providing tentative evaluations of the evidence submitted.

Although the Commission, as an independent regulatory agency, is not subject to Executive Order 12291, dated February 17, 1981, it nonetheless has reviewed the rule in terms of this Order and has determined that this rule is not a "major rule" as defined in Executive Order 12291 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 effects 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 Commission certifies, pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(n), that because this rule deals only with agency practice and procedure, it will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small government jurisdictions.

List of Subjects

46 CFR Part 502

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

Therefore, notice is hereby given that the Commission proposes to amend Part 502 of Title 46 CFR as follows:

PART 502 - RULES OF PRACTICE AND PROCEDURE

1. The authority citation for Part 502 is revised to read as follows:

Authority: 5 U.S.C. 504, 551, 552, 553, 556(c) 559, 561-569, 571-596; 12 U.S.C. 1141j(a); 18 U.S.C. 207; 26 U.S.C. 501(c)(3); 28 U.S.C. 2112(a); 46 U.S.C. app. 817, 820, 821, 826, 841a, 1114(b), 1705, 1707-1711, 1713-1716; E.O. 11222 of May 8, 1965 (30 FR 6499); 21 U. S. C. 853a.

2. Section 502.1 is amended by adding a new sentence to the end thereof reading as follows:

§502.1 Scope of the rules in this part.

* * * * *

To this end, all persons involved in proceedings conducted under the rules of this part shall be required to consider at an early stage of the proceeding whether resort to alternative dispute resolution techniques would be appropriate or useful.

3. A new §502.56 is added reading as follows:

§502.56 Negotiated rulemaking.

The Commission, either upon petition of interested persons or upon its own motion, may establish a negotiated rulemaking committee to negotiate and develop consensus on a proposed rule, if, upon consideration of the criteria of 5 U.S.C. 563, use of such a committee is determined by the Commission to be in the public interest.

4. Section 502.61 is amended by adding a new paragraph (d) reading as follows:

§502.61 Proceedings.

* * * * *

(d) All orders instituting a proceeding or noticing the filing of a complaint will contain language requiring that prior to the commencement of oral hearings consideration shall be given by the parties and presiding officer to the use of alternative forms of dispute resolution, and further requiring that hearings shall include oral testimony and cross-examination in the discretion of the presiding officer only upon proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents 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.

5. Section 502.91 is amended by redesignating paragraphs (a) and (b) as paragraphs (b) and (c) and by adding new paragraphs (a) and (d) reading as follows:

§502.91 Opportunity for informal settlement.

(a) Parties are encouraged to make use of all the procedures of this part which are designed to simplify or avoid formal litigation and to assist the parties in reaching settlements whenever it appears that a particular procedure would be helpful.

(b) * * *

(c) * * *

(d) Any party may request that a mediator or settlement judge be appointed to assist the parties in reaching a settlement. If such a request is made and is not opposed, the presiding judge will advise the Chief Administrative Law Judge who may appoint a mediator or settlement judge who is acceptable to all parties. The mediator or settlement judge shall convene and preside over conferences and settlement negotiations and shall report to the Chief Administrative Law Judge, within the time prescribed by the Chief Administrative Law Judge, on the results of settlement discussions with appropriate recommendations as to future proceedings. If settlement is reached, it shall be submitted to the presiding judge who shall issue an appropriate decision or ruling.

6. Section 502.94 is amended by adding a new paragraph (c) reading as follows:

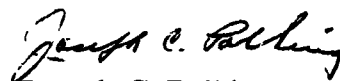
§502.94 Prehearing conference.

* * * * *

(c) At any prehearing conference which is called, consideration shall be given to whether the use of alternative means of dispute resolution would be appropriate or useful for the disposition of the proceeding.

7. Section 502.147, Functions and powers, paragraph (a), is amended by revising the language which reads "hold conferences for the settlement or simplification of issues by consent of the parties;" to read "inform the parties as to the availability of one or more alternative means of dispute resolution, encourage use of such methods, and require consideration of their use at an early stage of the proceeding; hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution; transmit the request of parties for the appointment of a mediator or settlement judge, as provided by §502.91 of this part; require the attendance at any such conference pursuant to 5 U.S.C. 556(c)(8), of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;" and by adding at the end of the phrase "permit submission of facts, arguments, offers of settlement, and proposals of adjustment;" the phrase "and, if the parties so request, issue informal opinions providing tentative evaluations of the evidence submitted;".

By the Commission.


Joseph C. Polking
Secretary