

**ORIGINAL**

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( April 13, 2005 )  
(FEDERAL MARITIME COMMISSION)

**FEDERAL MARITIME COMMISSION**

**46 CFR Parts 501 and 535**

**DOCKET NO. 03-15**

**OCEAN COMMON CARRIER AND MARINE TERMINAL OPERATOR AGREEMENTS  
SUBJECT TO THE SHIPPING ACT OF 1984**

**AGENCY:** Federal Maritime Commission

**ACTION:** Final Rule; clarifications and corrections.

**SUMMARY:** This document clarifies and corrects the regulations in sections 535.311 and 535.704 and appendix A of 46 CFR part 535 of the Final Rule published on November 4, 2004. These revisions to the regulations are non-substantive, and no further public comments on the Final Rule are necessary.

**DATES:** [UPON PUBLICATION]

**FOR FURTHER INFORMATION CONTACT:**

Amy W. Larson, General Counsel  
Federal Maritime Commission  
800 North Capitol Street, N.W.  
Room 1018  
Washington, D.C. 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, N.W.  
Room 940  
Washington, D.C. 20573-0001  
(202) 523-5796  
E-mail: tradeanalysis@fmc.gov

**SUPPLEMENTARY INFORMATION:**

On October 27, 2004, the Federal Maritime Commission ("FMC" or "Commission") adopted a Final Rule to amend its regulations in 46 CFR parts 501 and 535 on the delegation of the Commission's authorities, the filing of ocean common carrier and marine terminal operator agreements, and the reporting requirements for agreements pursuant to the Shipping Act of 1984 46 U.S.C. 1701-1719 ("Shipping Act"). 69 FR 64298, November 4, 2004. This document revises certain sections of the regulation in part 535 of the Final Rule published on November 4, 2004. The revisions clarify the meaning of the regulations and correct certain omissions and errors in the regulations, which were not detected in the course of preparing the Final Rule for publication. The revisions are non-substantive in nature and do not alter the decision adopted by the Commission in this Final Rule. Therefore, no further public comments on the Final Rule are necessary. The following sections in the regulations of part 535 of the Final Rule have been revised.

1. Section 535.311 Low market share agreements - exemption.

As discussed in the supplementary information of the Final Rule, the Commission adopted a new regulation in section 535.311, which provides an exemption from the statutory 45-day waiting period for filed agreements that qualify as "low market share agreements." *Id.* at 64399-64400. As adopted, section 535.311(a) states that:

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

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

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

*Id.* at 64420.

Section 535.311(a) uses different levels of market share to apply the exemption based on whether the parties to the filed agreement are members of another agreement in the same trade or sub-trade with any authorities listed in section 535.502(b).<sup>1</sup> As stated, the language in section 535.311(a) may reflect some

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<sup>1</sup> Section 535.502(b) of the Final Rule includes any of the following authorities: (1) the discussion of, or agreement upon, whether on a binding basis under a common tariff or a non-binding basis, any kind of rate or charge; (2) the discussion of, or agreement on, capacity rationalization; (3) the establishment of a joint service; (4) the pooling or division of cargo traffic, earnings, or revenues and/or losses; or (5) the discussion of, or agreement on, any service contract matter.

ambiguity in the application of the exemption that was unintended by the Commission. In a literal sense, section 535.311(a) can be read to mean that the application of the exemption only accounts for the two extreme cases where all parties are members of another agreement, or where none of the parties are members of another agreement. The application of the exemption may appear ambiguous in cases where some, but not all, parties are members of another agreement in the same trade or sub-trade with the authorities listed in section 535.502(b).

As adopted, it is the intention of the Commission that the market share level of less than 30 percent only applies in cases where all parties are members of another agreement; otherwise, the market share level of less than 35 percent applies.<sup>2</sup> To clarify the meaning of the exemption, as intended by the Commission, section 535.311(a)(2) has been revised to state that

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<sup>2</sup> The more stringent market share standard of less than 30 percent applies for the exemption because parties to an agreement with none of the authorities in section 535.502(b) are afforded greater authority to act concertedly when they all participate in another agreement, such as a conference or rate discussion agreement, within the same trade or sub-trade. For such agreements where the market share is 30 percent or above, the full 45-day waiting period, after the agreement is filed, is necessary for the Commission to analyze and assess the potential competitive impact of the agreement in relation to the overall authority of the parties within the relevant trade or sub-trade. This is less of a concern when only some, but not all, parties are members of another agreement, and thus, the more flexible market share standard of less than 35 percent is appropriate for exempting such agreements from the 45-day waiting period.

the market share level of less than 35 percent applies if at least one party is not a member of another agreement in the same trade or sub-trade with any of the authorities listed in section 535.502(b).

A number of other minor revisions have also been made to section 535.311. The introductory paragraph in section 535.311(a) has been revised to clarify that the unit of measurement for determining the combined market share of the parties shall be based on the volume of cargo carried by the parties. Cargo volume, whether measured in freight tons, containers, or other such units carried, is the standard unit of measurement used to derive the market share of ocean common carriers throughout the industry and in the FMC's regulations. In addition, the term "sub-trade" in the introductory paragraph of section 535.311(a) has been revised to use the grammatically correct plural form of the term, *i.e.*, "sub-trades." Further, the symbol "\$" has been added in the introductory paragraph in section 535.311(a) before the cite for section "535.502(b)."

2. Section 535.704 Filing of minutes.

As discussed in the supplementary information of the Final Rule, the Commission adopted a new regulation in section 535.704(d)(1) that exempts the parties' discussions of certain operational and administrative matters from the minutes requirements for agreements. *Id.* at 64411-64412. Discussions

between parties on matters identified in section 535.408(b)(4)(iv)<sup>3</sup> were included as an exemption. *Id.* In preparing the Final Rule, this exemption was inadvertently omitted from the regulations. Therefore, section 535.704(d)(1) has been revised to include this exemption. In addition, the singular form of the term "exemption" has been revised to the plural form "exemptions" in the introductory paragraph in section 535.704(d). The plural form conveys the correct use of the term in the context of this section.

3. Appendix A to Part 535 - Information Form and Instructions

Minor revisions have also been made in the format of FMC Form-150, *INFORMATION FORM FOR AGREEMENTS BETWEEN OR AMONG OCEAN COMMON CARRIERS*, in appendix A to part 535 of the Final Rule. Specifically, part 2(B) of section III in the text of Form-150 has been revised to request that parties provide a narrative statement on significant changes in their vessel calls. This change was adopted by the Commission in response to comments submitted to the Notice of Proposed Rulemaking, and addressed in the supplementary information of the Final Rule. *Id.* at 64407-64408. The text in Form-150 for this part was not modified due to an oversight. In addition, the term "Part 1" in the heading

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<sup>3</sup> Section 535.408(b)(4)(iv) of the Final Rule pertains to the express enabling authority of an agreement to establish procedures for anticipating the space requirements of the parties.

of part 1 of section V was inadvertently omitted from the text of FMC Form-150 when the Final Rule was prepared. Section V of the text of FMC Form-150 has been revised to correct this oversight.

**List of Subjects in 46 CFR Part 535**

Freight, Maritime carriers, Reporting and recordkeeping requirements.

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

1. Amend section 535.311 to revise paragraphs (a) and (a)(2) to read as follows:

**§ 535.311 Low market share agreements—exemption.**

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

(1) \* \* \*

(2) Less than 35 percent, if at least one party is not a member of another agreement in the same trade or sub-trade containing any of the authorities listed in § 535.502(b).

\* \* \* \* \*

2. Amend section 535.704 to revise paragraphs (d) and (d)(1) to read as follows:

**§ 535.704 Filing of minutes.**

\* \* \* \* \*

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

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

\* \* \* \* \*

3. Amend appendix A to part 535 to revise the paragraph in part 2(B) of section III and the heading in part 1 of section V in the text of FMC Form-150 to read as follows:

**Appendix A to Part 535-Information Form and Instructions**

**Information Form Instructions**

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FMC Form-150

OMB Control No. 3072-0045

**FEDERAL MARITIME COMMISSION**

**INFORMATION FORM FOR**

**AGREEMENTS BETWEEN OR AMONG OCEAN COMMON CARRIERS**

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**Section III**

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*Part 2 Vessel Calls*

(A) \* \* \*

(B) Narrative statement on significant changes in vessel calls:\_\_\_

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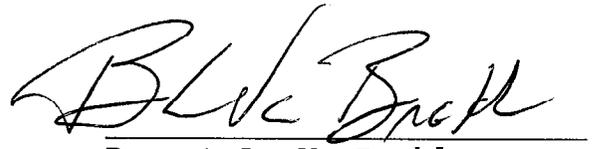
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**Section V**

*Part 1 Contact Persons and Certification*

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Bryant L. VanBrakle  
Secretary