

FEDERAL MARITIME COMMISSION

46 CFR Part 535

Docket No. 09-02

RIN 3072-AC35

REPEAL OF MARINE TERMINAL AGREEMENT EXEMPTION

AGENCY: Federal Maritime Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Maritime Commission proposes to repeal the exemption from the 45-day waiting period requirement applicable to certain Marine Terminal Agreements. The Commission also proposes to correct a typographical error in its regulations.

DATES: Comments are due by August 17, 2009.

ADDRESSES: Address all comments concerning this proposed rule to:

Karen V. Gregory, Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Room 1046
Washington, D.C. 20573-0001
Secretary@fmc.gov
(202) 523-5725

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Submit Comments: Submit an original and 15 copies of comments in paper form, and submit a copy in electronic form (Microsoft Word 2003) by e-mail to secretary@fmc.gov. Include in the e-mail subject line: “Comments on Repeal of Marine Terminal Agreement Exemption”.

Under section 16 of the Shipping Act, the Commission may exempt any class of agreements from the requirements of the Act if the Commission finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce. 46 U.S.C. 40103. The Commission may attach conditions to any exemption. *Id.* An exemption previously granted may be revoked, by order, after affording interested persons an opportunity for a hearing. *Id.*

In Docket No. 85-10, the Commission determined that it would exempt certain marine terminal agreements from the 45-day waiting period requirement, based upon its finding that such exemption would not substantially impair effective regulation by the Commission, be unjustly discriminatory or detrimental to commerce, nor result in a substantial reduction in competition within the meaning of Section 16 of the Shipping Act. *Marine Terminal Agreements*, 24 S.R.R. 192, 193-194 (FMC 1987). Initially adopted as section 572.307, this provision was later re-designated as section 535.308.

In the years since September 11, 2001, agreements filed with the Commission by marine terminal operators (MTOs) reveal the greater complexity of subject matter and the wider range of

operational issues that the marine terminal industry seeks to address in MTO agreements. See, e.g., testimony of Win Froelich of the National Association of Waterfront Employers before the House Transportation and Infrastructure Committee, Subcommittee on Coast Guard and Maritime Transportation (June 19, 2008) at 8 (citing, *inter alia*, newly created or imposed responsibilities for MTOs in areas of traffic congestion and noise issues, pollution abatement, and port security).

As port agreements have evolved beyond simple landlord-tenant issues, such agreements increasingly have the potential to incur the anticompetitive consequences that the Commission deemed unlikely when it first adopted the exemption. Under current rule 535.308, marine terminal agreements become effective upon filing, depriving the Commission of pre-effectiveness opportunity to review the agreements during the statutory 45-day waiting period and the opportunity to seek access to additional information from the agreement parties necessary for the Commission to perform its statutory duties under section 6 of the Shipping Act, 46 U.S.C. 40304, 41307. The absence of any waiting period requirement for marine terminal agreements under section 535.308 may frustrate the Commission's function of preventing a reduction in competition under section 6 of the Shipping Act, whether filed by public or private MTO parties. It therefore appears that section 535.308 may no longer be serving the original intent of the Commission's rulemaking.

In addition, recent review by the Commission of a marine terminal agreement filed under §535.308 demonstrates that the application and interpretation of the exemption has proven relatively complex to the industry and to counsel:

In considering the plain text of the cited provision, the operative requirements of the foregoing exemption specify application of the exemption only to: 1) an agreement, written or oral; 2) that applies to future, prospective activities; 3) that relates solely to marine terminal facilities and/or services; 4) among marine

terminal operators and among one or more marine terminal operators and one or more ocean common carriers; and 5) that completely sets forth the applicable rates, charges, terms and conditions agreed to by the parties for the facilities and/or services. The burden of establishing the applicability of an exemption falls on the person claiming the exemption.

Petition of Certain Marine Terminal Operator Parties to Agreement No. 201199, Petition No. P2-08, Order at 5-6 (January 16, 2009). Further, such exempt agreements must not be a joint venture agreement, marine terminal conference agreement, marine terminal discussion agreement or marine terminal interconference agreement. 46 CFR 535.308(a). The current provisions have underscored the potential for future confusion and dispute as to the proper application of the section 535.308 exemption.

Since the adoption of §535.308 in 1987, relatively few agreements have been filed claiming the waiting period exemption. As the number of filings claiming the exemption has been negligible, repeal of the section will have minimal impact on the shipping industry. Moreover, where agreement parties experience exigent circumstances justifying early effectiveness, the Shipping Act and the Commission regulations allow the parties to seek expedited review. *See* 46 U.S.C. 40304(e) and 46 CFR 535.605.

Even with respect to the three agreements that claimed application of the section 535.308 exemption (FMC Agreement Nos. 201176, 201196 and 201199), it remains subject to some dispute whether those agreements were in fact qualified for the exemption. It appears that the agreements may be ineligible for the waiting period exemption, or could more appropriately be characterized as a marine terminal services agreement subject to an existing exemption at §535.309 or a marine terminal facilities agreement subject to an exemption at §535.310. These provisions exempt marine terminal services agreements and marine terminal facilities

agreements from both the filing and waiting period requirements of the Shipping Act. 46 CFR 535.309 and 535.310.

To be conferred antitrust immunity, the parties may file such marine terminal services agreements pursuant to § 535.301(b) as an “optional filing.” Repeal of §535.308 thus may benefit the industry by clarifying and streamlining the application of the Commission’s regulations and by directing the industry to utilize the exemptions available under § 535.309 or §535.310.

I. The Proposed Rulemaking

In view of the foregoing reasons, the Commission proposes to make the following changes to 46 CFR Part 535.

First, the Commission proposes to repeal 46 CFR 535.308 by removing it from the CFR.

Second, the Commission proposes to amend 46 CFR 535.309(b)(1) to add the definition of marine terminal conference agreement, which is currently defined in 46 CFR 535.308.

Third, the Commission proposes to correct a typographical error in 46 CFR 535.604(b).

II. Statutory Review and Requests for Comment

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601-612, the Chairman of the Federal Maritime Commission certifies that the proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. The regulated entities that would be affected by the rule are limited to marine terminal operators and ocean common carriers. Pursuant to the guidelines of the Small Business Administration, the Commission has determined that these entities do not qualify as small for the purpose of the Small Business Regulatory Enforcement Fairness Act. The rule would simply require that agreements between

marine terminal operators, or between or among marine terminal operators and ocean common carriers, be made subject to the requirements of section 6 of the Shipping Act of 1984, 46 U.S.C 40304, and Commission agreement rules, 46 CFR Part 535.

This regulatory action is not a "major rule" under 5 U.S.C. 804(2).

List of Subjects for 46 CFR Part 535

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

For the reasons set forth above, the Federal Maritime Commission proposes to amend 46 CFR Part 535 Subpart C as follows:

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

1. The authority citation for Part 535 continues to read as follows:

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

Subpart C – Exemptions

§ 535.308 [Removed]

2. Remove § 535.308.

3. Amend 535.309 by revising paragraph (b)(1) to read as follows:

§ 535.309 Marine terminal services agreements – exemption.

* * * * *

(b) * * *

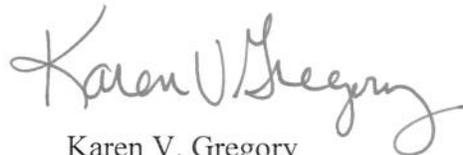
(1) They do not include rates, charges, rules, and regulations that are determined through a marine terminal conference agreement. *Marine terminal conference agreement* means an agreement between or among two or more marine terminal operators and/or ocean common carriers for the conduct or facilitation 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; and

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§ 535.604 [Amended]

4. Amend 535.604 by removing the word “latter” and adding in its place the word “later” in paragraph (b).

By the Commission.



Karen V. Gregory
Secretary