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Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984; Final Rule

FEDERAL MARITIME COMMISSION

46 CFR Parts 501 and 535

[Docket No. 03–15]

RIN 3072–AC28

Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984; Final Rule

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission issued a Notice of Proposed Rulemaking on December 2, 2003, that set forth proposed changes in the Commission's regulations for Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984. The proposal also included changes to the delegation of authority to the Commission's Bureau of Trade Analysis. The Commission requested that comments be filed by January 30, 2004. This notice of Final Rule summarizes the comments submitted and revises the proposed regulations based on those comments.

DATES: This rule is effective on January 3, 2005, except for §§ 535.702 and 535.703, which are effective February 2, 2005, and § 535.701(e), which is stayed until further notice.

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SUPPLEMENTARY INFORMATION:

I. Introduction

The Notice of Proposed Rulemaking (''NPR'') (68 FR 67510, Dec. 2, 2003) sought to amend the Commission's regulations governing the filing of agreements pursuant to the Shipping Act of 1984, 46 U.S.C. 1701–1719 (''Shipping Act''). In particular, the NPR addressed the concerns that had been raised by regulated entities that are parties to agreements regarding regulatory certainty, flexibility, and confidentiality. These concerns were raised in comments submitted in response to a Notice of Inquiry published by the Commission on August 3, 1999. 64 FR 42057. Specifically, in the NPR the Commission proposed the following changes to 46 CFR parts 501 and 535: the addition of new delegations of authority to the Commission's Director, Bureau of Trade Analysis (''BTA''); revisions to the requirements for the content of filed agreements, including a new exemption for ''low market share'' agreements (proposed 46 CFR 535.311) and a new term ''capacity rationalization'' (proposed 46 CFR 535.104(e)); revisions to its current exemptions for ''non-substantive'' and ''miscellaneous'' modifications and transshipment agreements (proposed 46 CFR 535.302, 535.309, 535.104(jj) and 535.306(a)); a revision to 46 CFR 535.602(a) (to indicate that the Commission will submit a notice to the **Federal Register** for publication of all filed agreements); revised requirements for information to be submitted in conjunction with filed agreements (proposed 46 CFR part 535, subparts E and G); and miscellaneous changes to update, clarify, and remove obsolete language from its rules (proposed 46 CFR 535.303, 535.304, 535.403, 535.605, 535.606, 535.607).

Six comments on the NPR were received. These came from Maersk Sealand (''MSL''); American President Lines, Ltd. and APL Co. Pte., Ltd. (''APL''); P&O Nedlloyd Limited (''PONL''); FESCO Ocean Management Limited (''FOML''); Trans-Net, Inc. (''Trans-Net''); and the Ocean Common Carriers and Agreements (''OCCA'').[1] Trans-Net also made oral presentations to individual Commissioners.

II. Agreement Content and Transshipment Agreements

A. Agreement Content—Generally and Proposed Exemptions

1. Summary of Comments

APL notes that the operations of global alliances are extremely complex and fluid, and are affected by factors outside the U.S. trades. APL at 1. APL stresses: (1) the critical importance that alliances and vessel sharing agreements (''VSAs'') have flexibility to make operating decisions on a timely and efficient basis; and (2) that a major alliance is a continuous work in progress. *Id.* at 2. Although APL takes no issue with the NPR's assertions about the effect of the capacity/demand relationship on rates, APL urges the Commission to consider that alliances and other VSAs give carriers the ability to achieve efficiencies and cost savings, which in turn result in benefits to shippers through improved service levels and increases in capacity. *Id.* at 2–3.

APL describes the operational matters of alliance agreements as often evolving via e-mail exchanges augmenting the original document, an ''implementing agreement'' and separate documents that may set forth particular aspects of cooperation. *Id.* at 3. APL believes that it is not entirely realistic to suggest that the commercial agreement among alliance partners is ''relatively static once signed, or that the full commercial agreement is contained in a readily identifiable single document.'' *Id.* at 4. On the other hand, APL believes that the NPR achieves a balanced approach through the combination of specified exemptions to the filing requirements for operations-related matters paired with an increase in monitoring report

[1] OCCA includes the following FMC-filed agreements and carriers that participate in them: ABC Discussion Agreement; Australia/United States Containerline Association; Australia/United States Discussion Agreement; Caribbean Shipowners Association; Central America Discussion Agreement; East Coast of South America Discussion Agreement; Eastern Mediterranean Discussion Agreement; Florida Bahamas Shipowners Association; Grand Alliance Agreement II; Hispaniola Discussion Agreement; Israel Trade Conference; New Caribbean Service Rate Agreement; New Zealand/United States Inter-carrier and Conference Discussion Agreement; New Zealand/United States Container Lines Association Conference; Trans-Atlantic Conference Agreement; Transpacific Stabilization Agreement; United States/Australasia Discussion Agreement; United States/South Europe Conference; Venezuelan Discussion Agreement; West Coast of South America Discussion Agreement; and Westbound Transpacific Stabilization Agreement.

The individual carriers are: A.P. Moller-Maersk A/S; Allianca Navegacao e Logistica Ltda.; American President Lines, Ltd. and APL Co. PTE Ltd.; Arawak Line Ltd.; Atlantic Container Line AB; Australia-New Zealand Direct Line and Contship Containerlines, divisions of CP Ships (UK) Limited; Bahamas Ro Ro Service (Freeport), Inc.; Bernuth Lines, Ltd.; Caicos Cargo Ltd. d/b/a Turks Island Shipping Line; China Shipping Container Lines Co., Ltd.; CMA CGM, S.A.; Compagnie Maritime Marfret S.A.; Companhia Libra de Navegacao; Compania Chilena de Navigacion Interoceania, S.A.; Compania Sud Americana de Vapores, S.A.; COSCO Container Lines Company Limited; Crowley Liner Services, Inc.; Dole Ocean Cargo Express; Evergreen Marine Corporation (Taiwan) Limited; Farrell Lines, Inc.; FESCO Ocean Management Inc.; Frontier Liner Services, Inc.; G&G Marine, Inc.; Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft KG; Hanjin Shipping Co., Ltd.; Hapag-Lloyd Container Linie GmbH; Hyundai Merchant Marine Co., Ltd.; Interline Connection, N.V.; Kawasaki Kisen Kaisha, Ltd.; King Ocean Services Limited; King Ocean Services de Venezuela; LauritzenCool AB; Seatrade Group N.V.; Lykes Lines Limited, LLC; Mediterranean Shipping Co. S.A.; Mitsui O.S.K. Lines, Ltd.; Montemar Maritima S.A.; Nippon Yusen Kaisha; Orient Overseas Container Line Inc., Orient Overseas Container Line Limited, and Orient Overseas Container Line (Europe) Limited; P&O Nedlloyd B.V and P&O Nedlloyd Limited; Pioneer Shipping, Ltd.; Seafreight Line, Ltd.; Seaboard Marine, Ltd.; South Pacific Shipping Co., Ltd.; Tecmarine Lines, Inc.; Trinity Shipping Line, S.A.; Tropical Shipping & Construction, Ltd.; Turkon Container Transportation and Shipping, Inc.; Wallenius Wilhelmsen Lines AS; Yangming Marine Transport Corp.; and Zim Israel Navigation Co., Ltd.

obligations. It strongly supports the NPR's codification of current practice as outlined in proposed section 535.408(b). *Id.* at 4, 5.

OCCA and MSL support the elimination of the 45-day waiting period for space charters and other operational agreements, particularly in instances where the parties' combined market shares do not give rise to serious competitive concerns. OCCA at 9; MSL at 1. MSL also argues that eliminating the waiting period for space charters and similar agreements would not undermine the Commission's regulatory oversight, as the proposed exemption would not relieve the subject agreements from either the substantive requirements of the Shipping Act or its filing requirement. MSL at 2.

Nevertheless, OCCA and MSL believe that the market share threshold for a ''low market share'' agreement should be increased from 15 percent to 30 percent if operating within a pricing agreement, and from 20 percent to 35 percent if not. OCCA at 11; MSL at 2. OCCA argues that the market share considered for the low market share exemption should include the entire agreement scope because doing so would increase the relief provided by the exemption. OCCA at 10. OCCA submits that an agreement with low overall market share that includes one or more small sub-trades in which it has a large market share should not be disqualified from the exemption. *Id.* OCCA argues that the Commission has read the *Antitrust Guidelines for Collaborations Among Competitors* (''Antitrust Guidelines'') too narrowly, and believes that the types of agreements which would be eligible for the proposed low market share exemption are just the types of efficiency enhancing and/or competitively neutral arrangements contemplated by those Guidelines. *Id.* at 11–12. Further, OCCA points out that the European Commission regulation levels are set at 30 percent and 35 percent. OCCA also recommends that the Commission's regulations state that the time period used to determine market share will be the most recent calendar quarter for which such data is available, because this is the same period the Information Form rules require. *Id.* at 10–11.

In addition to its other suggestions, OCCA urges the Commission to include specific activities in proposed section 535.408(b) exempting certain activities from amendment filing, namely: insurance; procedures for resolution of disputes relating to loss and/or damage of cargo; maintenance of books and records; force majeure clauses; procedures for allocating space and forecasting demand; and schedule adjustments. *Id.* at 12–13. OCCA argues that the catch-all provision in section 535.408(b)(5), which it asserts generally covers operational matters and is not restricted to a specific list, would not require modification to include these matters. *Id.* at 13.

Finally, OCCA requests that the Commission adopt a new exemption from the notice and waiting requirements to allow agreement amendments reflecting a change in party due to corporate acquisition to become effective upon filing. *Id.* This, OCCA asserts, would prevent a gap in antitrust immunity due to matters over which the Commission has no jurisdiction. *Id.* at 14. OCCA also requests that the disused term ''classes'' in sections 535.103(b) and 535.103(d) be replaced with a generic term such as ''types''; and that ''or a portion thereof'' be added to the end of the provision in section 535.302(b)(1) to indicate that cancellation of an agreement, in part or in whole, is a ''miscellaneous modification'' which may take effect upon filing. *Id.* at 15. OCCA believes these technical revisions would codify current practice and conform to other portions of the Commission's rules. *Id.* OCCA also recommends that the Commission provide agreement parties some period of time (for example, six months) from the effective date of the regulations to comply with the new requirements, and to prevent the revised regulation from having retroactive application. *Id.* at 16.

B. Discussion

The Commission is gratified that the comments generally recognize and agree with the NPR's stated purpose and approach in proposing an exemption from the statutory 45-day waiting period for agreements that contain neither capacity rationalization nor pricing authority. In response to the commenters' specific suggestions, the Commission has determined to revise the proposed rule as discussed below.

1. 46 CFR 535.402

The NPR included a proposal to replace sections 535.103(g) and 535.407(a) with a new section 535.402 to serve as a single controlling rule reasserting and clarifying the Commission's interpretation of the Shipping Act's requirements for the content of a filed agreement. The Commission agrees with APL's comments that the approach it has taken, namely reaffirming its interpretation of the Shipping Act to require the filing of the true and complete agreement balanced by additional exemptions and reductions in the filing, waiting period, and reporting requirements of the Commission's rules, achieves the balance the Commission articulated in the NPR.

2. 46 CFR 535.103(b), 535.103(d)

The Commission agrees with OCCA's suggestion that the term ''classes'' as it appears in proposed section 535.103(b), in light of the Commission's new approach to its information submission requirements, is no longer appropriate. The Final Rule changes the term, as suggested by OCCA, from ''classes'' to ''types.'' However, as to the Commission's use of the term ''classes'' in proposed section 535.103(d), describing the Commission's exemption authority for ''classes of agreements'' from requirements of the Shipping Act or these rules, the Commission has determined to retain the term as it mirrors the language of section 16 of the Shipping Act, 46 U.S.C. app. 1715.

3. 46 CFR 535.302(b)(1)

We agree with OCCA's suggestion that ''or a portion thereof'' be included in 46 CFR 535.302(b)(1), which will therefore allow cancellation of an agreement, or a portion thereof, to become effective upon filing. Much like amendments that delete an agreement party (46 CFR 535.302(b)(2)), the Commission believes cancellation of a portion of an agreement that, for example, would reduce the geographic scope or authority of an agreement, appears unlikely to have any potentially detrimental effects and therefore may become effective upon filing. The Final Rule reflects these changes.

4. 46 CFR 535.602(a)

No comments were received opposing the proposed changes to this provision indicating the Commission will transmit notices of all filed agreements, and their amendments, to the **Federal Register** for publication, and it is adopted in this Final Rule.

5. 46 CFR 535.311

The Commission proposed a new exemption from the Shipping Act's standard 45-day waiting period for ''low market share agreements.'' The Final Rule reflects commenters'' request that the market share level of such low market share agreements be raised, but the Commission declines to expand the definition of ''market'' for the exemption.

The commenters are correct to note that the Commission's proposed rule used the Antitrust Guidelines and

European regulations, which outline the types and size of competitor collaborations those regulators have represented they would presume lawful under generally-applicable competition laws, as points of departure for an exemption it may reasonably establish within the confines of section 16 of the Shipping Act. As such, the Commission is persuaded that the sub-trade market share levels for this exemption may be raised without exceeding the limitations of section 16 of the Shipping Act. We therefore adopt OCCA's and MSL's suggestion to permit certain agreements with less than 35 percent market share in any sub-trade in which they operate, or 30 percent market share if operating within another agreement with the authorities listed in 46 CFR 502(b), to be exempt from the 45-day notice and waiting period and the Information Form requirements (subpart E of this part), and thereby become effective upon filing.

We have revised the provision to clarify that such low market share agreements do not include agreements containing any of the authorities listed at section 535.502(b). The provision is revised thus:

(a) Low market share agreement means an agreement among ocean common carriers which contains none of the authorities listed in 535.502(b) and for which the combined market share of the parties in any of the agreement's sub-trades is either:

(1) Less than 30 percent, if all parties are members of another agreement in the same trade or sub-trade containing any of the authorities listed in § 535.502(b); or

(2) Less than 35 percent, if all parties are not members of another agreement in the same trade or sub-trade containing any of the authorities listed in § 535.502(b).

This is consistent with agreements required to file minutes under section 535.704(a)(1).

We decline, however, to adopt the commenters' suggestion to make the exemption based upon the entire agreement trade, and find that basing the market share limit on sub-trades is a better measure for competitive concerns, as the geographic scope of an agreement may be extremely broad. We note that the definition of a sub-trade in section 535.104(hh) is revised by combining the U.S. East Coast and U.S. Gulf Coast segments of the trade and that this combination will provide regulatory relief to filers of agreements that are unlikely to have major implications on competition. Section 535.311 of the Final Rule is revised to reflect this change.

In response to the commenters' request for guidance on market shares for purposes of determining whether an agreement may be eligible for the low market share exemption, and in the interests of consistency, we have determined that the appropriate period should be the same as that found in the Commission's Information Form rules (appendix A to this part), namely the latest available calendar quarter. We encourage parties to seek the opinion of the Director, BTA, available under section 535.311(c), as to whether a proposed agreement may qualify for the exemption prior to filing. As with other exemptions, filers wishing to invoke this low market share exemption should note such a desire in the transmittal letter accompanying the filing. In the Final Rule, the Commission has added a cross-reference to the appropriate filing fee for low-market share agreements in new section 535.311(d).

We are confident that the exemptions reflected in this Final Rule provide the industry flexibility for the matters it has identified as requiring flexibility within the confines of the Shipping Act. As such, we have revised the proposed rule at section 535.408 to include all the matters OCCA's comments suggest, and to codify current Commission practice. The term "such as,'' which appeared in proposed section 535.408(b)(5), is removed in the Final Rule in the interest of certainty. As proposed, section 535.408(a)reads,

(a) Agreements that arise from authority of an effective agreement but whose terms are not fully set forth in the effective agreement to the extent required by § 535.402 are permitted without further filing only if they:

(1) Are themselves exempt from the filing requirements of this part (pursuant to subpart C—Exemptions of this part); or

(2) Concern matters set forth in paragraph (b) of this section.

The Final Rule revises section 535.408(a)(2) to read, "(2) are listed in paragraph (b) of this section'' instead of "concern matters set forth in paragraph (b) of this section.'' This more accurately reflects the Commission's intent, as explained in the NPR, that it will no longer interpret what may fall under "operational'' activities on an "ad hoc'' basis.

Proposed section 535.408(b)(2) is revised to codify the Commission's existing policy as to what may be acted upon without further amendment to a filed agreement. The NPR proposed, "The terms and conditions of space allocation and slot sales, the establishment of space charter rates, and terms and conditions of charter parties.'' The Final Rule revises the section as follows:

(2) The terms and conditions of space allocations and slot sales, the procedures for allocating space, the establishment of space charter rates, and the terms and conditions of charter parties.

The Commission intends "procedures for allocating space'' to mean the method by which parties will make requests for space or notification of space availability, *e.g.*, whether by e-mail, telephone, etc., and to which individual or department such requests or notices should be directed.

Similarly, section 535.408(b)(4) as proposed is revised to add two matters correctly identified by the commenters as reasonable to include in the exemption from further filing, namely, procedures for anticipating parties' space requirements and the maintenance of books and records. The Final Rule revises the proposed language:

(4) The following administrative matters:

(i) Scheduling of agreement meetings;

(ii) Collection, collation and circulation of data and reports from or to members;

(iii) Procurement, maintenance, or sharing of office facilities, furnishings, equipment and supplies, the allocation and assessment of costs thereof, or the provisions for the administration and management of such agreements by duly appointed individuals;

(iv) Procedures for anticipating parties' space requirements;

(v) Maintenance of books and records; and

(vi) Details as to the following matters as between parties to the agreement: insurance; procedures for resolutions of disputes relating to loss and/or damage of cargo; and force majeure clauses.

For clarity's sake, the Commission notes its intention that "procedures for anticipating parties' space requirements'' includes changes to how members inform one another of their anticipated needs, but does not include changes to how parties discuss market demand on a broader level.

As noted in the NPR, the Commission finds it possible to exempt changes to the number of vessels or slots to be operated by an agreement if the originally-filed agreement contains an adequately described range of slots of vessels to be used under the agreement and if the changes fall within that range. 68 FR 67518, December 2, 2003. See also, infra, discussion of 46 CFR 535.704(d). Section 535.408(b)(5) is also revised to adopt the commenters' suggestion to allow changes in vessel substitution or replacement to become effective upon filing, and for clarity removes the phrase, "and there is no significant change in capacity'' thus:

(5) the following operational matters:

(i) port rotations and schedule adjustments; and

(ii) changes in vessel size, number of vessels, or vessel substitution or replacement, if the resulting change is within a capacity range specified in the agreement.

The Commission declines to include in this Final Rule an exemption from the 45-day waiting period for a change in agreement parties due to corporate acquisition as there may be situations in which such a change significantly alters the competitive landscape in a trade. Filing parties are always free to request expedited review for such amendments.

B. Agreement Content—Definition of "Capacity Rationalization''

The Commission received comments from APL and OCCA in response to its proposal to introduce a new term, "capacity rationalization,'' to describe authority that may be contained in some agreements. Inclusion of such authority would prevent an agreement from being eligible for the low market share exemption at section 535.311 and would subject filing parties to certain periodic reporting requirements under the Commission's monitoring program.[2]

OCCA objects not only to the proposed definition of the new term, but also to the removal of the existing definition of "capacity management.'' OCCA at 4. OCCA argues that the proposed definition would include activities of certain "operational'' agreements, such as alliance, cross slot charter, space charter or vessel sharing agreements, that preclude members, under certain expressed conditions, from initiating services independently in the agreement trade. Such restrictions, according to OCCA, have been recognized as legitimate commercial restrictions that are part of the quid pro quo to share space or vessels and serve a valid purpose. OCCA cites, for example, European Commission Regulation 823/2000, Article III(3)(a), *Lektro-Vend Corp.* v. *Vendo Co.*, 660 F.2d 255 (7th Cir. 1981), and *Red Sage Ltd. Partnership* v. *Despa Deutsche*, 254 F.3d 1120 (D.C. Cir. 2001) ("Red Sage'').[3] OCCA contends that the types of restrictions the Commission's proposal would include within the meaning of capacity rationalization are similar to those held valid in Red Sage, and, therefore, do not require closer monitoring.

However, assuming arguendo that the Commission retains the proposed level of monitoring for agreements that contain certain types of restrictions on their members, OCCA proposes that it should nevertheless revise the proposed definition of "capacity rationalization.'' OCCA argues that the proposed definition is too broad and goes beyond the Commission's expressed intent of focusing on restrictions imposed on capacity to be offered outside the terms of a filed agreement. OCCA suggests that the Commission may wish to rewrite the capacity rationalization definition to avoid inadvertently capturing legitimate activities that it believes the Commission should not subject to heightened reporting requirements, such as adjustments in capacity within a range specified in an agreement. OCCA also contends that the definition is unacceptably vague because it includes the term "stabilization,'' which is not itself defined. Id. at 6. OCCA suggests that the Commission replace its definition of capacity rationalization with one that focuses on three specific restrictions. OCCA proposes the following definition:

> *Capacity rationalization* means any agreement between or among two or more ocean common carriers that: (i) Restricts or limits the ability of any or all of those carriers to provide transportation in a trade on vessels other than those utilized under that agreement; (ii) restricts or limits the ability of any or all of those carriers to provide services that are alternate to or in competition with the services provided under that agreement; or (iii) which results in the withholding of vessel capacity on vessels being operated in the trade covered by that agreement. The term does not include adjustments to capacity made by adding or removing vessels or strings of vessels pursuant to and within the authority of sailing agreements, consortia, vessel sharing agreements or space charter agreements.

Id.

We decline to adopt the definition suggested by OCCA, as it would omit some conference and discussion agreements that contain authority for members to discuss and agree upon rationalization of capacity by members in specific trades. In addition, the Commission continues to be of the view expressed in the NPR that the potential effects of such arrangements are heavily dependent on conditions particular to an agreement trade and how the agreement is related to other agreements.

APL notes, without further comment, the OCCA suggestion that the definition be "clarified'' if the Commission elects to adopt the proposed use of the term. APL at 6. APL, however, recognizing the Commission's purpose in the NPR as increasing reporting requirements for agreements with such provisions rather than reducing the carriers' operating flexibility, suggests instead that the Commission refine the reporting requirements rather than the definition. Id. at 6.

In proposing this definition, the Commission's purpose was to identify arrangements that impose restrictions on capacity, and to distinguish those from simple operational exchanges of space. APL correctly assesses the purpose of the definition; the Commission intends to apply a level of monitoring to agreements that address members' participation in the market through manipulation or restriction of the potential supply of vessel capacity in a trade, similar to the level it applies to agreements covering members' pricing activities. It also intends to ensure that agreements containing such authority continue to be accompanied by sufficient information and receive the degree of scrutiny on initial filing that the Commission deems appropriate, without the waiver of the 45-day waiting period and Information Form that would apply based solely on the low market share of such agreements pursuant to section 535.311 and as discussed in this Supplemental Information. However, the Commission concurs with APL's assessment that not all of the heightened degree of ongoing reporting reflected in the proposed rule is necessary for agreements that contain authority that comes within the definition of capacity rationalization. The Final Rule will address that concern by revising the Monitoring Report regulations at section 535.703(c).

Finally, we note that the definition of capacity rationalization as published in the NPR inadvertently included language that was part of the Commission's existing definition of "capacity management.'' The last sentence, which reads, "The term does not include sailing agreements or space charter agreements'' should have been deleted. Consistent with the Commission's intention to apply its rules according to the authority contained in an agreement rather than by "type'' or "class'' of agreement, this language should not have been retained. Therefore, it is deleted from the definition of capacity rationalization in the Final Rule.

C. Transshipment Agreements

The Commission proposed a revision to the definition of a transshipment agreement and a corresponding change to the definition of a nonexclusive

[2] As proposed, the definition changed and replaced the existing definition of "capacity management'' at section 535.104(e) of the Commission's rules as follows:

(e) *Capacity rationalization* means a concerted reduction, stabilization, withholding, or other limitation in any manner whatsoever by ocean common carriers on the size or number of vessels or available space offered collectively or individually to shippers in any trade or service. The term does not include sailing agreements or space charter agreements.

[3] In Red Sage, a covenant not to compete in a lease was held valid.

transshipment agreement.[4] The changes would specify that a publishing carrier perform the transportation on one leg of the transshipment on its own vessel or on a vessel on which it has rights to space under a filed and effective agreement. The proposed changes would recognize the two ways by which an ocean common carrier may provide service: by operating its own vessel or by taking space on another carrier's vessel pursuant to a filed and effective agreement. Comments on the proposed rule came from Trans-Net, PONL, FOML, and OCCA.

Trans-Net, a licensed and bonded non-vessel-operating common carrier from Washington State, was the only commenter in favor of the proposed rule change. Trans-Net conveyed its views via written comments and meetings with individual Commissioners. Trans-Net argues that the change in the definition will provide greater transparency of carrier actions for both shippers and the Commission. Trans-Net at 3–4. At the same time, Trans-Net maintains that the filing of an agreement with the Commission would not be unduly burdensome to the carriers and that the proposed rule accommodates the carriers' desire for flexibility. Trans-Net at 5–7. PONL, FOML, and OCCA, however, disagree with Trans-Net and the Commission in that they do not consider the proposed rule changes either necessary or desirable.

In their comments, PONL and FOML challenge the Commission's ''traditional view'' of a transshipment agreement as stated in the supplemental information that accompanied the proposed rule. The Commission's ''traditional view'' of a transshipment agreement is an agreement ''under which two ocean common carriers that both operate vessels provide a through service between the United States and a foreign port.'' 68 FR 67520–21, December 2, 2003. However, PONL and FOML both challenge this view of a transshipment agreement as lacking legal and factual basis. PONL at 5, FOML at 3. The Commission's traditional view of a transshipment agreement is based mostly on experience in dealing with transshipment agreements filed prior to the current Shipping Act, when carriers participating in transshipment agreements typically operated one of the vessels involved in the transshipment. The optional provisions for nonexclusive transshipment agreements included in the Commission's regulations at section 535.306(d), based on the manner in which transshipments were conducted in 1984, tend to reinforce the Commission's traditional view.

PONL and FOML also assert that there is no basis to the Commission's contention that the definition needs clarification. PONL at 3, FOML at 1. In response, we note that the shipping industry has changed a great deal since 1984, with the increased use of vessel-sharing agreements and service contracts. We also note that Docket 99–10, Ocean Common Carriers Subject to the Shipping Act of 1984, has reduced dramatically the number of transshipment agreements that would now come under the Commission's jurisdiction. While the shipping industry has changed, the definition of a transshipment agreement has not changed, and we are taking this opportunity to update the definition accordingly.

OCCA claims that there is already sufficient transparency because the publishing carrier is required to state the name of the connecting carrier in its tariff (pursuant to the Commission's regulations for nonexclusive transshipment agreements). OCCA at 27. OCCA further maintains that most shippers would be aware of how their cargo is being transported because they have agreed to such service in their service contracts, and even if the shipper were unaware of how its cargo was being transported, the publishing carrier is responsible for the entire movement under its through bill of lading. OCCA at 28. Therefore, OCCA asserts that the rule changes are unnecessary. However, transparency is not the only issue with which the Commission is concerned. As stated earlier, we feel that the definition needs to be updated to reflect more accurately the manner in which transshipments are conducted at the present time.

With regard to the Commission's proposed rule, PONL, FOML, and OCCA are particularly concerned about the inclusion of the language ''filed and effective agreement'' in the Commission's proposed rule. They charge that this would create two different meanings for the term ''by direct vessel call'' in the definition for a nonexclusive transshipment agreement. OCCA at 28–29, PONL at 8–9, FOML at 5–7. According to PONL, FOML, and OCCA, the Commission's proposed rule would stipulate that a carrier taking space pursuant to a space charter agreement may be considered to make a ''direct vessel call'' in the portion of the transshipment between the U.S. port and the transshipment port, but not in the portion of the transshipment between the transshipment port and the foreign port because the publishing carrier would not have a filed and effective agreement to cover that portion of the transshipment.

By including the term ''filed and effective agreement'' in the definitions, PONL, FOML, and OCCA assert that the Commission appears to be dictating to carriers how they should structure their operations in the foreign-to-foreign portion of a transshipment, where, OCCA points out, the Commission has no jurisdiction. OCCA at 28–29. OCCA suggests that a publishing carrier that uses space chartered from another carrier in the foreign-to-foreign portion of a transshipment be considered as making a direct vessel call pursuant to the Commission's definition of a transshipment agreement. Id. at 29.

In consideration of those carriers that already participate in filed and effective alliance and vessel-sharing agreements, the Commission included the option of having a filed and effective agreement. It is not the Commission's intent to create a definition for the term ''direct vessel call.'' With regard to the concerns expressed by PONL, FOML, and OCCA, we note that a publishing carrier would only be required to have a filed and effective agreement or operate its own vessel on one leg of the transshipment. A publishing carrier that either operates its own vessel or takes space from another carrier pursuant to a filed and effective agreement in the U.S. portion of the transshipment may transport the cargo in the manner that is most advantageous to it commercially in the foreign-to-foreign portion of the transshipment.[5]

[4] § 535.104 Definitions.

(jj) *Transshipment agreement* means an agreement between an ocean common carrier serving a port or point of origin and another such carrier serving a port or point of destination, whereby cargo is transferred from one carrier to another carrier at an intermediate port served by direct vessel call of both such carriers in the conduct of through transportation and the publishing carrier performs the transportation on one leg of the through transportation on its own vessel or on a vessel on which it has rights to space under a filed and effective agreement.

§ 535.306 Nonexclusive transshipment agreements'exemption.

(a) A nonexclusive transshipment agreement is a transshipment agreement by which one ocean common carrier * * *

[5] PONL, FOML, and OCCA point out that in cases where a publishing carrier charters space from other carriers on both portions of a transshipment, the publishing carrier would no longer need a transshipment agreement because it would have two vessel-sharing agreements to cover its service. PONL at 10, FOML at 7, OCCA at 29. The consequence is that the publishing carrier would no longer be required to publish the name of the connecting carrier in its tariff. Given the concerns over national security, PONL, FOML, and OCCA suggest that the Commission may want to reconsider its proposal. However, we find their arguments to be unpersuasive.

OCCA also questions whether agreements that are otherwise exempt from filing, such as an agreement between a parent company and its wholly owned subsidiary, would be required to be filed. Id. Provided that the parent company is an ocean common carrier, it is the Commission's view that the proposed rule would not affect that exemption.

In addition to the arguments expressed above, PONL and FOML contend that the Commission is departing from its view that the publishing carrier may be the carrier serving the foreign-to-foreign portion of a transshipment. PONL at 9, FOML at 6. According to PONL and FOML, under the revised definition a publishing carrier that does not operate a vessel involved in the transshipment would have to be the origin carrier in the export trade of the United States and the destination carrier in the import trade of the United States because of the requirement that the publishing carrier have a filed and effective agreement. We disagree with this assessment on the grounds that pursuant to the Commission's regulations a publishing carrier is only the carrier offering the service. The Commission's regulations do not include the terms "origin carrier'' and "destination carrier'' or seek to dictate whether the publishing carrier should be the carrier serving the port of origin or the carrier serving the port of destination. The regulations refer to the "publishing carrier'' and the "nonpublishing carrier'' or "participating, connecting or feeder carrier.''

PONL and FOML further claim that they would be forced to discontinue many of their current transshipment arrangements because they would not be able to conduct them subject to transshipment agreements. PONL at 9–10, FOML at 7. In response to PONL's and FOML's complaint, we note that PONL and FOML may enter into vessel-sharing agreements that would enable them to continue those arrangements. Furthermore, under the changes outlined above for "low market share'' agreements, those vessel-sharing agreements may become effective upon filing.

III. Information Form and Monitoring Report, 46 CFR Part 535, Subparts E and G

A. Background

The NPR issued by the Commission replaced the current Information Form and Monitoring Report regulations with modified regulations that update the reporting requirements for carrier agreements. The modified regulations account for changes in carrier agreements that have occurred since the Ocean Shipping Reform Act of 1998, Public Law No. 105–258 ("OSRA'') became effective. As such, the Commission seeks to obtain the most relevant and accurate agreement information from carriers for its analysis of agreements under the Shipping Act, without placing an undue regulatory burden on carriers. In addition, the regulations were modified to reduce, where possible, the reporting burden on carriers.

The Information Form and Monitoring Report provide the Commission with essential information on an agreement from the parties to the agreement, and the Commission has consistently found that parties to an agreement are the most reliable source of information on the agreement. *See* Dkt. No. 94–13, Information Form and Post-Effective Reporting Requirements for Agreements Among Ocean Common Carriers Subject to the Shipping Act of 1984, 61 FR 11564, 11565–11566, March 21, 1996. The regulations in subpart E of part 535 require that an Information Form accompany a filed agreement and certain modifications to an existing agreement in effect under the Shipping Act. The Information Form is used in the agreement review process to analyze the probable competitive impact of a filed agreement or an agreement modification. Carrier agreements are initially reviewed upon filing to assess their compliance with the Shipping Act, particularly with respect to section 6(g) and the prohibited acts in section 10. Upon review, the Commission determines whether any action under the Shipping Act is necessary within the 45-day waiting period before an agreement becomes effective.

Once an agreement goes into effect under the Shipping Act, the regulations in subpart G of part 535 require that certain agreements submit ongoing revenue and/or operational data on the parties' activities for as long as the agreement remains in effect. As such, the Monitoring Report enables the Commission to track and analyze the ongoing competitive effects of an agreement after it becomes effective and, accordingly, determine whether any action under the Shipping Act may be necessary. Monitoring Reports also help the Commission to stay informed of agreement activity in the U.S. trades, and to address agreement issues that might arise in connection with investigations, complaints, inquiries, or petitions for Commission action on an agreement.

1. Information Form Regulations

The NPR revised the Information Form regulations by requiring all carrier agreements to submit an Information Form upon filing with the Commission. Specifically, proposed section 535.502(a) requires that all carrier agreements identified in section 535.201(a), except low market share agreements identified in section 535.311, submit an Information Form when the agreement is filed with the Commission. Proposed section 535.502(b) requires an Information Form when a modification to an existing agreement is filed that adds the authority to discuss, or agree on, capacity rationalization, or adds pricing or pooling authority.[6] A modification that expands the geographic scope of an agreement with such authority must also submit an Information Form as required in proposed section 535.502(c). Proposed section 535.504 provides waiver procedures whereby carriers may request relief from any of the Information Form requirements in subpart E of part 535.

2. Information Form

The Commission's proposed rule replaced the format of the Information Form in current sections 535.503 and 535.504 with one form under section 535.503(a) divided into sections I through V, as set forth in appendix A of part 535. Proposed section 535.503(b) requires that agreement parties complete each section of the Information Form applicable to the agreement and the authority contained in the agreement. Sections I and V apply to all carrier agreements subject to the Information Form requirements. Sections II, III and IV apply based on the authority contained in the agreement.

a. Section I

Section I of the Information Form applies to all carrier agreements subject to the Information Form requirements as identified in section 535.502(a) of the proposed rule. Parties to such agreements must complete parts 1 through 4 of section I with information on the following topics: the name of the agreement, narrative statements on the

[6] For ease of reference, the term "pricing or pooling authority'' is used herein to identify agreements containing any of the following authorities: (1) The discussion of, or agreement upon, whether on a binding basis under a common tariff or a non-binding basis, any kind of rate or charge; (2) the establishment of a joint service; (3) the pooling or division of traffic, earnings, or revenues and/or losses; (4) the discussion or exchange of data on vessel-operating costs; or (5) the discussion of service contract matters. These authorities were listed in the NPR. 68 FR 67541, December 2, 2003.

purpose of and commercial circumstances for the agreement, a list of the parties' other agreement participation within the geographic scope of the filed agreement, and the identification of the authorities and provisions contained in the agreement.

b. Section II

Section II of the Information Form applies to carrier agreements that contain simple operational authority including vessel space charter, and sailing or service rationalization arrangements. This authority does not include the establishment of a joint service as defined in section 535.104(o), or capacity rationalization as defined in section 535.104(e), of the proposed rule. Parties to such agreements must complete all items in part 1 of section II with information on their vessel calls at ports along with a narrative statement on any changes in port service that are anticipated or planned to occur when the agreement goes into effect.

c. Section III

Section III of the Information Form applies to carrier agreements with the authority to discuss, or agree on, capacity rationalization as defined in section 535.104(e) of the proposed rule. Parties to such agreements must complete parts 1 through 3 of section III with information on their vessel capacity and capacity utilization, their vessel calls at ports, and a narrative statement on any anticipated or planned changes in their vessel capacity and/or liner services (including ports) that would be implemented under the agreement when it goes into effect.

d. Section IV

Section IV of the Information Form applies to carrier agreements with pricing or pooling authority. Section 535.503(b)(4) of the proposed rule specifically identifies these authorities as: (a) The discussion of, or agreement upon, whether on a binding basis under a common tariff or a non-binding basis, any kind of rate or charge; (b) the establishment of a joint service; (c) the pooling or division of cargo traffic, earnings, or revenues and/or losses; (d) the discussion or exchange of data on vessel-operating costs; or (e) the discussion of, or agreement on, any service contract matter.

Parties to agreements with any of these authorities must complete parts 1 through 5 of section IV with information on the following topics: market share, total average revenue, cargo volume and revenue results for the top 10 agreement-wide commodities, vessel capacity and capacity utilization, and port service. The agreement parties must also provide narrative statements on any changes in their vessel capacity or port service that are anticipated or planned to occur when the agreement goes into effect. Changes in vessel capacity are qualified to mean "significant changes in the amounts of vessel capacity,'' as defined in part 4(C) of section IV.

e. Section V

Section V requires that parties to all subject agreements identify contact persons for the Information Form and the agreement, and that the Information Form be certified and signed by a representative of the parties.

3. Monitoring Report Regulations

The proposed rule modified the Monitoring Report regulations to require reporting only from parties to agreements with certain authority. For agreements that contain pricing or pooling authority,[7] the proposed rule limited the application of the regulations to include only those agreements with a combined market share of 35 percent or more.[8] Specifically, proposed section 535.702(a) requires Monitoring Reports from agreements with pricing or pooling authority where the parties to such agreements hold a combined market share of 35 percent or more in the entire U.S. inbound or outbound geographic scope of the agreement.[9] It also requires Monitoring Reports from all agreements with the authority to discuss, or agree on, capacity rationalization. At the time of the NPR, the Commission estimated that 63 agreements would be subject to the modified Monitoring Report regulations; this would be a reduction from 213 agreements.[10]

For exceptional agreements, proposed section 535.702(c) provides that the Commission may, as necessary, require Monitoring Reports from an agreement with pricing or pooling authority with a market share below the 35 percent threshold.[11] Further, section 535.702(d) clarifies the Commission's authority by providing that in addition to or instead of the Monitoring Report, the Commission may, as necessary, prescribe alternative periodic reporting requirements on parties to any agreement subject to section 535.201.[12] As with the Information Form regulations, proposed section 535.705 provides waiver procedures whereby carriers may request relief from any of the reporting requirements in subpart G of part 535.

4. Monitoring Report Form

The proposed rule replaced the format of the Monitoring Report in current sections 535.703, 535.704, and 535.705 with one form in proposed section 535.703(a) divided into sections I through III, as set forth in appendix B of part 535. Section 535.703(b) of the proposed rule requires that parties to an agreement complete each section of the Monitoring Report applicable to the agreement and the authority contained in the agreement. Sections I and II apply based on the authority contained in the agreement, and section III applies to all agreements required to submit

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[7] "Pricing or pooling authority'' as referred to in the Monitoring Report regulations is identical to the use of the term in the Information Form regulations; *i.e.*, it refers to any of the following authorities: (1) The discussion of, or agreement upon, whether on a binding basis under a common tariff or a non-binding basis, any kind of rate or charge; (2) the establishment of a joint service; (3) the pooling or division of cargoes, earnings, or revenues and/or losses; (4) the discussion or exchange of data on vessel-operating costs; or (5) the discussion of service contract matters. 68 FR 67544, December 2, 2003.

[8] The Commission's market share threshold of 35 percent for monitoring pricing or pooling agreements is analogous to the Horizontal Merger Guidelines issued jointly by the U.S. Department of Justice and the Federal Trade Commission in 1992. *1992 Horizontal Merger Guidelines* ("1992 Guidelines''), 57 FR 41552, Sept. 10, 1992. In analyzing horizontal mergers between firms, the 1992 Guidelines set forth economic standards that the agencies use to apply antitrust law. Accordingly, the agencies find that:

[w]here the merging firms have a combined market share of at least thirty-five percent, merged firms may find it profitable to raise price and reduce joint output below the sum of their premerger outputs because the lost markups on the foregone sales may be outweighed by the resulting price increase on the merged base of sales.

57 FR 41561, Sept. 10, 1992.

[9] Under section 535.703(b) of the proposed rule, the Commission's Director of BTA will determine the Monitoring Report obligations of agreements with pricing or pooling authority using the 35 percent market share threshold. For newly filed agreements, this will be based on the market share data from the Information Form submitted with the agreement. Thereafter, at the beginning of each calendar year, BTA will notify such agreements of any change in their reporting obligations based on the market share data from their Monitoring Reports for the previous second calendar quarter (April–June).

[10] Since the NPR was published, some carrier agreements on file at the Commission have been canceled. The Commission now estimates that a total of 57 agreements will be subject to the Monitoring Report regulations under the Final Rule.

[11] These cases may occur when a pricing or pooling agreement with a market share below 35 percent constitutes the major rate agreement in a trade, or poses unique anti-competitive or statutory concerns that require close monitoring. The proposed rule delegates the Commission's authority under section 535.702(c) to the Director of BTA in section 501.26(o).

[12] The Commission may find it necessary to prescribe alternative reporting requirements when an agreement contains unique authority, the effects of which may require monitoring, that is not captured under the standard Monitoring Report. The Commission's authority under section 535.702(d) is delegated to the Director of BTA in section 501.26(o).

Monitoring Reports under proposed section 535.702(a).

a. Section I

Section I of the Monitoring Report applies to all agreements with the authority to discuss, or agree on, capacity rationalization, as defined in section 535.104(e) of the proposed rule. Parties to such agreements must complete parts 1 through 3 of section I with quarterly information on their vessel capacity and capacity utilization. In addition, proposed section 535.703(c), as set forth in part 3 of section I, requires that a narrative statement of any changes in vessel capacity and/or liner services (including ports) that the parties plan to implement under the agreement be submitted to the Commission's Director of BTA no later than 15 days after a change has been agreed upon by the parties but prior to the implementation of the change.

b. Section II

As proposed, section II of the Monitoring Report applies to agreements in which the parties hold a combined market share, based on cargo volume, of 35 percent or more in the entire U.S. inbound or outbound geographic scope of the agreement and the agreement contains any of the following authorities: (a) The discussion of, or agreement upon, whether on a binding basis under a common tariff or a non-binding basis, any kind of rate or charge; (b) the establishment of a joint service; (c) the pooling or division of cargo traffic, earnings, or revenues and/or losses; (d) the discussion or exchange of data on vessel-operating costs; or (e) the discussion of, or agreement on, any service contract matter.

Parties to such agreements must complete parts 1 through 6 of section II with the following quarterly information: Market share, total average revenue, cargo volume and revenue results on the top 10 agreement-wide commodities, vessel capacity and capacity utilization, and narrative statements on any significant changes that occurred in vessel capacity and service at ports. The meaning of significant changes for these items is qualified in parts 5(C) and 6 of section II. The proposed rule substantially reduced the reporting burden for major agreement commodities by requiring parties to report their data on an agreement-wide basis, instead of a sub-trade basis.[13] For exceptional agreements, however, section 535.703(d) of the proposed rule provides that the Commission may, in its discretion, require sub-trade commodity data from agreements subject to section II of the Monitoring Report.[14]

c. Section III

Section III requires that parties to all subject agreements identify a contact person for the Monitoring Report, and that the Monitoring Report be certified and signed by a representative for the parties.

B. Summary of Comments and Discussion

Comments directly addressing the Information Form and Monitoring Report regulations of the proposed rule were submitted by OCCA and APL. As noted above, OCCA represents most of the conference and rate discussion agreements and their members in the U.S. trades. As a member of OCCA, APL endorses OCCA's comments on the proposed rule. APL at 1. However, APL also submitted separate comments as a supplement to OCCA's comments to elaborate on particular aspects of the proposed rule. Id. Summaries of the issues raised by the commenters as they pertain to the Information Form and Monitoring Report regulations proposed in the NPR are provided below with the Commission's discussion on each issue.

OCCA expressed its view that since OSRA became effective, the current Information Form and Monitoring Report regulations for carrier agreements are unduly burdensome and unnecessary given: (1) The extensive use of individual service contracts in the shipment of cargo, (2) the confidentiality of service contract terms, and (3) the reduction in the number of conference agreements in the U.S. trades. OCCA at 16–17. Overall, OCCA recognizes the Commission's efforts to reduce the current reporting burden on carriers and supports most of the proposed changes pertaining to the Information Form and Monitoring Report regulations. Id. at 17. Nonetheless, OCCA raises the following issues and recommendations that would in its view further improve the rule. Id.

1. Reporting Requirements for Agreements With Capacity Rationalization Authority

OCCA objects to the heightened reporting requirements on agreements that authorize capacity rationalization, as the term is defined in section 535.104(e) of the proposed rule. Id. at 5. OCCA interprets the meaning of capacity rationalization to include certain types of agreements, based upon its reading of the supplementary information of the NPR. Id. at 4. These are: (1) An agreement that prohibits or restricts the introduction of vessels into the agreement trade in a service other than that operated under the agreement; (2) an agreement that prohibits or restricts the use of space on non-agreement vessels in the agreement trade by an agreement party; and (3) an agreement that results in an artificial withholding of vessel capacity. Id. OCCA argues that operational agreements with restrictive provisions on its members' activities within the agreement trade are legitimate, understandable, and serve a valid purpose. Id. at 5. OCCA's objections to the new term "capacity rationalization'' and its suggestions for changes to the definition, as well as our response to OCCA's suggestions, are addressed earlier, in Part II(B) of the Supplemental Information.

On a related issue, OCCA recommends that the Commission delete the term "discussion of'' when identifying agreement modifications that add capacity rationalization authority in section 535.502(b)(2).[15] Id. at 15. OCCA argues that an agreement modification to discuss capacity rationalization does not require an Information Form because such authority does not permit the parties to engage in any capacity rationalization. Id. OCCA believes that an Information Form would only be necessary when an agreement modification is filed that permits the parties to engage in capacity rationalization, and thus, it finds section 535.502(b)(2) of the proposed rule, as it presently reads, to be unnecessarily duplicative and burdensome. Id.

OCCA also opposes proposed section 535.703(c), as set forth in part 3 of section I of the Monitoring Report, that requires parties to an agreement authorizing capacity rationalization to report to the Commission their planned vessel capacity and/or liner service

[13] The former regulations required that parties to certain agreements, categorized as Class A, report their cargo volume and revenue results for each major agreement commodity in each sub-trade within the geographic scope of the agreement. For purposes of reporting, sub-trade is defined to mean all liner movements between each U.S. port range and each foreign country within the scope of the agreement.

[14] Sub-trade commodity data may be necessary when an agreement with extremely high market share covers a broad trade area comprised of distinct sub-trades or regions, and establishes rates distinctly by sub-trade or region. In addition, such data may be necessary where unique anti-competitive concerns are present, or where competitive issues exist that affect pricing for certain commodities. Proposed section 501.26(p) would delegate this authority to the Director of BTA.

[15] Section 535.502(b)(2) of the proposed rule reads as, "The discussion of, or agreement on, capacity rationalization.''

changes prior to implementation.[16] Id. at 19. OCCA recommends that the Commission delete section 535.703(c) and part 3 of section I of the Monitoring Report. Id. It argues that a requirement to provide advance notice is not synchronous with the Monitoring Report, which must be submitted on a historical quarterly basis. Id. at 19–20. It also notes that major agreements of this nature publicly announce their vessel capacity changes. Id. at 20.

OCCA further believes the advance notice requirement to be unnecessary and duplicative because the rule requires vessel capacity data from many agreements in their quarterly Monitoring Reports. Id. Moreover, it argues that advance notice of capacity changes serves no legitimate regulatory purpose because carriers may lawfully act in concert to reduce capacity under the authority of a filed agreement, *e.g.*, the authority to operate a number of vessels within a specified range. Id.

In its supplemental comments, APL endorses OCCA's position to delete the advance notice requirement in section 535.703(c) of the proposed rule, and part 3 of section I of the Monitoring Report, for agreements authorizing capacity rationalization. APL at 6. As an alternative, however, APL suggests that the Commission limit the advance notice requirement to cover only concerted actions that reduce the total vessel capacity of such agreements. Id. at 6–7. It notes that increases in vessel capacity could be adequately reported on a quarterly basis in the regular Monitoring Report. Id. at 7. Further, APL suggests that the Commission qualify the meaning of vessel capacity and/or liner service changes to exclude temporary or minor changes that have little or no impact, regardless of whether reported in advance or on a historical quarterly basis. Id. APL finds the prospect of reporting such temporary or minor changes to be unduly burdensome and of no useful regulatory purpose. Id.

For the reasons discussed above in Part II of the Supplementary Information, we are not adopting OCCA's suggested definition of capacity rationalization. We are retaining the definition in proposed section 535.104(e), with the last sentence deleted in the Final Rule. This section addresses the reporting requirements for agreements that authorize capacity rationalization.

Based on its reading of the Supplementary Information in the NPR, OCCA interprets the intention of the reporting requirements for agreements authorizing capacity rationalization as primarily limited to certain types of operational agreements with restrictive provisions on their members' activities in the agreement trade. OCCA's interpretation is not entirely accurate. We addressed operational agreements in the Supplementary Information of the NPR to distinguish and illustrate some of the agreements that are included in the definition of capacity rationalization. Specifically, we determined that operational agreements included in the definition of capacity rationalization are those that affect the supply of vessel capacity in a trade or market and prohibit or place conditions on its members' independent agreement participation with other carriers and/or competing liner services outside of the agreement within the agreement trade. We discussed these agreements to distinguish them from simple operational agreements, which do not place such restrictions on their members, so that the agreement filing and reporting regulations would be understood and applied correctly. In focusing our discussion on operational agreements, it was not our intention to imply that the reporting requirements for agreements authorizing capacity rationalization are limited to certain types of agreements.

The proposed rule explicitly eliminated the identification of agreements by type or class in the Information Form and Monitoring Report regulations. The current regulations, which identify carrier agreements by type or class for the purpose of assigning reporting requirements, have become outdated and inadequate in relation to the changes that have occurred in carrier agreements and their increasingly complex authorities, as was explained in the Supplementary Information to the NPR:

> The current agreement classification regulations in section 535.502 provide procedures for assigning specific reporting requirements to specific types of agreements. Agreements filed at the Commission, however, have evolved since the current classification regulations were implemented, especially under OSRA. Now, multiple or complex forms of authority may be contained in a single agreement that might not neatly fall under one specific agreement type or class. Further, the reporting requirements assigned to a particular type or class of agreement may not adequately address the full authority of the agreement. For instance, the current reporting requirements for Class C agreements do not distinguish between simple operational agreements, such as vessel space charter arrangements, and the more complex and anticompetitive operational agreements with capacity rationalization authority that include global alliance arrangements.

68 FR 67525, December 2, 2003.

To address these concerns, the proposed rule modified the regulations to assign reporting requirements to specific authorities contained in agreements. In this regard, we stated that:

> While no rule can cover all circumstances, the Commission believes that this approach would more directly address the elements of concern within the agreement, *i.e.*, the parties' authority and the concerted activities they may pursue with such authority.

Id.

The Information Form and Monitoring Report regulations in the proposed rule provide that any agreement authorizing the discussion of, or agreement on, capacity rationalization is subject to the reporting requirements. The regulations include all carrier agreements with such authority, regardless of agreement type. In addition to operational agreements with capacity rationalization authority, there are a number of conference and rate discussion agreements with authority to discuss, or agree on, capacity rationalization. Such agreements will be subject to the reporting requirements for capacity rationalization authority in addition to all other reporting requirements applicable to their pricing or pooling authority under this Final Rule.[17]

In assigning reporting requirements to capacity rationalization authority, the Commission is intentionally increasing the level of its analysis and monitoring of the concerted actions that are planned or implemented by carriers under this authority of their agreements. We believe this increase in reporting is reasonable, judicious, and proportional to the increasing prevalence and use of capacity rationalization authority occurring in agreements between or among carriers in the U.S. trades. The Commission views these reporting requirements as a necessary measure within its authority under section 5(a) and based on its statutory

[16] For an agreement that authorizes capacity rationalization, section 535.703(c), as set forth in part 3 of section I of the Monitoring Report, requires a narrative statement of any planned changes in the vessel capacity and/or liner services that the parties will implement under the agreement. This statement shall be submitted to the Director, BTA, no later than 15 days after a vessel capacity and/or liner service change has been agreed upon by the parties but prior to the implementation of the actual change under the agreement.

[17] The instructions in appendices A and B to part 535 provide that where an agreement containing multiple authorities is subject to duplicate reporting requirements in the various sections of the Information Form or Monitoring Report, the parties may provide only one response so long as the reporting requirements within each section are fully addressed.

responsibilities under the Shipping Act, particularly with respect to the section 6(g) standard for agreements. 46 U.S.C. app. 1704(a) and 1705(g).

By promulgating reporting requirements for capacity rationalization authority, the Commission does not dispute, as OCCA argues, the legitimacy of such authority in agreements. Further, we do not dispute the lawfulness of carriers to act in concert under such authority within the standards of the Shipping Act. In the Supplementary Information to the NPR, we acknowledged that operational agreements, even those with capacity rationalization authority, can achieve efficiencies in a trade or market by lowering operational costs and even enhancing ocean liner services to the benefit of the shipping public. Id. at 67524. The efficiencies associated with capacity rationalization authority in conference or rate discussion agreements, however, are less apparent and would seem to be aimed at achieving the rate objectives of the agreement. Further, in the NPR, we cautioned that a concerted reduction in vessel capacity and the restrictions imposed by capacity rationalization authority can result in a shortage of vessel space in a trade leading to an unreasonable decrease in service. Id. A concerted reduction in vessel capacity can also produce an artificially-induced upward pressure on rate levels, potentially leading to an unreasonable increase in rates in violation of section 6(g). Id.

The reporting requirements for agreements authorizing capacity rationalization should not be viewed in any way as a punitive measure against such agreements. Rather, the purpose of the reporting requirements is to provide the Commission with necessary information to gauge the reasonableness of the parties' actions under such authority in accordance with the standards of the Shipping Act, and within the prevailing market conditions of the agreement trade.

We do not believe that reporting vessel capacity information places any undue regulatory burden on carriers because carriers engaged in capacity rationalization have such information readily available. Moreover, the Final Rule provides regulations that allow carriers to request a waiver, with a showing of good cause, from any of the Information Form and Monitoring Report requirements. Accordingly, in conjunction with the definition in section 535.104(e) of the Final Rule, all agreements identified in sections 535.502 and 535.702(a) that authorize the discussion of, or agreement on, capacity rationalization are subject to the applicable reporting requirements in subparts E and G of the Final Rule, as modified below.

With respect to section 535.502(b)(2) of the proposed rule, the Commission rejects OCCA's recommendation to delete the term "discussion of'' for agreement modifications that add capacity rationalization authority. The term accurately reflects the intention of the Commission's reporting requirements. We view the "discussion of'' capacity rationalization as potentially anti-competitive, especially within conference and rate discussion agreements, similar to the anti-competitive authority to discuss pricing information.

Adding authority for the discussion of capacity rationalization, or the discussion of pricing information, to an existing agreement alters the competitive composition of the agreement, and the agreement must be re-examined with a new Information Form. Absent such a reporting requirement, the Commission would have to request vessel capacity information from parties to an agreement modification authorizing the discussion of capacity rationalization after the modification was filed, which could delay the effective date. Further, deleting the term "discussion of'' for agreement modifications would conflict with the reporting requirements for newly filed agreements, which require information on the authority to discuss, or agree on, capacity rationalization. The Commission believes that authority to discuss capacity rationalization would not be any less anti-competitive based solely on it being filed as a modification to an existing agreement than it would be if filed in a new agreement.

On the issue of proposed section 535.703(c), and part 3 of section I of the Monitoring Report, the Commission does not agree with OCCA's recommendation to delete the reporting requirement for notice to the Commission of planned vessel capacity and/or liner service changes prior to implementation from parties to agreements authorizing capacity rationalization. OCCA incorrectly infers that the reporting requirement is an unnecessary imposition by the Commission that ignores or negates the legality of carriers to act within the authority of their agreements. As previously stressed, we do not dispute the lawfulness of carriers to act in concert under the authority of their agreements within the reasonable standards of the Shipping Act.

The reporting requirement is a judicious regulatory measure that enables the Commission to gauge the reasonableness of a pending action that the parties plan to implement under the authority of their agreement. With such reporting, the Commission can receive timely notice to take any necessary action under the Shipping Act to prevent a concerted action by carriers that would likely cause harm in the agreement trade prior to its implementation.

To make this determination, the Commission must first be informed in advance of the parties' pending action under the agreement. The Commission must also be able to weigh the severity of such action within the prevailing market conditions of the agreement trade. While an agreement may specify a range of vessel capacity within which the parties intend to operate, this range of vessel capacity may be broad spanning multiple trade lanes and liner services under the geographic scope of the agreement, especially in cases where the geographic scope covers all the U.S. trades. Moreover, market conditions in the agreement trade might have substantially changed from the time when the Commission initially analyzed the likely competitive impact of the agreement upon filing. Therefore, accurate and current information on the likely effects of a pending action under an agreement is required directly from the parties to the agreement. In accordance with the jurisdictional authority of the Commission governing agreements in effect under the Shipping Act, we find it both prudent and necessary to retain section 535.703(c) in the Final Rule for notice prior to implementation of pending actions planned by parties to agreements authorizing capacity rationalization.

We do not believe that this reporting requirement places any undue regulatory burden on carriers. As OCCA noted, parties to agreements often publish this information. Therefore, we believe that they can easily and readily submit the required information to the Commission. We do, however, concur with the alternative modifications suggested by APL for this reporting requirement.

APL correctly discerns that the underlying intention of the Commission for this reporting requirement focuses on receiving advance notice of concertedly planned reductions in vessel capacity that might potentially violate the standards of reasonableness under the Shipping Act. Further, as APL surmises, it is our intention that such reporting be limited to reductions in vessel capacity that would be

significant. Such a qualification includes reductions in vessel capacity that are strategically planned to be implemented for a period of time, or intended to be more permanent in nature. It excludes incidental alterations in vessel capacity that would be temporary in nature, or operational changes in vessel capacity that would have little or no impact on the amount of vessel capacity offered in a liner service or a trade. In addition, it is our intention that all reporting requirements set forth in appendices A and B of part 535 for similar information on changes in vessel capacity, or vessel calls at ports, be limited and qualified for reporting purposes to mean significant changes.

Therefore, section 535.703(c) has been modified in the Final Rule to require notice prior to implementation of any significant reductions in vessel capacity under the agreement. Part 3 of section I of the Monitoring Report in the proposed rule has been modified and parts 2(C) and 2(D) of section I have been added in the Final Rule. Part 2(C) of section I sets forth instructions on reporting significant reductions in vessel capacity prior to implementation. Part 2(D) of section I sets forth instructions on reporting other significant changes in vessel capacity for the preceding calendar quarter. Part 3 of section I of the Monitoring Report in the Final Rule has been modified and now sets forth instructions on reporting significant changes in vessel calls at ports for the preceding calendar quarter. In a similar manner, all other reporting requirements in appendices A and B of part 535 in the Final Rule have been modified and qualified for reporting purposes to mean significant changes in vessel capacity, or vessel calls at ports.

2. Reporting Requirements for Agreements With Authority To Discuss or Exchange Vessel-Operating Cost Data

OCCA objects to the heightened reporting requirements on agreements that contain the authority to discuss or exchange data on vessel-operating costs. OCCA at 7. OCCA notes that reporting on such authority was first adopted by the Commission in its rulemaking in *Information Form and Post-Effective Reporting Requirements for Agreements Among Ocean Common Carriers Subject to the Shipping Act of 1984*, FMC Docket No. 94–31, which established the current Information Form and Monitoring Report regulations. *Id.* It argues that the Commission's initial rationale for assigning heightened reporting requirements to such authority was, and continues to be, questionable from both a legal and a practical perspective. Id. at 7–8.

Specifically, OCCA refers to the Commission's application of Supreme Court cases,[18] where the Commission stated that "the sharing of pricing information can have a significant impact on price competition.'' [19] Id. at 7. It argues that these Supreme Court cases involved the sharing of price information rather than cost information, and therefore, it questions the validity of the Commission's previous legal analysis in FMC Docket No. 94–31. Id. at 7–8. OCCA further cites case law where it was found that the sharing of cost information by competing manufacturers was lawful because it improved efficiency and lowered costs.[20] Id. at 8.

From a practical perspective, OCCA argues that the authority to discuss or exchange vessel-operating cost data has no meaningful impact on pricing because carriers price based on total costs, in addition to market conditions, and vessel-operating costs are only a portion of total costs. Id. Moreover, OCCA points out that most vessel-operating cost data is publicly available information and can be readily obtained or discerned regardless of whether carriers are authorized to share such data. Id. at 8–9. Further, OCCA believes that heightened reporting requirements on such authority creates an excessive burden for carriers that obstructs efficiency because carriers generally discuss or exchange such data within their vessel-sharing agreements, which promote cost-effective services. Id. at 9. For these reasons, it recommends that the Commission delete all references to such authority from the rule, including the Information Form and Monitoring Report.[21] Id.

The Commission disagrees that its legal or economic rationale in FMC Docket No. 94–31 was misguided, as OCCA argues. The Commission considers the "sharing of pricing information'' between parties to an agreement, which affects price competition in a market, to include the authority to discuss or exchange cost information. In the case of the ocean shipping industry, such information includes vessel-operating cost data.

We recognize, however, that it is unnecessarily redundant to subject such authority to reporting requirements where vessel-operating cost data is shared by carriers for pricing purposes in agreements. Agreements that contain authority to discuss, or agree upon, pricing are already subject to the reporting requirements. Further, we agree that the authority to share vessel-operating cost data in agreements that do not contain pricing authority, such as a vessel-sharing agreement, is for operational purposes.

It is not our intention in this rule to subject such an agreement to a level of reporting on par with agreements containing potentially highly anti-competitive authorities when such reporting is not necessary or required. Therefore, the reference to the authority to discuss or exchange data on vessel-operating costs has been deleted from sections 535.502, 535.503, 535.702, and appendices A and B of part 535 of the Final Rule. The definition of vessel-operating costs, however, has been retained in section 535.104(kk) in the Final Rule for any future reference that may be necessary in 46 CFR part 535.

3. Section I of the Information Form in Appendix A of Part 535

OCCA recommends that the Commission delete parts 2, 4(D), and 4(J) of section I of the Information Form in the proposed appendix A.[22] Id. at 18. In general, OCCA views these reporting requirements as unnecessary, duplicative, and burdensome. Id. at 19. It notes that information on these matters can instead be obtained from the content of the agreement itself. Id. It further argues that these proposed requirements neither serve a legitimate regulatory purpose, nor advance the Commission's analysis of agreements with respect to the section 6(g) standards of the Shipping Act. Id. at 18–19.

The Commission declines to adopt OCCA's recommendation to delete parts 2(A) and 2(B) of section I of the Information Form that require narrative statements elaborating on the purpose and commercial aspects of an agreement between or among carriers filed at the Commission. We disagree with OCCA's arguments that such information has no regulatory purpose nor advances the

[18] *Sugar Institute, Inc.* v. *United States*, 297 U.S. 553 (1936), and *American Column & Lumber Co.* v. *United States*, 257 U.S. 377 (1921).

[19] *See* Docket No. 94–31, 59 FR 62372, 62376, December 5, 1994.

[20] *United States* v. *National Malleable Steel & Castings Co.*, 1957 Trade Cas. (CCH) ¶68,890 (N.D. Ohio 1957) *aff'd per curiam* 358 U.S. 38 (1958).

[21] These references are cited as proposed sections 535.104(kk), 535.502(b)(v), 535.503(b)(iv), 535.702(a)(2)(iv), and 535.704(a)(1).

[22] Part 2 of section I requires that the parties provide narrative statements on the purpose of, and the commercial circumstances for, the filed agreement. Part 4(D) of section I requires the parties to identify whether the agreement authorizes the parties to discuss or exchange vessel-operating cost data. Part 4(J) of section I requires the parties to identify any other authority contained in the agreement that is not otherwise covered in part 4 of section I of the Information Form.

Commission's analysis of agreements under section 6(g). In the Supplementary Information of the NPR, we explained that:

> Section I [of the Information Form] requires carriers to supply relevant agreement information to the Commission at the start of the review process. This information would be used in the initial review and analysis of an agreement, and would help to avoid formal requests for additional information which delay the effective date of the agreement.

68 FR 67525, December 2, 2003.

With respect to part 2 of section I, we further explained that this specific information provides the Commission with a clearer understanding of the parties' collective objectives under the agreement in relation to their services within the agreement trade. Id. at 67526. We noted that such information would be relevant to the Commission's review of the agreement, but might not be readily apparent by the terms of the agreement without seeking additional information from the parties. Id.

The statutes and regulations governing the filing of agreements under the Shipping Act only require that conference agreements contain a statement of purpose. For other agreements, it is at the discretion of the parties as to whether a statement of purpose is contained in the filed agreement. As such, the Commission cannot always rely on the content of agreements to disclose such information. The Commission has a vast amount of experience in reviewing and analyzing agreement filings under the Shipping Act. Accordingly, we have found that agreements filed at the Commission are generally crafted to meet the legal requirements of the Shipping Act, and very little additional information elaborating on the purpose or commercial aspects of an agreement accompanies the agreement filing. As previously noted, the authority of the Commission to promulgate rules on the form and manner of filed agreements and any additional information and documents that need to accompany the agreement filings is set forth in section 5(a) of the Shipping Act.

In some instances, parties to an agreement publish relevant information on the purpose and/or commercial circumstances pertaining to the agreement. The Commission uses any published information that is available to gain a clearer understanding of an agreement for its analysis. However, we find it wholly inadequate and inefficient that the receipt of relevant information useful to the Commission's review and analysis of an agreement may be dependent upon whether the parties choose to publish information, and limited to whatever sort of information they may choose to publish about the agreement. Instead, we believe that the relevant and straightforward agreement information required in part 2 of section I of the Information Form can be easily and readily submitted by the parties at the time that the agreement is first filed at the Commission.

When questions arise about an agreement that cannot be addressed by the content of the agreement or any published information, the Commission can request additional information from the parties, which could delay the effective date of the agreement. Part 2 of section I provides carriers with the opportunity to avoid requests for additional information on their agreements, and it is in their best interest to respond accordingly with meaningful agreement information that fully addresses this reporting requirement.

We do, however, see a need to modify this part of the Information Form. We believe that the purpose and commercial aspects of an agreement are interrelated and may more easily be addressed in a single narrative statement. Therefore, parts 2(A) and 2(B) have been consolidated into a requirement for one narrative statement in part 2 of section I of the Information Form in appendix A of part 535 of the Final Rule.

Regarding OCCA's issues with the other parts of section I of the Information Form, part 4(D) on the authority to discuss or exchange data on vessel-operating costs has been deleted from the Final Rule for the reasons previously stated. Further, we agree that agreements filed under the Shipping Act must comply with 46 CFR 535.402, and thus, part 4(J) of section I of the Information Form is unnecessary and has been deleted from the Final Rule because the complete and specific authorities between the parties can be obtained from the content of the agreement.

4. Reporting Requirements on the Cargo Volume and Revenue Results for the Top 10 Agreement-Wide Commodities

OCCA strongly urges the Commission to eliminate all reporting requirements for cargo volume and revenue data on agreement commodities.[23] OCCA at 17. It stresses that eliminating such reporting is the "single most significant change'' the Commission could make to reduce the current burden on the industry. Id. OCCA believes that the modification in the proposed rule that reduces reporting to the top 10 agreement-wide commodities still imposes a significant burden because carriers generally do not track revenue on a per-commodity basis. Id. It questions the value of this data given the wide use of confidential service contracts, where many such contracts apply a single rate for multiple commodities, such as a rate for General Department Store Merchandise, or Freight All Kinds. Id. It further questions whether fluctuations in this data for a particular carrier can be directly attributed to an agreement action, or to numerous other factors external to the agreement. Id. at 18. It argues that even if this data is of some use to the Commission, the burden of continually reporting such data outweighs its usefulness. Id. As an alternative, OCCA suggests that the Commission could require this data on an "as needed'' basis to address specific issues or concerns for a particular agreement. Id.

In the Supplementary Information of the NPR, the Commission acknowledged that since OSRA became effective, collective pricing under conference agreements has declined in favor of voluntary rate authority under discussion agreements. 68 FR 67524, December 2, 2003. Nevertheless, we stated that although coordination is voluntary, discussion agreements contain considerable and broad authority to influence tariff rates, service contract rates, and other service matters spanning large geographic areas in the U.S. trades. Id. We explained that:

> OSRA prohibited any mandatory restrictions on individual service contracts, but it allowed agreements to adopt voluntary service contract guidelines on their parties' individual contracts. On a voluntary basis, carriers may collectively set and adhere to rates and terms for their individual service contracts. Thus, while agreement carriers are pricing more independently under OSRA, they still have the power to exert their collective influence over contract rates and terms.

Id.

For this reason, the Commission declines to adopt OCCA's recommendation to eliminate part 3 of section IV of the Information Form (appendix A of part 535) and part 4 of section II of the Monitoring Report

[23] The former Information Form for Class A/B agreements and Monitoring Report for Class A agreements require each party to report its cargo volume and revenue results for each major commodity for each sub-trade within the geographic scope of the agreement. The Commission retained these requirements in the proposed rule, but reduced the amount of reporting to each party's cargo volume and revenue results on only the top 10 agreement-wide commodities.

(appendix B of part 535) that require reporting on each party's cargo volume and revenue results on the top 10 agreement-wide commodities for agreements that contain pricing or pooling [24] authority.

A review of the voluntary service contract guidelines filed with the Commission indicates that parties to most major agreements with pricing authority, whether a conference or a discussion agreement, collectively set guidelines on rate levels and/or rate increases for specific commodities. Parties to such agreements may use and adhere to the commodity rate guidelines in their individual service contracts. As such, agreements with authority to affect pricing, even with the changes that have occurred under OSRA, can and do affect commodity-specific freight rates in the ocean transportation of cargo moving under the individual service contracts of their members.

As stressed throughout this rule, the Commission is assigned the responsibility of overseeing and regulating the concerted behavior of ocean common carriers that, but for the Shipping Act, would otherwise be subject to the antitrust laws. 49 U.S.C. app. 1706. To carry out its statutory duty, the Commission must assess the competitive effects of the concerted behavior of agreement parties on the ocean carriage of cargo in the foreign commerce of the United States. Where parties to an agreement have authority to affect cargo freight rates and charges collectively, reporting requirements for specific information pertaining to such potentially anti-competitive authority is necessary for the Commission to gauge the reasonableness of the parties' behavior in accordance with the standards of the Shipping Act.

It is our view that in most major agreements with pricing authority the parties set freight rates for specific commodities, whether in tariffs or in service contracts, and adopt voluntary service contract guidelines that can affect the cargo freight rates of specific commodities. To regulate this behavior properly, it remains necessary for the Commission to receive some commodity-specific information directly from parties to agreements with authority that may affect pricing.

As such, we disagree with OCCA's arguments regarding the value and usefulness of the commodity specific data collected under the Commission's reporting requirements. This information provides the Commission with meaningful insight on the trends in, and the direction of, pricing under agreements for major commodity movements in the U.S. trades. By examining these data trends for an agreement, the Commission can more accurately gauge the competitive effects of the concerted pricing behavior of the parties in the agreement trade. The ability of the Commission to analyze pricing under an agreement is especially important in cases where the combined market share of the parties is inordinately high, which gives them considerable market power to affect pricing.[25]

The commodity information from the reporting requirements is also used by the Commission for guidance in addressing inquiries, complaints, and petitions for Commission action on an agreement in cases where such issues involve specific commodities. Issues on the pricing behavior of agreement parties continue to be brought before the Commission under OSRA.

We recognize the problems and burden for carriers associated with the former reporting requirements for agreement commodity data. Consequently, we modified these requirements by adding definitions and qualifications with better instructions in the proposed rule to assist carriers in preparing their data, and to improve the consistency and accuracy of the data reported to the Commission. We further substantially reduced the amount of required commodity data to ease the reporting burden on carriers.

We believe that the modified reporting requirements for the commodity data in the proposed rule represent a fair and reasonable compromise for carriers, and are compatible with the changes that have occurred in agreements under ORSA. Further, we believe that most major carriers maintain records of some form on their cargo volume and revenue results by commodity in the agreement trades that they serve. Accordingly, we do not believe that the modified reporting requirements for agreement commodity data in the proposed rule place an undue regulatory burden on carriers. Therefore, these requirements have been retained in this Final Rule. In cases where unique compliance problems or issues arise, a carrier may request relief, with a showing of good cause, from any of the Information Form and Monitoring Report requirements under the waiver procedures provided in the Final Rule.

C. Implementation of the Information Form and Monitoring Report Regulations

In the Supplementary Information of the NPR, the Commission indicated that the new Information Form regulations shall become effective 30 days after publication of a Final Rule in the **Federal Register**, and the new Monitoring Report regulations shall become effective 90 days after publication. To make this section consistent with the balance of the Final Rule, the effective date for the new Information Form regulations has been extended to 60 days after publication. The effective date for the new Monitoring Report regulations remains at 90 days after publication.

IV. Minutes, 46 CFR Part 535, Subpart G

A. Background

In the NPR, the Commission proposed to replace its current regulations in sections 535.706 through 535.708 on the filing requirements for minutes of meetings between parties to certain agreements with modified regulations in proposed section 535.704. The Commission found that modifications to the regulations were necessary to address problems it had encountered in the quality of information being reported in agreement minutes. As such, the proposed rule updated the regulations to require more descriptive reporting on relevant matters discussed at meetings between parties at levels that are pertinent to the decision-making process of the agreement. The proposed rule also sought to accommodate the changes in agreements that have occurred since OSRA.

Specifically, the NPR proposed to modify the current regulations to: (1) Require minutes from agreements based on the authority contained in the agreement; (2) eliminate the filing requirement that limits reporting to meetings at which the parties are authorized to take "final action;'' (3) clarify the level of detail required to describe matters discussed or considered at agreement meetings; (4) establish a new requirement that each document distributed, discussed, or exchanged at meetings be submitted with the minutes; (5) clarify the

[24] Pooling authority in a carrier agreement provides for the division of cargo carryings [cargo traffic], earnings, or revenues and/or losses between or among the parties in accordance with an established formula or scheme, as defined in 46 CFR 535.104(x). Such authority affects pricing by reducing price competition between the parties in the agreement trade.

[25] As discussed supra, the Commission modified the Monitoring Report regulations in the rule to limit reporting from agreements with pricing or pooling authority to those with a combined market share of 35 percent or more, recognizing that such higher market share agreements possess greater market power to affect competition and pricing in the marketplace.

sequential numbering of minutes; (6) reduce the filing time from 30 days to 15 days from the date of the meeting; and (7) update definitions and BTA designations, and, in particular, replace references to "conference [agreements]'' with the term "agreement.'' The Commission set forth these changes to improve the coverage of substantive issues in the filed minutes of meetings while deterring agreement parties from submitting minutes with insufficient descriptions of the relevant matters discussed at their meetings.

B. Summary of Comments and Discussion

Comments on the minutes requirements of the NPR were submitted by OCCA, APL, and PONL. Commenters acknowledged the need for the Commission to receive meaningful minutes of agreement meetings in a timely fashion. OCCA at 20. In general, however, they believe that the proposed minutes requirements are overly broad and unduly burdensome. OCCA at 21–22, APL at 8. In their view, if promulgated as proposed, the minutes regulations would overwhelm both the carriers and the Commission's staff with unnecessary paperwork and information. Id. They raise the following specific issues with respect to the proposed minutes regulations.

1. Agreements Subject to the Minutes Requirements

OCCA and APL take issue with section 535.704(a)(1) of the proposed rule, which assigned minutes requirements to agreements based on the authority contained in the agreement, as opposed to the former regulations, which assigned minutes requirements based on defined types of agreements.[26] Id. They are particularly concerned with the effects of the proposed minutes requirements on operational agreements that contain rate authority. Id. Specifically, OCCA points out that operational agreements with rate authority would be required to file minutes of meetings not only related to rate matters, but also to the "business of the agreement,'' which includes routine operational matters such as the scheduling of vessels, terminal and stevedoring arrangements, and other day-to-day functions. OCCA at 21–22. OCCA believes that minutes reporting on everyday operational issues imposes a significant burden on carriers and exceeds the intent of the rule. Id. To reduce this burden, OCCA recommends that the Commission revise the exemption provisions in section 535.704(d) to limit minutes reporting for types of operational agreements to matters solely relating to the authorities identified in section 535.704(a)(1) of the proposed rule.[27] Id.

APL concurs with OCCA's comments, and also recommends that the Commission delete the discussion or exchange of vessel-operating costs as an authority subject to the minutes requirements in section 535.704(a)(1). APL at 9. Among its comments, APL argues that parties to operational agreements, such as alliance arrangements, must, by the very nature of their agreements, discuss vessel-operating costs. Id. at 7. It asserts that the discussion of such costs is inherently relevant to making vessel deployment and operational decisions, which achieve efficiencies and cost savings. Id. Moreover, as mentioned above, APL questions the validity of the Commission's decision in FMC Docket No. 94–31, which originally assigned reporting requirements to agreements with such authority. Id. at 8.

It is not the intention of the Commission to elicit unnecessary information or impose an unjust reporting burden on agreement members under the minutes requirements. As such, we advise carriers to examine the authorities contained in their agreements, and where appropriate, eliminate any unnecessary or underutilized authority identified in section 535.704(a)(1) in the Final Rule, as modified below. While the Commission recognizes that revisions to the proposed rule would provide greater clarity and reduce any unnecessary reporting burden, particularly with respect to minor administrative and operational matters, the Commission disagrees with OCCA's recommendation on the exemption provisions in section 535.704(d).

To exempt types of agreements and to tie minutes reporting to discussions solely relating to the authorities in section 535.704(a)(1), as OCCA recommends, would undermine the clear intent of this rule. As previously discussed, the proposed rule updates the regulations to identify agreements by their authorities instead of narrowly defined agreement types. Similarly, the Commission believes that limiting minutes reporting to the authorities in section 535.704(a)(1) might also be interpreted too narrowly and relevant information might be omitted from the minutes.

The authorities in an agreement are interrelated, and the decisions reached pursuant to one authority may have a bearing on the decisions reached under the other authorities of the agreement. Without clear reporting in the minutes, the cause and effect relationship between the authorities in an agreement might not be apparent to the Commission. For instance, the discussion by parties of substantive operational matters that would affect the supply of vessel capacity under an agreement that also has rate authority would be relevant because supply can have a direct impact on the level of pricing in the marketplace. Consequently, such discussions must be fully addressed in minutes filed with the Commission.

Instead of specifically identifying which relevant issues need to be addressed in the minutes, the Commission believes that the correct approach to add clarity and reduce the reporting burden is to identify those matters that can be exempted from the minutes for all agreements subject to this section. Therefore, section 535.704(d) has been revised to include the following exemptions in the Final Rule:

(d) *Exemptions.* For parties to agreements subject to this section, the following exemptions shall apply:

(1) Minutes of meetings between parties are not required to reflect discussions of matters set forth in §§ 535.408(b)(2), (b)(3), (b)(4)(iii), (b)(4)(iv), (b)(4)(v) and (b)(4)(vi);[28]

[26] Section 535.704(a)(1) of the proposed rule reads:

[t]his section applies to agreements authorized to engage in any of the following activities: discussion or establishment of any type of rates, whether in tariffs or service contracts; pooling or apportionment of cargo; discussion of revenues, losses, or earnings; discussion or exchange of vessel-operating costs; discussion or agreement on service contract matters, including the establishment of voluntary service contract guidelines.''

68 FR 67545, December 2, 2003.

[27] OCCA suggests that a new paragraph be added to section 535.704(d) to state,

[t]o the extent a space charter, sailing or capacity rationalization agreement contains one or more types of the authority set forth in § 535.704(a), the minutes of meetings of the agreement need only reflect discussions held and agreements reached pursuant to such authority, and need not reflect discussion of or agreement upon routine operational matters such as those identified in §§ 535.508(b)(2), (b)(3), (b)(4) and (b)(5).

OCCA at 22.

[28] These sections include the following operational and administrative matters: (1) The terms and conditions of space allocation and slot sales, the procedures for allocating space, the establishment of space charter rates, and the terms and conditions of charter parties; (2) stevedoring, terminal, and related services including the operation of tonnage centers or other joint container marshaling facility; (3) procurement, maintenance, or sharing of office facilities, furnishings, equipment and supplies, the allocation and assessment of costs thereof, or the provisions for the administration and management of such agreements by duly appointed individuals; (4) procedures for anticipating parties' space requirements; (5)

Continued

(2) Minutes of meetings between parties are not required to reflect discussions of matters set forth in § 535.408(b)(5) to the extent that such discussions involve minor operational matters that have little or no impact on the frequency of vessel calls at ports or the amount of vessel capacity offered by the parties in the geographic scope of the agreement; and

(3) Minutes of meetings between parties are not required to reflect discussions of or actions taken with regard to rates that, if adopted, would be required to be published in an appropriate tariff. This exemption does not apply to discussions concerning general rate policy, general rate changes, the opening or closing of rates, service contracts, or time/volume rates.

It should be noted that section 535.408(b)(4)(ii) regarding the collection, collation, and circulation of data and reports from or to members of an agreement is omitted from the exemptions in section 535.704(d) in the Final Rule. The collection and circulation of commercial information in an agreement can directly impact competition between the agreement parties and in the agreement trade. To analyze the competitive impact of an agreement properly, it is important for the Commission to remain aware of how and what commercial information is being shared and used under the agreement. Consequently, a full account of the discussions in meetings between parties on administrative matters for sharing information within the agreement must be addressed in the minutes. For agreement filing purposes, however, the Commission recognizes that the regulations must provide parties with enough flexibility to perform their daily administrative functions pursuant to the express enabling authority of their agreements without requiring the filing of continuous agreement modifications on such matters. The Commission can remain informed of the information sharing activities of the parties through filed minutes.

With respect to the discussion or exchange of vessel-operating cost data, the Commission finds it unnecessarily redundant to include such authority in section 535.704(a)(1), as was similarly the Commission's finding for the Information Form and Monitoring Report regulations. We are primarily concerned with the sharing of pricing information, which includes costs, as such information sharing affects price competition. Where vessel-operating cost data is shared for pricing purposes, the agreement would already be subject to the minutes requirements because it contains pricing authority. Agreements authorizing the exchange of vessel-operating cost data without any of the other authorities in section 535.704(a)(1), such as a simple vessel-sharing arrangement, are operational in nature, and, therefore, not subject to the minutes requirements. Accordingly, the requirement to file minutes based on agreement authority to discuss or exchange vessel-operating cost data has been deleted from section 535.704(a)(1) in the Final Rule.

The Commission believes that these revisions in the Final Rule provide carriers with a sufficient degree of reporting relief sought under the minutes requirements. It should also be noted that parties to an agreement subject to this section may request a waiver for good cause from any of the minutes requirements in accordance with the procedures provided in section 535.705. The Commission would consider granting a waiver of some or all of the minutes requirements in cases where the parties could specifically demonstrate that the agreement raises little or no anti-competitive concern under the Shipping Act, or where the parties could demonstrate that such reporting would be irrelevant or would create an undue burden.

2. Definition of Meetings

OCCA contends that the definition of the term "meeting'' proposed in section 535.704(b) would increase the number of minutes filings and impose a significant burden on carriers by eliminating "authority to take final action'' as a precondition to the minutes requirements and by including discussions among as few as two parties within the meaning of the term. OCCA at 21. PONL raises a number of questions on what constitutes a meeting under the Commission's proposed definition. PONL at 2. As such, PONL recommends that the Commission clarify the definition of a meeting for it to be meaningful, enforceable, and one to which carriers can adhere. Id. Specifically, PONL suggests that the Commission make clear that informal discussions outside the context of an agreement, especially when the representatives do not have responsibilities relating to the agreement, should not be included in the minutes requirements. Id.

The Commission believes that the definition in proposed section 535.704(b) clearly conveys the meaning and intent of the term "meeting,'' and has adopted this definition in the Final Rule without any further revision.[29] In the NPR, we explained that:

> [T]he current definition of "meeting'' is ambiguous and causes confusion over which meetings or discussions held under an agreement are subject to the requirement to file minutes with the Commission. Further, differing interpretations of the regulations have resulted in minutes of meetings not being filed when such meetings covered substantive issues. Questions have arisen over whether the minutes filing requirement is based on the level of authority of the participants at a given meeting (*i.e.*, carrier representatives, committees, and subcommittees authorized to take final action on behalf of the agreement, even if the discussions did not result in "final'' decisions), or on whether "final action'' was taken.

68 FR 67531, December 2, 2003.

Accordingly, the Commission finds the current "final action'' concept for meetings to be unworkable because of the persistently inadequate information we have received in agreement minutes. The definition in the Final Rule corrects this deficiency to ensure that the Commission receives sufficient information on the substantive issues discussed among parties to agreements subject to the minutes requirements, as such discussions relate to the business of the agreement. Where informal discussions occur among three or more parties pertaining to the business of the agreement, this constitutes a meeting as defined in section 535.704(b) of the Final Rule, and minutes of such discussions must be filed with the Commission. The business of the agreement includes all of the authorities provided for in the filed agreement. If the discussion in a meeting is of a nature that implicates an authority contained in the filed agreement, minutes of the discussion must be filed with the Commission unless specifically exempted under section 535.704(d).

With respect to electronic communication, we noted in the NPR that "it is not the intent of the Commission to require the filing of minutes for such discussions as two-party electronic communication.'' Id. For further clarity, we add that a meeting subject to this section would take place where electronic communication is used by three or more parties to discuss the business of the agreement, or where an agreement is reached between any number of parties via electronic communication. More

maintenance of books and records; and (6) details as to the following matters as between parties to the agreement: Insurance, procedures for resolutions of disputes relating to loss and/or damage of cargo, and force majeure clauses.

[29] The Commission's revisions to sections 535.704(a)(1) and 535.704(d) of the Final Rule lessen the reporting burden on carriers and reduce the number of minutes filings that would have been required by the proposed rule, while focusing minutes reporting on the substantive issues discussed in meetings between agreement parties.

precisely, a meeting would occur where electronic communication performs the functional equivalent of a person-to-person discussion between parties to an agreement. Such a meeting is subject to the minutes requirements.[30] This would include polls of the agreement membership conducted via electronic communication or telephone. The electronic transmission of information between or among the parties, which does not contemplate discussion among the parties, however, would not be considered a meeting subject to the minutes requirements.

3. Content of Minutes

OCCA objects to section 535.704(c)(3) of the proposed rule in that it omits language in the current regulations which provides that the content of minutes need not disclose the identity of parties that participate in discussions or the votes taken. OCCA at 23. OCCA argues that if the proposed minutes requirements intend for participants in discussions to be identified, agreement parties would be reluctant to make proposals and state their positions clearly, which would have a ''chilling effect'' on agreement meetings. Id. at 23–24. To remedy this concern, OCCA recommends that the Commission revise section 535.704(c)(3) to include similar language as formerly provided.[31] Id.

OCCA further objects to section 535.704(c)(4) of the proposed rule that requires the submission of documents distributed, discussed, or exchanged at meetings between agreement parties. Id. OCCA argues that the proposed requirement is so expansive that it would disclose documents reflecting individual positions or proposals circulated at meetings whether or not such matters were adopted by the agreement. Id. OCCA also claims that disclosing the identity of the individual positions or proposals of parties under the proposed minutes requirements would have a ''chilling effect'' on agreement meetings, and that the submission of documents, as proposed, would create a huge burden for the carriers and the Commission. Id. at 23–25. OCCA recommends that the Commission revise section 535.704(c)(4) to limit the submission of documents to only those relating to the subject matter for which minutes would be filed.[32] Id. at 25. In this manner, OCCA believes that the minutes requirements would preserve anonymity by enabling agreement minutes to reflect proposals and discussions without attributing them to a particular party. Id.

The Commission agrees with OCCA to the extent that the proposed minutes requirements were not intended to disclose the identity of parties to individual proposals, positions, or votes that transpired at agreement meetings. Accordingly, section 535.704(c)(3) has been revised to include OCCA's recommended language in the Final Rule.

With respect to the submission of documents, the Commission believes that OCCA's recommendation to provide minutes reporting in lieu of submitting certain types of documents would undermine the intent of this requirement. Specifically, this requirement is aimed at uncovering and obtaining copies of all relevant documents circulated at agreement meetings.[33]

In the NPR, we explained that:

> [I]n instances where a document is identified in the minutes, Commission staff must then determine its importance and attempt to obtain a copy of the document. We believe it is more likely that many documents, collectively prepared or used by agreement members, remain unknown to the Commission.
>
> 68 FR 67532, December 2, 2003.

On the issue of burden, we further noted in the NPR that:

> The Commission considered, as an alternative, requiring agreements to submit a summary of all documents discussed at minuted meetings in lieu of the actual document. However, we rejected this proposal, believing that requiring agreements to create a summary, simply for filing purposes, would be more burdensome than requiring submission of the documents themselves. In addition, this approach would be less burdensome on the Commission's staff as it would reduce the utilization of scarce resources in tracking down documents, and instead allow us to focus on review and analysis of concerted activities.
>
> Id.

The above notwithstanding, the Commission understands OCCA's concerns for protecting the anonymity of the individual parties with respect to the submission of documents. The Commission is not overly concerned with who circulated a proposal at a meeting, but rather what proposals were circulated and the discussions or decisions that took place. Consistent with the revised language added to section 535.704(c)(3), section 535.704(c)(4) in the Final Rule has been revised to add the following statement:

> [a]ny documents submitted to the Commission pursuant to this section need not disclose the identity of the party or parties that circulated the document at the meeting.

4. Filing Time for Minutes

OCCA objects to the shorter filing time for minutes as proposed in the NPR, which was reduced from 30 days to 15 days after a meeting. OCCA at 26. It argues that under the new minutes requirements, and the resulting increase in the number of minutes filings, agreements will need more time, not less, to file minutes in compliance with the regulations. Id. OCCA recommends that if a shorter period is necessary, the Commission revise the rule by adjusting the filing time to 21 days after a meeting. Id. PONL concurs with OCCA's recommendation and further recommends that minutes of meetings between two or three agreement parties be permitted to file within 30 days because an administrator for the agreement might not necessarily be present at such a meeting. PONL at 3.

OCCA requests that the Commission stay the implementation of the shorter filing time for six months after the Final Rule becomes effective, whereby agreement parties may acclimate to the new regulations. OCCA at 26–27. OCCA also seeks clarification to ensure that the new regulations will only apply to meetings after the Final Rule becomes effective. Id. at 27.

In consideration of these concerns, we have revised the Final Rule by adjusting the time for filing minutes to 21 days after a meeting. The revised filing time, however, shall apply to all meetings subject to the minutes requirements of the Final Rule regardless of the number

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[30] Where a meeting subject to this section has occurred, actual copies of any textual communications, which were electronically transmitted between the parties, are not required to be filed with the Commission, except for those that constitute documents as identified in section 535.704(c)(4) of the Final Rule. Rather, the minutes of such a meeting that must be filed with the Commission should contain a description of the discussions that took place via electronic communication.

[31] OCCA suggests that section 535.704(c)(3) be revised to state,

> [a] description of discussions detailed enough so that a non-participant reading the minutes could reasonably gain a clear understanding of the nature [and extent]of the discussions and, where applicable, any decisions reached. Such description need not disclose the identity of the parties that participated in the discussion or the votes taken.
>
> OCCA at 24.

[32] Specifically, OCCA suggests that section 535.704(c)(4) be revised to read,

> [a]ny report, statistical compilation, analytical study, or other similar work in written or electronic format which is distributed, exchanged or discussed at the meeting. Memoranda or proposals prepared by one or more member lines or the agreement secretariat (other than reports, statistical compilations, analytical studies or similar works) need not be provided if the minutes reflect discussion of the subject of the memorandum or proposal.
>
> OCCA at 25.

[33] We note that documents circulated at meetings pertaining to matters exempted in section 535.704(d) of the Final Rule are not required to be submitted with minutes filings.

of agreement parties participating in a meeting. To craft regulations with varying filing periods based on the number of participants in a meeting would overly complicate the filing process. Moreover, we anticipate that, in general, minutes of meetings between two or three agreement parties would be less involved, and thus easier to prepare for filing, than minutes of meetings with more attendees.

OCCA's request for a stay on the implementation of the shorter filing time is denied.[34] As with other sections of this rule, the new minutes requirements shall become effective 60 days after the Final Rule is published in the **Federal Register**, at which time meetings between parties in agreements identified in section 535.704(a)(1) of the Final Rule shall be subject to the new regulations.

5. Liability for the Filing of Minutes

In response to the proposed minutes requirements, PONL raises questions regarding who has the obligation to file minutes and who is liable for any violation of the filing requirements. PONL at 2. PONL believes that the failure of two or three agreement parties to file minutes of their meetings should not extend liability to the other agreement parties that did not participate in the meetings. Id. at 3.

The Commission disagrees with PONL's view regarding the liability of agreement parties to file minutes of their meetings. It is our policy that the obligation and liability for complying with filing requirements pertaining to an agreement, whether minutes, Information Forms, Monitoring Reports, or other documentation, are shared equally by all parties to the agreement.

In terms of the filing practices of agreements, we note that agreements often choose to divide the various filing requirements among themselves or through a third party, such as an agreement secretariat or a filing counsel. Even though some agreements file portions of their data individually, such as Monitoring Report information, all parties of an agreement are jointly liable for the failure of the agreement to comply with the regulations.[35] By promulgating this rule, the Commission has not altered liability for violations. One party's failure to file imposes liability on the entire agreement, as well as its members. Under the new regulations, a party to an agreement continues to be liable for the actions, and failures, of the other parties to the agreement.[36]

V. Statutory Reviews

The reporting, recordkeeping, and disclosure requirements contained in this Final Rule have been submitted to the Office of Management and Budget (OMB). Public burden for this collection of information is estimated to average 37 hours per response for agreement filings (including Information Forms); 250 hours per quarterly response for Monitoring Reports from major pricing agreements; 170 hours per quarterly response for Monitoring Reports from less anti-competitive pricing agreements; 40 hours per quarterly response for Monitoring Reports from capacity rationalization agreements; and two hours per response for minutes filing. The overall estimated burden is 35,770 hours per annum, a reduction of 59.8 percent from the current estimated burden of 88,970 hours per annum. These estimates include, as applicable, the time needed to review instructions, develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to respond to a collection of information, search existing data sources, gather and maintain the data needed, and complete and review the collection of information; and transmit or otherwise disclose the information.

The Chairman of the Federal Maritime Commission certifies, pursuant to section 605 of the Regulatory Flexibility Act, 5 U.S.C. 605, that this Final Rule will not have a significant impact on a substantial number of small entities. The affected universe of parties is limited to ocean common carriers, passenger vessel operators, and marine terminal operators. The Commission has determined that these entities do not come under the program and policies mandated by the Small Business Regulatory Enforcement Fairness Act as they typically exceed the threshold figures for number of employees or annual receipts or both to qualify as a small entity under the Small Business Administration Guidelines.

List of Subjects

46 CFR Part 501

Authority delegations, Organization and functions, Seals and insignia.

46 CFR Part 535

Freight, Maritime carriers, Reporting and recordkeeping requirements.

■ The Federal Maritime Commission is amending parts 501 and 535 of subchapter A and subchapter B, respectively, of chapter IV of title 46 of the Code of Federal Regulations as follows:

PART 501—THE FEDERAL MARITIME COMMISSION—GENERAL

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

Authority: 5 U.S.C. 551–557, 701–706, 2903, and 6304; 31 U.S.C. 3721; 41 U.S.C. 414 and 418; 44 U.S.C. 501–520 and 3501–3520; 46 U.S.C. app. 876, 1111, and 1701–1720; Reorganization Plan No. 7 of 1961, 26 FR 7315, August 12, 1961; Pub. L. 89–56, 79 Stat. 195; 5 CFR part 2638; Pub. L. 89–777, 80 Stat. 1356; Pub. L. 104–320, 110 Stat. 3870.

■ 2. Amend § 501.26 by revising paragraphs (c) and (d), and adding new paragraphs (o) and (p) to read as follows:

§ 501.26 Delegation to the Director, Bureau of Trade Analysis.

* * * * *

(c) Authority to grant or deny applications filed under § 535.504 of this chapter for waiver of the Information Form requirements in subpart E of part 535.

(d) Authority to grant or deny applications filed under § 535.705 of this chapter for waiver of the reporting requirements in subpart G of part 535 of this chapter.

* * * * *

(o) Authority to require Monitoring Reports from, or prescribe alternative periodic reporting requirements for, parties to agreements under § 535.702(c) and (d) of this chapter.

(p) Authority to require parties to agreements subject to the Monitoring Report requirements in § 535.702(a)(2) of this chapter to report their agreement commodity data on a sub-trade basis pursuant to § 535.703(d) of this chapter.

■ 3. Revise part 535 to read as follows:

[34] Again, the Commission believes that the revisions to the minutes requirements in the Final Rule, which reduce the reporting burden and the number of minutes filings that would have been required by the NPR, provide sufficient relief for agreement parties subject to this section.

[35] For some agreements, the Commission has granted a waiver to allow each party to file its commercially sensitive data separately under the Monitoring Report requirements. These are usually smaller agreements that do not employ a third party to handle such matters. Nevertheless, where one party fails to file its required data, the entire agreement fails to meet the Monitoring Report requirements in violation of the Commission's regulations and may be subject to civil penalties under section 13(a) of the Shipping Act. 46 U.S.C. app. 1712(a).

[36] We have also clarified the proposed rule at section 535.902 regarding falsification of reports to encompass all of the information and reporting requirements contained in subparts E and G of part 535.

PART 535—OCEAN COMMON CARRIER AND MARINE TERMINAL OPERATOR AGREEMENTS SUBJECT TO THE SHIPPING ACT OF 1984

Subpart A—General Provisions

Subpart B—Scope

Subpart C—Exemptions

Subpart D—Filing of Agreements

Subpart E—Information Form Requirements

Subpart F—Action on Agreements

Subpart G—Reporting Requirements

Subpart H—Mandatory and Prohibited Provisions

Subpart I—Penalties

Subpart J—Paperwork Reduction

Authority: 5 U.S.C. 553; 46 U.S.C. 1701–1707, 1709–1710, 1712 and 1714–1718; Pub. L. 105–258, 112 Stat. 1902 (46 U.S.C. 1701 note); Sec. 424, Pub. L. 105–383, 112 Stat. 3440.

Subpart A—General Provisions

§ 535.101 Authority.

The rules in this part are issued pursuant to the authority of section 4 of the Administrative Procedure Act (5 U.S.C. 553), sections 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 15, 16, 17, and 19 of the Shipping Act of 1984 (''the Act''), and the Ocean Shipping Reform Act of 1998, Pub. L. 105–258, 112 Stat. 1902.

§ 535.102 Purpose.

This part implements those provisions of the Act that govern agreements by or among ocean common carriers and agreements among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers. This part also sets forth more specifically certain procedures provided for in the Act.

§ 535.103 Policies.

(a) The Act requires that agreements be processed and reviewed, upon their initial filing, according to strict statutory deadlines. This part is intended to establish procedures for the orderly and expeditious review of filed agreements in accordance with the statutory requirements.

(b) The Act requires that agreements be reviewed, upon their initial filing, to ensure compliance with all applicable provisions of the Act and empowers the Commission to obtain information to conduct that review. This part identifies those types of agreements that must be accompanied by information submissions when they are first filed, and sets forth the kind of information for certain agreements that the Commission believes relevant to that review. Only information that is relevant to such a review is requested. It is the policy of the Commission to keep the costs of regulation to a minimum and at the same time obtain information needed to fulfill its statutory responsibility.

(c) To further the goal of expedited processing and review of agreements upon their initial filing, agreements are required to meet certain minimum requirements as to form. These requirements are intended to ensure expedited review and should assist parties in preparing agreements. These requirements as to form do not affect the substance of an agreement and are intended to allow parties the freedom to develop innovative commercial relationships and provide efficient and economic transportation systems.

(d) The Act itself excludes certain agreements from the filing requirements and authorizes the Commission to exempt other classes of agreements from any requirement of the Act or this part. To minimize delay in the implementation of routine agreements and to avoid the private and public cost of unnecessary regulation, certain classes of agreements are exempt from the filing requirements of this part.

(e) Under the regulatory framework established by the Act, the role of the Commission as a monitoring agency has been enhanced. The Act favors greater freedom in allowing parties to form their commercial arrangements. This, however, requires greater monitoring of agreements after they have become effective to assure their continued compliance with all applicable provisions of the Act. The Act empowers the Commission to impose certain recordkeeping and reporting requirements. This part identifies those agreements that require specific record retention and reporting to the Commission and prescribes the applicable period of record retention, the form and content of such reporting, and the applicable time periods for filing with the Commission. Only information that is necessary to assure that the Commission's monitoring responsibilities will be fulfilled is requested.

(f) The Act requires that conference agreements contain certain mandatory provisions. Each conference agreement must:

(1) State its purpose;

(2) Provide reasonable and equal terms and conditions for admission and readmission to membership;

(3) Allow for withdrawal from membership upon reasonable notice without penalty;

(4) Require an independent neutral body to police the conference, if requested by a member;

(5) Prohibit conduct specified in sections 10(c)(1) or 10(c)(3) of the Act;

(6) Provide for a consultation process;

(7) Establish procedures for considering shippers' requests and complaints; and

(8) Provide for independent action.

(g) To promote competitive and efficient transportation and a greater reliance on the marketplace, the Act places limits on carriers' agreements regarding service contracts. Carriers may not enter into an agreement to prohibit or restrict members from engaging in contract negotiations, may not require members to disclose service contract negotiations or terms and conditions (other than those required to be published), and may not adopt mandatory rules or requirements affecting the right of an agreement member or agreement members to negotiate and enter into contracts. However, agreement members may adopt voluntary guidelines covering the terms and procedures of members' contracts.

§ 535.104 Definitions.

When used in this part:

(a) *Agreement* means an understanding, arrangement, or association, written or oral (including any modification, cancellation or appendix) entered into by or among ocean common carriers and/or marine terminal operators, but does not include a maritime labor agreement.

(b) *Antitrust laws* means the Act of July 2, 1890 (ch. 647, 26 Stat. 209), 15 U.S.C. 1, as amended; the Act of October 15, 1914 (ch. 323, 38 Stat. 730), 15 U.S.C. 12, as amended; the Federal Trade Commission Act (38 Stat. 717), 15 U.S.C. 41, as amended; sections 73 and 74 of the Act of August 27, 1894 (28 Stat. 570), 15 U.S.C. 8, 9, as amended; the Act of June 19, 1936 (ch. 592, 49 Stat. 1526), 15 U.S.C. 13, as amended; the Antitrust Civil Process Act (76 Stat. 548), 15 U.S.C. 1311, note as amended; and amendments and Acts supplementary thereto.

(c) *Appendix* means a document containing additional material of limited application and appended to an agreement, distinctly differentiated from the main body of the basic agreement.

(d) *Assessment agreement* means an agreement, whether part of a collective bargaining agreement or negotiated separately, that provides for collectively bargained fringe benefit obligations on other than a uniform man-hour basis regardless of the cargo handled or type of vessel or equipment utilized.

(e) *Capacity rationalization* means a concerted reduction, stabilization, withholding, or other limitation in any manner whatsoever by ocean common carriers on the size or number of vessels or available space offered collectively or individually to shippers in any trade or service.

(f) *Common carrier* means a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that:

(1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and

(2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel tanker, or by a vessel when primarily engaged in the carriage of perishable agricultural commodities:

(i) If the common carrier and the owner of those commodities are wholly owned, directly or indirectly, by a person primarily engaged in the marketing and distribution of those commodities; and

(ii) Only with respect to those commodities.

(g) *Conference agreement* means an agreement between or among two or more ocean common carriers that provides for the fixing of and adherence to uniform tariff rates, charges, practices, and conditions of service relating to the receipt, carriage, handling and/or delivery of passengers or cargo for all members. The term does not include joint service, pooling, sailing, space charter, or transshipment agreements.

(h) *Consultation* means a process whereby a conference and a shipper confer for the purpose of promoting the commercial resolution of disputes and/or the prevention and elimination of the occurrence of malpractices.

(i) *Cooperative working agreement* means an agreement that establishes exclusive, preferential, or cooperative working relationships that are subject to the Act, but that do not fall precisely within the parameters of any specifically defined agreement.

(j) *Effective agreement* means an agreement effective under the Act.

(k) *Equal access agreement* means an agreement between ocean common carriers of different nationalities, as determined by the incorporation or domicile of the carriers' operating companies, whereby such ocean common carriers associate for the purpose of gaining reciprocal access to cargo that is otherwise reserved by national decree, legislation, statute or regulation to carriage by the merchant marine of the carriers' respective nations.

(l) *Independent neutral body* means a disinterested third party, authorized by a conference and its members to review, examine, and investigate alleged breaches or violations of the conference agreement and/or the conference's properly promulgated tariffs, rules, or regulations by any member of the conference.

(m) *Information Form* means the form containing economic information that must accompany the filing of certain agreements and modifications.

(n) *Interconference agreement* means an agreement between conferences.

(o) (1) *Joint service agreement* means an agreement between ocean common carriers operating as a joint venture whereby a separate service is established that:

(i) Holds itself out in its own distinct operating name;

(ii) Independently fixes its own rates, charges, practices, and conditions of service or chooses to participate under its operating name in another agreement that is duly authorized to determine and implement such activities;

(iii) Independently publishes its own tariff or chooses to participate under its operating name in an otherwise established tariff;

(iv) Issues its own bills of lading; and

(v) Acts generally as a single carrier.

(2) The common use of facilities in a joint service may occur, and there is no competition between members for cargo in the agreement trade; but they otherwise maintain their separate identities.

(p) *Marine terminal facilities* means one or more structures (and services connected therewith) comprising a terminal unit, including, but not limited to docks, berths, piers, aprons, wharves, warehouses, covered and/or open storage space, cold storage plants, grain elevators and/or bulk cargo loading and/or unloading structures, landings, and receiving stations, used for the transmission, care and convenience of cargo and/or passengers or the interchange of same between land and ocean common carriers or between two

ocean common carriers. This term is not limited to waterfront or port facilities and includes so-called off-dock container freight stations at inland locations and any other facility from which inbound waterborne cargo may be tendered to the consignee or outbound cargo may be received from shippers for vessel or container loading.

(q) *Marine terminal operator* means a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to subchapter II of chapter 135 of title 49 U.S.C. This term does not include shippers or consignees who exclusively furnish marine terminal facilities or services in connection with tendering or receiving proprietary cargo from a common carrier or water carrier.

(r) *Maritime labor agreement* means a collective-bargaining agreement between an employer subject to the Act or group of such employers, and a labor organization representing employees in the maritime or stevedoring industry, or an agreement preparatory to such a collective-bargaining agreement among members of a multi-employer bargaining group, or an agreement specifically implementing provisions of such a collective-bargaining agreement or providing for the formation, financing or administration of a multi-employer bargaining group; but the term does not include an assessment agreement.

(s) *Modification* means any change, alteration, correction, addition, deletion, or revision of an existing effective agreement or to any appendix to such an agreement.

(t) *Monitoring Report* means the report containing economic information that must be filed at defined intervals with regard to certain agreements that are effective under the Act.

(u) *Ocean common carrier* means a common carrier that operates, for all or part of its common carrier service, a vessel on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker.

(v) *Ocean freight forwarder* means a person in the United States that dispatches shipments from the United States via common carriers and books or otherwise arranges space for those shipments on behalf of shippers; and processes the documentation or performs related activities incident to those shipments.

(w) *Person* means individuals, corporations, partnerships and associations existing under or authorized by the laws of the United States or of a foreign country.

(x) *Pooling agreement* means an agreement between ocean common carriers that provides for the division of cargo carryings, earnings, or revenue and/or losses between the members in accordance with an established formula or scheme.

(y) *Port* means the place at which an ocean common carrier originates or terminates (and/or transships) its actual ocean carriage of cargo or passengers as to any particular transportation movement.

(z) *Rate,* for purposes of this part, includes both the basic price paid by a shipper to an ocean common carrier for a specified level of transportation service for a stated quantity of a particular commodity, from origin to destination, on or after a stated effective date or within a defined time frame, and also any accessorial charges or allowances that increase or decrease the total transportation cost to the shipper.

(aa) *Rate agreement* means an agreement between ocean common carriers that authorizes the discussion of or agreement on, either on a binding basis under a common tariff or on a non-binding basis, any kind of rate or charge.

(bb) *Sailing agreement* means an agreement between ocean common carriers to provide service by establishing a schedule of ports that each carrier will serve, the frequency of each carrier's calls at those ports, and/or the size and capacity of the vessels to be deployed by the parties. The term does not include joint service agreements, or capacity rationalization agreements.

(cc) *Service contract* means a written contract, other than a bill of lading or a receipt, between one or more shippers and an individual ocean common carrier or an agreement between or among ocean common carriers in which the shipper or shippers makes a commitment to provide a certain volume or portion of cargo over a fixed time period, and the ocean common carrier or the agreement commits to a certain rate or rate schedule and a defined service level, such as assured space, transit time, port rotation, or similar service features. The contract may also specify provisions in the event of nonperformance on the part of any party.

(dd) *Shipper* means:

(1) A cargo owner;

(2) The person for whose account the ocean transportation is provided;

(3) The person to whom delivery is to be made;

(4) A shippers' association; or

(5) A non-vessel-operating common carrier (*i.e.*, a common carrier that does not operate the vessels by which the ocean transportation is provided and is a shipper in its relationship with an ocean common carrier) that accepts responsibility for payment of all charges applicable under the tariff or service contract.

(ee) *Shippers' association* means a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group in order to secure carload, truckload, or other volume rates or service contracts.

(ff) *Shippers' requests and complaints* means a communication from a shipper to a conference requesting a change in tariff rates, rules, regulations, or service; protesting or objecting to existing rates, rules, regulations or service; objecting to rate increases or other tariff changes; protesting allegedly erroneous service contract or tariff implementation or application, and/or requesting to enter into a service contract. Routine information requests are not included in the term.

(gg) *Space charter agreement* means an agreement between ocean common carriers whereby a carrier (or carriers) agrees to provide vessel space for use by another carrier (or carriers) in exchange for compensation or services. The arrangement may include arrangements for equipment interchange and receipt/delivery of cargo, but may not include capacity rationalization as defined in this subpart.

(hh) *Sub-trade* means the scope of ocean liner cargo carried between each U.S. port range and each foreign country within the scope of the agreement. U.S. port ranges are defined as follows:

(1) Atlantic and Gulf shall encompass ports along the eastern seaboard and the Gulf of Mexico from the northern boundary of Maine to Brownsville, Texas. It also includes all ports bordering on the Great Lakes and their connecting waterways, all ports in the State of New York on the St. Lawrence River, and all ports in Puerto Rico and the U.S. Virgin Islands; and

(2) Pacific shall encompass all ports in the States of Alaska, Hawaii, California, Oregon, and Washington. It also includes all ports in Guam, American Samoa, Northern Marianas, Johnston Island, Midway Island, and Wake Island.

(ii) *Through transportation* means continuous transportation between origin and destination for which a through rate is assessed and which is offered or performed by one or more

carriers, at least one of which is an ocean common carrier, between a United States point or port and a foreign point or port.

(jj) *Transshipment agreement* means an agreement between an ocean common carrier serving a port or point of origin and another such carrier serving a port or point of destination, whereby cargo is transferred from one carrier to another carrier at an intermediate port served by direct vessel call of both such carriers in the conduct of through transportation and the publishing carrier performs the transportation on one leg of the through transportation on its own vessel or on a vessel on which it has rights to space under a filed and effective agreement. Such an agreement does not provide for the concerted discussion, publication or otherwise fixing of rates for the account of the cargo interests, conditions of service or other tariff matters other than the tariff description of the transshipment service offered, the port of transshipment and the participation of the nonpublishing carrier. An agreement that involves the movement of cargo in a domestic offshore trade as part of a through movement of cargo via transshipment involving the foreign commerce of the United States shall be considered to be in the foreign commerce of the United States and, therefore, subject to the Act and this part.

(kk) *Vessel-operating costs* means any of the following expenses incurred by an ocean common carrier: salaries and wages of officers and unlicensed crew, including relief crews and others regularly employed aboard the vessel; fringe benefits; expenses associated with consumable stores, supplies and equipment; vessel fuel and incidental costs; vessel maintenance and repair expense; hull and machinery insurance costs; protection and indemnity insurance costs; costs for other marine risk insurance not properly chargeable to hull and machinery insurance or to protection and indemnity insurance accounts; and charter hire expenses.

Subpart B—Scope

§ 535.201 Subject agreements.

(a) *Ocean common carrier agreements.* This part applies to agreements by or among ocean common carriers to:

(1) Discuss, fix, or regulate transportation rates, including through rates, cargo space accommodations, and other conditions of service;

(2) Pool or apportion traffic, revenues, earnings, or losses;

(3) Allot ports or restrict or otherwise regulate the number and character of sailings between ports;

(4) Limit or regulate the volume or character of cargo or passenger traffic to be carried;

(5) Engage in exclusive, preferential, or cooperative working arrangements among themselves or with one or more marine terminal operators;

(6) Control, regulate, or prevent competition in international ocean transportation; or

(7) Discuss and agree on any matter related to service contracts.

(b) *Marine terminal operator agreements.* This part applies to agreements among marine terminal operators and among one or more marine terminal operators and one or more ocean carriers to:

(1) Discuss, fix, or regulate rates or other conditions of service; or

(2) Engage in exclusive, preferential, or cooperative working arrangements, to the extent that such agreements involve ocean transportation in the foreign commerce of the United States.

§ 535.202 Non-subject agreements.

This part does not apply to the following agreements:

(a) Any acquisition by any person, directly or indirectly, of any voting security or assets of any other person;

(b) Any maritime labor agreement;

(c) Any agreement related to transportation to be performed within or between foreign countries;

(d) Any agreement among common carriers to establish, operate, or maintain a marine terminal in the United States; and

(e) Any agreement among marine terminal operators that exclusively and solely involves transportation in the interstate commerce of the United States.

Subpart C—Exemptions

§ 535.301 Exemption procedures.

(a) *Authority.* The Commission, upon application or its own motion, may by order or rule exempt for the future any class of agreement involving ocean common carriers and/or marine terminal operators from any requirement of the Act if it finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce.

(b) *Optional filing.* Notwithstanding any exemption from filing, or other requirements of the Act and this part, any party to an exempt agreement may file such an agreement with the Commission.

(c) *Application for exemption.* Applications for exemptions shall conform to the general filing requirements for exemptions set forth at § 502.67 of this title.

(d) *Retention of agreement by parties.* Any agreement that has been exempted by the Commission pursuant to section 16 of the Act shall be retained by the parties and shall be available upon request by the Bureau of Trade Analysis for inspection during the term of the agreement and for a period of three years after its termination.

§ 535.302 Exemptions for certain modifications of effective agreements.

(a) Non-substantive modifications to effective agreements. A non-substantive modification to an effective agreement between ocean common carriers and/or marine terminal operators, acting individually or through approved agreements, is one which:

(1) Reflects changes in the name of any geographic locality stated therein, the name of the agreement or the name of a party to the agreement, the names and/or numbers of any other section 4 agreement or designated provisions thereof referred to in an agreement;

(2) Corrects typographical and grammatical errors in the text of the agreement or renumbers or reletters articles or sub-articles of agreements and references thereto in the text; or

(3) Reflects changes in the titles of persons or committees designated therein or transfers the functions of such persons or committees to other designated persons or committees or which merely establishes a committee.

(b) Other Miscellaneous Modifications to effective agreements. A miscellaneous modification to an effective agreement is one that:

(1) Cancels the agreement or a portion thereof;

(2) Deletes an agreement party;

(3) Changes the parties to a conference agreement or a discussion agreement among passenger vessel operating common carriers that is open to all ocean common carriers operating passenger vessels of a class defined in the agreements and that does not contain ratemaking, pooling, joint service, sailing or space chartering authority; or

(4) Changes the officials of the agreement and delegations of authority.

(c) A copy of a modification described in (a) or (b) of this section shall be submitted to the Commission but is otherwise exempt from the waiting period requirement of the Act and this part.

(d) Parties to agreements may seek a determination from the Director of the Bureau of Trade Analysis as to whether a particular modification is a non-

substantive or other miscellaneous modification within the meaning of this section.

(e) The filing fee for non-substantive or other miscellaneous modifications is provided in § 535.401(g).

§ 535.303 Husbanding agreements—exemption.

(a) A husbanding agreement is an agreement between an ocean common carrier and another ocean common carrier or marine terminal operator, acting as the former's agent, under which the agent handles routine vessel operating activities in port, such as notifying port officials of vessel arrivals and departures; ordering pilots, tugs, and linehandlers; delivering mail; transmitting reports and requests from the Master to the owner/operator; dealing with passenger and crew matters; and providing similar services related to the above activities. The term does not include an agreement that provides for the solicitation or booking of cargoes, signing contracts or bills of lading and other related matters, nor does it include an agreement that prohibits the agent from entering into similar agreements with other carriers.

(b) A husbanding agreement is exempt from the filing requirements of the Act and of this part.

(c) The filing fee for optional filing of husbanding agreements is provided in § 535.401(g).

§ 535.304 Agency agreements—exemption.

(a) An agency agreement is an agreement between an ocean common carrier and another ocean common carrier or marine terminal operator, acting as the former's agent, under which the agent solicits and books cargoes and signs contracts of affreightment and bills of lading on behalf of the ocean common carrier. Such an agreement may or may not also include husbanding service functions and other functions incidental to the performance of duties by agents, including processing of claims, maintenance of a container equipment inventory control system, collection and remittance of freight and reporting functions.

(b) An agency agreement as defined above is exempt from the filing requirements of the Act and of this part, except those:

(1) Where a common carrier is to be the agent for a competing ocean common carrier in the same trade; or

(2) That permit an agent to enter into similar agreements with more than one ocean common carrier in a trade.

(c) The filing fee for optional filing of agency agreements is provided in § 535.401(g).

§ 535.305 Equipment interchange agreements—exemption.

(a) An equipment interchange agreement is an agreement between two or more ocean common carriers for:

(1) The exchange of empty containers, chassis, empty LASH/SEABEE barges, and related equipment; and

(2) The transportation of the equipment as required, payment therefor, management of the logistics of transferring, handling and positioning equipment, its use by the receiving carrier, its repair and maintenance, damages thereto, and liability incidental to the interchange of equipment.

(b) An equipment interchange agreement is exempt from the filing requirements of the Act and of this part.

(c) The filing fee for optional filing of equipment interchange agreements is provided in § 535.401(g).

§ 535.306 Nonexclusive transshipment agreements—exemption.

(a) A nonexclusive transshipment agreement is a transshipment agreement by which one ocean common carrier serving a port of origin by direct vessel call and another such carrier serving a port of destination by direct vessel call provide transportation between such ports via an intermediate port served by direct vessel call of both such carriers and at which cargo will be transferred from one to the other and which agreement does not:

(1) Prohibit either carrier from entering into similar agreements with other carriers;

(2) Guarantee any particular volume of traffic or available capacity; or

(3) Provide for the discussion or fixing of rates for the account of the cargo interests, conditions of service or other tariff matters other than the tariff description of the service offered as being by means of transshipment, the port of transshipment and the participation of the nonpublishing carrier.

(b) A nonexclusive transshipment agreement is exempt from the filing requirements of the Act and of this part, provided that the tariff provisions set forth in paragraph (c) of this section and the content requirements of paragraph (d) of this section are met.

(c) The applicable tariff or tariffs shall provide:

(1) The through rate;

(2) The routings (origin, transshipment and destination ports); additional charges, if any (*i.e.* port arbitrary and/or additional transshipment charges); and participating carriers; and

(3) A tariff provision substantially as follows:

The rules, regulations, and rates in this tariff apply to all transshipment arrangements between the publishing carrier or carriers and the participating, connecting or feeder carrier. Every participating connecting or feeder carrier which is a party to transshipment arrangements has agreed to observe the rules, regulations, rates, and routings established herein as evidenced by a connecting carrier agreement between the parties.

(d) Nonexclusive transshipment agreements must contain the entire arrangement between the parties, must contain a declaration of the nonexclusive character of the arrangement and may provide for:

(1) The identification of the parties and the specification of their respective roles in the arrangement;

(2) A specification of the governed cargo;

(3) The specification of responsibility for the issuance of bills of lading (and the assumption of common carriage-associated liabilities) to the cargo interests;

(4) The specification of the origin, transshipment and destination ports;

(5) The specification of the governing tariff(s) and provision for their succession;

(6) The specification of the particulars of the nonpublishing carrier's concurrence/participation in the tariff of the publishing carrier;

(7) The division of revenues earned as a consequence of the described carriage;

(8) The division of expenses incurred as a consequence of the described carriage;

(9) Termination and/or duration of the agreement;

(10) Intercarrier indemnification or provision for intercarrier liabilities consequential to the contemplated carriage and such documentation as may be necessary to evidence the involved obligations;

(11) The care, handling and liabilities for the interchange of such carrier equipment as may be consequential to the involved carriage;

(12) Such rationalization of services as may be necessary to ensure the cost effective performance of the contemplated carriage; and

(13) Such agency relationships as may be necessary to provide for the pickup and/or delivery of the cargo.

(e) No subject other than as listed in paragraph (d) of this section may be included in exempted nonexclusive transshipment agreements.

(f) The filing fee for optional filing of nonexclusive transshipment agreements is provided in § 535.401(g).

§ 535.307 Agreements between or among wholly-owned subsidiaries and/or their parent'exemption.

(a) An agreement between or among wholly-owned subsidiaries and/or their parent means an agreement under section 4 of the Act between or among an ocean common carrier or marine terminal operator subject to the Act and any one or more ocean common carriers or marine terminal operators which are ultimately owned 100 percent by that ocean common carrier or marine terminal operator, or an agreement between or among such wholly-owned carriers or terminal operators.

(b) All agreements between or among wholly-owned subsidiaries and/or their parent are exempt from the filing requirements of the Act and this part.

(c) Ocean common carriers are exempt from section 10(c) of the Act to the extent that the concerted activities proscribed by that section result solely from agreements between or among wholly-owned subsidiaries and/or their parent.

(d) The filing fee for optional filing of these agreements is provided in § 535.401(g).

§ 535.308 Marine terminal agreements—exemption.

(a) *Marine terminal agreement* means an agreement, understanding, or association written or oral (including any modification or appendix) that applies to future, prospective activities between or among the parties and that relates solely to marine terminal facilities and/or services among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers that completely sets forth the applicable rates, charges, terms and conditions agreed to by the parties for the facilities and/or services provided for under the agreement. The term does not include a joint venture arrangement among marine terminal operators to establish a separate, distinct entity that fixes its own rates and publishes its own tariff.

(b) *Marine terminal conference agreement* means an agreement between or among two or more marine terminal operators and/or ocean common carriers for the conduct or facilitation of marine terminal operations that provides for the fixing of and adherence to uniform maritime terminal rates, charges, practices and conditions of service relating to the receipt, handling, and/or delivery of passengers or cargo for all members.

(c) *Marine terminal discussion agreement* means an agreement between or among two or more marine terminal operators and/or marine terminal conferences and/or ocean common carriers solely for the discussion of subjects including marine terminal rates, charges, practices, and conditions of service relating to the receipt, handling and/or delivery of passengers or cargo.

(d) *Marine terminal interconference agreement* means an agreement between or among two or more marine terminal conference and/or marine terminal discussion agreements.

(e) All marine terminal agreements, as defined in § 535.308(a), with the exception of marine terminal conference, marine terminal interconference, and marine terminal discussion agreements as defined in § 535.308(b), (c), and (d), are exempt from the waiting period requirements of the Act and this part and will, accordingly, be effective on filing with the Commission.

(f) The filing fee for marine terminal agreements is provided in § 535.401(g).

§ 535.309 Marine terminal services agreements—exemption.

(a) *Marine terminal services agreement* means an agreement, contract, understanding, arrangement, or association, written or oral, (including any modification or appendix) between a marine terminal operator and an ocean common carrier that applies to marine terminal services that are provided to and paid for by an ocean common carrier. These services include: checking, dockage, free time, handling, heavy lift, loading and unloading, terminal storage, usage, wharfage, and wharf demurrage and including any marine terminal facilities that may be provided incidentally to such marine terminal services. The term *marine terminal services agreement* does not include any agreement that conveys to the involved carrier any rights to operate any marine terminal facility by means of a lease, license, permit, assignment, land rental, or similar other arrangement for the use of marine terminal facilities or property.

(b) All marine terminal services agreements as defined in § 535.309(a) are exempt from the filing and waiting period requirements of the Act and this part on condition that:

(1) They do not include rates, charges, rules, and regulations that are determined through a marine terminal conference agreement, as defined in § 535.308(b); and

(2) No antitrust immunity is conferred under the Act with regard to terminal services provided to an ocean common carrier under a marine terminal services agreement that is not filed with the Commission.

(c) The filing fee for optional filing of terminal services agreements is provided in § 535.401(g).

§ 535.310 Marine terminal facilities agreement—exemption.

(a) *Marine terminal facilities agreement* means any agreement between or among two or more marine terminal operators, or between one or more marine terminal operators and one or more ocean common carriers, to the extent that the agreement involves ocean transportation in the foreign commerce of the United States, that conveys to any of the involved parties any rights to operate any marine terminal facility by means of lease, license, permit, assignment, land rental, or other similar arrangement for the use of marine terminal facilities or property.

(b) All marine terminal facilities agreements as defined in § 535.310(a) are exempt from the filing and waiting period requirements of the Act and this part.

(c) Parties to marine terminal facilities agreements currently in effect shall provide copies to any requesting party for a reasonable copying and mailing fee.

(d) The filing fee for optional filing of terminal facilities agreements is provided in § 535.401(g).

§ 535.311 Low market share agreements—exemption.

(a) Low market share agreement means any agreement among ocean common carriers which contains none of the authorities listed in 535.502(b) and for which the combined market share of the parties in any of the agreement's sub-trade is either:

(1) Less than 30 percent, if all parties are members of another agreement in the same trade or sub-trade containing any of the authorities listed in § 535.502(b); or

(2) Less than 35 percent, if all parties are not members of another agreement in the same trade or sub-trade containing any of the authorities listed in § 535.502(b).

(b) Low market share agreements are exempt from the waiting period requirement of the Act and this part, and are effective on filing.

(c) Parties to agreements may seek a determination from the Director, Bureau of Trade Analysis, as to whether a proposed agreement meets the general definition of a low market share agreement.

(d) The filing fee for low market share agreements is provided in § 535.401(g).

§ 535.312 Vessel charter party-exemption.

(a) For purposes of this section, vessel charter party shall mean a contractual agreement between two ocean common carriers for the charter of the full reach of a vessel, which agreement sets forth the entire terms and conditions (including duration, charter hire, and geographical or operational limitations, if any) under which the vessel will be employed.

(b) Vessel charter parties, as defined in paragraph (a) of this section, are exempt from the filing requirements of the Act and this part.

(c) The filing fee for optional filing of vessel charter parties is provided in § 535.401(g).

Subpart D—Filing of Agreements

§ 535.401 General requirements.

(a) All agreements (including oral agreements reduced to writing in accordance with the Act) subject to this part and filed with the Commission for review and disposition pursuant to section 6 of the Act, shall be submitted during regular business hours to the Secretary, Federal Maritime Commission, Washington, DC 20573. Such filing shall consist of:

(1) A true copy and seven additional copies of the executed agreement;

(2) Where required by this part, an original and five copies of the completed Information Form referenced at subpart E of this part; and

(3) A letter of transmittal as described in paragraph (b) of this section.

(b) The letter of transmittal shall:

(1) Identify all of the documents being transmitted including, in the instance of a modification to an effective agreement, the full name of the effective agreement, the Commission-assigned agreement number of the effective agreement and the revision, page and/or appendix number of the modification being filed;

(2) Provide a concise, succinct summary of the filed agreement or modification separate and apart from any narrative intended to provide support for the acceptability of the agreement or modification;

(3) Clearly provide the typewritten or otherwise imprinted name, position, business address, and telephone number of the filing party; and

(4) Be signed in the original by the filing party or on the filing party's behalf by an authorized employee or agent of the filing party.

(c) To facilitate the timely and accurate publication of the **Federal Register** Notice, the letter of transmittal shall also provide a current list of the agreement's participants where such information is not provided elsewhere in the transmitted documents.

(d) Any agreement that does not meet the filing requirements of this section, including any applicable Information Form requirements, shall be rejected in accordance with § 535.601(b).

(e) Assessment agreements shall be filed and shall be effective upon filing.

(f) Parties to agreements with expiration dates shall file any modification seeking renewal for a specific term or elimination of a termination date in sufficient time to accommodate the 45-day waiting period required under the Act.

(g) *Fees.* The filing fee is $1,834 for new agreements requiring Commission review and action; $931 for agreement modifications requiring Commission review and action; $442 for agreements processed under delegated authority (for types of agreements that can be processed under delegated authority, see 46 CFR 501.26(e)); and $145 for carrier and terminal exempt agreements.

(h) The fee for a copy of the Commission's agreement database report is $32.

§ 535.402 Complete and definite agreements.

An agreement filed under the Act must be clear and definite in its terms, must embody the complete, present understanding of the parties, and must set forth the specific authorities and conditions under which the parties to the agreement will conduct their operations and regulate the relationships among the agreement members, unless those details are matters specifically enumerated as exempt from the filing requirements of this part.

§ 535.403 Form of agreements.

The requirements of this section apply to all agreements except marine terminal agreements and assessment agreements.

(a) Agreements shall be clearly and legibly written. Agreements in a language other than English shall be accompanied by an English translation.

(b) Every agreement shall include a Title Page indicating:

(1) The full name of the agreement;

(2) Once assigned, the Commission-assigned agreement number;

(3) If applicable, the expiration date of the agreement; and

(4) The original effective date of the agreement whenever the Title Page is revised.

(c) Each agreement page (including modifications and appendices) shall be identified by printing the agreement name (as shown on the agreement title page) and, once assigned, the applicable Commission-assigned agreement number at the top of each page. For agreement modifications, the appropriate amendment number for each modification should also appear on the page along with the basic agreement number.

(d) Each agreement and/or modification filed will be signed in the original by an official or authorized representative of each of the parties and shall indicate the typewritten full name of the signing party and his or her position, including organizational affiliation. Faxed or photocopied signatures will be accepted if replaced with an original signature as soon as practicable before the effective date.

(e) Every agreement shall include a Table of Contents indicating the location of all agreement provisions.

§ 535.404 Agreement provisions.

Generally, each agreement should:

(a) Indicate the full legal name of each party, including any FMC-assigned agreement number associated with that name, and the address of its principal office (not the address of any agent or representative not an employee of the participating party);

(b) State the ports or port ranges to which the agreement applies as well as any inland points or areas to which it also applies; and

(c) Specify, by organizational title, the administrative and executive officials determined by the agreement parties to be responsible for designated affairs of the agreement and the respective duties and authorities delegated to those officials. At a minimum, the agreement should specify:

(1) The official(s) with authority to file the agreement and any modification thereto and to submit associated supporting materials; and

(2) A statement as to any designated U.S. representative of the agreement required by this chapter.

§ 535.405 Organization of conference agreements.

Each conference agreement shall:

(a) State that, at the request of any member, the conference shall engage the services of an independent neutral body to fully police the obligations of the conference and its members. The agreement must include a description of any such neutral body authority and procedures related thereto.

(b) State affirmatively that the conference parties shall not engage in conduct prohibited by sections 10(c)(1) or 10(c)(3) of the Act.

(c) Specify the procedures for consultation with shippers and for handling shippers' requests and complaints.

(d) Include provisions for independent action in accordance with § 535.801 of this part.

§ 535.406 Modification of agreements.

The requirements of this section apply to all agreements except marine terminal agreements and assessment agreements.

(a) Agreement modifications shall be filed in accordance with the provisions of §§ 535.401, 535.402, and 535.403.

(b) Agreement modifications shall be made by reprinting the entire page on which the matter being changed is published ("revised page''). The revised page shall indicate the consecutive denomination of the revision (*e.g.*, "1st Revised Page 7''). Additional material may be published on a new original page. New original pages inserted between existing effective pages shall be numbered with an alpha suffix (*e.g.*, a page inserted between page 7 and page 8 shall be numbered 7a).

(c) Each revised page shall be accompanied by a duplicate page, submitted for illustrative purposes only, indicating the language being modified in the following manner:

(1) Language being deleted or superseded shall be struck through; and,

(2) New and initial or replacement language shall immediately follow the language being superseded and be underlined.

(d) If a modification requires the relocation of the provisions of the agreement, such modification shall be accompanied by a revised Table of Contents page that shall indicate the new location of the provisions.

§ 535.407 Application for waiver.

(a) Upon a showing of good cause, the Commission may waive the requirements of §§ 535.401, 535.403, 535.404, 535.405, and 535.406.

(b) Requests for such a waiver shall be submitted in advance of the filing of the agreement to which the requested waiver would apply and shall state:

(1) The specific provisions from which relief is sought;

(2) The special circumstances requiring the requested relief; and

(3) Why granting the requested waiver will not substantially impair effective review of the agreement.

§ 535.408 Activities that may be conducted without further filings.

(a) Agreements that arise from authority of an effective agreement but whose terms are not fully set forth in the effective agreement to the extent required by § 535.402 are permitted without further filing only if they:

(1) Are themselves exempt from the filing requirements of this part (pursuant to subpart C—Exemptions of this part); or

(2) Are listed in paragraph (b) of this section.

(b) Unless otherwise exempt in subpart C of this part, only the following technical or operational matters of an agreement's affairs established pursuant to express enabling authority in an agreement are considered part of the effective agreement and do not require further filing under section 5 of the Act:

(1) Establishment of tariff rates, rules and regulations and their joint publication;

(2) The terms and conditions of space allocation and slot sales, the procedures for allocating space, the establishment of space charter rates, and the terms and conditions of charter parties;

(3) Stevedoring, terminal, and related services including the operation of tonnage centers or other joint container marshaling facilities;

(4) The following administrative matters:

(i) Scheduling of agreement meetings;

(ii) Collection, collation and circulation of data and reports from or to members;

(iii) Procurement, maintenance, or sharing of office facilities, furnishings, equipment and supplies, the allocation and assessment of costs thereof, or the provisions for the administration and management of such agreements by duly appointed individuals;

(iv) Procedures for anticipating parties' space requirements;

(v) Maintenance of books and records; and

(vi) Details as to the following matters as between parties to the agreement: insurance, procedures for resolutions of disputes relating to loss and/or damage of cargo, and force majeure clauses;

(5) The following operational matters:

(i) Port rotations and schedule adjustments; and

(ii) Changes in vessel size, number of vessels, or vessel substitution or replacement, if the resulting change is within a capacity range specified in the agreement; and

(6) Neutral body policing (limited to the description of neutral body authority and procedures related thereto).

Subpart E—Information Form Requirements

§ 535.501 General requirements.

(a) Agreements and modifications to agreements identified in § 535.502 shall be accompanied by an Information Form containing information and data on the agreement and the parties' authority under the agreement.

(b) Parties to an agreement subject to this subpart shall complete and submit an original and five copies of the Information Form at the time the agreement is filed. A copy of the Form in *Microsoft Word* and *Excel* format may be downloaded from the Commission's home page at *http://www.fmc.gov,* or a paper copy of the Form may be obtained from the Bureau of Trade Analysis. In lieu of submitting paper copies, parties may complete and submit their Information Form in the Commission's prescribed electronic format, either on diskette or CD–ROM.

(c) A complete response in accordance with the instructions on the Information Form shall be supplied to each item. If a party to the agreement is unable to supply a complete response, that party shall provide either estimated data (with an explanation of why precise data are not available) or a detailed statement of reasons for noncompliance and the efforts made to obtain the required information.

(d) Agreement parties may supplement the Information Form with any additional information or material to assist the Commission's review of an agreement.

(e) The Information Form and any additional information submitted in conjunction with the filing of an agreement shall not be disclosed by the Commission except as provided in § 535.608.

§ 535.502 Agreements subject to the Information Form requirements.

Agreements and modifications to agreements between or among ocean common carriers subject to this subpart are:

(a) All agreements identified in § 535.201(a), except for low market share agreements identified in § 535.311;

(b) Modifications to an agreement that add any of the following authorities:

(1) The discussion of, or agreement upon, whether on a binding basis under a common tariff or a non-binding basis, any kind of rate or charge;

(2) The discussion of, or agreement on, capacity rationalization;

(3) The establishment of a joint service;

(4) The pooling or division of cargo traffic, earnings, or revenues and/or losses; or

(5) The discussion of, or agreement on, any service contract matter; and

(c) Modifications that expand the geographic scope of an agreement containing any authority identified in § 535.502(b).

§ 535.503 Information Form.

(a) The Information Form, with instructions, for agreements and modifications to agreements subject to this subpart, are set forth in sections I through V of appendix A of this part. The instructions should be read in conjunction with the Act and this part.

(b) The Information Form shall apply as follows:

(1) Sections I and V shall be completed by parties to all agreements identified in § 535.502;

(2) Section II shall be completed by parties to agreements identified in § 535.502(a) that contain any of the following authorities: the charter or use of vessel space in exchange for compensation or services; or the rationalization of sailings or services relating to a schedule of ports, the frequency of vessel calls at ports, or the size and capacity of vessels for deployment. Such authorities do not include the establishment of a joint service, nor capacity rationalization;

(3) Section III shall be completed by parties to agreements identified in § 535.502 that contain the authority to discuss or agree on capacity rationalization; and

(4) Section IV shall be completed by parties to agreements identified in § 535.502 that contain any of the following authorities:

(i) The discussion of, or agreement upon, whether on a binding basis under a common tariff or a non-binding basis, any kind of rate or charge;

(ii) The establishment of a joint service;

(iii) The pooling or division of cargo traffic, earnings, or revenues and/or losses; or

(iv) The discussion of, or agreement on, any service contract matter.

§ 535.504 Application for waiver.

(a) Upon a showing of good cause, the Commission may waive any part of the Information Form requirements in this subpart.

(b) A request for such a waiver must be submitted and approved by the Commission in advance of the filing of the Information Form to which the requested waiver would apply. Requests for a waiver shall be submitted in writing to the Director, Bureau of Trade Analysis, Federal Maritime Commission, Washington, DC 20573–0001, and shall state:

(1) The specific requirements from which relief is sought;

(2) The special circumstances requiring the requested relief;

(3) Relevant trade and industry data and information to substantiate and support the special circumstances requiring the requested relief;

(4) Why granting the requested waiver will not substantially impair effective review of the agreement; and

(5) A description of the full membership, geographic scope, and authority of the agreement or the agreement modification that is to be filed with the Commission.

(c) The Commission may take into account the presence or absence of shipper complaints as well as the past compliance of the agreement parties with any reporting requirement under this part in considering an application for a waiver.

Subpart F—Action on Agreements

§ 535.601 Preliminary review-rejection of agreements.

(a) The Commission shall make a preliminary review of each filed agreement to determine whether the agreement is in compliance with the requirements of the Act and this part and, where applicable, whether the accompanying Information Form is complete or, where not complete, whether the deficiency is adequately explained or is excused by a waiver granted by the Commission under § 535.504.

(b)(1) The Commission shall reject any agreement that fails to comply substantially with the filing and Information Form of the Act and this part. The Commission shall notify the filing party in writing of the reason for rejection of the agreement. The original filing, along with any supplemental information or documents submitted, shall be returned to the filing party.

(2) Should a rejected agreement be refiled, the full 45-day waiting period will apply to the refiled agreement.

§ 535.602 Federal Register notice.

(a) A notice of any filed agreement will be transmitted to the **Federal Register** within seven days of the date of filing.

(b) The notice will include:

(1) A short title for the agreement;

(2) The identity of the parties to the agreement and the filing party;

(3) The Federal Maritime Commission agreement number;

(4) A concise summary of the agreement's contents;

(5) A statement that the agreement is available for inspection at the Commission's offices; and

(6) The final date for filing comments regarding the agreement.

§ 535.603 Comment.

(a) Persons may file with the Secretary written comments regarding a filed agreement. Such comments will be submitted in an original and ten (10) copies and are not subject to any limitations except the time limits provided in the **Federal Register** notice. Late-filed comments will be received only by leave of the Commission and only upon a showing of good cause. If requested, comments and any accompanying material shall be accorded confidential treatment to the fullest extent permitted by law. Such requests must include a statement of legal basis for confidential treatment including the citation of appropriate statutory authority. Where a determination is made to disclose all or a portion of a comment, notwithstanding a request for confidentiality, the party requesting confidentiality will be notified prior to disclosure.

(b) The filing of a comment does not entitle a person to:

(1) A reply to the comment by the Commission;

(2) The institution of any Commission or court proceeding;

(3) Discussion of the comment in any Commission or court proceeding concerning the filed agreement; or

(4) Participation in any proceeding that may be instituted.

§ 535.604 Waiting period.

(a) The waiting period before an agreement becomes effective shall commence on the date that an agreement is filed with the Commission.

(b) Unless suspended by a request for additional information or extended by court order, the waiting period terminates and an agreement becomes effective on the latter of the 45th day after the filing of the agreement with the Commission or on the 30th day after publication of notice of the filing in the **Federal Register**.

(c) The waiting period is suspended on the date when the Commission, either orally or in writing, requests additional information or documentary materials pursuant to section 6(d) of the Act. A new 45-day waiting period begins on the date of receipt of all the additional material requested or of a statement of the reasons for noncompliance, and the agreement becomes effective in 45 days unless the waiting period is further extended by court order or the Commission grants expedited review.

§ 535.605 Requests for expedited review.

(a) Upon written request of the filing party, the Commission may shorten the waiting period. In support of a request, the filing party should provide a full explanation, with reference to specific facts and circumstances, of the necessity for a shortened waiting period. In

reviewing requests, the Commission will consider the parties' needs and the Commission's ability to complete its review of the agreement's potential impact. In no event, however, may the period be shortened to less than fourteen (14) days after the publication of the notice of the filing of the agreement in the **Federal Register**. When a request for expedited review is denied, the normal 45-day waiting period will apply. Requests for expedited review will not be granted routinely and will be granted only on a showing of good cause. Good cause would include, but is not limited to, the impending expiration of the agreement; an operational urgency; Federal or State imposed time limitations; or other reasons that, in the Commission's discretion, constitute grounds for granting the request.

(b) A request for expedited review will be considered for an agreement whose 45-day waiting period has begun anew after being stopped by a request for additional information.

§ 535.606 Requests for additional information.

(a) The Commission may request from the filing party any additional information and documents necessary to complete the statutory review required by the Act. The request shall be made prior to the expiration of the 45-day waiting period. All responses to a request for additional information shall be submitted to the Director, Bureau of Trade Analysis, Federal Maritime Commission, Washington, DC 20573.

(b) Where the Commission has made a request for additional information, the agreement's effective date will be 45 days after receipt of the complete response to the request for additional information. If all questions are not fully answered or requested documents are not supplied, the parties must include a statement of reasons why questions were not fully answered or documents supplied. In the event all material is not submitted, the agreement's effective date will be 45 days after receipt of both the documents and information which are submitted, if any, and the statement indicating the reasons for noncompliance. The Commission may, upon notice to the Attorney General, and pursuant to sections 6(i) and 6(k) of the Act, request the United States District Court for the District of Columbia to further extend the agreement's effective date until there has been substantial compliance.

(c) A request for additional information may be made orally or in writing. In the case of an oral request, a written confirmation of the request shall be mailed to the filing party within seven days of the oral request.

(d) The Commission will publish a notice in the **Federal Register** that it has requested additional information and serve that notice on any commenting parties. The notice will indicate only that a request was made and will not specify what information is being sought. Interested parties will have fifteen (15) days after publication of the notice to file further comments on the agreement.

§ 535.607 Failure to comply with requests for additional information.

(a) A failure to comply with a request for additional information results when a person filing an agreement, or an officer, director, partner, agent, or employee thereof fails to substantially respond to the request or does not file a satisfactory statement of reasons for noncompliance. An adequate response is one which directly addresses the Commission's request. When a response is not received by the Commission within a specified time, failure to comply will have occurred.

(b) The Commission may, pursuant to section 6(i) of the Act, request relief from the United States District Court for the District of Columbia when it considers that there has been a failure to substantially comply with a request for additional information. The Commission may request that the court:

(1) Order compliance with the request;

(2) Extend the review period until there has been substantial compliance; or

(3) Grant other equitable relief that under the circumstances seems necessary or appropriate.

(c) Where there has been a failure to substantially comply, section 6(i)(2) of the Act provides that the court shall extend the review period until there has been substantial compliance.

§ 535.608 Confidentiality of submitted material.

(a) Except for an agreement filed under section 5 of the Act, all information submitted to the Commission by the filing party will be exempt from disclosure under 5 U.S.C. 552. Included in this disclosure exemption is information provided in the Information Form, voluntary submission of additional information, reasons for noncompliance, and replies to requests for additional information.

(b) Information that is confidential pursuant to paragraph (a) of this section may be disclosed, however, to the extent:

(1) It is relevant to an administrative or judicial action or proceeding; or

(2) It is disclosed to either body of Congress or to a duly authorized committee or subcommittee of Congress.

(c) Parties may voluntarily disclose or make information publicly available. If parties elect to disclose information they shall promptly inform the Commission.

§ 535.609 Negotiations.

At any time after the filing of an agreement and prior to the conclusion of judicial injunctive proceedings, the filing party or an authorized representative may submit additional factual or legal support for an agreement or may propose modifications of an agreement. Such negotiations between Commission personnel and filing parties may continue during the pendency of injunctive proceedings. Shippers, other government departments or agencies, and other third parties may not participate in these negotiations.

Subpart G—Reporting Requirements

§ 535.701 General requirements.

(a) Parties to agreements identified in § 535.702(a) shall submit quarterly Monitoring Reports on an ongoing basis for as long as the agreement remains in effect, containing information and data on the agreement and the parties' authority under the agreement.

(b) Parties to agreements identified in § 535.704 are required to submit minutes of their meetings for as long as their agreements remain in effect.

(c) If a joint service is a party to an agreement that is subject to the requirements of this subpart, the joint service shall be treated as one member of that agreement for purposes of that agreement's Monitoring Reports.

(d) Monitoring Reports and minutes required to be filed by this subpart should be submitted to: Director, Bureau of Trade Analysis, Federal Maritime Commission, Washington, DC 20573–0001. A copy of the Monitoring Report form in Microsoft Word and Excel format may be downloaded from the Commission's home page at *http://www.fmc.gov*, or a paper copy may be obtained from the Bureau of Trade Analysis. In lieu of submitting paper copies, parties may complete and submit their Monitoring Reports in the Commission's prescribed electronic format, either on diskette or CD–ROM.

(e)(1) The regulations in this paragraph (e) are stayed until further notice.

(2) Reports and minutes required to be filed by this subpart may be filed by direct electronic transmission in lieu of hard copy. Detailed information on electronic transmission is available from

the Commission's Bureau of Trade Analysis. Certification and signature requirements of this subpart can be met on electronic transmissions through use of a pre-assigned Personal Identification Number (PIN) obtained from the Commission. PINs can be obtained by submission by an official of the filing party of a statement to the Commission agreeing that inclusion of the PIN in the transmission constitutes the signature of the official. Only one PIN will be issued for each agreement. Where a filing party has more than one official authorized to file minutes or reports, each additional official must submit such a statement countersigned by the principal official of the filing party. Each filing official will be issued a unique password. A PIN or designation of authorized filing officials may be canceled or changed at any time upon the written request of the principal official of the filing party. Direct electronic transmission filings may be made at any time except between the hours of 8:30 a.m. and 2 p.m. Eastern time on Commission business days.

(f) *Time for filing.* Except as otherwise instructed, Monitoring Reports shall be filed within 75 days of the end of each calendar quarter. Minutes of meetings shall be filed within 21 days after the meeting. Other documents shall be filed within 15 days of the receipt of a request for documents.

(g) A complete response in accordance with the instructions on the Monitoring Report shall be supplied to each item. If a party to an agreement is unable to supply a complete response, that party shall provide either estimated data (with an explanation of why precise data are not available) or a detailed statement of reasons for noncompliance and the efforts made to obtain the required information.

(h) A Monitoring Report for a particular agreement may be supplemented with any other relevant information or documentary material.

(i) *Confidentiality.* (1) The Monitoring Reports, minutes, and any other additional information submitted by a particular agreement will be exempt from disclosure under 5 U.S.C. 552, except to the extent:

(i) It is relevant to an administrative or judicial action or proceeding; or

(ii) It is disclosed to either body of Congress or to a duly authorized committee or subcommittee of Congress.

(2) Parties may voluntarily disclose or make Monitoring Reports, minutes or any other additional information publicly available. The Commission must be promptly informed of any such voluntary disclosure.

(j) Monitoring Report or alternative periodic reporting requirements in this subpart shall not be construed to authorize the exchange or use by or among agreement members of information required to be submitted.

§ 535.702 Agreements subject to Monitoring Report and alternative periodic reporting requirements.

(a) Agreements subject to the Monitoring Report requirements of this subpart are:

(1) An agreement that contains the authority to discuss or agree on capacity rationalization; or

(2) Where the parties to an agreement hold a combined market share, based on cargo volume, of 35 percent or more in the entire U.S. inbound or outbound geographic scope of the agreement and the agreement contains any of the following authorities:

(i) The discussion of, or agreement upon, whether on a binding basis under a common tariff or a non-binding basis, any kind of rate or charge;

(ii) The establishment of a joint service;

(iii) The pooling or division of cargo traffic, earnings, or revenues and/or losses; or

(iv) The discussion of, or agreement on, any service contract matter.

(b) The determination of an agreement's reporting obligation under § 535.702(a)(2) in the first instance shall be based on the market share data reported on the agreement's Information Form pursuant to § 535.503. Thereafter, at the beginning of each calendar year, the Bureau of Trade Analysis will notify the agreement parties of any changes in its reporting requirements based on market share data reported on the agreement's quarterly Monitoring Report for the previous second quarter (April-June).

(c) The Commission may require, as necessary, that the parties to an agreement with market share below the 35 percent threshold, as identified and defined in § 535.702(a)(2), submit Monitoring Reports pursuant to § 535.703.

(d) In addition to or instead of the Monitoring Report in § 535.703, the Commission may prescribe, as necessary, alternative periodic reporting requirements for parties to any agreement identified in § 535.201.

§ 535.703 Monitoring Report form.

(a) For agreements subject to the Monitoring Report requirements in § 535.702(a), the Monitoring Report form, with instructions, is set forth in sections I through III of appendix B of this part. The instructions should be read in conjunction with the Act and this part.

(b) The Monitoring Report shall apply as follows:

(1) Section I shall be completed by parties to agreements identified in § 535.702(a)(1);

(2) Section II shall be completed by parties to agreements identified in § 535.702(a)(2); and

(3) Section III shall be completed by parties to all agreements identified in § 535.702(a).

(c) In accordance with the requirements and instructions in appendix B of this part, parties to an agreement subject to part 2(C) of section I of the Monitoring Report shall submit a narrative statement on any significant reductions in vessel capacity that the parties will implement under the agreement. The term "a significant reduction'' is defined in appendix B. The narrative statement shall be submitted to the Director, Bureau of Trade Analysis, no later than 15 days after a significant reduction in vessel capacity has been agreed upon by the parties but prior to the implementation of the actual reduction under the agreement.

(d)(1) The Commission may require, in its discretion, that the information on the top agreement commodities in part 4 of section II of the Monitoring Report be reported on a sub-trade basis, as defined in appendix B of this part, rather than on an agreement-wide basis. When commodity sub-trade information is required under this section, the Commission shall notify the parties to the agreement.

(2) For purposes of § 535.703(d)(1), the top agreement commodities shall mean the top 10 liner commodities (including commodities not subject to tariff publication) carried by all the agreement parties in each sub-trade within the geographic scope of the agreement during the calendar quarter. Where the agreement covers both U.S. inbound and outbound liner movements, inbound and outbound sub-trades shall be stated separately. All other instructions, definitions, and terms shall apply as specified and required in appendix B of this part.

§ 535.704 Filing of minutes.

(a) *Agreements required to file minutes.*

(1) This section applies to agreements authorized to engage in any of the following activities: discussion or establishment of any type of rates or charges, whether in tariffs or service contracts; pooling or apportionment of cargo traffic; discussion of revenues, losses, or earnings; or discussion or

agreement on service contract matters, including the establishment of voluntary service contract guidelines.

(2) Each agreement to which this section applies shall file with the Commission, through a designated official, minutes of all meetings defined in paragraph (b) of this section, except as provided in paragraph (d) of this section.

(b) *Meetings.* For purposes of this subpart, the term meeting shall include all discussions at which any agreement is reached among any number of the parties to an agreement relating to the business of the agreement, and all other discussions among three or more members of the agreement (or all members if fewer than three) relating to the business of the agreement. This includes, but is not limited to, meetings of the members' agents, principals, owners, officers, employees, representatives, committees, or subcommittees, and communications among members facilitated by agreement officials. Discussions conducted by telephone, electronic device, or other means are included.

(c) *Content of minutes.* Minutes shall include the following:

(1) The date, time, and place of the meeting;

(2) A list of participants and companies represented;

(3) A description of discussions detailed enough so that a non-participant reading the minutes could reasonably gain a clear understanding of the nature and extent of the discussions and, where applicable, any decisions reached. Such description need not disclose the identity of the parties that participated in the discussion or the votes taken; and

(4) Any report, circular, notice, statistical compilation, analytical study, survey, or other work distributed, discussed, or exchanged at the meeting, whether presented by oral, written, electronic, or other means. Where the aforementioned materials are reasonably available to the public, a citation to the work or relevant part thereof is acceptable in lieu of the actual work. Any documents submitted to the Commission pursuant to this section need not disclose the identity of the party or parties that circulated the document at the meeting.

(d) *Exemption.* For parties to agreements subject to this section, the following exemption shall apply:

(1) Minutes of meetings between parties are not required to reflect discussions of matters set forth in § 535.408(b)(2), (b)(3), (b)(4)(iii), (b)(4)(v), and (b)(4)(vi);

(2) Minutes of meetings between parties are not required to reflect discussion of matters set forth in § 535.408(b)(5) to the extent that such discussions involve minor operational matters that have little or no impact on the frequency of vessel calls at ports or the amount of vessel capacity offered by the parties in the geographic scope of the agreement; and

(3) Minutes of meetings between parties are not required to reflect discussions of or actions taken with regard to rates that, if adopted, would be required to be published in an appropriate tariff. This exemption does not apply to discussions concerning general rate policy, general rate changes, the opening or closing of rates, service contracts, or time/volume rates.

(e) *Serial numbers.* Each set of minutes filed with the Commission shall include the agreement name and FMC number and a unique identification number indicating the sequence in which the meeting took place during the calendar year.

§ 535.705 Application for waiver.

(a) Upon a showing of good cause, the Commission may waive any requirement of this subpart.

(b) A request for such a waiver must be submitted and approved by the Commission in advance of the filing of the Monitoring Report or minutes to which the requested waiver would apply. Requests for a waiver shall be submitted in writing to the Director, Bureau of Trade Analysis, Federal Maritime Commission, Washington, DC 20573–0001, and shall state and provide the following:

(1) The specific requirements from which relief is sought;

(2) The special circumstances requiring the requested relief;

(3) Relevant trade and industry data and information to substantiate and support the special circumstances requiring the requested relief; and

(4) Why granting the requested waiver will not substantially impair effective monitoring of the agreement.

(c) The Commission may take into account the presence or absence of shipper complaints as well as the past compliance of the agreement parties with any reporting requirement under this part in considering an application for a waiver.

Subpart H—Mandatory and Prohibited Provisions

§ 535.801 Independent action.

(a) Each conference agreement shall specify the independent action ("IA'') procedures of the conference, which shall provide that any conference member may take independent action on any rate or service item upon not more than 5 calendar days' notice to the conference and shall otherwise be in conformance with section 5(b)(8) of the Act.

(b)(1) Each conference agreement that provides for a period of notice for independent action shall establish a fixed or maximum period of notice to the conference. A conference agreement shall not require or permit a conference member to give more than 5 calendar days' notice to the conference, except that in the case of a new or increased rate the notice period shall conform to the tariff publication requirements of this chapter.

(2) A conference agreement shall not prescribe notice periods for adopting, withdrawing, postponing, canceling, or taking other similar actions on independent actions.

(c) Each conference agreement shall indicate the conference official, single designated representative, or conference office to which notice of independent action is to be provided. A conference agreement shall not require notice of independent action to be given by the proposing member to the other parties to the agreement.

(d) A conference agreement shall not require a member who proposes independent action to attend a conference meeting, to submit any further information other than that necessary to accomplish the publication of the independent tariff item, or to comply with any other procedure for the purpose of explaining, justifying, or compromising the proposed independent action.

(e) A conference agreement shall specify that any new rate or service item proposed by a member under independent action (except for exempt commodities not published in the conference tariff) shall be included by the conference in its tariff for use by that member effective no later than 5 calendar days after receipt of the notice and by any other member that notifies the conference that it elects to adopt the independent rate or service item on or after its effective date.

(f)(1) As it pertains to this part, "adopt'' means the assumption in identical form of an originating member's independent action rate or service item, or a particular portion of such a rate or service item. If a carrier adopts an IA at a lower rate than the conference rate when there is less than 30 days remaining on the original IA, the adopted IA should be made to expire 30 days after its effectiveness to comply with the statutory 30-day notice

requirement. In the case of an independent action time/volume rate (''IA TVR''), the dates of the adopting IA may vary from the dates of the original IA, so long as the duration of the adopting IA is the same as that of the originating IA. Furthermore, no term other than ''adopt'' (*e.g.*, ''follow,'' ''match'') can be used to describe the action of assuming as one's own an initiating carrier's IA. Additionally, if a party to an agreement chooses to take on an IA of another party, but alters it, such action is considered a new IA and must be published pursuant to the IA publication and notice provisions of the applicable agreement.

(2) An IA TVR published by a member of a ratemaking agreement may be adopted by another member of the agreement, provided that the adopting member takes on the original IA TVR in its entirety without change to any aspect of the original rate offering (except beginning and ending dates in the time period) (*i.e.*, a separate TVR with a separate volume of cargo but for the same duration). Any subsequent IA TVR offering that results in a change in any aspect of the original IA TVR, other than the name of the offering carrier or the beginning date of the adopting IA TVR, is a new independent action and shall be processed in accordance with the provisions of the applicable agreement. The adoption procedures discussed above do not authorize the participation by an adopting carrier in the cargo volume of the originating carrier's IA TVR. Member lines may publish and participate in joint IA TVRs, if permitted to do so under the terms of their agreement; however, no carrier may participate in an IA TVR already published by another carrier.

(g) A conference agreement shall not require or permit individual member lines to be assessed on a per carrier usage basis the costs and/or administrative expenses incurred by the agreement in processing independent action filings.

(h) A conference agreement may not permit the conference to unilaterally designate an expiration date for an independent action taken by a member line. The right to determine the duration of an IA remains with the member line, and a member line must be given the opportunity to designate whatever duration it chooses for its IA, regardless if the duration is for a specified period or open ended. Only in instances where a member line gives its consent to the conference, or where a member line freely elects not to provide for the duration of its IA after having been given the opportunity, can the conference designate an expiration date for the member line's IA.

(i) Any new conference agreement or any modification to an existing conference agreement that does not comply with the requirements of this section shall be rejected pursuant to § 535.601 of this part.

(j) If ratemaking is by sections within a conference, then any notice to the conference required by § 535.801 may be made to the particular ratemaking section.

§ 535.802 Service contracts.

(a) Ocean common carrier agreements may not prohibit or restrict a member or members of the agreement from engaging in negotiations for service contracts with one or more shippers.

(b) Ocean common carrier agreements may not require a member or members of the agreement to disclose a negotiation on a service contract, or the terms and conditions of a service contract, other than those terms or conditions required by section 8(c)(3) of the Act.

(c) Ocean common carrier agreements may not adopt mandatory rules or requirements affecting the right of an agreement member or agreement members to negotiate or enter into service contracts.

(d) An agreement may provide authority to adopt voluntary guidelines relating to the terms and procedures of an agreement member's or agreement members' service contracts if the guidelines explicitly state the right of the members of the agreement not to follow these guidelines.

(e) Voluntary guidelines shall be submitted to the Director, Bureau of Trade Analysis, Federal Maritime Commission, Washington, DC 20573–0001. Voluntary guidelines shall be kept confidential in accordance with § 535.608 of this part. Use of voluntary guidelines prior to their submission is prohibited.

§ 535.803 Ocean freight forwarder compensation.

No conference or group of two or more ocean common carriers may:

(a) Deny to any member of such conference or group the right, upon notice of not more than 5 calendar days, to take independent action on any level of compensation paid to an ocean freight forwarder; or

(b) Agree to limit the payment of compensation to an ocean freight forwarder to less than 1.25 percent of the aggregate of all rates and charges applicable under the tariff assessed against the cargo on which the forwarding services are provided.

Subpart I—Penalties

§ 535.901 Failure to file.

Any person operating under an agreement, involving activities subject to the Act pursuant to sections 4 and 5(a) of the Act and this part and not exempted pursuant to section 16 of the Act or excluded from filing by the Act, that has not been filed and that has not become effective pursuant to the Act and this part is in violation of the Act and this part and is subject to the civil penalties set forth in section 13(a) of the Act.

§ 535.902 Falsification of reports.

Knowing falsification of any report required by the Act or this part, including knowing falsification of any item in any applicable agreement information and/or reporting requirements pursuant to subparts E and G of this part, is a violation of the rules of this part and is subject to the civil penalties set forth in section 13(a) of the Act and may be subject to the criminal penalties provided for in 18 U.S.C. 1001.

Subpart J—Paperwork Reduction

§ 535.991 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control number assigned to information collection requirements of the Commission in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, Pub. L. 104–13. The Commission intends that this section comply with the requirements of section 3507(a)(3) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget (OMB) for each agency information collection requirement in the following table:

Section	Current OMB control No.
535.101 through 535.902	3072–0045

Appendix A to Part 535—Information Form and Instructions

Information Form Instructions

1. All agreements and modifications to agreements between or among ocean common carriers identified in 46 CFR 535.502 must be accompanied by a completed Information Form to the full extent required in sections I through V of this Form. Sections I and V must be completed by all such agreements. In addition, sections II, III and IV must be completed, as applicable, in accordance with the authority contained in each agreement. Where an

agreement containing multiple authorities is subject to duplicate reporting requirements in the various sections of this Form, the parties may provide only one response so long as the reporting requirements within each section are fully addressed. The Information Form specifies the data and information which must be reported for each section and the format in which it must be provided. If a party to an agreement is unable to supply a complete response to any item of this Form, that party shall provide either estimated data (with an explanation of why precise data are not available) or a detailed statement of reasons for noncompliance and the efforts made to obtain the required information. For purposes of this Form, if one of the agreement signatories is a joint service operating under an effective agreement, that signatory shall respond to the Form as a single agreement party.

2. For clarification of the agreement terminology used in this Form, the parties may refer to the definitions provided in 46 CFR 535.104. In addition, the following definitions shall apply for purposes of this Form: *liner movement* means the carriage of liner cargo by liner operators; *liner cargo* means cargo carried on liner vessels in a liner service; *liner operator* means a vessel-operating common carrier engaged in liner service; *liner vessel* means a vessel used in a liner service; *liner service* means a definite, advertised schedule of sailings at regular intervals; and *TEU* means a unit of measurement equivalent to one 20-foot shipping container. Further, when used in this Form, the terms "entire geographic scope of the agreement'' or "agreement-wide'' refer to the combined U.S. inbound trade and/or the combined U.S. outbound trade as such trades apply to the geographic scope of the agreement, as opposed to the term "sub-trade,'' which is defined for reporting purposes as the scope of all liner movements between each U.S. port range and each foreign country within the scope of the agreement. Whether required on a combined trade basis or a sub-trade basis, the U.S. inbound trade (or sub-trades) and the U.S. outbound trade (or sub-trades) shall always be stated separately.

Section I

Section I applies to all agreements identified in 46 CFR 535.502. Parties to such agreements must complete parts 1 through 4 of this section. The authorities listed in part 4 of this section do not necessarily include all of the authorities that must be set forth in an agreement filed under the Act. The specific authorities between the parties to an agreement, however, must be set forth, clearly and completely, in a filed agreement in accordance with 46 CFR 535.402.

Part 1

State the full name of the agreement.

Part 2

Provide a narrative statement describing the specific purpose(s) of the agreement pertaining to the parties' business activities as ocean common carriers in the foreign commerce of the United States, and the commercial or other relevant circumstances within the geographic scope of the agreement that led the parties to enter into the agreement.

Part 3

List all effective agreements that cover all or part of the geographic scope of this agreement, and whose parties include one or more of the parties to this agreement.

Part 4(A)

Identify whether the agreement authorizes the parties to discuss, or agree upon, whether on a binding basis under a common tariff or a non-binding basis, any kind of rate or charge.

Part 4(B)

Identify whether the agreement authorizes the parties to establish a joint service.

Part 4(C)

Identify whether the agreement authorizes the parties to pool cargo traffic or revenues.

Part 4(D)

Identify whether the agreement authorizes the parties to discuss, or agree on, any service contract matter.

Part 4(E)

Identify whether the agreement authorizes the parties to discuss or agree on capacity rationalization as defined in 46 CFR 535.104(e).

Part 4(F)

Identify whether the agreement contains provisions that place conditions or restrictions on the parties' agreement participation, and/or use or offering of competing services within the geographic scope of the agreement.

Part 4(G)

Identify whether the agreement authorizes the parties to charter or use vessel space in exchange for compensation or services. This authority does not include capacity rationalization as referred to in part 4(E) of this section.

Part 4(H)

Identify whether the agreement authorizes the parties to rationalize sailings or services relating to a schedule of ports, the frequency of vessel calls at ports, or the size and capacity of vessels for deployment. This authority does not include the establishment of a joint service or capacity rationalization as referred to in parts 4(B) and 4(E) of this section.

Section II

Section II applies to agreements identified in 46 CFR 535.502(a) that contain any of the following authorities: a) the charter or use of vessel space in exchange for compensation or services; or b) the rationalization of sailings or services relating to a schedule of ports, the frequency of vessel calls at ports, or the size and capacity of vessels for deployment. Such authorities do not include the establishment of a "joint service,'' nor "capacity rationalization'' as these terms are defined in 46 CFR 535.104 (o) and (e). Parties to agreements identified in this section must complete all items in part 1.

Part 1(A)

For the most recent 12-month period for which complete data are available, provide the number of vessel calls each party made at each port for its liner services that would be covered by the agreement within the entire geographic scope of the agreement.

Part 1(B)

Provide a narrative statement on any significant changes, anticipated or planned to be implemented when the agreement goes into effect, in the number of vessel calls at a port for the parties' liner services that would be covered by the agreement within the entire geographic scope of the agreement. Specifically, explain the nature of the significant change and its effect on the frequency of vessel calls at the port for the liner service that would be subject to the change. For purposes of this part, a significant change refers to an increase or a decrease in the number of vessel calls at a port for a fixed, seasonally planned, or indefinite period of time. A significant change excludes an incidental or temporary alteration in the number of vessel calls at a port, or an operational change in vessel calls that would have little or no impact on the number of vessel calls at a port. If no significant change is anticipated or planned, it shall be noted with the term "none'' in response to part 1(B) of this section.

Section III

Section III applies to agreements identified in 46 CFR 535.502 that contain the authority to discuss or agree on capacity rationalization as defined in 46 CFR 535.104(e). Parties to such agreements must complete parts 1 and 2 of this section.

Part 1(A)

1. For the most recent calendar quarter for which complete data are available, provide the amount of vessel capacity for each party for each of its liner services that would be covered by the agreement within the entire geographic scope of the agreement, stated separately for the U.S. inbound and outbound trades as applicable to the geographic scope of the agreement. For purposes of this Form, vessel capacity means a party's total commercial liner space on line-haul vessels, whether operated by it or other parties from whom space is obtained, sailing to and/or from the continent of North America for each of its liner services that would be covered by the agreement.

2. When 50 percent or more of the total liner cargo carried by all the parties in the geographic scope of the agreement during the calendar quarter was containerized, the amount(s) of vessel capacity for each party shall be reported in TEUs. When 50 percent or more of the total liner cargo carried by all the parties in the geographic scope of the agreement during the calendar quarter was non-containerized, the amount(s) of vessel capacity for each party shall be reported in non-containerized units of measurement. The unit of measurement used in calculating the amounts of non-containerized vessel capacity must be specified clearly and consistently applied.

Part 1(B)

Provide the percentage of vessel capacity utilization for each party for each of its liner services that would be covered by the agreement within the entire geographic scope of the agreement, corresponding to the figures and time period used in part 1(A) of this section, stated separately for the U.S. inbound and outbound trades as applicable to the geographic scope of the agreement. For purposes of this Form, the percentage of vessel capacity utilization means a party's total volume of liner cargo, for each of its liner services that would be covered by the agreement, carried on any vessel space counted under part 1(A) of this section, divided by its total vessel capacity as defined and derived in part 1(A) of this section, which quotient is multiplied by 100.

Part 1(C)

Provide a narrative statement on any significant changes, anticipated or planned to be implemented when the agreement goes into effect, in the amounts of vessel capacity for the parties' liner services that would be covered by the agreement within the entire geographic scope of the agreement. Specifically, explain the nature of and the reasons for the significant change and its effects on the liner service and the total amount of vessel capacity for such service that would be subject to the change. For purposes of this part, a significant change refers to the removal from or addition to a liner service of vessels or vessel space for a fixed, seasonally planned, or indefinite period of time. A significant change excludes instances when vessels may be temporarily repositioned or shifted from one service to another, or when vessel space may be temporarily altered, or when vessels are removed from a liner service and vessels of similar capacity are substituted. It also excludes operational changes in vessels or vessel space that would have little or no impact on the amount of vessel capacity offered in a liner service or a trade. If no significant change is anticipated or planned, it shall be noted with the term "none'' in response to part 1(C) of this section.

Part 2(A)

For the most recent 12-month period for which complete data are available, provide the number of vessel calls each party made at each port for its liner services that would be covered by the agreement within the entire geographic scope of the agreement.

Part 2(B)

Provide a narrative statement on any significant changes, anticipated or planned to be implemented when the agreement goes into effect, in the number of vessel calls at a port for the parties' liner services that would be covered by the agreement within the entire geographic scope of the agreement. Specifically, explain the nature of the significant change and its effect on the frequency of vessel calls at the port for the liner service that would be subject to the change. For purposes of this part, a significant change refers to an increase or a decrease in the number of vessel calls at a port for a fixed, seasonally planned, or indefinite period of time. A significant change excludes an incidental or temporary alteration in the number of vessel calls at a port, or an operational change in vessel calls that would have little or no impact on the number of vessel calls at a port. If no significant change is anticipated or planned, it shall be noted with the term "none'' in response to part 2(B) of this section.

Section IV

Section IV applies to agreements identified in 46 CFR 535.502 that contain any of the following authorities: a) the discussion of, or agreement upon, whether on a binding basis under a common tariff or a non-binding basis, any kind of rate or charge; b) the establishment of a joint service; c) the pooling or division of cargo traffic, earnings, or revenues and/or losses; or d) the discussion of, or agreement on, any service contract matter. Parties to such agreements must complete parts 1 through 5 of this section.

Part 1

1. For the most recent calendar quarter for which complete data are available, provide the market shares of all liner operators for the entire geographic scope of the agreement and in each sub-trade within the scope of the agreement. A joint service shall be treated as a single liner operator, whether it is an agreement line or a non-agreement line. Sub-trade is defined as the scope of all liner movements between each U.S. port range within the scope of the agreement and each foreign country within the scope of the agreement. Where the agreement covers both U.S. inbound and outbound liner movements, inbound and outbound market shares shall be shown separately.

2. U.S. port ranges are defined as follows:

a. Atlantic and Gulf—Includes ports along the eastern seaboard and the Gulf of Mexico from the northern boundary of Maine to Brownsville, Texas. Also includes all ports bordering upon the Great Lakes and their connecting waterways, all ports in the State of New York on the St. Lawrence River, and all ports in Puerto Rico and the U.S. Virgin Islands.

b. Pacific—Includes all ports in the States of Alaska, Hawaii, California, Oregon, and Washington. Also includes all ports in Guam, American Samoa, Northern Marianas, Johnston Island, Midway Island, and Wake Island.

3. An application may be filed for a waiver of the definition of "sub-trade'' under the procedures described in 46 CFR 535.504. In any such application, the burden shall be on the parties to show that their marketing and pricing practices have been done by ascertainable multi-country regions rather than by individual countries or, in the case of the United States, by broader areas than the port ranges defined herein. The parties must further show that, though operating individually, they were nevertheless applying essentially similar regional practices.

4. The formula for calculating market share in the entire agreement scope or in a sub-trade is as follows: The total amount of liner cargo carried on each liner operator's liner vessels in the entire agreement scope or in the sub-trade during the most recent calendar quarter for which complete data are available, divided by the total liner movements in the entire agreement scope or in the sub-trade during the same calendar quarter, which quotient is multiplied by 100. The calendar quarter used must be clearly identified. The market shares held by non-agreement lines as well as by agreement lines must be provided, stated separately in the format indicated.

5. If 50 percent or more of the total liner cargo carried by the parties in the entire agreement scope during the calendar quarter was containerized, only containerized liner movements (measured in TEUs) must be used for determining market share. If 50 percent or more of the total liner cargo carried by the parties was non-containerized, only non-containerized liner movements must be used for determining market share. The unit of measurement used in calculating amounts of non-containerized cargo must be specified clearly and applied consistently.

Part 2

1. For each party that served all or any part of the geographic scope of the agreement during all or any part of the most recent 12-month period for which complete data are available, provide each party's total liner revenues within the geographic scope, total liner cargo carried within the geographic scope, and average revenue. For purposes of this Form, total liner revenues means the total revenues, in U.S. dollars, of each party corresponding to its total cargo carried for its liner services that would fall under the agreement, inclusive of all ocean freight charges, whether assessed on a port-to-port basis or a through intermodal basis; accessorial charges; surcharges; and charges for inland cargo carriage. Average revenue shall be calculated as the quotient of each party's total liner revenues within the geographic scope divided by its total cargo carried within the geographic scope.

2. When 50 percent or more of the total liner cargo carried by all the parties in the geographic scope of the agreement during the 12-month period was containerized, each party shall report only its total carryings of containerized liner cargo (measured in TEUs) within the geographic scope, total revenues generated by its carriage of containerized liner cargo, and average revenue per TEU. When 50 percent or more of the total liner cargo carried by all the parties in the geographic scope of the agreement during the 12-month period was non-containerized, each party shall report only its total carryings of non-containerized liner cargo (specifying the unit of measurement used), total revenues generated by its carriage of non-containerized liner cargo, and average revenue per unit of measurement. When the agreement covers both U.S. inbound and outbound liner movements, inbound and outbound data shall be stated separately.

Part 3(A)

For the same 12-month period used in part 2 of this section, provide a list, for the entire geographic scope of the agreement, of the top 10 liner commodities (including

commodities not subject to tariff publication) carried by all the parties for their liner services that would fall under the agreement. For purposes of this Form, commodities shall be identified at the 4-digit level of customarily used commodity coding schedules. When 50 percent or more of the total liner cargo carried by all the parties in the geographic scope of the agreement during the 12-month period was containerized, this list shall include only containerized commodities. When 50 percent or more of the total liner cargo carried by all the parties in the geographic scope of the agreement during the 12-month period was non-containerized, this list shall include only non-containerized commodities. When the agreement covers both U.S. inbound and outbound liner movements, inbound and outbound data shall be stated separately.

Part 3(B)

Provide the cargo volume and revenue results for each party for each of the major commodities listed in part 3(A) of this section, corresponding to the same 12-month period and unit of measurement used. For purposes of this Form, revenue results means the revenues, in U.S. dollars, earned by each party on the cargo volume of each major commodity listed in part 3(A) of this section, inclusive of all ocean freight charges, whether assessed on a port-to-port basis or a through intermodal basis; accessorial charges; surcharges; and charges for inland cargo carriage. If a party has no cargo volume and revenue results for a commodity listed in part 3(A) of this section, it shall be noted by using a zero for that party in response to part 3(B) of this section.

Part 4(A)

For the same calendar quarter used in part 1 of this section, provide the amount of vessel capacity for each party for each of its liner services that would fall under the agreement within the entire geographic scope of the agreement, stated separately for the U.S. inbound and outbound trades as applicable to the geographic scope of the agreement. For purposes of this Form, vessel capacity means a party's total commercial liner space on line-haul vessels, whether operated by it or other parties from whom space is obtained, sailing to and/or from the continent of North America for each of its liner services that would fall under the agreement. When 50 percent or more of the total liner cargo carried by all the parties in the geographic scope of the agreement during the calendar quarter was containerized, the amount(s) of vessel capacity for each party shall be reported in TEUs. When 50 percent or more of the total liner cargo carried by all the parties in the geographic scope of the agreement during the calendar quarter was non-containerized, the amount(s) of vessel capacity for each party shall be reported in non-containerized units of measurement. The unit of measurement used in calculating the amounts of non-containerized vessel capacity must be specified clearly and consistently applied.

Part 4(B)

Provide the percentage of vessel capacity utilization for each party for each of its liner services that would fall under the agreement within the entire geographic scope of the agreement, corresponding to the figures and time period used in part 4(A) of this section, stated separately for the U.S. inbound and outbound trades as applicable to the geographic scope of the agreement. For purposes of this Form, the percentage of vessel capacity utilization means a party's total volume of liner cargo, for each of its liner services that would fall under the agreement, carried on any vessel space counted under part 4(A) of this section, divided by its total vessel capacity as defined and derived in part 4(A) of this section, which quotient is multiplied by 100.

Part 4(C)

Provide a narrative statement on any significant changes, anticipated or planned for when the agreement goes into effect, in the amounts of vessel capacity for the parties' liner services that would fall under the agreement within the entire geographic scope of the agreement. Specifically, explain the nature of and reasons for the significant change and its effects on the liner service and the total amount of vessel capacity for such service that would be subject to the change. For purposes of this part, a significant change refers to the removal from or addition to a liner service of vessels or vessel space for a fixed, seasonally planned, or indefinite period of time. A significant change excludes instances when vessels may be temporarily repositioned or shifted from one service to another, or when vessel space may be temporarily altered, or when vessels are removed from a liner service and vessels of similar capacity are substituted. It also excludes operational changes in vessels or vessel space that would have little or no impact on the amount of vessel capacity offered in a liner service or a trade. If no significant change is anticipated or planned, it shall be noted with the term "none'' in response to part 4(C) of this section.

Part 5(A)

For the same 12-month period used in parts 2 and 3 of this section, provide the number of vessel calls each party made at each port for its liner services that would fall under the agreement within the entire geographic scope of the agreement.

Part 5(B)

Provide a narrative statement on any significant changes, anticipated or planned for when the agreement goes into effect, in the number of vessel calls at a port for the parties' liner services that would fall under the agreement within the entire geographic scope of the agreement. Specifically, explain the nature of the significant change and its effect on the frequency of vessel calls at the port for the liner service that would be subject to the change. For purposes of this part, a significant change refers to an increase or decrease in the number of vessel calls at a port for a fixed, seasonally planned, or indefinite period of time. A significant change excludes an incidental or temporary alteration in vessel calls at a port, or an operational change in vessel calls that would have little or no impact on the number of vessel calls at a port. If no significant change is anticipated or planned, it shall be noted with the term "none'' in response to part 5(B) of this section.

Section V

Section V applies to all agreements identified in 46 CFR 535.502. Parties to such agreements must complete all items in part 1 of this section.

Part 1(A)

State the name, title, address, telephone and fax numbers, and electronic mail address of a person the Commission may contact regarding the Information Form and any information provided therein.

Part 1(B)

State the name, title, address, telephone and fax numbers, and electronic mail address of a person the Commission may contact regarding a request for additional information or documents.

Part 1(C)

A representative of the parties shall sign the Information Form and certify that the information in the Form and all attachments and appendices are, to the best of his or her knowledge, true, correct and complete. The representative also shall indicate his or her relationship with the parties to the agreement.

Privacy Act and Paperwork Reduction Act Notice

1. The collection of this information is authorized generally by section 15 of the Shipping Act of 1984, 46 U.S.C. app. § 1714. The submission of this form is mandatory for parties to agreements that contain certain authorities.

2. You are not required to provide information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. The valid control number for this information collection is 3072–0045.

3. The time needed to complete and submit this form will vary depending on individual circumstances. The total estimated average time to complete this form is about 30 hours. This estimate includes reading the instructions, collecting necessary data, and compiling that data.

4. If you have any comments concerning the accuracy of the above estimate or have any suggestions for simplifying the form, please contact Secretary, Federal Maritime Commission, 800 North Capitol Street, NW., Washington, DC 20573–0001; or by e-mail *secretary@fmc.gov.*

FEDERAL MARITIME COMMISSION
INFORMATION FORM FOR
AGREEMENTS BETWEEN OR AMONG OCEAN COMMON CARRIERS

Section I

Part 1

Agreement Name: _____

Part 2

Narrative statement on agreement purpose, and commercial or other circumstances requiring the agreement: _____

_____

_____

Part 3

List all effective agreements covering all or part of the geographic scope of this agreement, whose parties include one or more of the parties to this agreement.

Part 4

This agreement includes:

(A) Authority to discuss or agree upon rates or charges?	Yes ☐	No ☐
(B) Joint service?	Yes ☐	No ☐
(C) Pooling of cargo traffic or revenues?	Yes ☐	No ☐
(D) Authority to discuss or agree on service contracts and their terms?	Yes ☐	No ☐
(E) Authority to discuss or agree on capacity rationalization?	Yes ☐	No ☐
(F) Conditions or restrictions on the parties' agreement participation, and/or use or offering of competing services in the geographic scope?	Yes ☐	No ☐
(G) Authority to charter vessel space?	Yes ☐	No ☐
(H) Authority to rationalize sailings or services?	Yes ☐	No ☐

Section II

Part 1

(A) Vessel Calls
Agreement-Wide Trade: U.S. Inbound (or Outbound) Name
Time Period: [12-Months]
[Port Names] Port 1 Port 2 Port 3 Port 4 Etc. . . .
Carrier A [Name]
Carrier B
Carrier C
Etc. . . .
(B) Narrative statement on significant changes in vessel calls: _____

_____

_____

Section III

Part 1 Vessel Capacity And Utilization

Agreement-Wide Trade: U.S. Inbound (or Outbound) Name
Time Period: [Calendar Quarter]

	(A) Vessel Capacity [TEUs or other units]	(B) Utilization [percent]
Carrier A [Name]		
Liner Service 1 [Name]	XX,XXX	XX
Liner Service 2	XX,XXX	XX
Liner Service 3	XX,XXX	XX
Etc. . . .		
Carrier B		
Liner Service 1	XX,XXX	XX
Liner Service 2	XX,XXX	XX
Liner Service 3	XX,XXX	XX
Etc. . . .		
Etc. . . .		

(C) Narrative statement on significant changes in vessel capacity: _____

_____

_____

Part 2 Vessel Calls

(A) Agreement-Wide Trade: U.S. Inbound (or Outbound) Name
Time Period: [12-Months]
[Port Names] Port 1 Port 2 Port 3 Port 4 Etc. . . .
Carrier A [Name]

Carrier B
Carrier C
Etc. . . .
(B) Narrative statement on anticipated or planned changes: _____

_____

_____

Section IV

Part 1 Market Share

Agreement-Wide Trade (or Sub-Trade): U.S. Inbound (or Outbound) Name
Time Period: [Calendar Quarter]

	TEUs [or other units]	Percent
Agreement Market Share:		
Line A [Name]	X,XXX	XX
Line B	X,XXX	XX
Line C	X,XXX	XX
Etc. . . .		
Total Agreement	X,XXX	XX
Non-Agreement Market Share:		
Line X	X,XXX	XX
Line Y	X,XXX	XX
Line Z	X,XXX	XX
Etc. . . .		
Total Non-Agreement	X,XXX	XX
Total Trade [or Sub-Trade]	X,XXX	100

Part 2 Total Liner Cargo and Revenues

Agreement-Wide Trade: U.S. Inbound (or Outbound) Name
Time Period: [12-Months]

[Name]	Total revenues	TEUs [or other units]	Average revenue
Carrier A	$	X,XXX	$
Carrier B	$	X,XXX	$
Carrier C	$	X,XXX	$
Etc. . . .			

Part 3 Top Liner Commodities

Agreement-Wide Trade: U.S. Inbound (or Outbound) Name
Time Period: [Same 12-Months in part 2 of this section]

[Name]	Carrier A	Carrier B	Etc. . . .
Commodity 1 [Name and 4-Digit Code]:			
TEUs [or other units]	X,XXX	X,XXX	
Revenues	$	$	
Commodity 2:			
TEUs	X,XXX	X,XXX	
Revenues	$	$	
Etc. . . .			

Part 4 Vessel Capacity and Utilization

Agreement-Wide Trade: U.S. Inbound (or Outbound) Name
Time Period: [Same Calendar Quarter in part 1 of this section]

	(A) Vessel capacity [TEUs or other units]	(B) Utilization [percent]
Carrier A [Name]		
Liner Service 1 [Name]	XX,XXX	XX
Liner Service 2	XX,XXX	XX
Liner Service 3	XX,XXX	XX
Etc. . . .		
Carrier B		
Liner Service 1	XX,XXX	XX
Liner Service 2	XX,XXX	XX
Liner Service 3	XX,XXX	XX

	(A) Vessel capacity [TEUs or other units]	(B) Utilization [percent]
Etc. . . .		
Etc. . . .		

(C) Narrative statement on significant changes in vessel capacity: _____

Part 5

(A) Vessel Calls
Agreement-Wide Trade: U.S. Inbound (or Outbound) Name
Time Period: [Same 12-Months in parts 2 and 3 of this section]
[Port Names] Port 1 Port 2 Port 3 Port 4 Etc. . . .
Carrier A [Name]
Carrier B
Carrier C
Etc. . . .
(B) Narrative statement on significant changes in vessel calls: _____

Section V

Contact Persons and Certification

(A) Person(s) to Contact Regarding Information Form.
(1) Name _____
(2) Title _____
(3) Firm Name and Business _____
(4) Business Telephone Number _____
(5) Fax Number _____
(6) E-Mail Address _____
(B) Individual Located in the United States Designated for the Limited Purpose of Receiving Notice of an Issuance of a Request for Additional Information or Documents (see 46 CFR 535.606).
(1) Name _____
(2) Title _____
(3) Firm Name and Business _____
(4) Business Telephone Number _____
(5) Fax Number _____
(6) E-Mail Address _____
(C) Certification
This Information Form, together with any and all appendices and attachments thereto, was prepared and assembled in accordance with instructions issued by the Federal Maritime Commission. The information is, to the best of my knowledge, true, correct, and complete.
Name (please print or type) _____
Title _____
Relationship with parties to agreement _____
Signature _____
Date _____

Appendix B to Part 535—Monitoring Report and Instructions

Monitoring Report Instructions

1. All agreements between or among ocean common carriers identified in 46 CFR 535.702(a) must submit completed Monitoring Reports to the full extent required in sections I through III of this Report. Sections I and II must be completed, as applicable, in accordance with the authority contained in each agreement. Section III must be completed by all agreements subject to Monitoring Report requirements.

2. Where an agreement containing multiple authorities is subject to duplicate reporting requirements in the various sections of this Report, the parties may provide only one response so long as the reporting requirements within each section are fully addressed. The Monitoring Report specifies the data and information which must be reported for each section and the format in which it must be provided. If a party to an agreement is unable to supply a complete response to any item of this Report, that party shall provide either estimated data (with an explanation of why precise data are not available) or a detailed statement of reasons for noncompliance and the efforts made to obtain the required information. For purposes of this Report, if one of the agreement signatories is a joint service operating under an effective agreement, that signatory shall respond to the Report as a single agreement party.

3. For clarification of the agreement terminology used in this Report, the parties may refer to the definitions provided in 46 CFR 535.104. In addition, the following definitions shall apply for purposes of this Report: *liner movement* means the carriage of liner cargo by liner operators; *liner cargo* means cargo carried on liner vessels in a liner service; *liner operator* means a vessel-operating common carrier engaged in liner service; *liner vessel* means a vessel used in a liner service; *liner service* means a definite, advertised schedule of sailings at regular intervals; and TEU means a unit of measurement equivalent to one 20-foot shipping container. Further, when used in this Report, the terms “entire geographic scope of the agreement’’ or “agreement-wide’’ refer to the combined U.S. inbound trade and/or the combined U.S. outbound trade as such trades apply to the geographic scope of the agreement, as opposed to the term “sub-trade,’’ which is defined for reporting purposes as the scope of all liner movements

between each U.S. port range and each foreign country within the scope of the agreement. Whether required on a combined trade basis or a sub-trade basis, the U.S. inbound trade (or sub-trades) and the U.S. outbound trade (or sub-trades) shall always be stated separately.

Section I

Section I applies to agreements, identified in 46 CFR 535.702(a)(1), that contain the authority to discuss or agree on capacity rationalization as defined in 46 CFR 535.104(e). Parties to such agreements must complete parts 1 through 3 of this section.

Part 1

State the full name of the agreement and the agreement number assigned by the FMC.

Part 2(A)

1. For the preceding calendar quarter, provide the amount of vessel capacity for each party for each of its liner services that is covered by the agreement within the entire geographic scope of the agreement, stated separately for the U.S. inbound and outbound trades as applicable to the geographic scope of the agreement. For purposes of this Report, vessel capacity means a party's total commercial liner space on line-haul vessels, whether operated by it or other parties from whom space is obtained, sailing to and/or from the continent of North America for each of its liner services that is covered by the agreement.

2. When 50 percent or more of the total liner cargo carried by all the parties in the geographic scope of the agreement during the calendar quarter was containerized, the amount(s) of vessel capacity for each party shall be reported in TEUs. When 50 percent or more of the total liner cargo carried by all the parties in the geographic scope of the agreement during the calendar quarter was non-containerized, the amount(s) of vessel capacity for each party shall be reported in non-containerized units of measurement. The unit of measurement used in calculating the amounts of non-containerized vessel capacity must be specified clearly and consistently applied.

Part 2(B)

For the preceding calendar quarter, provide the percentage of vessel capacity utilization for each party for each of its liner services that is covered by the agreement within the entire geographic scope of the agreement, corresponding to the figures used in part 2(A) of this section, stated separately for the U.S. inbound and outbound trades as applicable to the geographic scope of the agreement. For purposes of this Report, the percentage of vessel capacity utilization means a party's total volume of liner cargo, for each of its liner services that is covered by the agreement, carried on any vessel space counted under part 2(A) of this section, divided by its total vessel capacity as defined and derived in part 2(A) of this section, which quotient is multiplied by 100.

Part 2(C)

Provide a narrative statement on any significant reductions, to be implemented under the agreement, in the amounts of vessel capacity for the parties' liner services that are covered by the agreement within the entire geographic scope of the agreement. Specifically, explain the nature of and the reasons for the significant reduction and its effects on the liner service and the total amount of vessel capacity for such service that would be subject to the reduction. The narrative statement for part 2(C) of this section shall be submitted to the Director, Bureau of Trade Analysis, no later than 15 days after a significant reduction in the amount of vessel capacity has been agreed upon by the parties but prior to the implementation of the actual reduction under the agreement. For purposes of this part, a significant reduction refers to the removal from a liner service of vessels or vessel space for a fixed, seasonally planned, or indefinite period of time. A significant reduction excludes instances when vessels may be temporarily repositioned or shifted from one service to another, or when vessel space may be temporarily altered, or when vessels are removed from a liner service and vessels of similar or greater capacity are substituted. It also excludes operational changes in vessels or vessel space that would have little or no impact on the amount of vessel capacity offered in a liner service or a trade.

Part 2(D)

Excluding those changes already reported in part 2(C) of this section, provide a narrative statement on any other significant changes, implemented under the agreement during the preceding calendar quarter, in the amounts of vessel capacity for the parties' liner services that are covered by the agreement within the entire geographic scope of the agreement. Specifically, explain the nature of and the reasons for the significant change and its effects on the liner service and the total amount of vessel capacity for such service that was subject to the change. For purposes of this part, a significant change refers to the addition to a liner service of vessels or vessel space for a fixed, seasonally planned, or indefinite period of time. A significant change excludes instances when vessels were temporarily repositioned or shifted from one service to another, or when vessel space was temporarily altered, or when vessels were removed from a liner service and vessels of similar capacity were substituted. It also excludes operational changes in vessels or vessel space that had little or no impact on the amount of vessel capacity offered in a liner service or a trade. If no significant change was implemented, it shall be noted with the term "none'' in response to part 2(D) of this section.

Part 3

Provide a narrative statement on any significant changes, implemented under the agreement during the calendar quarter, in the number of vessel calls at a port for the parties' liner services that are covered by the agreement within the entire geographic scope of the agreement. Specifically, explain the nature of the significant change and its effect on the frequency of vessel calls at the port for the liner service that was subject to the change. For purposes of this part, a significant change refers to an increase or a decrease in the number of vessel calls at a port for a fixed, seasonally planned, or indefinite period of time. A significant change excludes an incidental or temporary alteration in the number of vessel calls at a port, or an operational change in vessel calls that had little or no impact on the number of vessel calls at a port. If no significant change was implemented, it shall be noted with the term "none'' in response to part 3 of this section.

Section II

Section II applies to agreements, identified in 46 CFR 535.702(a)(2), where the parties to the agreement hold a combined market share, based on cargo volume, of 35 percent or more in the entire U.S. inbound or outbound geographic scope of the agreement and the agreement contains any of the following authorities: a) the discussion of, or agreement upon, whether on a binding basis under a common tariff or a non-binding basis, any kind of rate or charge; b) the establishment of a joint service; c) the pooling or division of cargo traffic, earnings, or revenues and/or losses; or d) the discussion of, or agreement on, any service contract matter. Parties to such agreements must complete parts 1 through 6 of this section.

Part 1

State the full name of the agreement and the agreement number assigned by the FMC.

Part 2

1. For the preceding calendar quarter, provide the market shares of all liner operators for the entire geographic scope of the agreement and in each sub-trade within the scope of the agreement. A joint service shall be treated as a single liner operator, whether it is an agreement line or a non-agreement line. Sub-trade is defined as the scope of all liner movements between each U.S. port range within the scope of the agreement and each foreign country within the scope of the agreement. Where the agreement covers both U.S. inbound and outbound liner movements, inbound and outbound market shares shall be shown separately.

2. U.S. port ranges are defined as follows:

a. Atlantic and Gulf—Includes ports along the eastern seaboard and the Gulf of Mexico from the northern boundary of Maine to Brownsville, Texas. Also includes all ports bordering upon the Great Lakes and their connecting waterways, all ports in the State of New York on the St. Lawrence River, and all ports in Puerto Rico and the U.S. Virgin Islands.

b. Pacific—Includes all ports in the States of Alaska, Hawaii, California, Oregon, and Washington. Also includes all ports in Guam, American Samoa, Northern Marianas, Johnston Island, Midway Island, and Wake Island.

3. An application may be filed for a waiver of the definition of "sub-trade'' under the procedures described in 46 CFR 535.705. In any such application, the burden shall be on the parties to show that their marketing and pricing practices have been done by ascertainable multi-country regions rather than by individual countries or, in the case of the United States, by broader areas than

the port ranges defined herein. The Commission will also consider whether the alternative definition of "sub-trade'' requested by the waiver application is reasonably consistent with the definition of "sub-trade'' applied in the original Information Form for the agreement.

4. The formula for calculating market share in the entire agreement scope or in a sub-trade is as follows: The total amount of liner cargo carried on each liner operator's liner vessels in the entire agreement scope or in the sub-trade during the most recent calendar quarter for which complete data are available, divided by the total liner movements in the entire agreement scope or in the sub-trade during the same calendar quarter, which quotient is multiplied by 100. The market shares held by non-agreement lines as well as by agreement lines must be provided, stated separately in the format indicated.

5. If 50 percent or more of the total liner cargo carried by the parties in the entire agreement scope during the calendar quarter was containerized, only containerized liner movements (measured in TEUs) must be used for determining market share. If 50 percent or more of the total liner cargo carried by the parties was non-containerized, only non-containerized liner movements must be used for determining market share. The unit of measurement used in calculating amounts of non-containerized cargo must be specified clearly and applied consistently.

Part 3

1. For the preceding calendar quarter, provide each party's total liner revenues in the entire geographic scope of the agreement, total liner cargo carried in the entire geographic scope of the agreement, and average revenue. For purposes of this Report, total liner revenues means the total revenues, in U.S. dollars, of each party corresponding to its total cargo carried for its liner services that fall under the agreement, inclusive of all ocean freight charges, whether assessed on a port-to-port basis or a through intermodal basis; accessorial charges; surcharges; and charges for inland cargo carriage. Average revenue shall be calculated as the quotient of each party's total liner revenues in the entire geographic scope divided by its total cargo carried in the entire geographic scope.

2. When 50 percent or more of the total liner cargo carried by all the parties in the geographic scope of the agreement during the calendar quarter was containerized, each party shall report only its total carryings of containerized liner cargo (measured in TEUs) during the calendar quarter, total revenues generated by its carriage of containerized liner cargo, and average revenue per TEU. When 50 percent or more of the total liner cargo carried by all the parties in the geographic scope of the agreement during the calendar quarter was non-containerized, each party shall report only its total carryings of non-containerized liner cargo during the calendar quarter (specifying the unit of measurement used), total revenues generated by its carriage of non-containerized liner cargo, and average revenue per unit of measurement. When the agreement covers both U.S. inbound and outbound liner movements, inbound and outbound data shall be stated separately.

Part 4(A)

For the preceding calendar quarter, provide a list, for the entire geographic scope of the agreement, of the top 10 liner commodities (including commodities not subject to tariff publication) carried by all the parties for their liner services that fall under the agreement. For purposes of this Report, commodities shall be identified at the 4-digit level of customarily used commodity coding schedules. When 50 percent or more of the total liner cargo carried by all the parties in the geographic scope of the agreement during the calendar quarter was containerized, this list shall include only containerized commodities. When 50 percent or more of the total liner cargo carried by all the parties in the geographic scope of the agreement during the calendar quarter was non-containerized, this list shall include only non-containerized commodities. When the agreement covers both U.S. inbound and outbound liner movements, inbound and outbound data shall be stated separately.

Part 4(B)

For the preceding calendar quarter, provide the cargo volume and revenue results for each party for each of the major commodities listed in part 4(A) of this section, corresponding to the same unit of measurement used. For purposes of this Report, revenue results means the revenues, in U.S. dollars, earned by each party on the cargo volume of each major commodity listed in part 4(A) of this section, inclusive of all ocean freight charges, whether assessed on a port-to-port basis or a through intermodal basis; accessorial charges; surcharges; and charges for inland cargo carriage. If a party has no cargo volume and revenue results for a commodity listed in part 4(A) of this section, it shall be noted by using a zero for that party in response to part 4(B) of this section.

Part 5(A)

For the preceding calendar quarter, provide the amount of vessel capacity for each party for each of its liner services that falls under the agreement within the entire geographic scope of the agreement, stated separately for the U.S. inbound and outbound trades as applicable to the geographic scope of the agreement. For purposes of this Report, vessel capacity means a party's total commercial liner space on line-haul vessels, whether operated by it or other parties from whom space is obtained, sailing to and/or from the continent of North America for each of its liner services that falls under the agreement. When 50 percent or more of the total liner cargo carried by all the parties in the geographic scope of the agreement during the calendar quarter was containerized, the amount(s) of vessel capacity for each party shall be reported in TEUs. When 50 percent or more of the total liner cargo carried by all the parties in the geographic scope of the agreement during the calendar quarter was non-containerized, the amount(s) of vessel capacity for each party shall be reported in non-containerized units of measurement. The unit of measurement used in calculating the amounts of non-containerized vessel capacity must be specified clearly and consistently applied.

Part 5(B)

For the preceding calendar quarter, provide the percentage of vessel capacity utilization for each party for each of its liner services that falls under the agreement within the entire geographic scope of the agreement, corresponding to the figures used in part 5(A) of this section, stated separately for the U.S. inbound and outbound trades as applicable to the geographic scope of the agreement. For purposes of this Report, the percentage of vessel capacity utilization means a party's total volume of liner cargo, for each of its liner services that falls under the agreement, carried on any vessel space counted under part 5(A) of this section, divided by its total vessel capacity as defined and derived in part 5(A) of this section, which quotient is multiplied by 100.

Part 5(C)

Provide a narrative statement on any significant changes in the amount of vessel capacity that occurred during the preceding calendar quarter for the parties' liner services that fall under the agreement within the entire geographic scope of the agreement. Specifically, explain the nature of and the reasons for the significant change and its effects on the liner service and the total amount of vessel capacity for such service that was subject to the change. For purposes of this part, a significant change refers to the removal from or addition to a liner service of vessels or vessel space for a fixed, seasonally planned, or indefinite period of time. A significant change would exclude instances when vessels were temporarily repositioned or shifted from one service to another, or when vessel space was temporarily altered, or when vessels were removed from a liner service and vessels of similar capacity were substituted. It also excludes operational changes in vessels and vessel space that had little or no impact on the amount of vessel capacity offered in a liner service or a trade. If no significant change occurred during the calendar quarter, it shall be noted with the term "none'' in response to part 5(C) of this section.

Part 6

Provide a narrative statement on any significant changes in the number of vessel calls at a port that occurred during the preceding calendar quarter for the parties' liner services that fall under the agreement within the entire geographic scope of the agreement. Specifically, explain the nature of the significant change and its effect on the frequency of vessel calls at the port for the liner service that was subject to the change. For purposes of this part, a significant change refers to an increase or a decrease in the number of vessel calls at a port for a fixed, seasonally planned, or indefinite period of time. A significant change excludes an incidental or temporary alteration in the number of vessel calls at a port, or an operational change in vessel calls that had little or no impact on the number of vessel calls at a port. If no significant change occurred during the calendar quarter, it shall

be noted with the term "none'' in response to part 6 of this section.

Section III

Section III applies to all agreements identified in 46 CFR 535.702(a). Parties to such agreements must complete all items in part 1 of this section.

Part 1(A)

State the name, title, address, telephone and fax numbers, and electronic mail address of a person the Commission may contact regarding the Monitoring Report and any information provided therein.

Part 1(B)

A representative of the parties shall sign the Monitoring Report and certify that the information in the Report and all attachments and appendices are, to the best of his or her knowledge, true, correct and complete. The representative also shall indicate his or her relationship with the parties to the agreement.

Privacy Act and Paperwork Reduction Act Notice

1. The collection of this information is authorized generally by section 15 of the Shipping Act of 1984, 46 U.S.C. app. § 1714. The submission of this form is mandatory for parties to agreements that contain certain authorities.

2. You are not required to provide information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. The valid control number for this information collection is 3072–0045.

3. The time needed to complete and submit this form will vary depending on individual circumstances. The total estimated average time to complete this form is about 63.5 hours. This estimate includes reading the instructions, collecting necessary data, and compiling that data.

4. If you have any comments concerning the accuracy of the above estimate or have any suggestions for simplifying the form, please contact Secretary, Federal Maritime Commission, 800 North Capitol Street, NW., Washington, DC 20573–0001; or by e-mail *secretary@fmc.gov.*

FMC Form–151 OMB Control No. 3072–0045

FEDERAL MARITIME COMMISSION
MONITORING REPORT FOR
AGREEMENTS BETWEEN OR AMONG OCEAN COMMON CARRIERS

Section I

Part 1

Agreement Name: _____

FMC Number: _____

Part 2 Vessel Capacity and Utilization

Agreement-Wide Trade: U.S. Inbound (or Outbound) Name
Time Period: [Calendar Quarter]

	(A) Vessel capacity [TEUs or other units]	(B) Utilization [percent]
Carrier A [Name]:		
Liner Service 1 [Name]	XX,XXX	XX
Liner Service 2	XX,XXX	XX
Liner Service 3	XX,XXX	XX
Etc.		
Carrier B:		
Liner Service 1	XX,XXX	XX
Liner Service 2	XX,XXX	XX
Liner Service 3	XX,XXX	XX
Etc. . . .		
Etc. . . .		

(C) Narrative statement on significant reductions in vessel capacity to be implemented (submit statement no later than 15 days after a reduction has been agreed upon but prior to the implementation of the reduction): _____

_____

(D) Narrative statement on other significant changes in vessel capacity implemented during the calendar quarter: _____

_____

Part 3 Vessel Calls

Narrative statement on significant changes in vessel calls implemented during the calendar quarter: _____

_____

Section II

Part 1

Agreement Name: _____

FMC Number: _____

Part 2 Market Share

Agreement-Wide Trade (or Sub-Trade): U.S. Inbound (or Outbound) Name
Time Period: [Calendar Quarter]

	TEUs [or other units]	Percent
Agreement Market Share:		
Line A [Name]	X,XXX	XX

	TEUs [or other units]	Percent
Line B	X,XXX	XX
Line C	X,XXX	XX
Etc. . . .		
Total Agreement	X,XXX	XX
Non-Agreement Market Share:		
Line X	X,XXX	XX
Line Y	X,XXX	XX
Line Z	X,XXX	XX
Etc. . . .		
Total Non-Agreement	X,XXX	XX
Total Trade [or Sub-Trade]	X,XXX	100

Part 3 Total Liner Cargo and Revenues

Agreement-Wide Trade: U.S. Inbound (or Outbound) Name
Time Period: [Calendar Quarter]

[Name]	Total revenues	TEUs [or other units]	Average revenue
Carrier A	$	X,XXX	$
Carrier B	$	X,XXX	$
Carrier C	$	X,XXX	$
Etc. . . .			

Part 4 Top Liner Commodities

Agreement-Wide Trade: U.S. Inbound (or Outbound) Name
Time Period: [Calendar Quarter]

[Name]	Carrier A	Carrier B	Etc. . .
Commodity 1 [Name and 4-Digit Code]:			
TEUs [or other units]	X,XXX	X,XXX	
Revenues	$	$	
Commodity 2:			
TEUs	X,XXX	X,XXX	
Revenues	$	$	
Etc. . . .			

Part 5 Vessel Capacity and Utilization

Agreement-Wide Trade: U.S. Inbound (or Outbound) Name
Time Period: [Calendar Quarter]

	(A) Vessel capacity [TEUs or other units]	(B) Utilization [percent]
Carrier A [Name]:		
Liner Service 1 [Name]	XX,XXX	XX
Liner Service 2	XX,XXX	XX
Liner Service 3	XX,XXX	XX
Etc.		
Carrier B:		
Liner Service 1	XX,XXX	XX
Liner Service 2	XX,XXX	XX
Liner Service 3	XX,XXX	XX
Etc. . . .		
Etc. . . .		

(C) Narrative statement on significant changes in vessel capacity that occurred during the calendar quarter: _____

_____

Part 6 Vessel Calls

Narrative statement on significant changes in vessel calls that occurred during the calendar quarter: _____

_____

_____

Section III

Part 1 Contact Person and Certification

(A) Person(s) To Contact Regarding Monitoring Report.
(1) Name _____
(2) Title _____

(3) Firm Name and Business _____
(4) Business Telephone Number _____
(5) Fax Number _____
(6) E-Mail Address _____
(B) Certification.

This Monitoring Report, together with any and all appendices and attachments thereto, was prepared and assembled in accordance with instructions issued by the Federal Maritime Commission. The information is, to the best of my knowledge, true, correct, and complete.

Name (please print or type) _____
Title _____
Relationship with parties to agreement _____
Signature _____
Date _____

By Order of the Commission.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 04–24438 Filed 11–3–04; 8:45 am]

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