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46 CFR Parts 501 and 535

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

AGENCY: Federal Maritime Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Maritime Commission proposes to amend its regulations governing agreements among ocean common carriers and marine terminal operators in response to changes in the shipping industry since the enactment of the Ocean Shipping Reform Act of 1998 (''OSRA''), which amended the Shipping Act of 1984 (''Shipping Act''). The Commission proposes to delegate additional authority to the Director of the Commission's Bureau of Trade Analysis (46 CFR part 501). The Commission also proposes to update its rules relating to standards and exceptions for information that a filed agreement must contain and to revise its regulations pertaining to transshipment agreements (46 CFR part 535). Further, the Commission proposes to modify its Information Form and Monitoring Reports regulations and appendices (46 CFR part 535) to reflect changes in the amount and kind of data the Commission deems necessary to monitor carriers' use of their antitrust immunity for filed agreements. Finally, the Commission proposes to revise its regulations regarding the filing of agreement minutes (46 CFR part 535). The revision would reduce inadequate inclusion or coverage of substantive issues and insufficient levels of detail to describe carrier discussions, clarify regulations on meetings for which minutes are required to be filed, and identify and provide for timely Commission access to materials used or discussed in such meetings.

DATES: Submit an original and 15 copies of comments (paper), or e-mail comments as an attachment in WordPerfect 10, Microsoft Word 2000, or earlier versions of these applications, no later than January 30, 2004. Requests for meetings to make oral presentations to individual Commissioners must be received, and the meetings completed, by this date as well.

ADDRESSES: Address all comments concerning this proposed rule to: Bryant L. VanBrakle, Secretary, Federal Maritime Commission, 800 North Capitol Street, NW., Room 1046, Washington, DC 20573–0001, (202) 523–5725, E-mail: secretary@fmc.gov.

FOR FURTHER INFORMATION CONTACT:

Carol J. Neustadt, Acting General Counsel, Federal Maritime Commission, 800 North Capitol Street, NW., Room 1018, Washington, DC 20573–0001, (202) 523–5740, E-mail: GeneralCounsel@fmc.gov.

Florence A. Carr, Director, Bureau of Trade Analysis, Federal Maritime Commission, 800 North Capitol Street, NW., Room 940, Washington, DC 20573–0001, (202) 523–5796, E-mail: tradeanalysis@fmc.gov.

SUPPLEMENTARY INFORMATION:

Outline

I. Delegations to the Director, Bureau of Trade Analysis, 46 CFR 501.26

The proposed rule amends § 501.26 to account for modifications in the delegations of the Commission's authority to the Director, Bureau of Trade Analysis (''BTA'') in connection with the proposed modifications in 46 CFR part 535. Specifically, sections 501.26(c) and (d) are being revised to match the re-coded section numbers for applications for waivers to the reporting requirements for carrier agreements in part 535 of the proposed rule. Sections 501.26(o) and (p) are being added to provide new delegations of authority to the Director of BTA pertaining to the proposed Monitoring Report regulations for carrier agreements in part 535 of the proposed rule.

II. The Content of Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984, 46 CFR Part 535, Subparts A, B, C, and D

A. Background—Docket No. 99–13

1. Introduction

The Shipping Act of 1984, 46 U.S.C. app. §§ 1701–1719 (''Shipping Act''), requires, at section 5(a), the filing of certain types of commercial agreements by and among ocean common carriers and marine terminal operators with the Federal Maritime Commission (''Commission'' or ''FMC''). 46 U.S.C. app. § 1704(a). The Commission's current regulations implementing this provision were first adopted by the Commission in that same year. Docket Nos. 84–26 and 84–32, *Rules Governing Agreements by Ocean Common Carriers and Other Persons Subject to the Shipping Act of 1984,* 22 S.R.R. 1453, 49 FR 45320 (final rule) (November 15, 1984) (''Docket Nos. 84–26 and 84–32 (final rule)''). The Commission most recently amended its agreement rules in 1999, in response to changes made to the Shipping Act by the Ocean Shipping Reform Act of 1998, Public Law No.

105–258 (''OSRA''). Docket No. 98–26, *Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984,* 64 FR 11236, March 8, 1999, (''Docket No. 98–26'').

Pursuant to changes mandated by OSRA, Docket No. 98–26 eliminated most of the ''form and manner'' rules describing the procedural rules for filing these agreements, but left unchanged the substantive ''content'' requirements, which were not affected by OSRA. 64 FR 11238. Comments submitted in the course of Docket No. 98–26 revealed concerns and uncertainties about the Commission's substantive requirements for agreements, and requested further clarifications, enhancements or new rules on agreements. In response to these concerns, the Commission initiated Docket No. 99–13, *The Content of Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984,* by the publication of a Notice of Inquiry (''NOI'') on August 3, 1999, requesting comment on the specific manner in which the Commission's agreement content rules should be updated or refined. 64 FR 42057.[1] The Commission asked commenters to include concrete examples and to quantify their answers in response to the NOI. *Id.*

The Commission received five comments in response to the NOI, all of which requested that the Commission's rules on content standards for agreement filings be updated or refined in a further rulemaking and identified three main concerns: certainty, flexibility, and confidentiality. These comments are summarized below.

2. Summary of the Comments

The Commission received comments from the National Industrial Transportation League (''NITL''), the Council of European & Japanese National Shipowners'' Associations (''CENSA''), the International Longshoreman's Association (''ILA'') P&O Nedlloyd, Ltd. (''PONL''), and the Ocean Carrier Working Group Agreement (''OCWGA'').[2]

In addition to responses directed at particular questions posed by the Commission in the NOI, summarized below, there were some general comments in response to the Commission's initial inquiry. OCWGA recommends that the Commission revise the rules by affirmatively defining what must be included in the filed agreement, rather than enumerating what need not be filed. OCWGA at 11. It states that this approach would allow for incremental adjustments to the regulations and clarify any uncertainty in the rule. *Id.* at 11–12.

OCWGA and PONL both assert that the Commission should determine the level of specificity it requires for such filings to be meaningful, and balance that need against the burden on filers. OCWGA at 19; PONL at 8. OCWGA suggests that the Commission seek to alleviate commercial harm arising from the disclosure of sensitive business information and the administrative costs associated with filing agreements so specific that they require constant amendments which also must be filed. OCWGA at 19.

A summary of comments addressed to the specific questions contained in the NOI follows. (a) The Commission asked whether the current filing exemption for routine operational or administrative matters should be eliminated, retained in its current form, or modified (NOI Question 1). Although the current regulations provide that filed agreements be ''the complete agreement among the parties and * * * specify in detail the substance of the understanding of the parties'' (46 CFR 535.407(a)), as summarized below, several comments generally remark that there are exceptions to this requirement. The comments cite the Commission's rules allowing ''permissive authority'' at 46 CFR 535.407(b)[3] and the exemption from additional filing for interstitial implementation of routine operational or administrative matters at 46 CFR 407(c). OCWGA contends that the Commission has never required the parties to a filed agreement to actually exercise all the authority in an agreement. It also alleges that the Commission's proceedings in Docket No. 97–07, *Possible Unfiled Agreement between Hyundai Merchant Marine Co., Ltd. and Mediterranean Shipping Co., S.A.,* 28 S.R.R. 1428 (2000) and Docket No. 97–08, *Possible Unfiled Agreement Among A.P. Moller-Maersk Line, P&O Nedlloyd Limited and Sea-Land Service, Inc.,* 28 S.R.R. 1431 (2000) (''Docket No. 97–08''), deviate from that position. OCWGA at 12–13. OCWGA asserts that allowing permissive authority benefits both the Commission and the carriers because it allows the Commission to consider both the immediate and potential future effects of the agreement, while providing carriers essential operational and commercial flexibility. *Id.* at 13. OCWGA suggests that not allowing such permissive authority would be impossibly burdensome for both carriers and the Commission. *Id.*

OCWGA gives four instances in which permissive authority could promote flexibility. *Id.* at 14–17. First, with regard to the requirement that an agreement provide information as to the number of vessels and vessel capacity/slots it intends to utilize, OCWGA asserts it would be useful for the Commission to formalize the current policy that an agreement may set forth a maximum number (or range) of vessels and capacity, or maximum number of slots, that may be used without amendment to the agreement. *Id.* at 14.

Second, OCWGA states that the Commission's practice allowing agreements to describe their geographic scope in terms of port ranges rather than the specific ports served is beneficial because operational and commercial considerations may require diversions on short notice. *Id.* at 15. OCWGA further asserts that there is no regulatory purpose in requiring that an agreement name the specific ports it intends to serve rather than port ranges, because such information is provided to the Commission in the information forms and monitoring reports, and typically is also provided to the public through published sailing schedules. *Id.*

Third, OCWGA recommends that agreements continue to have the ability to contain permissive authority for their members to discuss and agree on joining

[1] Docket No. 99–13, *The Content of Ocean Common Carrier and Marine Terminal Operators Agreements Subject to the Shipping Act of 1984,* has been discontinued by separate order. The instant proceeding, Docket No. 03–15, *Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984,* encompasses former Docket No. 99–13 and expands it to cover additional matters. As indicated below, the five comments submitted to the Commission in Docket No. 99–13 are incorporated by reference into the record of the instant proceeding and have been considered by the Commission.

[2] Members of OCWGA at the time of this submission were: the Latin America Agreement; Israel Trade Conference; Trans-Atlantic Conference Agreement; Transpacific Stabilization Agreement; United States/Australia-New Zealand Association; United States/South Europe Conference; United States/Southern Africa Conference; Westbound Transpacific Stabilization Agreement; Mediterranean-North Pacific Coast Freight Conference; A.P. Moller-Maersk Line; Contship Containerlines, Ltd.; Crowley American Transport, Inc; Evergreen Marine Corporation (Taiwan) Ltd.; King Ocean Service de Venezuela, S.A.; Sea-Land Service, Inc.; Star Shipping A/S; Tropical Shipping & Construction Company, Ltd.; Wallenius Wilhelmsen Lines AS; Zim-Israel Navigation Company; and Hapag-Lloyd Container Linie GmbH.

[3] That provision states:

Except as provided in paragraph (c) of this section, agreement clauses which contemplate a further agreement or give the parties authority to discuss and/or negotiate a further agreement, the terms of which are not fully set forth in the enabling agreement, will be permitted only if the enabling agreement indicates that any such further agreement cannot go into effect unless filed and effective under the Shipping Act and that interstitial implementation of routine operational or administrative matters is permitted without requiring further filings.

other agreements, as the Commission would have notice of any action taken under such authority through a subsequent filing. *Id.* at 15–16. OCWGA objects to any requirement that an amendment to the original agreement also be filed when the parties exercise permissive authority. It asserts that such a requirement would serve no legitimate regulatory purpose and would be duplicative. It notes that there are 25 effective agreements currently on file with the Commission which contain this authority. *Id.* at 16. Finally, OCWGA recommends that the Commission allow permissive authority to include operational agreements, such as slot or space charters.[4]

PONL and CENSA contend that the term, ''routine operational or administrative matters'' used in section 535.407(c), lacks clarity. PONL at 6; CENSA at 1. CENSA suggests that the Commission identify and define those aspects of agreements which are relevant to its initial review and subsequent monitoring responsibilities, and establish specific rules with respect to them. CENSA at 2. OCWGA, however, recommends that the existing exemption for ''routine operational or administrative matters'' be retained in its current form. OCWGA at 10.

PONL contends that the Commission's interpretations of the term ''interstitial implementation'' [5] in Docket No. 97–08 and Docket No. 96–14, *Compania Sud Americana de Vapores, S.A.* v. *Inter-American Freight Conference,* 28 S.R.R. 137 (1998) (''CSAV''), have made that term very unclear. PONL asserts that its attempts to use the term ''interstitial'' in agreements have met with objection from the Commission's Bureau of Trade Analysis Office of Agreements. PONL at 5.

PONL asserts that if the Commission considers a conference's implementation of its tariff rate agreement authority an ''interstitial implementation,'' as indicated in the example in 535.407(c), then it should similarly consider implementation of authority to agree on a joint approach to joining a conference to be a routine administrative matter and an interstitial implementation of such authority. *Id.* PONL further asserts that the implementation of rates, terms, and conditions by an agreement with space charter authority should also be considered interstitial. *Id.* PONL suggests that an agreement that, for example, includes the authority for its members to enter into space charters, as well as other authorities, can enter into a space charter without any additional filings, as contemplated by 46 CFR 535.407(b). PONL asserts that little purpose would be served by requiring the public filing of agreements that involve interstitial implementation of express enabling authority contained in a filed and effective agreement. *Id.* at 8.

(b) The Commission posed the question, ''if parties were required to file every arrangement or understanding that came within the scope of section 4, would they be subject to commercial harm or burden?'' (NOI Question 2). Section 5(a) of the Shipping Act requires the filing of a ''true copy of every agreement.'' 46 U.S.C. app. § 1704(a). The Commission's regulations currently require that the filed agreement be true, complete, detailed and specific. 46 CFR 535.103(g), 535.401(a)(1), 535.407(a). PONL, CENSA and OCWGA all assert that the Commission's requirement that the ''complete'' agreement be filed cannot be interpreted literally. PONL asserts that a literal reading would create an internal conflict between the Shipping Act's 45-day waiting period imposed on agreements before they become effective, and the fact that tariff rate reductions may become effective immediately. PONL at 7. Similarly, OCWGA believes that the 45-day waiting provision indicates that Congress did not intend to require every detail of coordinated carrier activity to be filed. OCWGA maintains that the Shipping Act's use of the phrase ''every agreement'' should not be construed literally or else it would be impossible to file every detail of joint or group arrangements. OCWGA at 8, 19. OCWGA asserts that imposing such a requirement on service contracting agreements would subject them to an enormous and repetitive filing burden (because the service contracts themselves are filed) and, in the case of contracts with confidentiality clauses, might violate the terms of the service contract itself and the Shipping Act. *Id.* at 21. OCWGA believes that at some level of specificity, ''agreements'' cease to have any relevance to the Commission's statutory duties. *Id.*

CENSA contends that the term ''complete'' is of little guidance to the industry. CENSA at 1. PONL objects to the current regulation's requirement that a ''true and complete'' agreement be filed, stating that the statutory requirement is only that a ''true copy'' of the agreement be filed. PONL at 2 (comparing section 5(a) of the Shipping Act with 46 CFR 535.407(a)). It notes that the Commission's jurisdiction may not cover the ''complete'' agreement if, for example, it involves trade between foreign ports; and states that based on the Commission's regulations, ''complete'' does not include ''routine operational or administrative matters.'' *Id.* at 2–3 (citing 46 CFR 535.407(c)).

PONL asserts that certain agreements, for example, cross space charters, vessel sharing, and alliance agreements, that are on their face subject to additional understandings have been accepted for filing and allowed to go into effect by the Commission. *Id.* at 3. It further asserts that, therefore, the Commission's jurisdictional limitations, its current regulations, and its past practice of not objecting to the filing of agreements using permissive authority phrases indicate that the term ''complete'' does not literally mean complete. *Id.* at 4.

NITL urges that only those carrier agreements which are likely to have a significant impact on competition in a given market continue to require ''complete'' filing with the Commission. NITL at 4. NITL asserts that the Commission and the public need to have the ability to read and understand the scope and terms of agreements that are likely to result in a reduction in competition or otherwise artificially influence the supply of and demand for ocean transportation service. *Id.* at 3–4. NITL opines that detailed and complete information filed by the carrier parties to such agreements is required. However, NITL cautions that the requirement for the filing of a complete agreement should not be interpreted so as to restrict useful operational flexibility, particularly in non-conference type settings such as space/slot charter and sailing agreements. *Id.*

(c) The Commission asked whether it should adopt different standards for agreement content for different types of agreements. (NOI Question 3). OCWGA points out that the Commission already distinguishes between conference and other types of agreements in 46 CFR 535.404, but warns that developing further general standards for different types of agreements may create more confusion. OCWGA at 22. With respect to alliances and space/vessel sharing agreements, which do not easily fit into fixed categories however, OCWGA suggests that the Commission clarify the filing requirements through guidance stated in functional terms, as opposed to

[4] OCWGA's position on operational agreements generally is discussed below.

[5] The terms ''interstitial implementation'' and ''routine operational or administrative matters'' are found in 46 CFR 535.407(c), which provides that:

[f]urther specific agreements or understandings which are established pursuant to express enabling authority in an agreement are considered interstitial implementation and are permitted without further filing under section 5 of the Act only if the further agreement concerns routine operational or administrative matters, including the establishment of tariff rates, rules and regulations.

the rules' current use of classification terms. *Id.* at 22. OCWGA suggests as an example, that the Commission's rules direct that each ''agreement that provides for the sharing of vessels or space on vessels shall state the maximum number and capacity of vessels that may be so employed.'' *Id.*

NITL believes that the level of detail for filings related to agreements that would not significantly alter competitive conditions in a given market should be relaxed. NITL at 5. CENSA simply urges that the Commission avoid unnecessary and burdensome requirements and provide carriers with a reasonable amount of operational flexibility. CENSA at 2.

(d) The Commission asked whether commenters could identify types of agreements currently filed which would be appropriate for exemption from filing under section 16 of the Shipping Act.[6] (NOI Question 4). OCWGA, PONL and CENSA maintain that agreements with little or no competitive effect, agreements concerning operations, and slot charter agreements should all be exempt from the filing requirements of the Shipping Act. OCWGA asserts that agreements which typically have little or no competitive effect (such as those that do not authorize discussion or agreement on rates, vessel operating costs, shared vessel usage, service contracts, or capacity) should be completely exempt from the filing requirements of the Shipping Act. OCWGA at 23. OCWGA contends that this exemption would serve the dual purposes of defining the applicability of the term ''cooperative working arrangement'' found in section 4(a)(5) of the Shipping Act[7] and providing certainty regarding the filing requirements. *Id.* It urges the Commission to retain the other existing exemptions. *Id.*

NITL suggests that the Commission consider further exemptions for other types of agreements that do not significantly affect competition. NITL at 6. NITL approves of the existing exemption from filing for interstitial implementation of routine operational or administrative matters found in section 535.407(c). Where full exemption for a certain type of agreement is not warranted, NITL believes that the Commission should consider a relaxation of other procedural requirements, such as the waiting period requirement. *Id.*

OCWGA observes that in late 1996 and early 1997, Commission staff began informally requiring space charter, slot charter, sailing and other forms of cooperative agreements among carriers (collectively referred to as ''slot charter agreements'') to contain a greater degree of detail than had been required at any time since 1984. OCWGA at 4–5. OCWGA contends that there is now considerable uncertainty stemming from recent Commission proceedings as to what must be set forth in such agreements. *Id.*

PONL suggests that the Commission adopt an exemption for simple space charter agreements where one carrier charters space to another, stating that this enhances, not reduces competition. PONL at 9. OCWGA opines that most slot charter agreements ''resemble a joint venture or partnership in which on-going and extensive operational coordination is necessary to provide an efficient, competitive, and coordinated service.'' OCWGA at 5–6. OCWGA urges that the Commission resolve this uncertainty in the proposed rules bearing in mind such things as the purpose of agreement filing, what information is practical to include, the procedural requirements of the Shipping Act, and flexibility for the Commission and carriers to process amendments to agreements. *Id.* at 6.

OCWGA contends that the Shipping Act's replacement of the ''public interest'' standard (which required an affirmative showing of public benefit before an agreement could be approved) with the presumption that agreements are permissible, changed the Commission's need for certain information. *Id.* at 7. OCWGA states that, therefore, the information necessary to analyze whether an agreement is likely to result in an unreasonable increase in rates or unreasonable reduction in services is identifiable and limited to the nature of the coordinated activities, the identity and number of parties involved, and the trades in which the agreement will operate. *Id.* Beyond these basic points of information, OCWGA contends, there is a dispute over what should be filed. *Id.* at 7–8.

OCWGA further contends that operational arrangements arising from slot charter agreements that detail how the parties put into effect the authority set forth in the filed agreement should be exempted from filing, arguing the documents are ''non-standard'' and not ''created to fulfill a regulatory purpose.'' *Id.* at 17. OCWGA also opines that filing operational arrangements arising from slot charter agreements would be unworkable, because of their excessive specificity, and impractical, because including such details would require the frequent filing of amendments. *Id.*

(e) The Commission asked whether the rates charged by one carrier to another for use of space and/or vessels should be exempt from filing or withheld from public disclosure. (NOI Question 5). PONL and OCWGA contend that for the last 15 years there has been a *de facto* exemption to the Shipping Act's filing requirements for slot charter costs. PONL at 9; OCWGA at 24. PONL states that requiring the filing and subsequent public disclosure of that information would harm carriers because other carriers would insist on getting the same rates, and competing carriers and shippers could use the price information in any further pricing and rate negotiation. PONL at 9. PONL believes that there would be no regulatory benefit to requiring that such rates be made public. *Id.* Similarly, OCWGA believes that these rates should be confidential and that the public has no legitimate interest in them. OCWGA at 24. OCWGA also maintains that such disclosure would be anticompetitive because it would ''circumscribe the ability of carriers to negotiate different rates with different carriers.'' *Id.*

CENSA also asserts that the ''industry needs some degree of confidentiality with respect to the commercial terms of their operational agreements.'' CENSA at 2. It claims that requiring carriers to disclose the amounts they pay for vessel space ''could prove to be anticompetitive and contrary to the objectives of OSRA.'' *Id.*

(f) The Commission requested comments on whether public disclosure of filed agreements is useful to shippers, intermediaries, labor, non-party carriers, marine terminal operators or other interested persons. (NOI Question 6). PONL and OCWGA state that beneficial shippers and ocean transportation intermediaries (''OTIs'') have shown little interest in filed agreements. PONL at 10; OCWGA at 24. OCWGA opines that on the rare occasions that shippers or OTIs do express such interest they usually request the information directly from the carrier or from the agreement rather than from the Commission.

[6] Section 16 provides, *inter alia,* that the Commission ''may exempt for the future any class of agreements * * * if it finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce.'' 46 U.S.C. app. § 1715.

[7] Section 4(a)(5) of the Shipping Act reads, ''This Act applies to agreements by or among ocean common carriers to—(5) engage in exclusive, preferential, or cooperative working arrangements among themselves or with one or more marine terminal operators * * *.'' 46 U.S.C. app. § 1703(a)(5). The Commission's regulations define a ''cooperative working arrangement'' as an agreement which establishes exclusive, preferential, or cooperative working relationships which are subject to the Shipping Act of 1984, but which do not fall precisely within the arrangements of any specifically defined agreement. 46 CFR 535.104(i).

OCWGA at 24. PONL suggests that the Commission answer this question by reviewing its records pertaining to requests for copies of agreements and comments on filed agreements. PONL at 10.

ILA would like certain matters in agreement filings to be made public and for agreements filed with the Commission (and noticed in the **Federal Register**) to document the origins, destinations, and points of entry and departure of cargo accurately and in an easily understandable manner that will not handicap it in administering and enforcing the provisions of its own collective bargaining agreements. ILA at 1. ILA argues that not making such information publicly available would hamper its ability to detect the movements of containers destined for a designated port area but off-loaded at different port. *Id.* at 1–2. ILA states that it requires access to the carriers' electronic systems, and that it is concerned by some carriers' practice of making certain information public but masking it in digitized codes. *Id.* at 2. ILA maintains that it is not seeking to have the Commission require disclosure of competitive rates of carriers, their surrogates or allies. *Id.* Although ILA asserts that its labor contracts apply regardless of whether the filed agreement is classified as a ''rate agreement'' or an ''operational agreement,'' ILA wants the ''ability to anticipate and locate the shipments which its contracts entitle its [l]ongshorepersons to handle and which are subject to charges as defined under those agreements.'' *Id.*

(g) The Commission asked whether it can implement measures to protect commercially sensitive information contained in filed agreements. (NOI Question 7). Some commenters assert that there may be sensitive commercial information in filed agreements that the parties may legitimately need to protect. OCWGA notes that while section 6(a) requires publication in the **Federal Register**, section 6(j) appears to specify a different treatment for section 5 agreements than for ''documentary material'' submitted under sections 5 and 6. OCWGA at 24–25. It maintains that this may place some procedural restrictions on how the Commission implements its authority to protect such information from disclosure and urges that, ''[s]pecifically, in order for information to be unambiguously protected from disclosure, such information must not be required to be included in the agreement required to be filed under section 5.'' *Id.* PONL opines that the Commission has already implemented measures to protect commercially sensitive information because it does not require conferences to publicly file minutes and notes that the Commission's exemption authority can shield such information. PONL at 10.

NITL believes that the Commission should not shield from disclosure information that would enable shippers to gain a thorough and complete understanding of the scope of a filed agreement likely to have a substantial impact on competition, such as conference or discussion agreements. NITL at 7. However, NITL asserts that information of a purely operational nature, and not relating to competition may be appropriately protected from public disclosure and should be determined on a case-by-case basis. *Id.*

ILA believes that the Commission should require that agreements filed with it contain provisions which, while neither exposing rates nor other truly confidential data, would allow labor interests to track the movements of containerized cargoes subject to collective bargaining agreements. ILA at 2.

(h) The Commission requested commenters to provide information on how competing concerns of completeness, burden and confidentiality are resolved in the filing requirements of other regulatory agencies. (NOI Question 8). OCWGA notes that no other agency operates under a statutory provision identical to section 6(j) of the Shipping Act but cites some comparable provisions used by other agencies. OCWGA at 26. These include provisions by the Department of Transportation (''DOT'') for air carrier agreements, the Surface Transportation Board (''STB'') for agreements among railroads, the Federal Trade Commission (''FTC'') for general pre-merger notifications and the Securities and Exchange Commission (''SEC'') for registration statements for securities. OCWGA notes that under 49 U.S.C. 41308 and 49 U.S.C. 41309(a) the Secretary of Transportation has the authority to exempt from antitrust laws cooperative air carrier agreements filed with it and that to obtain this exemption, an air carrier must file ''a true copy * * * and complete memorandum of an agreement.'' *Id.* OCWGA further notes that DOT has implemented regulations to protect the confidentiality of this information (14 CFR 302.39(b)) which provide a procedure by which a carrier may mark as confidential portions of an agreement and may move to withhold such portion from public disclosure.[8] *Id.*

OCWGA also cites to 49 U.S.C. 10502 which grants the STB authority to exempt rail carriers from the antitrust laws and directs it to approve and monitor those agreements pursuant to 49 U.S.C. 10704 and 10705. OCWGA urges that 49 CFR 1313.7 and 1313.16 be used as examples for the confidential treatment of agreement information. *Id.* Finally, OCWGA notes that the FTC receives pre-merger notification filings for companies under its jurisdiction and that 15 U.S.C. 18a(h) exempts from disclosure any information filed pursuant to the pre-merger notification requirement, unless relevant to any administrative or judicial action or proceeding. *Id.*

Similarly, PONL notes that the Antitrust Division of the Department of Justice (''DOJ'') receives pre-merger filings as well as requests for Business Review Letters and that DOJ may ask filers for more information and prevent disclosure of confidential information. PONL at 10.

PONL and OCWGA observe that the SEC receives securities registrations as authorized by its controlling statute which enumerates all information required to be submitted in the registration, but that SEC regulations allow filers to request confidential treatment by separating the confidential portion from the regulation statement and filing it separately. 17 CFR 230.406(2). PONL at 10; OCGWA at 26.

B. The Proposed Rule

In accommodating the concerns expressed in the comments, the Commission must reconcile what may appear to be conflicting missions of the agency—on the one hand, to exercise the meaningful oversight of agreements to check any abuses arising from antitrust immunity required by section 6 of the Shipping Act, and on the other, to minimize regulatory intrusions and burdens, as required by section 1. Therefore, the Commission proposes the following regulations, which are intended to permit it to exercise effective oversight consistent with the Commission's statutory responsibilities without imposing undue regulatory burdens.

[8] The rule reads, in pertinent part:

Any person who objects to the public disclosure of any information in any paper filed in any proceeding * * * shall segregate, or request the segregation of, such information into a separate paper and shall file it * * * separately in a sealed envelope, bearing the caption of the enclosed paper, and the notation ''Classified or Confidential Treatment Requested Under Sec. 302.39.''

14 CFR 302.39(b).

1. Proposed Changes To Address Concerns for Certainty

Section 5(a) of the Shipping Act requires that a true copy of every agreement entered into with respect to an activity described in section 4(a) or (b) of this Act shall be filed with the Commission, except agreements related to transportation to be performed within or between foreign countries and agreements among common carriers to establish, operate, or maintain a marine terminal in the United States. 46 U.S.C. app. § 1704.

Many commenters assert that it is simply not reasonable to require the filing of a true copy of every agreement because there are some details which cannot reasonably be expected to be specifically reflected, and also for the following reasons:

- Doing so would subject sensitive commercial information to disclosure, due to the notice requirement of section 6(a) of the Shipping Act;
- The parties need more flexibility than the 45-day waiting period would provide;
- There are details which have not yet been agreed upon when the agreement is filed;
- Some details have no anticompetitive potential; and/or
- The details are not reflected in standardized documents, so drafting them would be burdensome for the filer and reviewing them would be burdensome for the Commission.

Therefore, they argue that the text of the Shipping Act cannot be interpreted to literally mean a copy of the commercial agreement.

The present text of the Commission's policy, stated at section 535.103(g), was originally added in rulemakings in 1984.[9] It represented a codification of the Commission's then-existing policy. Early on in its administration of the Shipping Act, the Commission had received agreements with unacceptably vague, incomplete or indefinite statements of authority. *See*, Docket Nos. 84–26 and 84–32 (final rule). Therefore, the Commission created this rule to ensure that ''a complete agreement is filed in sufficient detail to conduct a meaningful review.'' *Id.*

Such review, based on the requirements of section 6 of the Shipping Act, includes: (1) A preliminary review of the section 5 requirements; (2) a review for section 6(g) compliance; and (3) a general review of the agreement to ensure that it does not facially contravene other sections of the Shipping Act (*e.g.*, acts prohibited by section 10). Section 535.103(g) reflects the Commission's need for specificity in order that it may: (1) Evaluate the probable impact of an agreement; (2) conduct ongoing monitoring of agreement operations (especially for section 10(a)(2) and (3) prohibitions); and (3) avoid ambiguities concerning antitrust immunity granted to agreements.[10]

The policy presently stated at section 535.103(g) is carried out through section 535.407(a)[11] which requires an agreement to ''reflect the full and complete present understanding of the parties as to its essential terms.'' Docket No. 84–32, *Rules Governing Agreements by Ocean Common Carriers and Other Persons*, 49 FR 36371 (Interim Rule and Request for Comments) (''1984 Interim Agreement Rule''). The 1984 Interim Agreement Rule also described the reach of section 535.407(a) as follows:

The rule does not contemplate that every activity be enumerated in detail. However, general grants of authority which do not specify the activities under the agreement are not favored. For example, an agreement which, as its authority, merely recited the language of section 4(a)(1)–(7) of the Act would require some further clarification. Otherwise, review of such an agreement would be virtually meaningless. Such general statements of authority, even where clarified by subsequent refinement, should be avoided. *Id.* at 36372.

Some commenters claim that the industry does not have a clear understanding of the significance of the term ''true and complete,'' and argue that the phrase cannot be interpreted literally if it is read concurrently with the exemption allowing routine operational or administrative matters interstitial to a filed agreement without further filing. Some commenters also point out that matters which may be part of the commercial arrangement but which are outside the scope of the Commission's jurisdiction necessarily must not be included in the filed agreement.

The Commission's rules (as well as past Commission case law) are not more extensive than its jurisdiction: section 535.103(g) refers to an ''agreement filed under the Act'' and section 535.407(a) refers to ''any agreement required to be filed by the Act.'' These jurisdictional limitations, also discussed in *Transpacific Westbound Rate Agreement*, 951 F.2d 950 (9th Cir. 1991) (''TWRA''), provide boundaries to the information required in a filed agreement. Nevertheless, these concerns appear to be addressed to the limits of the Commission's subject matter jurisdiction over agreements, as opposed to the completeness with which matters within that jurisdiction must be reflected.

The Commission has consistently interpreted 46 U.S.C. app. § 1704(a) to require filed agreements to be complete, specific, detailed reflections of the present understanding of the parties. 46 CFR 535.103(g) and 535.407(a). The commenters point to no legislative history to demonstrate that the subject matter jurisdictional limitations of the Shipping Act indicate that its drafters did not intend the phrase ''true copy'' to be interpreted literally. A general definition of the term indicates ''[a] true copy does not mean an absolute exact copy but means that the copy shall be so true that anybody can understand it.'' Black's Law Dictionary (1995 ed.).[12] For oral agreements, the Shipping Act requires that ''a complete memorandum specifying in detail the substance of the agreement'' be filed. 46 U.S.C. app. § 1704(a). The Commission finds no indication that Congress intended the Commission to subject oral agreements to greater requirements than those which are written. Therefore, we disagree with the commenters' assertion that the text of the Shipping Act cannot be interpreted literally.

Nevertheless, we recognize that there may be some legitimate confusion as to what the Commission expects a filed agreement to contain. This confusion may have arisen from the Commission's historical usage of suggested language for form and manner, especially for filed agreements' ''authority'' clauses. We believe confusion may also arise when the policy reflected in sections 535.103(g) and 535.407(a) is read in tandem with the allowances of sections 535.407(b) and (c) for further agreements on certain routine matters. However, we find no precedent to support the proposition that the term ''true and complete'' means only those

[9] 46 CFR 535.103(g) states:

An agreement filed under the Act must be clear and definite in its terms, must embody the complete understanding of the parties, and must set forth the specific authorities and conditions under which the parties to the agreement will conduct their present operations and regulate the relationships among the agreement members.

[10] In Docket Nos. 84–26 and 84–32 (final rule), the Commission stated, ''agreements should be sufficiently precise and definite to determine whether a particular activity is within the scope of the antitrust immunity conferred upon them by section 7 of the [Shipping] Act.'' 49 FR at 45332.

[11] Section 535.407(a) provides:

(a) Any agreement required to be filed by the Act and this part shall be the complete agreement among the parties and shall specify in detail the substance of the understanding of the parties.

[12] *See also*, *Associated-Banning Co.* v. *Matson Nav. Co.*, 5 F.M.B. 336, 342 (1957), interpreting the ''true and complete'' standard under the 1916 Act(''when parties file an agreement for approval they must include all understandings and arrangements of the character covered by section 15 which exist between them at the time.'')

details which the Commission had positively required to be filed in its prior form and manner regulations.

For the sake of clarity, the Commission now proposes to remove current sections 535.103(g) and 535.407(a) and replace them with a newly created section 535.402 to serve as one concise and clearly controlling rule. The new section is intended to reassert the Commission's original interpretation requiring the filing of the commercial document as agreed to by the parties, in contrast to the filing of a document drafted solely to meet U.S. regulatory requirements.

2. Proposed Changes to Address Concerns for Future Commercial Flexibility

a. Requirement to File Every Agreement (46 CFR 535.402)

In promulgating what is now section 535.407(a), the Commission asserted that the statute and the new rule required that an agreement ''reflect the * * * present understanding of the parties as to its essential terms.''[13] 1984 Interim Agreements Rule at 36372. Thus, the Shipping Act does not require or allow for the filing of proposed, draft or preliminary agreements. In addition, the Commission's rules positively prohibit clauses in agreements which contemplate a further agreement, sometimes called ''agreements to agree.'' 46 CFR 535.407(b).[14] Allowing vague authority clauses to be filed in agreements appears to conflict somewhat with the Commission's policy requiring that the agreement ''set forth the specific authorities and conditions under which the parties to the agreement will conduct their present operations' (46 CFR 535.103(g)). However, forward-looking clauses have been permitted when there is an indication that any further contemplated agreements will not be carried out unless and until filed and effective under the Shipping Act. 46 CFR 407(b).

In order to address parties' needs to maintain future flexibility in agreements describing their collaborative arrangements, the Commission generally has permitted the filing of agreements containing statements of authority which must be amended when the parties have reached the details of their agreement. The Commission has also crafted an exemption for certain day-to-day details, thereby removing the filing requirement for ''interstitial implementation of routine operational and administrative matters.'' 46 CFR 535.407(c). However, the comments appear to suggest that this approach has proved unsatisfactory.

In suggesting that the statute be read broadly enough to accommodate the future needs of parties, the commenters use a term that appears neither in the Shipping Act nor in the Commission's regulations: ''permissive authority.'' This term apparently refers to: (1) Authority that may never actually be exercised (*e.g.*, ''the parties may discuss rates'' or ''the parties are authorized to discuss rates''); (2) broad statements of authority (*e.g.*, ''the parties are authorized to exchange slots on such terms as they may from time to time agree''); or (3) an agreement to act ''within a range,'' for example, of capacity or ports served. Such forward-looking statements frequently appear in filed agreements. Indeed, the Commission itself may have encouraged their use by referring in its rules to agreement ''authority,'' a term that itself implies future implementing agreements.

Moreover, we recognize that parties may not wish to file details of their collaboration for at least two reasons. For example, this may be because: (1) agreement on the details has not yet been reached and the parties are still in negotiation, but wish to file and thereby commence the 45-day waiting period; or (2) the parties have reached a final and specific agreement, but anticipate changes to those understandings and wish to build flexibility into the document they file. No commenter has cited nor has the Commission found any legislative history of the Shipping Act which would support the suggestion that Congress intended that parties may file a ''preliminary draft'' of an agreement, which would commence the running of the 45-day review period. Therefore, the proposed regulations clarify that the Commission will not accept any such ''preliminary draft'' agreements.

This determination is reflected in the revised section 535.402, which retains the Commission's core interpretation of the Shipping Act's requirement that a ''true copy of every agreement'' be filed. The proposed rule also clarifies this by rephrasing it as a positive requirement in section 535.402 rather than as a policy statement.

b. Modifications to Effective Agreements (46 CFR 535.407)

While the Commission interprets the Shipping Act to generally require that parties file their final, detailed agreement, rather than a general agreement to collaborate, the Commission has also historically recognized certain exceptions to that general standard. The first of these exceptions is explicit in the Shipping Act: section 4 necessarily contemplates certain agreements which cannot contain implementing details because they are by their very nature agreements to discuss future collaboration. These are the rate agreements authorized by section 4(a)(1), 4(a)(7) and 4(b)(1). 46 U.S.C. app. §§ 1703(a)(1), (a)(7), (b)(1).

We believe that the most logical interpretation of section 4 is that certain matters may not be discussed in detail unless and until the parties have a filed and effective agreement. Therefore, the parties cannot be required to file a detailed, complete or specific agreement for those types of agreements. We believe this view is supported by the Commission's historical treatment of conference and other rate-setting agreements in its rulemakings.

The use of authority that might (or might not) be exercised pursuant to a filed agreement but would not require further filings, was first recognized by the Commission in ''suggested agreement language'' published in Docket No. 67–55 (General Order 24), *Filing of Agreements Between Common Carriers of Freight by Water in the Foreign Commerce of the United States,* 33 FR 11655 (1968). Those rules were intended to ''establish guidelines for the filing, format and content of agreements'' to ''encourage uniformity of agreements'' and expedite their review by the Commission. 46 CFR 522.1 (1968). To that end, the regulations suggested language to be used by conference and rate agreements.[15] Although the 1968 ''guidelines'' for agreements included some suggested language for agreements other than conference and rate agreements, the suggested terms did not include ''authority'' clauses.[16]

[13] *See also*, *Isbrandtsen Co.* v. *States Marine*, 6 F.M.B. 422, 434 (1961)(''There is no filing requirement until there is an agreement or a meeting of minds * * * regarding activities described in Sec. 15.''). The issue in this case concerned unacceptably vague authority statements in agreements that were being filed at the time.

[14] This prohibition might appear to be inconsistent with the Shipping Act's specific provision for agreements ''to discuss *and agree* on any matter related to service contracts.'' 46 U.S.C. app. § 1703(a)(7). However, we believe the statute provides consistent treatment by providing that any resulting agreement with respect to service contracts be reflected in confidentially filed ''voluntary guidelines.'' 46 U.S.C. app. § 1704(c)(3).

[15] For conference agreements, the Commission's rules included the following suggested language:

[16] Pooling, joint service, sailing, transshipment and cooperative working agreements did not include the ''authority'' provisions which were suggested for conference and rate agreements. 46 CFR 521.6(c)–(g)(1970).

Authority Under This Agreement

On their face, therefore, such agreements were, in fact, ''agreements to agree.'' The two sets of guidelines for agreement language (both intended for agreements with rate-making activity) were the only such Commission-provided examples for agreements containing such open-ended authority. It appears that over the years, the ''suggested authority'' language has been adopted for use in non-rate-making agreements (also called ''operational agreements'') as well.

The Commission subsequently recognized and addressed the need for some open-ended authority in agreements through current section 535.407(b). This provision permits ''agreement clauses which contemplate a further agreement or give the parties authority to discuss and/or negotiate a further agreement, the terms of which are not fully set forth in the enabling agreement'' to be included in filed agreements only if ''the enabling agreement indicates that any such further agreement cannot go into effect unless filed and effective under the Act.'' The 1984 Interim Agreements Rule's supplementary information described the Commission's reasons for requiring that provisions in agreements that contemplate further agreements not become operative until filed and effective under the Shipping Act:

> [a] problem of open-ended authority arises where an agreement allows for future substantive modification of an agreement without specifically requiring filing under section 5. Such general authority to make future modifications without filing with the Commission would subvert the Commission's ability to review and monitor an agreement. 49 FR 36372.

The Commission's 1984 Agreements Rules offered a further degree of commercial flexibility to agreement parties through another provision: the exception from filing for the ''interstitial implementation of routine operational and administrative matters'' under section 535.407(c).[17] The Commission explained in the 1984 Interim Agreements Rule that the provision was originally intended to ''allow[] flexibility to make changes for tariff matters or routine operational and administrative matters having no anticompetitive effect.'' 49 FR 36372. The Commission asserted that this section ''provide[s] that activities which may reasonably be viewed as interstitial to a stated agreement authority need not be expressly stated.'' *Id.* The Interim Rule gave only the following two examples: (1) authority to establish ''overland common point'' rates would be interstitial to general ratemaking authority, but establishing a tariffed contract rate system would not; and (2) changes in the terms and conditions of a charter party (contract) underlying a space charter agreement would generally be interstitial, but changes in the number of vessels (or range of number of vessels) and definition of vessel capacity (or range of capacities) dedicated in a joint service or space charter agreement would not. *Id.*[18]

Until recently, conferences (and other rate) agreements were those with which the Commission had the most concern. The Commission's current rules on agreements were adopted at a time when conferences were the principal method by which ocean common carriers exercised their antitrust immunity to achieve price discipline and rate stabilization. Now, however, there has been a precipitous decline in the number and role of traditional conferences, and their influence has been supplanted by discussion agreements on pricing. This development, concurrent with the appearance of global strategic alliances, has resulted in agreements which may be more effective than conferences ever were at stabilizing rates by controlling capacity.

As a result of the above-discussed history, the commenters assert that ''permissive authority'' has come to be invoked for matters much broader than simply the implementation of rate-related authority, *i.e.* tariffs and service contracts. In addition, the exemption from filing for ''interstitial implementation of routine operational and administrative matters'' under section 535.407(c) has been a prime source of confusion. Some commenters assert that ''interstitial implementation of routine operational or administrative matters'' could be indicated by the use of phrases such as, ''the parties agree to ___ according to terms, rates and conditions as the parties may from time to time agree.'' Thus, with respect to ''permissive authority,'' responses to the NOI generally proffer two types of future actions taken pursuant to an agreement: (1) those allowed by grants of authority which might (or might not) be exercised, but which do not anticipate subsequent filing if exercised; and (2) those allowed without further filing due to their categorization as ''interstitial implementation of routine operational or administrative matters.'' There also appears to be another type of ''permissive authority'': that which outlines a range (for example of capacity, ports, *etc.*) in which the agreement may operate. The following discussion addresses each of these interpretations.

In promulgating the exception for ''interstitial implementation of routine operational and administrative matters,'' the Commission explained that section 535.407(c) would be interpreted on an *ad hoc* basis. *Id.* The comments received in the NOI demonstrate that this ad hoc approach may have created some confusion. Recently, the Commission found a violation of section 10(a)(2) of the Shipping Act[19] where a conference failed to file its understanding as to the winding up of its affairs. The respondent conference argued that such a matter was ''routine operational or administrative'' and therefore exempt from the filing requirements. *Compania*

Subject to applicable provisions of law, the Conference *is authorized* to:

1. *Agree upon* and establish rates and charges for the carriage of cargo and rules and regulations governing the application thereof and defining the service to be rendered therefor;

2. Declare rates for specified commodities to be ''open'' with or without agreed minimum, and thereafter declare the rates for such commodities to be ''closed'';

3. *Agree upon* and establish tariffs, tariff amendments, and supplements;

4. Make rules and regulations for the handling and carriage of cargo;

5. *Provide for* use of a contract/noncontract rate system for filing with the Commission for approval pursuant to section 14b of the Shipping Act, 1916;

6. *Agree on* amounts of brokerage and/or compensation to forwarders and the conditions for the payment thereof as permitted by applicable law;

7. Keep such records and statistics as may be required by the parties or deemed helpful to their interests.

46 CFR 522.6(a)(1968)(emphasis added).

Similar ''authority'' provisions were also suggested for non-conference rate agreements. 46 CFR 522.6(b)(196

[17] Section 535.407(c) reads:

''Further specific agreements or understandings which are established pursuant to express enabling authority in an agreement are considered interstitial implementation and are permitted without further filing under section 5 of the Act only if the further agreement concerns routine operational or administrative matters, including the establishment of tariff rates, rules, and regulations.''

[18] The Commission also gave the following guidance:

''[A]n agreement which merely stated that the parties are authorized ''to operate a joint service,'' without indicating the number, or range of vessels, committed to the service would not be deemed to reflect the full understanding of the parties. Such a deficiency would defeat any meaningful Commission review. Similarly, a statement in a joint service agreement which authorized the parties to ''acquire substitute or additional tonnage'' would result in a situation where the Commission would be unable to evaluate the economic impact of the agreement on the trade under section 6(g). Finally, a filed agreement which referred to or was governed by another agreement not filed with the Commission would be incomplete.''

Id.

[19] Section 10(a)(2) reads, ''No person may . . . operate under an agreement required to be filed under section 5 of this Act that has not become effective under section 6, or that has been rejected, disapproved or canceled.''

Sud Americana De Vapores S.A. v. *Inter-American Freight Conference* (''CSAV''), 28 S.R.R. 141, 141–142 (1998). The Commission found that the winding up was not ''routine operational,'' but extraordinary and, therefore, not falling within the exemption of section 535.407(c).

In *CSAV,* the Commission provided further guidance as to matters it would consider ''routine operational or administrative,'' namely, the establishment of individual tariff rates;[20] the scheduling of individual meetings; the securing of office space or supplies; and the circulation of particular reports or memoranda to members. These are matters which require day-to-day operational flexibility.*CSAV,* 28 S.R.R. at 142.

As discussed above, the Commission's general rule has been that all agreements must be true, complete, detailed and specific and represent the present understanding of the parties. With the exception of agreement clauses which anticipate a further agreement to be filed that are permitted under section 535.407(b), only two types of ''further agreements'' may be acted upon without further filing: agreements which fall under section 535.407(c), or which are otherwise exempt from filing under an explicit exemption found in subpart C of this part.

OCWGA suggests that the Commission recognize four additional types of ''further agreements'' as ''interstitial implementation of routine operational or administrative matters'': (1) Changes to the number of vessels/slots (or changes within a quantified range); (2) changes in port calls; (3) decisions on operation within another filed agreement; and (4) ''operational'' agreements generally. OCWGA at 14–17. While we rejected the first three suggestions in our previous rulemaking on ''routine operational or administrative matters,'' we now reconsider these suggestions in light of the comments and recent changes in the industry.

It has been the Commission's approach since the passage of the Shipping Act to determine on an ad hoc basis what it considers ''routine operational and administrative matters'' to be implemented without further filing. However, we believe the comments indicate the public's desire that the better approach is to list specifically operational matters that are exempted and revise the current regulations accordingly.

OCWGA's suggestion that the Commission enumerate what must be contained (a positive list), rather than what need not be contained (a negative list or exemptions) appears impractical. The Commission chooses to follow the latter approach. While it is true that the Commission may anticipate some developments in the industry, we do not have the ability to predict them all, nor should we seek to stifle innovation or dictate what must be contemplated in an agreement. We can, however, determine what activities, as they are presently employed by agreements, are most likely not to raise concerns about competition.

The Commission, therefore, proposes to remove the current terms ''interstitial implementation'' and ''routine operational and administrative'' altogether from its rules, and add a list of specific exemptions for certain types of operations. Under section 16 of the Shipping Act, the Commission has the discretion to grant exemptions it finds will neither cause substantial reduction in competition nor be detrimental to commerce. 46 U.S.C. app. § 1715. The Commission has determined to propose several new specific exemptions to replace the current exemptions for ''routine operational and administrative matters'' and other operational matters which it finds have met the criteria for exemptions under section 16.

The initial proposals for a list begin with the activities already determined by the Commission to be ''routine operational and administrative matters,'' such as those enumerated in *CSAV.* Additionally, the Commission proposes to include the following matters previously treated as ''interstitial implementation of routine operational and administrative matters'' not requiring further filing:

- charter parties arising out of filed agreements (such as those pursuant to a space, slot or vessel sharing agreement);
- specific monetary amounts for compensation for space; booking and documentation procedures;
- insurance;
- procedures for resolution of disputes relating to loss and/or damage to cargo;
- maintenance of books and records;
- force majeure clauses;
- common terminal and stevedoring arrangements;
- procedures for allocating space and forecasting demand; and
- schedule adjustments.[21]

With regard to the suggestion that changes to the number of vessels or slots to be operated (*i.e.*, capacity) be implemented without amendment to an agreement, we find that it may be acceptable to change these terms without further filing if the originally-filed agreement contains an adequately described range (*i.e.*, maximum and minimum) of slots or vessels to be used under the agreement and if the changes fall within that range. This approach would allow filers to adjust their agreement from time to time without the need to file, and allow the Commission to make an assessment of the commercial impact of the agreement for both ends of the range.

OCWGA also urges the Commission to exempt slot charter costs from a filed slot charter agreement. As the comments point out, it has been the practice of the Commission to allow slot charter costs to be agreed upon from time to time (without requiring further filings or amendments), and not specifically disclosed in the filed agreement, under an interpretation of 535.407(b) and (c). The phrases, ''as may be agreed upon from time to time'' or ''whatever is reasonable based on actual costs'' have been used in filed agreements to this effect. We have therefore proposed to treat slot charter rates as matters specifically exempted in proposed section 535.408.

The Commission is also proposing to codify its de facto exemption from the filing requirements for vessel charter parties in a new section 535.312. This codification would eliminate uncertainty the commenters now appear to have regarding which agreements must be filed. These contracts, which are generally for the control of single vessels, do not appear to have potential to result in a substantial reduction in competition or be detrimental to commerce, and are therefore within the Commission's section 16 authority for exemption from the requirements of the Shipping Act and its regulations.

The commenters are also concerned about operational flexibility for changes to port calls which typically are commercial decisions that must be made quickly. It appears that most agreements are filed reciting only a general ''geographic scope'' within which they will operate. While it

[20] The establishment of individual tariff rates are specifically enumerated as exempt in the text of the rule. 46 CFR 535.407(c).

[21] We recognize that most if not all of these commercially essential matters are likely determined before an agreement can be implemented and are unlikely to require frequent changes in the course of carrying out the agreement. We are skeptical that these need the sort of day-to-day flexibility the current exemption contemplates. Nevertheless, as a practical matter, we also recognize that these details of agreement implementation may be the most commercially sensitive and their absence appears to be unlikely to impair the Commission's ability to assess the relationship among the parties.

remains a required term in the Commission's rules,[22] geographic scope may be put forth in terms of ports or port ranges. This requirement has in the past provided adequate detail for Commission review purposes, while allowing changes in specific port calls or rotations to be made without filing a modification.[23] Therefore, OCWGA's concern that port calls cannot presently be changed on an emergency or ''as-needed'' basis without filing a modification of the agreement (entailing a 45-day waiting period) appears to be unfounded. Because the Commission's regulations currently provide that an agreement's scope may be defined in terms of port ranges, such a situation would only arise if the agreement were so specifically drafted as to contain each individual port. We agree that if within a port range, any changes would generally be acceptable with no need for further filing. We note OCWGA's assertion that the public generally is apprised of changes to port calls by the carriers themselves. While the Commission is sensitive to ILA's concern that allowing an agreement's specific port calls to be changed on an ad hoc basis may hamper its ability to anticipate where the cargo which its membership is entitled to handle will arrive or depart,[24] we believe that the current approach, reflected explicitly in the proposed exemption, is an adequate accommodation to the legitimate commercial needs of parties to agreements.

Third, OCWGA suggests that the Commission allow ''permissive authority'' to ensure flexibility as to how agreement parties would operate vis-a-vis another filed agreement. This appears to run afoul of NITL's concern that the public will not have adequate notice of how an agreement will operate. Further, PONL's assertion that any implementation of such an agreement will be reflected in an agreement filing, does not take into consideration either an agreement that the parties participate only to a limited extent or in a particular concerted manner in another agreement. The Commission's ability to assess an agreement's potential impact on competition would be severely impaired if the relationship between facially ''non-restrictive'' agreements and other agreements which contain market or capacity restrictions were not revealed. The Commission therefore declines to adopt such an interpretation.

Fourth, the OCWGA recommends that the Commission allow agreements to implement ''operational'' agreements contemplated in, and pursuant to, authority within filed agreements without further filing. We note that NITL expresses no objections to permissive authority in agreements for ''purely operational matters which are not likely to have impact on competition.'' The proposed language attempts to address these concerns, without creating an exemption so broad as to render other provisions of the regulations meaningless, by an exemption for terms and conditions of space allocation and slot sales, the establishment of space charter rates, and terms and conditions of charter parties, if contemplated by a filed agreement.

While we see nothing contradictory between the Commission's current rules requiring true, complete, and detailed agreements to be filed and those providing exemptions from filing certain agreements, the comments indicate that this position should be clarified. The Commission, therefore, proposes to revise sections 535.407(b) and sections 535.407(c). New section 535.408 provides that an agreement reached pursuant to general authority in a filed agreement is not considered part of the filed agreement unless it provides for one or more of the ''technical or operational matters'' specifically listed or is otherwise exempt from filing under the rules.

c. Exemptions

Subpart C of part 535 of the Commission's current rules contains exemptions (either partial or full) from the filing requirements of the Shipping Act for several types of agreements and modifications to agreements.[25] The commenters suggest further vague categories of agreements the Commission might exempt from filing, such as: (a) Agreements that have little or no competitive effect (but do not suggest what those may be); (b) agreements for routine operations (be exempt or have a reduced waiting period for effectiveness); and (c) slot charter arrangements (be fully exempt from filing). The Commission has the authority and discretion to grant exemptions from all requirements, or to grant exemptions limited to one or more of the specific filing, notice, and waiting requirements of the Shipping Act and its regulations, consistent with the policies of Congress.[26] 46 U.S.C. app. § 1715. The Commission proposes one new exemption and several changes to existing exemptions, as discussed below.

i. Low Market Share Exemption and Definition of Capacity Rationalization (proposed §§ 535.311, 535.104(e))

The Shipping Act's general scheme is to enable filers to obtain immunity from prosecution for commercial collaborations that might otherwise be violative of the antitrust laws, in return for oversight of these collaborations by the Commission. 46 U.S.C. app. § 1706. If not filed with the Commission, in addition to being a violation of the Shipping Act itself, collaborations restraining competition are otherwise subject to the antitrust laws and the scrutiny of the agencies which administer those laws.

The Commission believes that exemption from the Shipping Act's waiting period requirement of certain types of agreements that fall under a market share threshold (or ''safety zone'') may fall within the criteria of section 16 and be a reasonable way to meet the purposes of the Shipping Act by reducing the regulatory burdens on the industry. This approach also appears consistent with current

[22] Section 535.403(b) requires, in pertinent part, that the parties ''[s]tate the ports or port ranges to which the agreement applies and any inland points or areas to which it also applies with respect to the collective activities contemplated and authorized in the agreement.''

[23] The Commission is apprised of parties' past service levels and initial changes resulting from an agreement through the concurrently-filed Information Form. 46 CFR part 535 App. A (Information Form, parts V, VI, and VIII). Thereafter, changes to the port calls which expand the overall geographic scope of the agreement must be indicated by the filing of a modification and in some cases an accompanying Information Form. 46 CFR 535.503(b). The Commission does not require such a filing for changes to port calls which effectively reduce the scope of an agreement.

[24] It appears that ILA may have confused Shipping Act agreements (a term of art in Shipping Act context) with ''agreements'' used as a general term, and that their comments may more appropriately address issues which arise in a ''service contract'' context. It is unclear to which ''electronic systems'' ILA's comments refer—perhaps it is to the carriers' electronic container tracking systems or to electronic tariff publications.

[25] The Commission's current regulations contain various exemptions for the following types of agreements: non-substantive agreements and non-substantive modifications to existing agreements (exempt from notice and waiting requirements); husbanding agreements (fully exempt from filing requirements); agency agreements (limited exemption from filing requirements); equipment interchange agreements (fully exempt from filing requirements); non-exclusive transshipment agreements (limited exemption from filing requirements); marine terminal agreements (exempt from waiting requirements); agreements between or among wholly-owned subsidiaries and/or their parent (fully exempt from filing requirements); miscellaneous modifications to agreements (if filed for informational purposes, exempt from notice and waiting); marine terminal service agreements (limited exemption from filing and waiting requirements, but no antitrust immunity unless the agreement is filed); and marine terminal facilities agreements (exempt from filing and waiting requirements). 46 CFR 535.302–311.

[26] S. Rep. No. 61, 105th Cong., 1st Sess. 30 (1997) (''Senate Report'').

practices by other regulatory entities charged with oversight of commercial agreements affecting competition.[27]

Appropriately exempted agreements would appear to include those which: (1) have neither pricing nor capacity or trade lane allocation authority; and (2) have less than 20% combined market share in the relevant trade lane and all sub-trades, or 15%, if operating within a rate agreement. This exemption might cover, for example, non-exclusive two-party vessel sharing agreements and slot/space charters and other types of collaborative agreements in which the parties' combined market share falls below the 20% level. A definition of ''sub-trade'' consistent with the definition in the appendix to the Monitoring Report has been added to the Commission's regulations at § 535.104(hh).

The types of agreements outlined above would appear to meet the criteria under which the Commission has the authority to grant exemptions from requirements of the Shipping Act. The Commission has discretion to grant such exemptions only if doing so (1) will not result in substantial reduction in competition or (2) be detrimental to commerce. 46 U.S.C. app. § 1715. Agreements within the safety zone exemption would appear to cause neither a substantial reduction in competition nor otherwise be detrimental to commerce.[28] The Commission, therefore, proposes new section 535.311 providing for an exemption from the 45-day waiting period for agreements meeting the above-discussed criteria.

In connection with this proposed new exemption, the Commission also proposes to introduce a new term, ''capacity rationalization,'' to describe one of the authorities that would prevent an agreement from qualifying for this low market share exemption. The Commission's rules currently utilize the term ''capacity management agreement,'' which is defined very narrowly: only ''artificial'' reduction of space on a per vessel basis is contemplated. *See,* 46 CFR 535.104(e). However, sailing or space charter agreements, especially those with exclusivity clauses, such as vessel sharing arrangements or alliances, may also be properly considered agreements which manage or restrict the amount or use of productive capacity. Therefore, the Commission proposes to revise section 535.104(e) to utilize the term ''capacity rationalization'' rather than the term ''capacity management agreement,'' in order to distinguish between those agreements reflecting simple operational arrangements and those which actively impose restrictions on capacity, thereby raising section 6(g) concerns for effects on price and service, and to promote consistency with other Commission regulations. Agreements with capacity rationalization authority would include, for example, agreements in which the parties restrict their ability to provide transportation in the Trade on vessels other than those utilized by the agreement or to enter into services that are alternate to/or in competition with the services provided under the agreement, without the prior consent of the agreement members.

ii. Revision of the Present Exemptions for Non-substantive Agreements and Amendments, Miscellaneous Modifications (proposed § 535.302), and Public Notice of Filings (proposed § 535.602)

As another effort to address the commenters' concern about the need for flexibility, the Commission proposes to retain and clarify its existing exemptions for certain types of modifications to agreements that may go into effect upon filing, or be filed for informational purposes only: namely, ''non-substantive'' modifications (46 CFR 535.302) and ''miscellaneous'' modifications (46 CFR 535.309).

We believe that the current ''non-substantive'' exemption is unnecessarily broader than the pre-1984 exemption for modifications which it was intended to continue, but which contained no category for ''non-substantive'' initial agreements. The Commission believes that the scope of this exemption is unclear and thus should be revised. In addition, the Commission has determined to eliminate the practice of determining on an ad hoc basis through delegated authority whether an amendment to an agreement is ''non-substantive.'' 46 CFR 535.302(c). Therefore, the Commission proposes to combine some of the language of section 535.309 with that of a revised section 535.302 to eliminate the exemption for non-substantive initial agreements and enumerate the ''non-substantive'' and ''miscellaneous'' modifications that are exempt from filing.

The Commission proposes to remove the current exemption for ''miscellaneous modifications'' for changes to parties to a discussion agreement contained in present section 535.309(a)(2)(i). Such additions in members to a discussion agreement may alter the potential competitive impact of the discussion agreement. On the other hand, the Commission believes that it is appropriate to continue the current exemption from the 45-day waiting period otherwise required by the Shipping Act for conferences, which are required to be open to all carriers serving the conference trade. Therefore, the Commission is proposing a revision to former 535.309(a)(2)(i) to indicate this change.

In addition to the specific exemption changes discussed above, the Commission is also proposing to change its current policy regarding publication of notice in the **Federal Register** of agreement filings that are otherwise exempt from the requirements of this part. At present, the Commission does not publish notice of optionally-filed agreements and modifications, or agreements and modifications exempted from the 45-day waiting period. However, the Commission recognizes that public notice is the most effective way for the public to know what agreements and modifications to agreements are being filed. The Commission believes it is important for the public to know, for example, whether a carrier joins a conference agreement or resigns from one, or whether certain marine terminal operators have leases. To that end, the Commission is proposing to revise § 535.602 to indicate that a notice will be published in the **Federal Register** of each new agreement and agreement modification, including those agreements that are exempt from the 45-day waiting period and those that are optionally filed under the various exemptions in subpart C.

iii. Transshipment Agreements (proposed §§ 535.104(jj) and 535.306(a))

The proposed rule changes for transshipment agreements are intended to clarify the Commission's view of what constitutes a transshipment agreement but not remove the filing exemption for nonexclusive transshipment agreements. The Commission has traditionally viewed transshipment agreements as agreements under which two ocean common carriers that both operate

[27] The *Antitrust Guidelines for Collaborations among Competitors,* (''Guidelines'') issued by the FTC and DOJ in April 2000, provides a ''safety zone'' for ''situations in which anticompetitive effects are so unlikely that [FTC and DOJ] presume the arrangements to be lawful without inquiring into particular circumstances.'' Guidelines at section 4. To qualify for this exemption the parties to commercial collaborations must meet established market share thresholds as well as meet other enumerated conditions. The European Commission's Competition Directorate has adopted a similar ''safety zone'' approach for international ocean carrier collaborations which do not involve price-fixing of freight rates and fall below a certain market share threshold.

[28] We estimate 87 presently effective agreements would have qualified for this exemption.

vessels provide a through service between the United States and a foreign port. However, the Commission also recognizes that the ocean transportation industry has substantially evolved since the Commission's current agreement rules were drafted. One notable change is the increased use of vessel sharing or space charter agreements by ocean common carriers to replace or augment their direct services. This change may have led to the development of what the Commission considers to be nontraditional transshipment arrangements, such as those in which a publishing carrier provides a transshipment service solely by taking space on vessels operated by other ocean common carriers. In an effort to provide a regulatory environment that promotes commercial flexibility and the resulting economic efficiencies for the carriers involved and the shipping public, the Commission is amending its definition of transshipment agreement to clarify that such arrangements between two ocean common carriers may be considered to be a transshipment agreement subject to the Shipping Act if the publishing carrier operates its own vessel in the through movement or provides service on its leg of the through service in accordance with a filed and effective space charter agreement.

The Commission acknowledged that there is some overlap between transshipment agreements and space charter agreements in promulgating the final rules implementing the Shipping Act, by stating that ''a transshipment agreement is a type of space charter.'' 49 FR 45324 (November 15, 1984). This observation remains accurate in today's marketplace. Just as a space charter agreement permits an ocean common carrier to offer service in a trade without having to introduce its own vessels, a transshipment agreement permits a carrier to offer a service that it would not otherwise be able to provide unless it operated vessels on both legs of the transshipment. The publishing carrier pays the connecting carrier for space on the connecting carrier's vessel, just as a space charterer pays for the space that it uses on another ocean common carrier's vessel. Inevitably, therefore, a transshipment agreement includes space chartering.

In 1984, the Commission exempted nonexclusive transshipment agreements from the filing requirements for policy and practical considerations. Though the publishing carrier provides certain information regarding the transshipment arrangement in its tariff pursuant to Section 535.306(b) and (c),[29] the filing exemption has resulted in reduced transparency for transshipment arrangements. As a result, the shipping public may lack a clear understanding of how the through transportation is being provided. To address the issue of transparency that arises when an ocean common carrier does not use its own vessels in the through transportation as well as to clarify the Commission's view of what constitutes a transshipment agreement, the Commission is proposing the addition of new language to the definition of a transshipment agreement.

The added language would clearly set forth the Commission's position that an ocean common carrier offering a transshipment service must either operate a vessel involved in the through movement or have a filed and effective space charter agreement to cover the portion of its service between the United States and the port of transshipment. The Commission believes that it is consistent with the provisions of the Shipping Act relating to agreements (46 U.S.C. app. §§ 1703, 1704) to require an ocean common carrier offering a transshipment service pursuant to a transshipment agreement to operate at least one vessel involved in the through movement. Nevertheless, in recognition that many ocean common carriers in U.S. trades now depend on space charter agreements, in addition to their own vessels, to provide their services, the Commission is including such arrangements in the revised definition of a transshipment agreement. In both instances, the goal of transparency would be achieved.

3. Confidentiality of Sensitive Commercial Information in Filed Agreements

The Commission has determined not to re-examine its interpretation of section 6(j) of the Shipping Act at this time. That provision reads,

(j) Nondisclosure of Submitted Material.

Except for an agreement filed under section 5 of this Act, information and documentary material filed with the Commission under section 5 or 6 is exempt from disclosure under section 552 of title 5, United States Code [FOIA] and may not be made public except as may be relevant to an administrative or judicial action or proceeding.

The Commission's current regulation at 46 CFR 535.608(a) states,

(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 non-compliance, and replies to requests for additional information.

Section 6 (j) of the Shipping Act should be read harmoniously with the notice provision of section 6(a), which states that ''[w]ithin 7 days after an agreement is filed, the Commission shall transmit a notice of its filing to the **Federal Register** for publication.'' 46 U.S.C. app. § 1705(a). In this regard, current Commission regulations further define what the notice of filing must contain, reflecting a long-held understanding that the Commission should make the complete agreement as filed available to the public. 46 CFR 535.602(b)(5). The current regulation is nearly identical to that originally adopted under the Shipping Act, 1916. 46 CFR 572.6(1997); 46 CFR 522.6; General Order 24 (1968).

The Commission has long interpreted the Shipping Act to require the public availability of the complete filed agreement, and to protect from Freedom of Information Act (''FOIA'') disclosure only information supplementing the agreement. The Commission has never provided by rule for the protection of information contained in a filed agreement and no objection has ever been filed to the disclosure of such information. Most of the commenters appear to assume that the only means of protecting sensitive information contained in agreements is through filing exemptions.

Although no other statute precisely mirrors the Shipping Act procedures, especially as to the public's role in agreement review and their generally automatic effectiveness, we recognize that some agencies responsible for filings similar to agreements under the Shipping Act provide for confidentiality.[30] While it may be

[29] Under Section 535.306, nonexclusive transshipment agreements are exempt from the filing requirement of the Shipping Act provided that the publishing carrier publishes in its tariff the through rate, the routings, any additional charges, and the participating carriers. The publishing carrier also issues the bill of lading.

[30] *See, e.g.*, DOT (14 CFR 302.39(b)), STB (49 CFR 1001.4) and SEC (17 CFR 230.406). It is unclear what effect Executive Order 12,600 of June 23, 1987, may have on the Commission's ability to protect sensitive commercial information in filed agreements. Section 2(b) of that order directs Federal agencies ''to permit submitters of confidential commercial information to designate, at the time the information is submitted to the Federal government or a reasonable time thereafter, any information the disclosure of which the submitter claims could reasonably be expected to cause substantial competitive harm.'' The Commission's rules provide for such protection

Continued

arguable, therefore, whether the drafters intended to preclude the Commission from protecting sensitive commercial information contained in the agreement itself, it appears unnecessary for the Commission to make any such determination now. As the Commission is now proposing to exempt the information identified by the commenters as potentially sensitive commercial information, we see no need to address this issue further at this time. Therefore, the proposed rule contains no further proposals in this respect. However, commenters may wish to raise this issue, as well as to identify any item of sensitive commercial information which would be included in an agreement required to be filed that is not within the terms listed in section 535.408 or otherwise exempted. Such comments should also address the issue of the Commission's authority to protect commercially sensitive information contained in filed agreements.

III. Information Forms and Monitoring Reports, 46 CFR Part 535, Subparts E and G.

A. Introduction

Currently, when a carrier agreement is filed with the Commission, the Information Form regulations (subpart E of part 535) require that certain historic revenue and/or operational data be furnished for each party to the agreement. The Information Form must accompany the filed agreement. In addition, certain modifications filed as amendments that expand the geographic scope or authority of an existing agreement must also be accompanied by an Information Form at the time of filing. Once an agreement goes into effect under the Shipping Act, the Monitoring Report regulations (subpart G of part 535) require that ongoing revenue and/or operational data on the parties' activities under the agreement be submitted to the Commission for as long as the agreement remains in effect.

The jurisdiction to set rules requiring carrier agreement information is conferred on the Commission by the Shipping Act. Section 5(a) states that ''[t]he Commission may by regulation prescribe the form and manner in which an agreement shall be filed and the additional information and documents necessary to evaluate the agreement.'' Further, section 17(a) authorizes the Commission to ''prescribe rules and regulations as necessary to carry out'' the Shipping Act. Additionally, the Shipping Act gives the Commission the direct authority to obtain any relevant information from carriers. Pursuant to section 15, the Commission may issue an order to require any common carrier ''to file with it any periodical or special report * * * appertaining to the business of that common carrier.'' [31]

The proposed rule replaces the current regulations with regulations that would require all carrier agreements identified in § 535.201(a) and subject to the forty-five day waiting period to submit an Information Form for the Commission's review upon filing with information and data on the agreement and the authority in the agreement.[32] The proposed rule limits the application of the Monitoring Report regulations to require reporting only from parties to agreements with certain authority. For some authority, the Monitoring Report regulations are further limited based on the parties' market share.

The reporting requirements for the proposed Information Form and Monitoring Report have been modified in relation to changes that have occurred in carrier agreements. Reporting requirements that are no longer necessary have been eliminated. New reporting requirements have been added to obtain essential data, such as vessel capacity, from agreements with authority that poses concerns under the Shipping Act. New terms and definitions have also been provided in the instructions of the proposed Information Form and Monitoring Report. These terms and definitions are intended to provide carriers with clearer instructions that should help to improve the accuracy and consistency of the agreement data reported to the Commission. Commenters are encouraged to review these proposals with this intent in mind, and to suggest further refinements or feasible alternatives to the proposed terms and definitions.

In general, the proposed modifications herein seek to ensure that the Commission receives the most meaningful and reliable agreement data to carry out its statutory responsibilities, without placing an undue regulatory burden on carriers. In this regard, the Commission has incorporated its experience in administering the current Information Form and Monitoring Report regulations. Changes in carrier agreements that have occurred since OSRA became effective have resulted in the changes reflected in the proposed rule. The proposed modifications also reduce, where possible, the reporting burden on the carriers.

B. Background

1. The Current Regulations

The Information Form regulations for carrier agreements were originally established under the Shipping Act in Docket Nos. 84–26 and 84–32 (final rule). Under this rule, depending on the agreement's authority, the Information Form required such data as market share, cargo carriage, and/or planned changes in port calls or services relating to the agreement. The rule did not prescribe standard periodic reporting requirements for carrier agreements after they become effective under the Shipping Act.

The current Information Form and Monitoring Report regulations were promulgated in Docket No. 94–31, *Information Form And Post-Effective Reporting Requirements For Agreements Among Ocean Common Carriers Subject To The Shipping Act of 1984*, 61 FR 11564 (March 21, 1996). The Information Form is used in the agreement review process to analyze the probable economic impact of filed agreements, or certain agreement modifications. 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. In addition, the data submitted in the Information Form provides historic (or baseline) economic figures for analyzing changes that may occur after the agreement goes into effect.

generally: for nondisclosure of filings generally, 46 CFR 502.119; and for third party comments on agreements, 46 CFR 535.603.

[31] The Commission has consistently held the view that the most reliable source of information on carrier agreements is directly obtained from the parties to the agreement. In Docket No. 94–31, the Commission stressed ''that information regarding the operation and probable future impact of an agreement ''[a]lmost uniformly is in the hands of those seeking approval * * * and it is incumbent upon those in possession of such information to come forward with it.'' *Mediterranean Pools Investigation* 9 F.M.C. 264, 290 (1966).'' See Dkt. No. 94–31, *Information Form and Post-Effective Reporting Requirements for Agreements Among Ocean Common Carriers Subject to the Shipping Act of 1984*, 61 FR 11564, 11565 (March 21, 1996). The Commission further emphasized this point by stating that ''the 1984 Act removed the burden of proof in agreement investigations from the carriers, but did not alter the accuracy of the Commission's 1996 observation in the *Mediterranean Pools Investigation* that the primary source for information on the operation of an agreement is the carriers that are the parties to the agreement.'' *Id.*at page 11566.

[32] ''Low market share agreements'' defined in section 535.311 of the proposed rule would be exempted from the waiting period requirements, and from the Information Form and Monitoring Report requirements unless otherwise instructed by the Commission.

The Monitoring Report enables the Commission to track and analyze the ongoing economic effects of an agreement after it becomes effective, and accordingly, determine whether any action under the Shipping Act may be necessary. Monitoring Reports also are used to assess the probable economic effects of modifications filed. Monitoring Reports further 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 against an agreement.

The Commission's current regulations require some level of revenue and/or operational data from almost all carrier agreements subject to the Shipping Act. The degree of required data is determined by the agreement's classification. The current regulations classify agreements into three categories: Class A, Class B, and Class C. Upon a showing of good cause by an agreement, the Commission may waive any of the reporting requirements pursuant to sections 535.505 and 535.709.[33] Carrier agreements that fall outside of the classifications set in the current regulations are not obligated to submit the specified agreement information, unless otherwise instructed by the Commission.[34]

For the Information Form, Class A and B agreements are grouped together as ''Class A/B,'' and are identified in section 535.502(a) as: rate agreements, joint service agreements, pooling agreements, agreements authorizing discussion or exchange of data on vessel-operating costs, and agreements authorizing regulation or discussion of service contracts. Class A/B agreements contain forms of pricing or pooling authority that can have a significant impact on competition. The Commission thoroughly addressed its concerns with the agreement authorities included in the Class A/B category and the potential effects of each of these authorities on competition in its Notice of Proposed Rulemaking (''NPRM'')in Docket No. 94–31. *See* Dkt. No. 94–31, 59 FR 62372, 62375–62376 (December 5, 1994).

When a Class A/B agreement is filed for review, an Information Form must also be filed in accordance with the reporting requirements specified in appendix A of part 535 (section 535.503). These reporting requirements address the following topics relating to the parties activities in the agreement trade: other agreement participation, identification of agreement authority, market share for all liner operators, total average revenue, cargo volume and revenue results for major commodities, and port service. Much of this data must be specified for each sub-trade within the geographic scope of the agreement. The regulations define sub-trade to mean all liner movements between each U.S. port range and each foreign country within the scope of the agreement. The U.S. port ranges are specified separately for the Atlantic, Gulf, and Pacific coasts.

Information Forms for Class C agreements require much less data. Class C agreements contain various forms of operational authority, and are identified in section 535.502(b) as sailing agreements and space charter agreements.[35] In its NPRM in Docket No. 94–31, the Commission noted that ''[a]lthough such agreements have rarely presented serious regulatory concerns, some oversight is necessitated by section 6(g)'s admonition against agreements that cause unreasonable reductions in service.'' *Id.* at 62378. Thus, Class C agreements are only required to submit data on the parties' other agreement participation and port service within the agreement trade, in accordance with the reporting requirements specified in appendix B of part 535 (section 535.504).

For Monitoring Reports, however, the current regulations distinguish between Class A and B agreements.[36] Class A agreements are identified as those agreements specified in section 535.502(a) with market shares of 50 percent or more in half or more of the their sub-trades (section 535.702(a)(1)). Class B agreements are identified as those agreements specified in section 535.502(a) that do not have market shares of 50 percent or more in half or more of their sub-trades (section 535.702(a)(2)). To account for changes in market share that may alter an agreement's classification, the regulations direct BTA to classify all Class A and B agreements annually based on their second quarter market share data (section 535.702(b)). Class C agreements are also required to file quarterly Monitoring Reports and are identified as those agreements specified in section 535.502(b) (section 535.702(c)).

Class A agreements file the most Monitoring Report data in line with the same sub-trade specificity required for the Information Form, as instructed in appendix C of part 535 (section 535.703). The amount of Monitoring Report data and sub-trade specificity is reduced for Class B agreements, as instructed in appendix D to part 535 (section 535.704). Class C agreements only report on changes in the parties' other agreement participation and port service in the agreement trade, as instructed in appendix E to part 535 (section 535.705). As of August 2003, there were 29 Class A agreements, 51 Class B agreements, and 133 Class C agreements, for a total of 213 classified agreements on file with the Commission.[37]

Since the current regulations became effective in 1996, carriers have continued to raise issues specifically regarding the Monitoring Report requirements. The Ocean Carrier Working Group Agreement commented on the Monitoring Report requirements in Docket No. 98–26, 64 FR at 11240; Docket No. 01–01, *The Impact Of The Ocean Shipping Reform Act Of 1998; Notice of Issuance of Notice of Inquiry,* 66 FR 7764 (January 25, 2001); and the Commission's *Notice of Request for Public Comments Regarding Extensions to Existing OMB Clearances,* 67 FR 10407 (March 7, 2002).

In sum, carriers have generally voiced concerns about the burden involved in preparing the quarterly sub-trade data for the Monitoring Reports for Class A agreements. To ease this burden, carriers have repeatedly requested that the level of Monitoring Report data for Class A agreements be reduced to the lesser level required for Class B agreements. In support of this request,

[33] The Commission's authority to grant or deny waiver applications is delegated to the Director of the BTA in subpart C of part 501.

[34] Such agreements currently include housekeeping agreements, equipment management agreements, portal agreements, credit policy agreements, non-compete agreements associated with acquisitions, and general discussion agreements.

[35] The Class C category does not include agreements authorizing capacity management or regulation as currently defined in section 535.104(e). Such authority was intentionally not included in section 535.502. At the time of the Commission's rulemaking, agreements with capacity management or regulation programs also contained rate authority, and therefore, automatically fell within the regulations. Subsequently, the authority for capacity management was withdrawn from agreements or held in abeyance. Presently, no agreements engage in capacity management programs as currently identified in section 535.104(e).

[36] Under section 535.702(b), the classification of an agreement as Class A or Class B for purposes of its Monitoring Report obligations is initially based on the market share data reported on the agreement's Information Form pursuant to section 535.503, or on similar data otherwise obtained. Thereafter, before the beginning of each calendar year, the agreement is classified as Class A or Class B for that year, based on the market share data reported on the agreement's quarterly monitoring report for the previous second quarter (April-June).

[37] At the same time, there were 24 agreements on file with the Commission that were not subject to the reporting requirements.

carriers have argued that market changes since OSRA have rendered the level of Monitoring Report data for Class A agreements unnecessary. In Docket No. 98–26, the Commission dismissed the carriers' request noting that ''[a]ny modifications in the current agreement monitoring program based on changed market conditions will be considered only after an opportunity to evaluate the competitive effects of OSRA's regulatory changes.'' *See* Dkt. No. 98–26, 64 FR at 11240.

2. Changes in Carrier Agreements Since OSRA

The legislative reforms introduced by OSRA have considerably altered the ocean shipping industry in the U.S. trades. OSRA has encouraged carriers to operate more independently in response to competitive market forces. While these changes have improved competition, carriers are still very committed to cooperating in agreements and actively using their agreement authority to pursue and achieve their collective objectives. Thus, under OSRA, carrier agreements still can exert a powerful collective influence over competition in the U.S. trades. The Commission's need for reliable and specific information to evaluate and monitor carrier agreements remains.

Under OSRA, a clear pattern in carrier agreement activity has emerged in most of the U.S. trades. Collective pricing by carriers under conference agreements has declined in favor of voluntary rate authority under discussion agreements.[38] In addition, carriers are cooperating more in operational arrangements which can affect rate and service levels in the trades, particularly in agreements with capacity rationalization authority.[39]

Liner cargo in today's trades is predominantly shipped under individual service contracts with independently-negotiated freight rates and terms. While cargo carriage under a common conference tariff has diminished, discussion agreements and the concerted activities of their parties continue to pose significant anticompetitive and statutory concerns under the Shipping Act.

Although compliance is voluntary, discussion agreements contain considerable, broad authority over rate, service contract, and service matters spanning large geographic areas in the U.S. trades. Further, many discussion agreements include most of the major carriers operating within their respective geographic scopes. Thus, discussion agreements generally have high market shares which contribute toward their ability to affect freight rates and competitive conditions. For example, each of the agreement market shares for the Transpacific Stabilization Agreement (''TSA'') and the Westbound Transpacific Stabilization Agreement (''WTSA'') in the U.S./Asia trades exceeds 70 percent.

OSRA prohibited any mandatory restrictions on individual service contracts, but it allowed agreements to adopt voluntary service contract guidelines applicable to 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.

The extent to which voluntary authority and adherence are effective under discussion agreements likely depends on the prevailing and anticipated economic conditions in the respective agreement trades. Such conditions, however, are difficult to discern and even harder to anticipate without reliable agreement and trade information.

Carriers are also relying more heavily on operational agreements to control the supply of excess vessel capacity. These agreements allow carriers to rationalize services and remove excess vessel capacity through vessel-sharing, space or slot chartering, sailing, and/or service arrangements. Operational agreements with capacity rationalization authority raise particular concerns under section 6(g). This concerted authority not only affects the amount of vessel capacity supplied in a trade, but also imposes restrictions on the parties' ability to freely participate in other service arrangements and/or independently operate competing services within the geographic scope of the agreement. Some carriers use this concerted authority to form complex and highly integrated alliance arrangements where the parties fix and allocate their collective vessel capacity on a global scale. Many of these alliances enter into space chartering agreements as a group with other carriers or groups of carriers.

Carriers assert that operational agreements, even those with capacity rationalization authority, produce cost and service benefits for the shipping public. Carriers may use their concerted authority to better align the supply of vessel space with the demand for vessel space in specific trade lanes. In trade lanes burdened with high excess capacity, the coordination of vessel space between carriers can achieve efficiencies by lowering operational costs while still preserving, or even enhancing, the level and frequency of ocean liner services. Alternatively, 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 causing unreasonable service decreases and/or unreasonable rate increases in violation of section 6(g). Even if a shortage does not occur, a concerted reduction in vessel capacity decreases the amount of market pressure placed on carriers competing to fill excess vessel space. This reduction in competition may be significant enough to enable carriers to increase or maintain rates more easily by discouraging rate discounting.

These concerns are compounded where carrier agreements contain both rate and capacity rationalization authority. Even if these authorities are not in the same agreement, many carriers participate in large rate discussion agreements that cover broad trade areas and also participate in separate agreements with capacity rationalization authority in the same trade areas. These authorities are interrelated and complementary. Carriers may discuss and agree on their overall rate and service objectives under the broad authority of their discussion agreements, and implement and fix their service and capacity levels within the same trade using their capacity rationalization authority contained in separate agreements. Likewise, carriers may collectively fix the supply of vessel capacity in a trade, through their capacity rationalization authority contained in separate agreements, to

[38] The preference for voluntary rate discussion agreements between carriers has evolved in most of the major U.S. trades, except for those trades that include member nations of the European Union (''EU''), where the conference system has remained in place. Conference agreements between ocean common carriers are specifically exempted from the competition laws of the EU, and the European Commission (''EC'') opposes other forms of collective pricing outside of formal conference agreements. The effects of conferences, however, have been mitigated under OSRA because most conference carriers heavily engage in individual service contracts to stay competitive in the trades. The EC further restricts conference carriers from adopting voluntary service contract guidelines and disclosing information relating to service contracts negotiated outside the conference system. Nonetheless, conferences still represent the main rate agreements in the U.S./Europe trades, and require close monitoring.

[39] The Commission's proposed rule defines capacity rationalization as the 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.

augment the overall rate objectives agreed upon in their discussion agreements. Thus, in addition to market conditions, the structure of complementary authority in agreements within trades further helps carriers achieve their collective objectives, depending on how well they can coordinate and maintain these efforts.

While the use of conferences has subsided under OSRA, the benefits carriers enjoy as a result of their ability to participate in antitrust-exempted agreements under the Shipping Act has clearly not diminished. The developments in carrier agreements under OSRA reinforce the need for the Commission to obtain firsthand information directly from the carriers involved in agreements.

C. The Proposed Rule

To account for the changes that have occurred in carrier agreements since OSRA, and considering the views of carriers, the Commission proposes the following modifications to the Information Form and Monitoring Report regulations and requirements.

1. Information Form Regulations

The proposed rule no longer identifies carrier agreements by specific classes for the purpose of assigning reporting requirements. Instead, section 535.502(a) of the proposed rule would require that all carrier agreements identified in section 535.201(a), except for low market share agreements identified in section 535.311, submit an Information Form when the agreement is filed with the Commission. Agreements with certain authorities that have significant potential to affect competition would be required to submit Information Form data pertaining to the specific authority contained in the agreement.

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.

Section 535.503(b) of the proposed rule addresses these concerns by assigning specific reporting requirements to specific authorities contained in agreements. 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. Further, the proposed rule would replace the current agreement classification procedures with simpler regulations and clearer instructions.

Section 535.502(b) of the proposed rule would require an Information Form when a modification to an existing agreement is filed that adds the authority to discuss or agree on capacity rationalization, or pricing or pooling authority.[40] Further, a modification that expands the geographic scope of such authority within an existing agreement would also require an Information Form under section 535.502(c) of the proposed rule. Aside from adding the Information Form requirement for agreements containing capacity rationalization authority, the proposed rule is not likely to increase the number of agreement modifications which would be subject to Information Form requirements. The proposed rule refers to agreement modifications by listing the actual authorities in place of the current agreement class labels. When authority is added or expanded, the competitive impact of the existing agreement is altered, and must be re-examined with a new Information Form.

Section 535.504 of the proposed rule provides waiver procedures whereby carriers may request relief from any of the Information Form requirements. Additional information, however, would be required for the Commission's review of waiver requests. Applications for waiver of the Information Form requirements would have to provide data and information in support of the requested relief along with details on the agreement or agreement modification that is to be filed with the Commission.

2. Information Form

The proposed rule changes the format of the Information Form. Section 535.503(a) of the proposed rule replaces the current Information Forms for Class A/B and Class C agreements with one form in appendix A of part 535. The form is divided into sections I through V. Section 535.503(b) of the proposed rule would require 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 would apply to all carrier agreements subject to the Information Form requirements.[41] Sections II, III and IV would apply based on the authority contained in the agreement. The Information Form would be made available in electronic format using Microsoft Office 2000 (Word and Excel) that could be downloaded from the Commission's home page. Parties may complete and submit their Information Form in paper format, or in electronic format on diskette or CD–ROM. This procedure will remain available until the Commission develops and implements an electronic filing system for such documents.

a. Section I

As noted, section I of the proposed Information Form would be required from all carrier agreements subject to the Information Form requirements. Section I would require basic information on the following topics: the name of the agreement, narrative statements on the purpose and commercial circumstances relating to the agreement, a list of the parties' other agreement participation within the geographic scope of the filed agreement, and the identification of the authority and provisions contained in the agreement.

Section I 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. The Commission does not believe that section I would impose any undue burden on carriers because most agreements that fall under

[40] For ease of reference, the term ''pricing or pooling authority'' is used herein to identify agreements containing 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 cargoes, earnings, or revenues and/or losses; (d) the discussion or exchange of data on vessel-operating costs; and/or (e) the discussion of service contract matters. These authorities are listed in the proposed rule.

[41] Low market share agreements identified in section 535.311 of the proposed rule would be exempted from all Information Form and Monitoring Report requirements unless otherwise specifically instructed by the Commission.

the current regulations provide some degree of this information already. Carrier agreement filings that fall outside of the current classification regulations would also be required to provide this information. However, the number of such filings is very limited. Further, the Commission believes that this information is readily available to carriers and would not require any costly or extensive preparation that could affect or delay the filing of an agreement.

The requirements for narrative statements on the purpose and commercial circumstances of the agreement are new. These statements are not intended to elicit a justification of the agreement. They would simply provide the Commission with a clearer understanding of the parties' collective objectives under the agreement in relation to their services within the agreement trade. It may be that the parties formed an agreement to start a new liner service to expand into a new trade area. 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.

The proposed Information Form retains the existing requirement for a list of the parties' other agreements. The term ''other agreements'' refers to all other carrier agreements within the geographic scope of the filed agreement in which the parties to the filed agreement are participants. It remains important for the Commission to understand the parties' full authority within the context of all their agreements in a given trade. Given the brevity of the review period established by section 6 of the Shipping Act, it is necessary that the parties supply this information at the outset.

The proposed Information Form continues to require that the parties identify the specific authorities contained in the filed agreement. Authorities identified in the Information Form would now be expanded to include authorities and provisions relating to operational agreements and capacity rationalization. This modification reflects the increased importance and use of such authorities by carriers. Further, in assigning reporting requirements based on the parties' authority, it is important that the full authority of the agreement be identified.

b. Section II

Section II of the proposed Information Form would apply to carrier agreements that contain simple operational authority including vessel space charter and sailing or service rationalization arrangements. Such authority, however, would not include the establishment of a joint service, or capacity rationalization authority. The proposed Information Form retains the requirement that parties with operational authority provide data on their vessel calls at ports, along with a narrative statement of any changes in port service that are anticipated or planned to occur when the agreement goes into effect. For clarification, however, this requirement would be modified to limit the information required to vessel calls directly related to the parties' liner services covered by the agreement, rather than any or all vessel calls within the agreement trade. Similarly, changes in port service would be modified to mean anticipated or planned changes that the parties would implement under the agreement after it goes into effect, rather than any change in port service within the agreement trade. These modifications would refine the parties' data so that the actual impact of the agreement could be analyzed with greater accuracy.

c. Section III

Section III of the proposed Information Form would apply to carrier agreements with the authority to discuss or agree on capacity rationalization. Section III distinguishes the more complex operational agreements with capacity rationalization authority from the simpler operational authorities identified in section II above. As such, new reporting requirements have been added. To enable the Commission to properly analyze these agreements, parties with capacity rationalization authority would be required to provide, for a calendar quarter period, data on their vessel capacity and percentage of vessel capacity utilization for their liner services that would be covered by the agreement. In order to secure accurate and consistent data, definitions of vessel capacity and capacity utilization are provided in the instructions of the proposed Information Form. In addition, parties with capacity rationalization authority would also be required to provide data on their vessel calls at ports for their liner services that would be covered by the agreement. Lastly, such parties would be required to identify and state any anticipated or planned changes in their vessel capacity and/or liner services (including ports) that would be implemented under the agreement after it goes into effect.

Under the current Information Form regulations, operational agreements with capacity rationalization authority that do not contain pricing or pooling authority are Class C agreements. As such, the only operational data required from these agreements when filed relates to the parties' port services. As discussed above, however, capacity rationalization authority not only allows the parties to fix the levels of capacity and service as to which they will cooperate in a trade, it also restricts any other collective and individual operations of the parties within the agreement trade. In reviewing these agreements under section 6(g), the Commission is concerned about the likely impact of capacity rationalization authority on both service and rate levels in a trade. To determine this impact, the Commission has found it necessary in the past to request vessel capacity and capacity utilization information from parties to such agreements during the review process.

The proposed Information Form would require this necessary information when the agreement is first filed. The Commission does not believe that these additional reporting requirements would impose any undue burden because the parties readily have this information when entering into such agreements.

d. Section IV

Section IV of the proposed Information Form would apply to carrier agreements with pricing or pooling authority. Section 535.503(b)(4) of the proposed rule identifies the particular authorities contained in agreements which causes them to be subject to reporting information and data under section IV of the Information Form. These authorities are: (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 cargoes, earnings, or revenues and/or losses; (d) the discussion or exchange of data on vessel-operating costs; and/or (e) the discussion of service contract matters.[42]

Agreements with any of these authorities would be required to submit data and information on the following topics in section IV: 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.

[42] Carrier agreements with these authorities currently fall under the Class A/B category and are listed as types of agreements.

i. Market Share

The proposed Information Form retains the requirement for market share data showing all liner operators for the entire geographic scope of the agreement and in each sub-trade within the scope of the agreement. The number of sub-trade reports, however, would be reduced by combining the separate U.S. Atlantic and Gulf port ranges into one U.S. port range. Liner services and pricing at U.S. Atlantic and Gulf ports are very similar, which allows these sub-trades to be combined. The different service and pricing circumstances prevalent at U.S. Pacific ports dictate that the Pacific be considered a separate U.S. sub-trade.

ii. Total Average Revenue

The proposed Information Form continues the current requirement that the parties report their total liner revenues, total liner cargo carried, and average revenue within the geographic scope of the agreement. A definition of total liner revenues is provided in the instructions to improve the accuracy and consistency of the parties' revenue data. Without a clear definition, the parties could calculate their total liner revenues differently, which makes it difficult to conduct a proper analysis of the data.

iii. Cargo Volume and Revenue Results for the Top 10 Agreement-Wide Commodities

The proposed Information Form retains, but significantly reduces, the reporting requirements for commodity data. Currently, when a Class A/B agreement is filed, the parties must report their cargo volume and revenue results for each major commodity for each sub-trade within the geographic scope of the agreement. The Commission first established these reporting requirements to incorporate commodity specific data into its impact analysis of agreements with pricing or pooling authority. *See* Docket No. 94–31, 59 FR at 62377. Commodity specific data remains an important component of the Commission's impact analysis of such agreements. The Commission, however, believes that the amount of commodity data reported can be reduced without hindering its ability to gauge the general impact of pricing or pooling agreements. Therefore, the proposed Information Form would eliminate the sub-trade requirement, and instead, would require that parties to pricing or pooling agreements report their cargo volume and revenue results on only the top 10 agreement-wide commodities. Commodity data reported on an agreement-wide basis, instead of a sub-trade basis, should be readily available to the parties and less burdensome to report. Further, a definition of revenue results is provided in the instructions to improve the accuracy and consistency of the parties' commodity revenue data. To maintain a consistent commodity reporting standard, the requirement that commodities be identified at the 4-digit level of customarily used commodity coding schedules remains. While some parties may not use commodity coding schedules to identify and track their cargo and revenues, such discrepancies should be easier to resolve under the reduced commodity reporting requirements proposed herein.

iv. Vessel Capacity and Utilization

The proposed Information Form adds new reporting requirements for agreements with pricing or pooling authority. Parties to such agreements would be required to report, for a calendar quarter period, their vessel capacity and percentage of vessel capacity utilization for their liner services that would fall under the agreement. Further, the parties would be required to identify and describe any significant changes in the amounts of vessel capacity for their liner services that are anticipated or planned to occur when the agreement goes into effect. For consistency and clarity, the Information Form instructions provide definitions of vessel capacity, capacity utilization, and the term ''significant changes in the amounts of vessel capacity.''

Parties to rate discussion and conference agreements collectively set freight rates in relation to the supply and demand conditions within trades. Even if these agreements do not contain operational authority, many rate discussion and conference agreements authorize the parties to exchange information and collectively discuss their vessel capacity, capacity utilization, and service levels. These agreements may regularly track and distribute this information to their carrier members. Further, as discussed, the parties may augment the overall rate objectives of their rate discussion or conference agreements by controlling the supply of vessel capacity under their separate operational agreements within trades.

To analyze the likely impact of agreements with pricing or pooling authority accurately, the Commission must examine such authority in close connection with the amounts of vessel capacity supplied by the parties along with their corresponding capacity utilization percentages. For a complete analysis, the Commission also would need to know whether the parties are planning to significantly alter their vessel capacity levels after the agreement goes into effect. Often, the Commission has requested such information from parties to pricing or pooling agreements during the review process, and after such agreements have become effective as concerns under section 6(g) have arisen. The proposed Information Form would provide the Commission with this necessary information. As such, the Commission would be better able to analyze both the supply and demand conditions in the U.S. trades, and consequently, the potential impact of pricing or pooling agreements on freight rates. Carriers to such agreements are the best source of accurate vessel capacity and capacity utilization information regarding their liner services. The Commission does not believe that the addition of these reporting requirements would impose an undue burden since carriers already routinely track this information for their operations.

v. Port Service

The proposed Information Form retains the requirement that parties to pricing or pooling agreements provide their vessel calls and describe any port service changes that are anticipated or planned to occur when the agreement goes into effect. As with similar modifications, this requirement would be clarified to limit the parties' reporting to only those vessel calls and port service changes relating to their liner services that would fall under the agreement, rather than any or all vessel calls and changes within the agreement trade.

e. Section V

Section V would require 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

Subpart G of part 535 of the proposed rule modifies the Monitoring Report regulations to mirror the proposed changes to the Information Form regulations in subpart E of part 535. Agreements subject to Monitoring Reports are identified by the authority contained in the agreement, rather than using the current agreement classifications. Most notably, the proposed rule reduces the number of agreements subject to Monitoring Reports and limits the application of the regulations.

Currently, all Class A, B, and C agreements that are effective under the Shipping Act are required to submit quarterly Monitoring Reports. Section 535.702(a) of the proposed rule would require Monitoring Reports from all agreements with the authority to discuss or agree on capacity rationalization, and from agreements with pricing or pooling authority [43] where the parties to a pricing or pooling agreement hold a combined market share of 35 percent or more in the entire U.S. inbound or outbound geographic scope of the agreement.[44] The Commission estimates that the number of agreements subject to Monitoring Reports would be reduced from 213 to 63. These 63 agreements would include rate discussion, conference, and major global alliance agreements in effect throughout the U.S. trades. The Commission believes that Monitoring Reports from these agreements would generally provide sufficient information to monitor the collective activities of carriers within the U.S. trades pursuant to the standards of the Shipping Act.

The Commission's proposal to apply a market share threshold of 35 percent to monitor 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 U.S. antitrust law. Part of their analysis involves evaluating the likely effects of a merger on the competitive behavior of firms within a market. The intent is to determine whether a merger would likely lead to increased coordinated interaction between firms in a market, and/or create the incentive for merging firms to alter their unilateral behavior by increasing prices and suppressing output, *i.e.*, supply. The agencies conclude 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.[45]

1992 Guidelines at 41561.

Market share provides a general economic measure to gauge the competitive influence of carrier agreements. Under the Shipping Act, however, the Commission does not solely rely on market share in assessing the competitive impact of a carrier agreement on freight rates and service levels in the U.S. trades. Other factors must be considered, including the authority and terms of the agreement, the competitive structure of the agreement trade, and the prevailing and projected economic conditions within the agreement trade. We note, however, that the 35 percent market share threshold used for application of periodic reporting requirements should not be construed as establishing a determination of the likely impact of an agreement for purposes of section 6(g) of the Shipping Act, nor does it imply that we consider pricing or pooling agreements below this threshold to be economically insignificant.

The Commission recognizes that the Monitoring Report regulations must be flexible enough to provide for exceptional cases. 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 anticompetitive or statutory concerns that would require close monitoring. Therefore, section 535.702(c) of the proposed rule 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.[46]

In addition, the Commission occasionally may find it necessary to prescribe alternative periodic reports on the use of certain authority contained in an agreement. This may occur when an agreement contains unique authority, the effects of which may require monitoring, but is not captured under the standard Monitoring Reports. For example, the Commission currently requires alternative periodic reports, in addition to Monitoring Reports, from the Trans-Atlantic Conference Agreement on its temporary slot assist chartering authority. Traditionally, these types of reports have been negotiated on an informal basis with the parties when an agreement or an agreement modification was filed with the Commission. Section 535.702(d) of the proposed rule clarifies the Commission's authority in this regard 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.[47]

Section 535.705 of the proposed rule provides waiver procedures whereby carriers may request relief from any of the Monitoring Report requirements. Additional data and information in support of the requested relief, however, would be required for the Commission's review.

[43] ''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: (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 cargoes, earnings, or revenues and/or losses; (d) the discussion or exchange of data on vessel-operating costs; and/or (e) the discussion of service contract matters.

[44] Under section 535.702(b) of the proposed rule, the Commission's Director of BTA may determine the Monitoring Report obligations of agreements with pricing or pooling authority using the 35 percent market share threshold. For newly filed agreements, this would be based on the market share data from the Information Form submitted with the agreement. Thereafter, at the beginning of each calendar year, BTA would 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).

[45] As discussed, carriers collectively set freight rates in relation to the supply and demand conditions within trades. The authorities to agree on rate levels and vessel capacity are interrelated and complementary even if such authorities are not contained within a single agreement. Many carriers in a trade may participate in a large rate discussion agreement and separate agreements with capacity rationalization authority, which such carriers may use to control the supply of vessel capacity to further their rate objectives under the discussion agreement. The Commission must examine the collective rate activities of carriers in relation to the vessel capacity supplied by carriers and any collective activities that might affect the supply of vessel capacity in a trade. For these reasons, the Commission believes that the underlying economic rationale used to apply the 35 percent market share standard under U.S. antitrust law makes it comparable and appropriate as a threshold for monitoring agreements with pricing or pooling authority.

The proposed rule does not apply a market share threshold for monitoring agreements with capacity rationalization authority. These arrangements tend to operate globally, which makes it difficult or impractical to apply a standard market share threshold to the entire geographic scope of the agreement, or any one particular trade within the scope of the agreement. The definition of capacity rationalization authority, however, distinguishes it from simpler forms of operational authority, and therefore, limits the application of the Monitoring Report regulations.

[46] The Commission's authority on this matter would be delegated to the Director of BTA in subpart C of part 501.

[47] Section 535.201 applies to carrier agreements, agreements between marine terminal operators, and agreements between carriers and marine terminal operators. At present, the Commission does not require any specifically prescribed periodic reports from any agreements between marine terminal operators, or between marine terminal operators and carriers. The Commission's jurisdiction to require additional information and documents from all such agreements is stated in section 5(a) of the Shipping Act. The proposed rule would delegate the Commission's authority to prescribe alternative periodic reports to the Director of BTA in subpart C of part 501.

4. Monitoring Report

Section 535.703(a) of the proposed rule replaces the current Monitoring Report forms with one form in appendix B of part 535 and divides the form into three sections. Section 535.703(b) of the proposed rule would require 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 would apply based on the authority contained in the agreement. Section III would apply to all agreements required to submit Monitoring Reports under section 535.702(a) of the proposed rule. The Monitoring Report form would be made available in electronic format using Microsoft Office 2000 (Word and Excel) that could be downloaded from the Commission's home page. Parties may complete and submit their Monitoring Reports in paper format, or in electronic format on diskette or CD–ROM. This procedure will remain available until the Commission has developed and implemented an electronic filing system for such documents.

It is further proposed to stay section 535.701(e) until such time as the Commission has developed and implemented an electronic system for filing Monitoring Reports and Minutes.

a. Section I

Section I of the proposed Monitoring Report would apply to all agreements with the authority to discuss or agree on capacity rationalization. Parties to agreements subject to this section would be required to submit quarterly data on their vessel capacity and capacity utilization. These reporting requirements correspond to the proposed requirements in section III of the Information Form.[48]

Section I would also require 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 that change (*See* section 535.703(c) of the proposed rule). Advance notice of the parties' planned changes in connection with this agreement authority is necessary. The Commission believes it should have more timely notice of such information than quarterly submissions would provide, in order to determine whether action pursuant to section 6(g) of the Shipping Act is necessary prior to implementation of a harmful reduction in vessel capacity or liner service.

b. Section II

Section II of the proposed Monitoring Report would apply to agreements under which 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: (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 cargoes, earnings, or revenues and/or losses; (d) the discussion or exchange of data on vessel-operating costs; and/or (e) the discussion of service contract matters.[49]

Parties to agreements subject to this section would be required to submit the following quarterly data and information: market share, total average revenue, cargo volume and revenue results on the top 10 agreement-wide commodities, vessel capacity and capacity utilization, significant changes in vessel capacity, and significant changes in service at ports. These requirements correspond to the proposed requirements in section IV of the Information Form. The proposed Monitoring Report would no longer require quarterly reporting on independent rate actions for parties to conference agreements. With the industry changes which have occurred since OSRA, the Commission no longer believes that a quarterly reporting burden on conference parties to monitor this information is necessary.

Regarding the commodity data requirements in this section, the Commission believes that quarterly information on the top 10 agreement-wide commodities would be sufficient for most agreements subject to this section. The Commission, however, recognizes that exceptional circumstances may arise in which it would be appropriate to require the submission of data on a sub-trade or regional basis, rather than an agreement-wide basis. This may occur when an agreement with extremely high market share covers a broad trade area comprised of large distinct sub-trades or regions, and establishes rates distinctly by sub-trade or region. For example, the Commission believes that it may be appropriate to require large rate discussion agreements, such as TSA and WTSA, to report commodity data for this section on a sub-trade or regional basis. In addition, sub-trade commodity data may be necessary where unique anticompetitive concerns are present, or where competitive issues affect pricing for certain commodities. Therefore, 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 this section of the Monitoring Reports.[50]

c. Section III

Section III would require 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 of the parties.

D. Implementation of the Proposed Information Form and Monitoring Report Regulations

In order to assure a smooth transition from the Commission's existing system for collecting information and data in connection with filed agreements to the system proposed in this proceeding, the Commission proposes to implement the Information Form and Monitoring regulations as follows. The new regulations would become effective 30 days after publication of a final rule in the **Federal Register**. All new agreements filed after that time would be required to comply with the new Information Form provisions. The new Monitoring Report provisions would become effective 90 days after publication, and would apply to all agreements then in effect under the Shipping Act. Commenters are encouraged to provide input on this proposed timetable.

IV. Minutes, 46 CFR Part 535, Subpart G

A. Introduction

The Commission requires that certain agreements authorized to operate pursuant to section 4 of the Shipping Act, 46 U.S.C. app. 1703, file confidentially with the Commission a report of designated meetings describing all matters within the scope of the agreement which are discussed or addressed at any such meeting, and indicate any action taken. 46 CFR 535.706. The current minutes filing regulations, which largely reflect the original rules adopted nearly twenty

[48] At present, the Commission estimates that there are 30 agreements in effect with capacity rationalization authority.

[49] At present, the Commission estimates that there are 33 such agreements in effect.

[50] The Commission's authority on this matter would be delegated to the Director of BTA in subpart C of part 501.

years ago following the enactment of the Shipping Act, provide the Commission with a summary of the business transacted at a meeting of parties to an agreement filed with the Commission. Minutes provide the Commission with information on specific areas on which agreement parties focus their attention (*i.e.*, rates, service contracting, conditions of service), as well as the economic and competitive conditions of the trade that influence their collective activity. Minutes have been recognized by Congress as ''perhaps the chief means whereby the [agency] was to be kept apprised of conference action'' [51] and are useful in monitoring the activities of the agreement and its members, and in understanding important topics and issues discussed by the agreement members. More recently, during the legislative process that led to the enactment of OSRA, the Commission was encouraged to be more vigilant in exercising its agreements oversight function.[52]

The liner shipping industry has undergone significant regulatory and structural change since the enactment of the Shipping Act and the adoption of the Commission's current minutes regulations. Carrier agreements have become more complex, and many include authority to engage in a wider variety of activities. These changes have made it more difficult for the Commission to monitor agreement activities and assess economic and competitive trade conditions. Moreover, our experience reviewing agreement minutes, discussions with agreement filing counsel and representatives, and recent fact findings and other investigative proceedings have highlighted areas of concern that necessitate an enhancement of our minutes program. These areas of concern include: (1) Inadequate inclusion and coverage of substantive issues and insufficient level of detail used to describe carrier discussions; (2) failure to file minutes of meetings held under authority of the agreement where substantive issues are being discussed; (3) inadequate identification of and lack of provision for Commission access to documents used or discussed in agreement meetings; and (4) untimely filing of agreement minutes.

To address these concerns, the Commission proposes to replace its rules governing the filing of minutes by agreements, currently set forth at 46 CFR 535.706–07.[53] Our proposal would: (1) Require minutes to be filed by agreements based on the types of authority specified in the agreement, rather than according to agreement type as currently provided for in 46 CFR 535.706(b); (2) eliminate current regulatory language that limits the minutes filing requirement 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 of such meetings; (5) clarify the format used for assigning sequential numbers for minutes currently provided in 46 CFR 535.706(d); (6) reduce the time period for filing minutes with the Commission from 30 days as required in 46 CFR 535.701(f), to 15 days from the date of the meeting; and (7) amend language throughout the existing minutes rules to update definitions and Bureau designations, and replace references to ''conferences'' with the term ''agreement,'' clarifying the broad range of agreements to which these provisions apply.

B. Discussion of the components of the current minutes rules and the proposed changes

1. Agreements Required to File Minutes

The Commission's current rules require that minutes of agreement meetings be filed by ''conferences, interconference agreements, agreements between a conference and other ocean common carriers, pooling agreements, equal access agreements, discussion agreements, marine terminal conferences, and marine terminal rate fixing agreements * * *'' 46 CFR 535.706(b). Although most of these named agreement types are specifically defined in 46 CFR 535.104, others are not, *e.g.*, discussion agreements.[54] Thus, 46 CFR 535.706(b) identifies those agreements that must file minutes based on a specific type of agreement, rather than on the actual activities in which the parties are authorized to engage. Due to the changes in the industry and the concurrent increase in the types of agreement activities, this approach may not reflect all of the actual authority contained in the agreement itself, or the activities in which the agreement parties are engaged. Moreover, use of these agreement categories to identify which agreements must file minutes with the Commission often raises questions about agreements' compliance with Commission regulations. Further, use of these categories has often resulted in lengthy discussions with filing counsel as to an agreement's minutes filing responsibilities, particularly for those agreements that contain multiple authorities, *e.g.*, vessel space sharing, voluntary rate discussion, and joint service contracting authority.

When the Commission's rules governing the filing of agreement minutes were promulgated under the Shipping Act, the authority of most carrier agreements generally fit into the enumerated categories in the rules. At that time, the specified agreement types represented the universe of consequential agreements filed with the Commission and minutes were filed by agreements considered to be of significant regulatory concern. Rarely was there a question as to an agreement's minutes filing responsibilities based on its agreement classification. However, over time these agreement categories have not kept pace with the evolving nature of collective carrier activities. For example, most agreements now on file with the Commission combine a number of activities under one agreement (*e.g.*, operational agreements that also include authority to discuss service contract rates or terms), or have established new authority not anticipated when the current definitions were drafted (*e.g.*, portal agreements).

To address the evolving nature of carrier agreements and to clarify which agreements must file minutes of their meetings, we propose to create a new subsection (a) for the redesignated 46 CFR 535.704. This new subsection would provide that the filing requirement be based on the specific type of authority contained in the filed agreement, rather than on a generic agreement type. Thus, agreements authorized to engage in ''discussion or establishment of any type of rates, whether in tariffs or service contracts; pooling or apportioning of cargo; discussion of revenues, earnings, or losses; discussion or exchange of vessel operating costs; or discussion of service contract matters, including the

[51] *Report of the Antitrust Subcommittee on the Judiciary on the Ocean Freight Industry,* House of Representatives, 87th Cong., 2nd Sess., 363 (1962).

[52] Senate Report at 13.

[53] Sections 535.706–07 will be redesignated as section 535.704.

[54] While the Commission's rules do not specifically define a ''discussion agreement,'' 46 CFR 535.104(aa) defines ''rate agreement'' to mean an agreement between ocean common carriers which authorizes agreement upon, on either a binding basis under a common tariff or on a non-binding basis, or discussion of, any kind of rate. An agreement between ocean common carriers that authorizes voluntary, non-binding agreement on or discussion of a variety of pricing or operational matters including rates and terms of individual carrier tariffs or service contracts, or capacity rationalization, is what is commonly referred to as a ''discussion agreement.''

establishment of voluntary service contract guidelines'' would be required to file minutes of meetings with the Commission. We believe this approach more efficiently captures the true nature of agreements' activities.

2. Definition of Meeting

Section 535.706(a) currently defines the term ''meetings'' as including ''any meeting of the parties to the agreement, including meetings of their agents, principals, owners, committees or sub-committees of the parties authorized to take final action on behalf of the parties.'' Section 535.706(b) requires certain specified agreements to file ''a report of each meeting * * * describing all matters within the scope of the agreement which are discussed or considered at any such meeting * * * and shall indicate the action taken.''

The Commission's review of agreement minutes, discussions with filing counsel and agreement representatives, and recent fact findings and other investigative proceedings, all indicate that the 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 their respective lines or on behalf of the agreement, even if the discussions did not result in ''final'' decisions), or on whether ''final action'' was taken. Moreover, numerous documents obtained in Commission proceedings indicate that the Commission has not received minutes for communications for which we believe the regulations contemplate the filing of minutes.

Market-oriented regulatory reforms under the Shipping Act, and more recently under OSRA, especially those focused on liberalizing service contracting, encourage carriers to act more independently within discussion agreements, yet also challenge carriers to find effective ways to communicate and share information. Today, the Internet and agreement-administered email systems allow carriers to collect and share unlimited information on a more frequent and timely basis. Some agreements have comprehensive communications networks and procedures to ensure and support transparency through the flow of information among carrier members and the agreement secretariat. As a result, major discussions are being conducted under circumstances that may not be viewed as a meeting.

Agreements structure their organizations in varied ways and utilize many methods for decision-making. Many conduct their business under multiple committees and sub-committees and file minutes of meetings held under some of those groups. Other agreements have a more streamlined structure and file few, if any, minutes for committees or sub-committees, even if major policy discussions are conducted at these levels. As a consequence, time-consuming staff follow-up with agreement representatives is often necessary to gain a clear understanding of the origins of and issues behind those discussions that are reported.

In order to address these issues, the Commission proposes to revise the current definition of meeting at redesignated subsection 535.704(b) to include ''all discussions at which any agreement is reached among any number of parties to the 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.'' Further, the rule would specify that this definition is intended to encompass meetings of the members' agents, principals, owners, officers, employees, representatives, committees or subcommittees. Thus, agreements authorized to engage in certain enumerated activities would be required to file minutes of all discussions among any number of members relating to the business of the agreement when an agreement is reached, and all discussions between three or more members relating to the business of the agreement regardless of whether an agreement is reached. Agreements with less than three members would submit minutes on all discussions relating to the business of the agreement. The proposal would also encompass discussions held via electronic means, and through agreement secretariats. The Commission considered eliminating completely the final action provision and proposing that minutes of all discussions among any number of members be filed. However, we believe that minutes of discussions between three or more members, whether or not agreement is reached, should provide the necessary coverage and details of relevant meetings enabling the Commission to obtain a clear picture of the activities of the agreement.[55] Further, it is not the intent of the Commission to require the filing of minutes for such discussions as two-party electronic communications. Requiring the filing of minutes for discussions of this nature would put an undue burden on the industry and appears to be unnecessary.

We propose to retain the present waiver provision, currently at 46 CFR 535.709 (redesignated as § 535.705). Under that provision, a waiver from the minutes filing requirement may be granted in advance upon a showing of good cause.

3. Content of Minutes

The Commission's current rules governing the content of minutes, at 46 CFR 535.706(b), provide that specified agreements shall file with the Commission ''a report of each meeting * * * describing all matters within the scope of the agreement which are discussed or considered at any such meeting * * * and shall indicate the action taken.'' The rules do not, however, specify the degree of detail such reports are expected to contain. As a result, the minutes currently being filed under this provision vary considerably in detail and scope. We are particularly concerned about the filing of vague and obscure minutes by some agreements. As a consequence, the minutes being filed by some agreements are not useful in assisting the Commission in its oversight of activities taking place under the authority of the filed agreement.

To that end, we are proposing to amend the minutes regulation, at redesignated subsection 535.704(c), to require that descriptions of agreement meetings be ''detailed enough 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 * * *'' We believe that this proposal more clearly enunciates our intention that the parties who are granted limited antitrust immunity to operate in concert under filed agreements must provide a sufficient degree of detail of the discussions permitted under these agreements. Further, we seek to make clear that full disclosure is required, and any efforts to obscure the true nature of discussions or actions taken is prohibited.

The Commission's current rules, at 46 CFR 535.707, require agreements subject

[55] The term ''final action'' has been eliminated. See discussion, *infra.*

to the minutes filing requirement to list in their minutes ''all reports, circulars, notices, statistics, analytical studies or other documents, not otherwise filed with the Commission, * * * which are distributed to the member lines and are used to reach a ''final decision'' on a variety of matters. The extent of compliance with this requirement is difficult to assess accurately since such documents may not be mentioned in minutes if they are not viewed as related to a ''final decision.'' Such documents may not be used to reach a final decision, but may be used to guide members' independent activities. The general paucity of such listings in current minutes, as well as material developed from Commission information demand orders and through discussions with agreement secretariats and filing counsel suggest that compliance with this requirement is far from complete. Further, in 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.

The Commission believes that effective monitoring of agreement activity requires efficient and timely access to such documents. To address this issue, we are proposing to eliminate the reference to ''final decision'' and add to the redesignated 46 CFR 535.704(c) a subparagraph that agreements must file with their minutes ''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.'' However, the parties would not be required to submit publicly available materials, provided they are identified in the minutes and are readily accessible.

This proposal is intended to provide the Commission with the relevant information necessary to fulfill its statutory obligation of monitoring carriers' collective activities to ensure they do not result in an unreasonable increase in transportation cost or an unreasonable reduction in transportation service. The Commission considered, as an alternative, requiring agreements to submit a summary of all documents discussed at minuted meetings in lieu of the actual documents. 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.

4. Serial Numbers

Current section 535.706(d)(1) requires each set of minutes filed with the Commission to be assigned a serial number, and provides an illustrative example suggesting that minutes of meetings be sequentially numbered from the date the agreement becomes effective. Section 535.706(d)(2) provides that any conference or rate agreement which has a system for assigning sequential numbers to its minutes which differs from the example may continue to use its own system.

We now propose, at the redesignated 46 CFR 535.704(e), to require that each set of minutes filed with the Commission shall include the agreement name and number, and a unique identification number indicating the sequence in which the meeting took place during the calendar year. For example, the first meeting of 2003 for agreement ''A'' would be listed as: ''A (Agreement Number), 1/2003.'' The second meeting would be listed as ''A (Agreement Number), 2/2003'' and so on, irrespective of whether the meeting is of a specific committee or subcommittee. Numbering would start over in the following calendar year, *i.e.*, the first meeting of the 2004 calendar year would be ''A (Agreement Number), 1/2004.''

The current rule suggests that serial numbers be applied sequentially. Almost all agreements currently assign serial numbers in this manner to meetings held during a calendar year and start a new numbering sequence for each consecutive year. In addition, about one-third of those assign serial numbers based on the type of meeting or sub-committee, while a few agreements only refer to the date of the meeting and do not assign a unique serial number at all.

Agreements filed with the Commission today typically have a complex organizational structure. Policy level meetings and committees are used to establish pricing policy and to discuss and address broad trade and competitive issues, while working committees or sub-committees (usually consisting of less than the full membership) conduct research; collect, compile and analyze data and information; and make recommendations to the higher level policy committees on significant matters. Ad hoc committees also are established as necessary, and teleconferences are frequently used as a means to conduct collective carrier business.

Therefore, in order to establish and facilitate an efficient system for filing agreement minutes, as well as to manage the information for compliance and research purposes, the Commission proposes a regulation requiring a standard format for assigning serial numbers to agreement minutes. This proposal requires that agreement minutes' serial numbers be unique, sequentially assigned numbers reflecting the year in which the meeting takes place, adopting the format currently used by a number of carrier agreements.

5. Filing Deadlines

Section 535.701(f) currently requires, among other things, that minutes of agreement meetings be filed within 30 days of the meeting, and that any documents requested by the Commission be filed within 30 days from the receipt of a request. The 30-day requirement was established prior to the widespread adoption and use of new forms of electronic communications. Today, most agreements have electronic mail systems administered through a secretariat and use such systems to electronically record, review and disseminate information, including minutes of their meetings. Based on draft minutes of agreement meetings obtained in Commission investigations and responses to other Commission information demand orders, it appears that minutes for some agreement meetings are prepared within one or two days of the meeting (and sometimes the same day), and are provided promptly to the participants for review (mainly via email). These agreements then typically allow up to two weeks for the participants to respond with any revisions. Based on our comparison of the samples of draft minutes with the final versions, it appears that revisions are rare. Moreover, Commission records show that some agreements do file minutes of their meetings prior to the current 30-day deadline, and in fact, agreements have expedited their filings in response to informal staff requests for minutes of particular interest.

The Commission therefore proposes that the time period for filing minutes of meetings, set forth at section 535.701(f), be reduced from 30 to 15 calendar days from the date of the meeting. Relevant documents referenced in filed minutes would be submitted with the minutes.

V. Miscellaneous Changes to 46 CFR Part 535

Along with all the proposed changes discussed above, the Commission is also taking this opportunity to update and clarify language in some rule sections. For the most part, these changes involve rewording of rules with no substantial change in the intent or effect of the affected rules. Apart from non-substantive language changes throughout the rules, some of the miscellaneous changes include rearranging the sequence of marine terminal agreement exemptions under subpart C of the rules; updating the name of the Bureau of Trade Analysis; clarifying the identities of parties to husbanding and agency agreements in §§ 535.303 and 535.304, respectively; and clarifying the wording of the rules regarding requests for expedited review of agreements in § 535.605, requests for additional information in § 535.606, and failures to comply with requests for additional information in § 535.607.

Finally, the Commission is proposing removing obsolete language regarding the form requirements for agreements and agreement amendments; specifically, in § 535.403 removing reference to the generic classification of agreements and the date of the last republication of an agreement from the title page. The Commission further proposes to add minor form requirements for reflecting the original effective date on the title page of an agreement when the title page is revised and requiring that the latest amendment number be reflected on each revised page in § 535.403.

VI. Oral Presentations

Pursuant to Rule 53(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.53(a) (2002), in notice-and-comment rulemakings the Commission may permit interested persons to make oral presentations in addition to filing written comments. The Commission has determined to permit interested persons to make such presentations to individual Commissioners in this proceeding, at the discretion of each Commissioner.

Interested persons may request one-on-one meetings at which they may make presentations describing their views on the proposed rule. Any meeting or meetings shall be completed before the close of the comment period. The summary or transcript of oral presentations will be included in the record and must be submitted to the Secretary of the Commission within 5 days of the meeting. Interested persons wishing to make an oral presentation should contact the Office of the Secretary to secure contact names and numbers for individual Commissioners.

VII. Statutory Reviews and Request for Comments

The reporting, recordkeeping, and disclosure requirements contained in this proposed 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); 170 hours per quarterly response for monitoring reports from pricing or pooling 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 41,947 hours per annum, a reduction of 52.85 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.

Send comments regarding the burden estimate to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Federal Maritime Commission, New Executive Office Building, 725 17th Street, NW., Washington, DC 20503 within 30 days of publication in the **Federal Register**.

The Commission would also like to solicit comments to: (a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) evaluate the accuracy of the Commission's burden estimates for the proposed collection of information; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this proposed rulemaking will be summarized and/or included in the final rule and will become a matter of public record.

The Chairman of the Federal Maritime Commission certifies, pursuant to section 605 of the Regulatory Flexibility Act, 5 U.S.C. 605, that the proposed rules will not, if promulgated, 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 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.

For the reasons discussed in the preamble, the Federal Maritime Commission proposes to amend parts 501 and 535 of Subchapter A and Subchapter B, respectively, of Chapter IV of Title 46 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, 70 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 § 535.503 of this chapter.

(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:

PART 535—OCEAN COMMON CARRIERS AND MARINE TERMINAL OPERATORS 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

Appendix A To Part 535—Information Form and Instructions

Appendix B To Part 535—Monitoring Report and Instructions

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1701–1707, 1709–1710, 1712 and 1714–1718; Pub. L. 105–258, 112 Stat. 1902 (46 U.S.C. app. 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 classes 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 exempted 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. The term does not include sailing agreements or space charter agreements.

(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 may occur, and there is no competition

between members for traffic 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 kinds of 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 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 make 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 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; 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 unlicenced 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 or 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;

(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 agreement 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) above 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 be 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 that neither authorizes agreement on or discussion of any rate or charge nor the rationalization of capacity, and for which the combined market share of the parties is either:

(1) Less than 15 percent if all parties are members of the same agreement having pricing or capacity rationalization authority in the relevant trade lane and all sub-trades; or

(2) Less than 20 percent if the parties are not members of the same agreement having pricing or capacity rationalization authority in the relevant trade lane and all sub-trades.

(b) Low market share agreements are exempt from the waiting period

requirement of the Act and of 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.

§ 535.312 Vessel charter party—exemption.

(a) For purposes of this section, vessel charter party means 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 with respect to the exercise of the collective activities contemplated and authorized in the agreement; 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 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) Concern matters set forth 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 establishment of space charter rates, and 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; and

(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.

(5) operational matters such as port rotations, changes in vessel size or number of vessels if within a range specified in the agreement, or vessel substitution or replacement if, as a result, there is no significant change in capacity; 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 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; or

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

(1) The discussion of, or agreement on, 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 traffic, earnings, or revenues and/or losses;

(5) The discussion or exchange of data on vessel-operating costs; and/or

(6) The discussion of service contract matters; or

(c) For an agreement containing any authority identified in § 535.502(b),

modifications to the agreement that expand the geographic scope of the agreement.

§ 535.503 Information Form.

(a) The Information Form, with instructions, for agreements and modifications to agreements subject to this subpart, is 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; and/or the rationalization of sailings or services relating to a schedule of ports, the frequency of port calls, and/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 on, 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 cargoes, earnings, or revenues and/or losses;

(iv) The discussion or exchange of data on vessel-operating costs; and/or

(v) The discussion of service contract matters.

§ 535.504 Application for waiver.

(a) Upon a showing of good cause, the Commission may waive any part of the Information Form requirements of § 535.503.

(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 with the filing and Information Form requirements 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 that has not already been rejected pursuant to § 535.601 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) 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. The 45-day waiting period begins anew 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 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 and documents 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 shall publish a notice in the **Federal Register** that it has requested additional information and serve that notice on any commenting party. The notice shall 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 2:00 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 15 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; and/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 on, 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 cargoes, earnings, or revenues and/or losses;

(iv) The discussion or exchange of data on vessel-operating costs; and/or

(v) The discussion of service contract matters.

(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 submitted 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 3 of section I of the Monitoring Report shall submit a narrative statement on 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, Bureau of Trade Analysis, 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.

(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, 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.

(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 attendees 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; 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.

(d) *Exemption.* Minutes are not required to reflect discussions of administrative matters, as set forth in § 535.408(b)(4)(iii), or 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 date 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 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 this section 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. 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:

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

Appendix A to Part 535—Information Form and Instructions

Instructions

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. 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, rather than ''sub-trades'' which refer to the specific foreign countries and specific U.S. port ranges that are included in the geographic 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 and modifications to agreements identified in 46 CFR 535.502. Parties to such agreements must complete parts 1 through 4 of this section.

Part 1

State the full name of the agreement.

Part 2(A)

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.

Part 2(B)

Provide a narrative statement describing 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 cargoes or revenues.

Part 4(D)

Identify whether the agreement authorizes the parties to discuss or exchange data on vessel-operating costs.

Part 4(E)

Identify whether the agreement authorizes parties to discuss service contract matters.

Part 4(F)

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

Part 4(G)

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(H)

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(F) of this section.

Part 4(I)

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

Part 4(J)

Identify any other authority contained in the agreement that is not otherwise covered in part 4 of this section. If there is no other authority in the agreement, it shall be noted with the term ''none'' in response to part 4(J) 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; and/or (b) the rationalization of sailings or services relating to a schedule of ports, the frequency of port calls, and/or the size and capacity of vessels for deployment. Such authorities do not include the establishment of a joint service, nor capacity rationalization as defined in 46 CFR 535.104(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 that clearly describes the nature, level, or type of any anticipated or planned changes in service at ports that the parties would implement under the agreement after it goes into effect. Examples of such changes include a change in the base port designation, the frequency of vessel calls, and the use of indirect as opposed to direct service. If no 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 through 3 of this section.

Part 1(A)

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. 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 2

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 3

Provide a narrative statement that clearly describes the nature, basis, and effects of any anticipated or planned changes in the vessel capacity and/or liner services (including service at ports) that the parties would implement under the agreement after it goes into effect. If no change is anticipated or planned, it shall be noted with the term ''none'' in response to part 3 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 cargoes, earnings, or revenues and/or losses; (d) the discussion or exchange of data on vessel-operating costs; and/or (e) the discussion of service contract matters. Parties to such agreements must complete parts 1 through 5 of this section.

Part 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.

U.S. port ranges are defined as follows:

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.

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.

An application may be filed for a waiver of the definition of ''sub-trade'' under the procedure 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.

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.

If 50 percent or more of the total liner cargo carried by the parties in the entire agreement scope or in the sub-trade 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

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.

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, 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 describing the nature, basis, and effects of any significant changes in the amounts of vessel capacity, anticipated or planned for when the agreement goes into effect, for the parties' liner services that would fall under the agreement within the entire geographic scope of the agreement. For purposes of this Form, the term ''significant changes in the amounts of vessel capacity'' means the removal from or addition to a liner service of vessels or vessel space for a fixed, seasonally planned, or indefinite period of time, as opposed to incidental operational changes when vessels may be temporarily repositioned or shifted from one service to another, or when vessel space may be temporarily altered, on short notice. 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 that clearly describes the nature, level, or type of any changes, anticipated or planned for when the agreement goes into effect, in service at ports for the parties' liner services that would fall under the agreement within the entire geographic scope of the agreement. Examples of such changes include a change in the base port designation, the frequency of vessel calls, and the use of indirect as opposed to direct service. If no 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.

FEDERAL MARITIME COMMISSION

INFORMATION FORM FOR AGREEMENTS BETWEEN OR AMONG OCEAN COMMON CARRIERS

Section I
Part 1
Agreement Name:

Part 2

(A) Narrative statement on agreement purpose: _____

_____

_____

(B) Narrative statement on the 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 cargoes or revenues?	Yes ☐	No ☐
(D) Authority to discuss or exchange data on vessel-operating costs?	Yes ☐	No ☐
(E) Authority to discuss or agree on service contracts and their terms?	Yes ☐	No ☐
(F) Authority to discuss or agree on capacity rationalization?	Yes ☐	No ☐
(G) Conditions or restrictions on the parties' agreement participation, and/or use or offering of competing services in the geographic scope?	Yes ☐	No ☐
(H) Authority to charter vessel space?	Yes ☐	No ☐
(I) Authority to rationalize sailings or services?	Yes ☐	No ☐

(J) Other authority: _____

_____

_____

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*	Etc. . . .
Carrier A [Name]				

Carrier B
Carrier C
Etc. . . .

(B) Narrative statement on anticipated or planned changes: _____

_____

_____

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. . . .		

Part 2 Vessel Calls
Agreement-Wide Trade: U.S. Inbound (or Outbound) Name
Time Period: [12-Months]

[Port Names]	*Port 1*	*Port 2*	*Port 3*	Etc. . . .
Carrier A [Name]				
Carrier B				
Carrier C				
Etc. . . .				

Part 3 Planned Changes

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 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]

	Total revenues	*TEUs* [or other units]	*Average revenue*
[Name]			
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
Etc. . . .		
Etc. . . .		

(C) Narrative Statement on anticipated or planned significant changes: _____

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*	Etc....
Carrier A [Name]				
Carrier B				
Carrier C				
Etc....				

(B) Narrative statement on anticipated or planned changes: _____

Section V

Part 1 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

Instructions

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. 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. 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, rather than ''sub-trades'' which refer to the trade between specific foreign countries and specific U.S. port ranges that are included in the geographic 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)

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.

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 3

Provide a narrative statement that clearly describes the nature, basis, and effects of any planned changes in the vessel capacity and/or liner services (including service at ports) that the parties will implement under the agreement. This narrative statement shall be submitted to the Director, Bureau of Trade Analysis, 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.

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 cargoes, earnings, or revenues and/or losses; (d) the discussion or exchange of data on vessel-operating costs; and/or (e) the discussion of service contract matters. 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

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.

U.S. port ranges are defined as follows:

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.

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.

An application may be filed for a waiver of the definition of ''sub-trade'' under the procedure 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.

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.

If 50 percent or more of the total liner cargo carried by the parties in the entire agreement scope or in the sub-trade 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

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.

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, 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 describing the nature, basis, and effects of any significant changes in the amounts 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. For purposes of this Report, the term ''significant changes in the amounts of vessel capacity'' means the removal from or addition to a liner service of vessels or vessel space for a fixed, seasonally planned, or indefinite period of time, as opposed to incidental operational changes when vessels may be temporarily repositioned or shifted from one service to another, or when vessel space may be temporarily altered, on short notice. 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 that clearly describes the nature, level, or type of any significant changes in service at ports 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. For purposes of this Report, the term ''significant changes in service at ports'' means a planned change in port service for a fixed, seasonal, or indefinite period of time, as opposed to an incidental or unplanned alteration in port service that was temporary. If no significant change occurred during the calendar quarter, it shall be noted with the term ''none'' in response to part 6 of the 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.

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. . . .		

Part 3 Planned Changes

Narrative statement on planned changes to be implemented (submit statement no later than 15 days after a change has been agreed upon but prior to the implementation of the change):

_____

_____

_____

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
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]

	Total Revenues	TEUs [or other units]	Average Revenue
[Name]			
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 that occurred during the calendar quarter: _____

Part 6 Port Service

Narrative statement on significant changes in service at ports 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 VanBrakle,

Secretary.

[FR Doc. 03–29738 Filed 12–1–03; 8:45 am]

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