

March 31, 2011

FEDERAL MARITIME COMMISSION

46 CFR Part 502

Docket No. 11-05

RIN: 3072-AC43

Rules of Practice and Procedure

AGENCY: Federal Maritime Commission.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Federal Maritime Commission (FMC or Commission) is seeking comments on possible amendments to its Rules of Practice and Procedure to update and clarify its rules, and to reduce the burden on parties to proceedings before the Commission.

DATES: Submit comments on or before: May 6, 2011.

ADDRESSES: Address all comments concerning this advance notice of proposed rulemaking to Karen V. Gregory, Secretary, Federal Maritime Commission, 800 North Capitol Street, N.W., Washington, DC 20573-0001. Submit electronic comments to secretary@fmc.gov.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

The Commission proposes to amend Part 502 of Title 46 of the Code of Federal Regulations to update and improve its Rules of Practice and Procedure, 46 CFR Part 502. The rules in 46 CFR 502.1-502.991 are designed to secure just, speedy, and inexpensive resolution of proceedings before the Commission. On February 24, 2011, certain changes to Subparts A, H, I, S, and T of Part 502 were published in the Federal Register, 76 FR 10258 (February 24, 2011) and are now in effect. The Commission intends to update and revise the rest of its Rules of Practice and Procedure. By this advance notice, it seeks public comment addressing existing rules that should be updated to reflect current practices and technologies, or could be improved to bring about more efficient and user-friendly procedures. Following receipt and consideration of comments, the Commission intends to issue specific proposed rules in a Notice of Proposed Rulemaking and solicit additional public comment on its proposal.

A. Modernization and efficiency enhancement

The Commission proposes to amend and update any rules in Part 502 that may be appropriate in order to improve their effectiveness and enhance administrative efficiency, both in use of material and human resources. In line with this goal, the recent revision to Subpart A requests all filings to be submitted in electronic PDF format, as well as paper. This first step towards accepting documents in electronic form will give the Commission an opportunity to develop new internal procedures that reduce paper and staff time. The Commission is

interested in suggestions and information from the public regarding electronic filing and docket systems they have used and found most efficient and user-friendly. The Commission intends to make the best use of electronic resources currently at its disposal and recognizes the importance of electronic communications.

The Commission contemplates editorial revisions to clarify language as well as substantive changes to make the rules more effective and efficient for the industry and the Commission. All procedural rules are being examined for possible revision. At the outset, some of the initial candidates for change are: qualification of non-attorney practitioners, 46 CFR 502.27; content of filed complaints and answers, 46 CFR 502.62-502.64; intervention by the Bureau of Enforcement in complaint proceedings, 46 CFR 502.42; rules governing computation of time, time of filing, and enlargements of time, 46 CFR Subpart G; hearing procedures, 46 CFR Subpart J; requirements for filing briefs, including the time periods for filing exceptions, page limits, and contents, 46 CFR Subpart M; and the functions and authorities of the presiding officer in proceedings. Consideration will also be given to the possible addition of rules for the use of summary judgment in proceedings; voluntary and involuntary dismissal of complaints in line with the Federal Rules of Civil Procedure (FRCP); and the use of cross-claims and third-party complaints in Commission proceedings.

Additionally, the Commission seeks comment on whether it should amend its rules on filing and service of documents. Several federal agencies now require physical receipt of documents to meet filing and/or service deadlines.

Currently the Commission's rule provides that "the date of filing shall be either the date on which the pleading, document, or paper is physically delivered to the Commission by a party, the date on which a party certifies it to have been deposited in the mail or delivered to a courier, or the date of email transmission." 46 CFR 502.2(b) (previously 46 CFR 114(c)).

The Commission also seeks comment on the possible applicability of the FRCP to proceedings before the Commission consistent with its responsibilities under the Administrative Procedure Act. 5 U.S.C. 551-559. The Commission's rules currently provide that the FRCP will apply in situations that are not covered by a specific Commission rule to the extent the federal rules are consistent with sound administrative practice. 46 CFR 502.12. The presiding officer also has discretion to waive any rules "to prevent undue hardship, manifest injustice, or if the expeditious conduct of business so requires." 46 CFR 502.10. The Commission desires to ensure that procedures are consistent with modern practice while giving due regard to limitations on its resources and the nuances of its own procedures and requirements.

B. Modernization of discovery rules

The Shipping Act of 1984 provides: "In an investigation or adjudicatory proceeding under this part – . . . (2) a party may use depositions, written interrogatories, and discovery procedures under regulations prescribed by the Commission that, to the extent practicable, shall conform to the Federal Rules of Civil Procedure (28 App. U.S.C.)." 46 U.S.C. 41303(a). In 1984, the Commission promulgated discovery rules based primarily on the federal rules as

they then existed. 49 FR 44369 (November 6, 1984). The Commission also promulgated minor amendments to Rule 201 in 1999 and Rule 203 in 1993, but in all other respects the rules are unchanged since 1984. The Commission's discovery rules are set forth in 46 CFR Subpart L.

The federal rules regulating discovery have been amended many times since 1984. Some amendments concerned matters that hardly existed in 1984, such as electronic discovery. FRCP 26, 34. Other amendments altered established discovery procedures, including the scope of discovery (compare FRCP 26(b)(1) with 46 CFR 502.201(h)); the requirement to provide initial disclosures, including identification of expert witnesses (FRCP 26(a)); procedures for claiming privilege or protecting trial-preparation materials (FRCP 26(b)(5)); a limitation of number (FRCP 30(a)(2)) and conduct of depositions (FRCP 30(d)); and a limitation on the number of interrogatories (FRCP 33(a)(1)). The thirty-day period to respond to interrogatories and requests for production of documents that existed in the FRCP in 1984 was not included in the Commission's rules.

The Commission seeks public comments on whether to revise its discovery rules to conform more closely to the FRCP as they are formulated today. The Commission believes that to achieve the optimum result, any revision should consider the views of the parties and attorneys who would be subject to the revised rules. Therefore, it seeks their views through this advance notice of proposed rulemaking.

Interested parties may address the following questions or other concerns:

1. What specific problems, if any, have you experienced with the Commission's current rules of discovery?

2. What specific problems, if any, would you foresee if the Commission were to adopt particular provisions of the discovery rules as they currently exist in the FRCP, giving due regard to the differences in the nature of the proceedings and practice before the federal courts and before the Commission?

C. Informal Docket or Small Claims Procedures

Subpart S of the Commission's rules, 46 CFR 502.301-502.305, governs informal procedures for adjudication of small claims. These procedures were established for use by complainants when the amount in controversy is \$50,000 or less. In those cases, an appointed settlement officer will make a decision without necessity of formal proceedings. A complainant may request a Subpart S proceeding, but a respondent can elect not to consent to such proceeding. If a respondent does not consent, the matter will be heard by an administrative law judge under Subpart T, Formal Procedure for Adjudication of Small Claims.

The Commission is seeking comment on Subpart S proceedings, in particular as to: effecting service when parties make themselves unavailable for service of claims and decisions, or become unreachable after initially participating in a proceeding; dismissal of claims if service on the respondent cannot be achieved; and if the Commission's rules on ex parte communications, 46 C.F.R. 502.11, should apply to Informal Docket proceedings. The Commission is particularly interested in commenters' experience with small

claims procedures used by other government entities that the Commission might use as guidance when amending its own rules.

The Commission will be able to better consider whether and how its Rules of Practice and Procedure should be amended if commenters provide specific examples regarding the current rules and possible improvement of the rules.

Commenters transmitting comments by email should indicate “FMC 502 ANPR” in the subject line of the email. All email comments should be sent to secretary@fmc.gov.

By the Commission.

Karen V. Gregory
Secretary