

(S E R V E D)
(February 1, 1993)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

46 CFR PARTS 502, 505, 510, 540

[DOCKET NO. 93-02]

MISCELLANEOUS AMENDMENTS TO RULES OF PRACTICE AND PROCEDURE

AGENCY: Federal Maritime Commission.

ACTION: Proposed Rule.

SUMMARY: The Federal Maritime Commission proposes to amend its rules of practice and procedure in numerous respects. Experience under these rules indicates that several changes are desirable to remove ambiguities, to delete outdated or extraneous provisions, and to improve the efficient administration of proceedings.

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.
Washington, D. C. 20573-0001
202-523-5725

FOR FURTHER INFORMATION CONTACT:

Joseph C. Polking, Secretary
Federal Maritime Commission
202-523-5725

SUPPLEMENTARY INFORMATION:

The Commission's Rules of Practice and Procedure, 46 CFR Part 502, govern procedures in proceedings before the Commission. Experience under the rules suggests certain provisions are either outdated, unclear, conflicting or inadequate to achieve their desired purpose. Additionally, it would appear that certain provisions in Parts 505 and 540 dealing with assessment and compromise of civil penalties would more appropriately be included in Part 502. To remedy these deficiencies, the Commission proposes to make several revisions to its rules.

A section by section explanation of the proposed rule changes follows:

Federal Rules of Civil Procedure

The Commission has consistently endorsed the policy of following the Federal Rules of Civil Procedure in situations not covered by a specific Commission rule and where there is no conflict with administrative law or another Commission rule. This policy is well established in Commission cases, see, e.g., Brazilian National Steel Co. v. Lloyd Brasileiro, 21 SRR 1505, 1507-1508 (ALJ 1983). It is proposed that a new section 502.12 be added which codifies this policy in the Commission's Rules of Practice and Procedure.

Firms and Corporations

Section 502.28 currently bars "firms or corporations" from practicing before the Commission on behalf of others. This rule is confusing in its application and is frequently not followed. For example, tariff publishing firms or filing agent firms often represent carriers in special docket proceedings and rate auditors often represent shippers in

overcharge claim proceedings. It is unclear whether the existing rule is intended to bar practice by such firms or corporations when their representative is one who is admitted to practice before the Commission. The current prohibition appears to serve no purpose and it is proposed to be removed. Firms and corporations then would be permitted to represent others, subject of course to the requirement in 46 CFR 502.27 that their representative is admitted to practice before the agency.

Section 10(a)(1) complaints

In recent years the Commission has experienced a marked increase in the volume of complaints alleging violations of section 10(a)(1) of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. 1709(a)(1). In the large majority of such cases, complainants merely allege that respondent shippers have failed to pay ocean freight on the shipments involved, the respondent shippers fail to answer the complaint or respond to orders and notices, and default judgments are issued.

In a final interpretive rule issued in Docket No. 92-46, Unpaid Freight Charges, the Commission has provided guidance to persons who wish to file complaints alleging violations of section 10(a)(1), explaining in part:

An essential element of [section 10(a)(1)] is use of an "unjust or unfair device or means." In the absence of evidence of bad faith or deceit, the Federal Maritime Commission will not infer an "unjust or unfair device or means" from the failure of a shipper to pay ocean freight. An "unjust or unfair device or means" could be inferred where a shipper, in bad faith, induced the carrier to relinquish its possessory lien on the cargo and to transport the cargo without prepayment by the shipper of the applicable freight charges.

Under the current Rules of Practice and Procedure ("Rules"), 46 CFR Part 502, however, the Commission cannot promptly determine with reasonable assurance that the case properly involves section 10(a)(1) and is therefore a matter for the Commission rather than the courts which have traditionally heard such cases. Furthermore, the typical complaint in such cases fails to give respondents adequate notice of the true nature of a section 10(a)(1) violation, possibly discouraging respondents from asserting a valid defense under the Shipping Act. Even though further proof or amendment to the complaint could be required by the presiding officer under the present Rules, such action consumes time and leads to unnecessary delay which could have been avoided had complainants taken more care to identify the unjust or unfair device or means or the conduct which section 10(a)(1) expressly mentions.

The Commission is therefore proposing to amend its Rules applicable to the filing of complaints so as to enable presiding officers to determine more promptly and efficiently whether such complaints are proper matters for the Commission rather than the courts. The proposed amendment is patterned after the corresponding rule 9(b) of the Federal Rules of Civil Procedure, ("FRCP"), governing complaints alleging fraud, which, by its nature, bears some resemblance to the type of conduct which is prohibited by section 10(a)(1). In addition, the proposed amendment will encourage complainants to be careful to frame their complaints with particularity as to the operative events by authorizing presiding officers to dismiss inadequately drafted complaints without waiting for answers or for defaults. Such a rule should help to screen out mere freight-collection cases and ensure that future complaints invoking section 10(a)(1) have proper jurisdictional bases. Since the dismissal

would normally be without prejudice, a complainant having a legitimate claim under section 10(a)(1) could refile a properly framed complaint, if the facts permitted, so that the Commission could have reasonable assurance of its subject-matter jurisdiction, respondent would receive adequate notice, and the delays experienced in default situations could be avoided.

Counter-complaints

The Commission currently has no rule permitting or governing the filing of counter-complaints in complaint proceedings, even though in practice they have been allowed. See A/S Ivaran v. Lloyd Brasileiro, 24 SRR 1029, 1032, n.7 (FMC 1988). The frequency with which such filings have been made has been increasing and often they fail to include a verification, which is required by statute for complaints before the Commission, 46 U.S.C. app. 1710. It is proposed that section 502.64 be amended to provide for the filing of properly verified counter-complaints and providing for their service directly by the parties if authorized by the presiding officer.

Amendments to pleadings

Section 502.113 provides that complaints and amendments to complaints will be served by the Secretary of the Commission. Section 502.70(b) states that amendments to pleadings allowed prior to hearing will be served in the same manner as the original pleading. These rules would seem to mandate that amended complaints be served only by the Secretary. In practice, when amended complaints are filed, the complainant

simultaneously serves a copy on respondents. In such situations, there appears to be no need to have the complaint re-served by the Secretary, and the presiding Administrative Law Judge ("ALJ") has sometimes, with agreement of the parties, waived application of the requirement. It is proposed, therefore, to amend sections 502.70(b) and 502.113 to authorize the presiding officer to allow service of amended complaints merely by having the filing party serve respondent or its counsel of record.

Bill of Particulars

Section 502.71 contains provisions for a bill of particulars. Under the FRCP, the bill of particulars has been replaced by motions for more definite statement, FRCP 12(e). To avoid confusion and to bring Commission rules more in line with modern federal practice, section 502.71 is proposed to be revised to include provisions modeled on present Rule 12(e) of the FRCP.

Satisfaction of complaint

Section 502.93 contains provisions relating to satisfaction of complaints. This rule is outdated, is drafted to apply to shipper complaints against carriers only, and refers to a non-existent form ("Exhibit No. 1 to Subpart D"). The rule would appear to be unnecessary, in any event, because any proceeding may be dismissed by the presiding officer upon a proper showing, and the requirement for seeking dismissal would be no different where the complaint has been satisfied than where any other settlement has been reached. It is proposed that the rule be removed.

Subscription and verification of documents

Section 502.112(a) currently provides that the signature of the attorney or practitioner on a filing constitutes a certificate that the filer has read the filing and "that to the best of his or her knowledge, information, and belief there is good ground to support it." This rule is the Commission's counterpart to FRCP 11, which now imposes a requirement that a filer's signature on a pleading represents that the filer has made reasonable inquiry that the pleading is well grounded in fact and is warranted in existing law. The FRCP provision imposes a stricter standard on the filer and is designed to avoid the bringing of frivolous actions or the submission of frivolous pleadings. It is proposed to amend section 502.112 to pattern it after FRCP 11 provisions. This language, in conjunction with the current provision of the Commission's rule which subjects violators to disciplinary action, should serve to minimize the filing of inappropriate pleadings in Commission proceedings.

Section 502.112(b) currently requires that when filings are made by an officer or agent of a party not represented by someone admitted or qualified to practice before the Commission, the filing either must (in the case of a corporate party) be attested under seal of the corporation, or (in the case of a non-corporate party) be accompanied with a power of attorney. These requirements have not been uniformly applied and do not appear to be necessary inasmuch as such filings are otherwise required to be sworn, verified, or submitted under penalty of perjury. It is therefore proposed that this requirement be removed.

Modern practice in civil courts and in some administrative agencies permits the filing of unsworn declarations under penalty of perjury in lieu of requiring the submission of sworn or verified filings. This is embodied in the provisions of 28 U.S.C. 1746 which applies to any

rule, regulation, order or requirement made pursuant to United States law. It is especially appropriate to permit such unsworn declarations where the filing is executed outside of the United States and filers are unfamiliar with United States verification requirements. It is proposed that a new paragraph be added to section 502.112 which permits the use of unsworn declarations whenever the rules otherwise require a sworn or verified filing.

Depositions upon oral examination

Section 502.203 contains procedures for the taking of depositions upon oral examination. It has been discovered that when this rule was reissued in 1984, a portion of the rule which required a notice of oral deposition to provide the name and address of each person to be examined or, if unknown, a general description sufficiently complete to identify the person, was inadvertently omitted. This proposal would reinsert the omitted language.

Exceptions/appeals

Section 502.227 includes procedures for filing of exceptions to an ALJ's initial decisions and appeals of an ALJ's order of dismissal, and allows 22 days for their filing. The rule allows 22 days for filing of replies to exceptions, but allows only 15 days for filing of replies to appeals. In the interest of consistency and fairness, the rule is proposed to be amended to allow 22 days for filing of replies to appeals.

Attorney's fees

Section 502.254 governs proceedings to determine whether an award of attorney's fees is appropriate in particular Commission reparation proceedings. Paragraph (f) of this section governs appeals to the Commission of a presiding officer's award of attorney's fees. The procedures for such appeals are significantly different than those contained in section 502.227 for exceptions and appeals of other presiding officer decisions. Additionally, no provision is included for review of such awards by the Commission on its own motion in the absence of appeal. It is proposed that the rule be amended to include the same appeal and review procedures that apply under current Rule 227.

Petitions for reconsideration and replies

Section 502.261 governs the filing of petitions for reconsideration and stay. Under this rule, such petitions are limited to specific and narrow grounds. The rule provides that "[p]etitions which merely elaborate upon or repeat arguments made prior to the decision or order will not be received...." Despite these restrictions, lengthy petitions are too frequently filed that deal with extraneous matters. The Federal Rules of Appellate Procedure limit petitions for rehearing of a circuit court decision to 15 pages. It is proposed that a page limitation be imposed on such petitions at the Commission. Since Commission decisions and petitions for reconsideration of such decisions may involve questions of evidence, however, and such questions may require more space to discuss than would pure issues of law, the page limit is proposed to be set at 25.

Section 502.262 currently permits "any party" to file a reply to a petition for reconsideration. It is proposed that this rule be amended to clarify that only replies in opposition to petitions for reconsideration may be filed. The filing of replies in support of petitions usually evokes a request for the filing of a further reply to the reply. Additionally, it is reasonable to require parties who feel aggrieved by a Commission decision to timely file their own petitions for reconsideration rather than tagging onto someone else's petition. It is further proposed that the same 25 page limitation be imposed on replies to petitions for reconsideration.

Civil penalty procedures

The Commission's rules on compromise and settlement of civil penalties currently are contained in Part 505 of Title 46 CFR. Because these rules are essentially procedural in nature and in part pertain to proceedings conducted under Part 502 of 46 CFR, it is proposed that they be relocated and incorporated as a new subpart in Part 502. It is further proposed that Appendix A (model compromise agreement) be revised to better reflect current practice and that Appendix B (Example of Promissory Note) be deleted because installment payments are seldom permitted, and the presence of this appendix leaves the wrong impression that the Commission welcomes them. References to the civil penalty provisions of section 19 of the Merchant Marine Act, 1920, 46 U.S.C. app. §875, also are proposed to be added.

Subpart C of 46 CFR Part 540, the Commission's passenger vessel certification rules, also contains provisions governing civil penalties, viz., for violations of PL 89-777. Confusion has resulted, however, from those provisions being separated from, and sometimes

conflicting with, Part 505. Accordingly, it is proposed that subpart C of Part 540 be removed and that the new subpart of Part 502 be amended to reflect that its procedures also govern civil penalties for violations of PL 89-777.

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 Federal Maritime 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.

46 CFR Part 505

Administrative practice and procedure, Maritime carriers, Penalties.

46 CFR Part 510

Freight forwarders; Maritime carriers; Reporting and recordkeeping requirements; Surety bonds.

46 CFR Part 540

Insurance, Maritime carriers, Reporting and recordkeeping requirements, Surety bonds.

Therefore, notice is hereby given that the Commission proposes to amend Parts 502, 505, 510 and 540 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, 559; 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; and Pub. L 89-777 (46 U.S.C. app. 817d, 817e).

2. A new §502.12 is added to subpart A reading as follows:

§502.12 Applicability of Federal Rules of Civil Procedure.

In proceedings under this part, for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice.

3. Section 502.28 is removed.

4. Section 502.62 is amended by redesignating paragraphs (b) through (g) as paragraphs (c) through (h) and by adding a new paragraph (b), to read as follows:

§502.62 Complaints and fee.

* * * * *

(b) In all averments of violations of section 10(a)(1), the circumstances constituting such violations shall be stated with particularity. In the event that the complaint fails to specify the circumstances, as required by this rule, the presiding officer may dismiss the complaint at any time whether or not an answer has been filed. A complaint which merely alleges that respondent has failed to pay ocean freight bills without alleging conduct that violates section 10(a)(1) will be deemed not to have complied with this rule. For a discussion of an essential element of this offense and the evidence necessary to satisfy it, reference should be had to the Federal Maritime Commission Interpretation set forth at section 571.2 of this chapter.

* * * * *

5. Section 502.64 is amended to revise the section title and to add a new paragraph (d) reading as follows:

§502.64 Answer to complaint; counter-complaint.

* * * * *

(d) In addition to filing an answer to a complaint, respondent may file a counter-complaint alleging violations of the Shipping Acts within the jurisdiction of the Commission. The filing of counter-complaints and answers to counter-complaints is governed by the rules and requirements of §502.62 (excluding fees) and of this section for the filing of complaints

and answers. Counter-complaints may be served directly by the parties if authorized by the presiding officer.

6. Section 502.70 is amended by revising the last sentence of paragraph (b) to read as follows:

§502.70 Amendments or supplements to pleadings.

(a) * * *

(b) * * *. Amendments or supplements allowed prior to hearing will be served in the same manner as the original pleading, except that the presiding officer may authorize the service of amended complaints directly by the parties rather than by the Secretary of the Commission.

* * * * *

7. Section 502.71 is revised to read as follows:

§502.71 Motions for more definite statement.

If a pleading (including a complaint or cross complaint filed pursuant to §§502.62 or 502.64) to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall be filed within 15 days of the pleading and shall point out the defects complained of and the details desired. If the motion is granted and the order of the presiding officer is not obeyed within 10 days after service of the order or within such time as the presiding officer may fix, the presiding officer may strike the pleading to which the motion was directed or make such

order as is deemed just. If the motion is disallowed, the time for responding to the pleading shall be extended to a date 10 days after service of the notice of disallowance.

8. Section 502.93 is removed.

9. Section 502.112 is amended by revising the third sentence of paragraph (a) and by adding a new paragraph (c) to read as set forth below; and is further amended by removing the last sentence of paragraph (b).

§502.112 Subscription and verification of documents.

(a) * * *. The signature of a person admitted or qualified to practice before the Commission constitutes a certificate by the signer that the signer has read the pleading, document or paper; that the signer is authorized to file it; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry the filing is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. * * * * *

(c) Wherever, under any rules of this part, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition under §§502.203 or 502.204), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by such person, as true under penalty of perjury, in substantially the following form.

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct."

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct."

10. The first sentence of section 502.113 is revised to read as follows:

§502.113 Service by the Commission.

Complaints filed pursuant to §502.62, amendments to complaints (unless otherwise authorized by the presiding officer pursuant to §502.70(b)), and complainant's memoranda filed in shortened procedure cases will be served by the Secretary of the Commission.

* * *

11. Section 502.203 is amended by revising the second sentence of paragraph (a)(1) to read as follows:

§502.203 Depositions upon oral examination.

(a) Notice of examination. (1) * * * . The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs.* * *

* * * * *

12. Section 502.227 is amended by revising paragraph (b)(2) to read as follows:

§502.227 Exceptions to decisions or orders of administrative law judges; replies thereto; and review of decisions or orders of dismissal by Commission.

* * * * *

(b)(1) * * *

(2) Any adverse party may file and serve a reply to an appeal under this paragraph within twenty-two (22) days after the appeal is served.

13. Section 502.254 is amended by revising paragraph (f) to read as follows:

§502.254 Attorney's fees in reparation proceedings.

* * * * *

(f) In cases where the presiding officer issues an award order, appeal of that order and Commission review of that order in the absence of appeal shall be governed by the procedures of §502.227 of this part. [Rule 254]

14. Section 502.261 is amended by revising the second sentence of paragraph (a) to read as follows:

§502.261 Petitions for reconsideration and stay.

(a) * * *. Such petition shall be limited to 25 pages in length and shall be served in conformity with the requirements of subpart H of this part. * * *

* * * * *

15. Section 502.262 is revised to read as follows:

§502.262 Reply to petition for reconsideration or stay.

Any party may file a reply in opposition to a petition for reconsideration or stay within fifteen (15) days after the date of service of the petition in accordance with §502.74.

The reply shall be limited to 25 pages in length and shall be served in conformity with subpart H of this part. [Rule 262.]

16. Subpart W--Paperwork Reduction Act is redesignated as Subpart X.

PART 505 - COMPROMISE, ASSESSMENT, SETTLEMENT AND COLLECTION OF CIVIL PENALTIES

17. Part 505 of chapter IV, Title 46 CFR, is redesignated as Subpart W of Part 502, and is revised to read as follows:

Subpart W--Compromise, Assessment, Mitigation, Settlement, and Collection of Civil Penalties

Sec.

502.601 Purpose and scope.

502.602 Definitions.

502.603 Assessment of civil penalties: Procedure; criteria for determining amount; limitations; relation to compromise.

502.604 Compromise of penalties: Relation to assessment proceedings.

502.605 Payment of penalty: Method; default.

Appendix A -- Example of Compromise Agreement To Be Used Under 46 CFR 502.604

§ 502.601 Purpose and scope.

The purpose of this subpart is to implement the statutory provisions of section 32 of the Shipping Act, 1916, section 19 of the Merchant Marine Act, 1920, section 13 of the Shipping Act of 1984, and sections 2(c) and 3(c) of Public Law 89-777 by establishing rules and regulations governing the compromise, assessment, settlement and collection of civil

penalties arising under certain designated provisions of the Shipping Act, 1916, the Merchant Marine Act, 1920, the Intercoastal Shipping Act, 1933, the Shipping Act of 1984, Public Law 89-777, and/or any order, rule or regulation (except for procedural rules and regulations contained in this part) issued or made by the Commission in the exercise of its powers, duties and functions under those statutes.

§ 502.602 Definitions.

For the purposes of this subpart:

(a)“Assessment” means the imposition of a civil penalty by order of the Commission after a formal docketed proceeding.

(b)“Commission” means the Federal Maritime Commission.

(c)“Compromise” means the process whereby a civil penalty for a violation is agreed upon by the respondent and the Commission outside of a formal, docketed proceeding.

(d)“Mitigation” means the reduction, in whole or in part, of the amount of a civil penalty.

(e)“Person” includes individuals, corporations, partnerships, and associations existing under or authorized by the laws of the United States or of a foreign country.

(f)“Respondent” means any person charged with a violation.

(g)“Settlement” means the process whereby a civil penalty or other disposition of the case for a violation is agreed to in a formal, docketed proceeding instituted by order of the Commission.

(h)“Violation” includes any violation of sections 14 through 21 (except section 16 First and Third) of the Shipping Act, 1916; sections 19(6)(d), 19(7)(d) and 19(11) of the

Merchant Marine Act, 1920; section 2 of the Intercoastal Shipping Act, 1933; any provision of the Shipping Act of 1984; sections 2 and 3 of Public Law 89-777; and/or any order, rule or regulation (except for procedural rules and regulations contained in this part) issued or made by the Commission in the exercise of its powers, duties and functions under the Shipping Act, 1916, the Merchant Marine Act, 1920, the Intercoastal Shipping Act, 1933, the Shipping Act of 1984, or Public Law 89-777.

(i) Words in the plural form shall include the singular and vice versa; and words importing the masculine gender shall include the feminine and vice versa. The terms “includes” and “including” do not exclude matters not listed but which are in the same general class. The word “and” includes “or”, except where specifically stated or where the context requires otherwise.

§ 502.603 Assessment of civil penalties: Procedure; criteria for determining amount; limitations; relation to compromise.

(a) Procedure for assessment of penalty. The Commission may assess a civil penalty only after notice and opportunity for hearing. Civil penalty assessment proceedings, including settlement negotiations, shall be governed by the Commission’s Rules of Practice and Procedure in this part. All settlements must be approved by the Presiding Officer. The full text of any settlement must be included in the final order of the Commission.

(b) Criteria for determining amount of penalty. In determining the amount of any penalties assessed, the Commission shall take into account the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission’s rules and regulations and the applicable statutes. The Commission

shall also consider the respondent's degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires.

(c) Limitations; relation to compromise. When the Commission, in its discretion, determines that policy, justice or other circumstances warrant, a civil penalty assessment proceeding may be instituted at any time for any violation which occurred within five years prior to the issuance of the order of investigation. Such proceeding may also be instituted at any time after the initiation of informal compromise procedures, except where a compromise agreement for the same violations under the compromise procedures has become effective under § 502.604(e).

§ 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.

(b) Notice. When the Commission considers it appropriate to afford an opportunity for the compromise of a civil penalty, it will, except when otherwise authorized by the Commission, or where circumstances render it unnecessary, send a registered or certified Notice and Demand Letter ("NDL") to the respondent. The NDL will describe 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; the amount of the penalty demanded; and the names of Commission personnel with whom the demand may be discussed, if the person desires to compromise

the penalty. The NDL also will state the deadlines for the institution and completion of compromise negotiations and the consequences of failure to compromise.

(c) Request for compromise. Any person receiving a NDL provided for in paragraph (b) of this section may, within the time specified, deny the violation, or submit matters explaining, mitigating or showing extenuating circumstances, as well as make voluntary disclosures of information and documents.

(d) Criteria for compromise. In addition to the factors set forth in § 502.603(b), in compromising a penalty claim, the Commission may consider litigative probabilities, the cost of collecting the claim and enforcement policy.

(e) Disposition of claims in compromise procedures. (1) When a penalty is compromised and the respondent agrees to settle for that amount, a compromise agreement shall be executed. (One example of such compromise agreement is set forth as Appendix A to this subpart.) This agreement, after reciting the nature of the claim, will include a statement evidencing the respondent's agreement to the compromise of the Commission's penalty claim for the amount set forth in the agreement and will also embody an approval and acceptance provision which is to be signed by the appropriate Commission official. Upon compromise of the penalty in the agreed amount, a duplicate original of the executed agreement shall be furnished to the respondent.

(2) Upon completion of the compromise, the Commission may issue a public notice thereof, the terms and language of which are not subject to negotiation.

(f) Relation to assessment proceedings. Except by order of the Commission, no compromise procedure shall be initiated or continued after institution of a Commission

assessment proceeding directed to the same violations. Any offer of compromise submitted by the respondent pursuant to this section shall be deemed to have been furnished by the respondent without prejudice and shall not be used against the respondent in any proceeding.

(g) Delegation of compromise authority. The compromise authority set forth in this subpart is delegated to the Director, Bureau of Hearing Counsel.

§ 502.605 Payment of penalty: Method; default.

(a) Method. Payment of penalties by the respondent is to be made as follows:

(1) By bank cashier's check or other instrument acceptable to the Commission;

(2) Upon execution of a promissory note containing a confess-judgment agreement, by periodic regular installments, with interest where appropriate, by bank cashier's check or other instrument acceptable to the Commission; or

(3) By combination of the above alternatives.

(b) All checks or other instruments submitted in payment of claims shall be made payable to the Federal Maritime Commission.

(c) Default in payment. Where a respondent fails or refuses to pay a penalty properly assessed under § 502.603, or compromised and agreed to under § 502.604, appropriate collection efforts will be made by the Commission, including, but not limited to referral to the Department of Justice for collection. Where such defaulting respondent is a licensed freight forwarder, such default also may be grounds for revocation or suspension of the respondent's license, after notice and opportunity for hearing, unless such notice and hearing have been waived by the respondent in writing.

APPENDIX A TO SUBPART W - EXAMPLE OF COMPROMISE AGREEMENT

COMPROMISE AGREEMENT

FMC File No. _____

This Agreement is entered into between:

- (1) the Federal Maritime Commission, hereinafter referred to as Commission, and
- (2) _____, hereinafter referred to as Respondent.

Whereas, the Commission is considering the institution of an assessment proceeding against Respondent for the recovery of civil penalties provided under the _____ [appropriate statute] _____, for alleged violations of section _____;

Whereas, this course of action is the result of practices believed by the Commission to have been engaged in by Respondent, to wit:

[General description of practices
and dates or time period involved]

Whereas, the Commission has authority under the Shipping Act of 1984 and the Shipping Act, 1916, to compromise and collect civil penalties; and,

Whereas, Respondent has terminated the practices which are the basis for the allegations of violation set forth herein, and has instituted and indicated its willingness to maintain measures designed to eliminate these practices by Respondent, its officers, directors or employees.

Now Therefore, in consideration of the premises herein, and in compromise of all civil penalties arising from the alleged violations, Respondent and the Commission hereby agree upon the following terms and conditions of compromise and settlement:

1. Respondent shall make a monetary payment to the Commission herewith, by bank cashier's check, in the total amount of \$_____.

2. Upon acceptance in writing of this Agreement by the Director of the Bureau of Hearing Counsel of the Commission, this instrument shall forever bar the commencement or institution of any assessment proceeding or other claim for recovery of civil penalties from the Respondent arising from the alleged violations set forth above.

3. It is expressly understood and agreed that this Agreement is not, and is not to be construed as, an admission by Respondent to the alleged violations set forth above.

(Respondent's Name)

By: _____

Title: _____

Date: _____

APPROVAL AND ACCEPTANCE

The above terms, conditions and consideration are hereby approved and accepted:

By the Federal Maritime Commission:

Director, Bureau of Hearing Counsel

Date:

PART 510 - LICENSING OF OCEAN FREIGHT FORWARDERS

18. The authority citation for Part 510 continues to read as follows:

Authority: 5 U.S.C. 553, 46 U.S.C. app. 1702, 1707, 1709, 1710, 1712, 1714, 1716 and 1718; 21 U.S.C. 853a.

19. The references to "part 505" in §§510.15 and 510.16(a)(5) and (b) are revised to read "subpart W of part 502."

PART 540 - SECURITY FOR THE PROTECTION OF THE PUBLIC

20. The authority citation for Part 540 continues to read as follows:

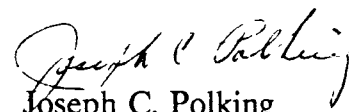
Authority: 5 U.S.C. 552, 553; secs. 2 and 3, Public Law 89-777, 80 Stat. 1356-1358 (46 U.S.C. app. 817e, 817d); sec. 43 of the Shipping Act, 1916 (46 U.S.C. app. 841a); sec. 17 of the Shipping Act of 1984 (46 U.S.C. app. 1716).

21. The heading of Subpart C of Part 540 is revised to read:

Subpart C -- General

22. Sections 540.30 through 540.36 and Appendices A and B are removed.

By the Commission.


Joseph C. Polking
Secretary