

**FEDERAL MARITIME COMMISSION**

**46 CFR PART 501 AND 535**

**DOCKET NO. 16-04**

**RIN: 3072-AC54**

**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 is seeking public comments on proposed modifications to its rules governing agreements by or among ocean common carriers and/or marine terminal operators subject to the Shipping Act of 1984 and its rules on the delegation of authority to and redelegation of authority by the Director, Bureau of Trade Analysis. These proposed modifications were developed in conformity with the objectives of the 2011 Executive Order to independent regulatory agencies that aims to promote a regulatory system that protects public health, welfare, safety and our environment while promoting economic growth, innovation, competitiveness and job creation.

**DATES:** Submit comments on or before: October 17, 2016. In compliance with the Paperwork Reduction Act, the Commission is also seeking comment on revisions to an information collection. See the Paperwork Reduction Act section under Regulatory Analyses and Notices below. Please submit all comments relating to the revised information collection to the Commission and to the Office of Management and Budget (OMB) at the address listed in the **ADDRESSES** section on or before October 17, 2016. Comments to OMB are most useful if submitted within 30 days of publication.

**ADDRESSES:** You may submit comments by the following methods:

- *E-mail:* secretary@fmc.gov. Include in the subject line: "Docket 16-04, [Commentor/Company name]." Comments should be attached to the e-mail as a Microsoft Word or text-searchable PDF document. Only non-confidential and public versions of confidential comments should be submitted by e-mail.
- *Mail:* Karen V. Gregory, Secretary, Federal Maritime Commission, 800 North Capitol Street, N.W., Washington, DC 20573-0001.

*Docket:* For access to the docket to read background documents or comments received, go to the Commission’s Electronic Reading Room at: <http://www.fmc.gov/16-04>.

*Confidential Information:* The Commission will provide confidential treatment for identified confidential information to the extent allowed by law. If your comments contain confidential information, you must submit the following:

- A transmittal letter requesting confidential treatment that identifies the specific information in the comments for which protection is sought and demonstrates that the information is a trade secret or other confidential research, development, or commercial information.
- A confidential copy of your comments, consisting of the complete filing with a cover page marked “Confidential-Restricted,” and the confidential material clearly marked on each page. You should submit the confidential copy to the Commission by mail.
- A public version of your comments with the confidential information excluded. The public version must state “Public Version – confidential materials excluded” on the cover page and on each affected page, and must clearly indicate any information withheld. You may submit the public version to the Commission by e-mail or mail.

**FOR FURTHER INFORMATION CONTACT:** For questions regarding submitting comments or the treatment of confidential information, contact Karen V. Gregory, Secretary. *Phone:* (202) 523-5725. *E-mail:* [secretary@fmc.gov](mailto:secretary@fmc.gov). For technical questions, contact Florence A. Carr, Director, Bureau of Trade Analysis. *Phone:* (202) 523-5796. *E-mail:* [tradeanalysis@fmc.gov](mailto:tradeanalysis@fmc.gov). For legal questions, contact Tyler J. Wood, General Counsel. *Phone:* (202) 523-5740. *E-mail:* [generalcounsel@fmc.gov](mailto:generalcounsel@fmc.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Introduction**

The Federal Maritime Commission (FMC or Commission) issued an Advance Notice of Proposed Rulemaking (ANPR) to obtain public comments on proposed modifications to its regulations in 46 CFR part 535, *Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984*, and 46 CFR 501.27, *Delegation to and redelegation by the Director, Bureau of Trade Analysis*. 81 FR 10188(Feb. 29, 2016). The ANPR was issued pursuant to Executive Order 13579 (E.O. 13579), *Regulation and Independent Regulatory Agencies* (July 11, 2011), and the Commission’s corresponding *Plan for the*

*Retrospective Review of Existing Rules.*<sup>1</sup> Under this plan, the Commission requested and received comments on how to improve its existing regulations and programs. With respect to part 535, comments with specific recommendations on regulatory modifications were submitted by ocean carrier members of major discussion agreements effective under the Shipping Act.<sup>2</sup>

The proposed modifications in the ANPR were based on the Commission's comprehensive review of its regulations in parts 501 and 535, including review of the modifications recommended in the comments submitted by the carriers. In the ANPR, the Commission sought public comments on possible changes to the following regulations: (1) The definition of capacity rationalization in § 535.104(e), a new waiting period exemption for space charter agreements in § 535.308, and the waiting period exemption for low market share agreements in § 535.311; (2) the agreement filing exemption of marine terminal services agreements in § 535.309; (3) the standards governing complete and definite agreements in § 535.402 and agreement activities that may be conducted without further filing in § 535.408; (4) the Information Form requirements in subpart E of part 535; (5) the filing of comments on agreements in § 535.603 and the request for additional information on agreements in § 535.606; (6) the agreement reporting requirements in subpart G of part 535; and (7) non-substantive modifications to update and clarify the regulations in parts 501 and 535.

In response to the ANPR, seven sets of comments were received from interested parties. These parties are the ocean common carriers and agreements (carriers);<sup>3</sup> the National

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<sup>1</sup> The Commission's *Plan for the Retrospective Review of Existing Rules* (Nov. 4, 2011) and *Update to Plan for Retrospective Review of Existing Rules* (Feb. 13, 2013) are published on the FMC home page under About the FMC/Report, Strategies, and Budget.

<sup>2</sup> *Comments of Ocean Common Carriers to Retrospective Review of Existing Rules*, dated May 18, 2012, are published on the FMC home page under [www.fmc.gov/16-04](http://www.fmc.gov/16-04).

<sup>3</sup> The carriers are the members to the *ABC Discussion Agreement*, *Australia and New Zealand-United States Discussion Agreement*, *Caribbean Shipowners Association*, *Central American Discussion Agreement*, *Transpacific Stabilization Agreement*, *U.S./Australasia Discussion Agreement*, *Venezuelan Discussion Agreement*, and the *West Coast of South America Discussion Agreement*.

Association of Waterfront Employers (NAWE); the Pacific Merchant Shipping Association (PMSA); the Port of NY/NJ Sustainable Terminal Services Agreement, and the Port of NY/NJ-Port Authority/Marine Terminal Operator Agreement (Port of NY/NJ); the West Coast MTO Agreement, the Oakland MTO Agreement, and their members (WCMTOA/OAKMTOA), the South Carolina Port Authority (SCPA); and the National Customs Brokers and Forwarders Association of America, Inc. (NCBFAA). Under this Notice of Proposed Rulemaking (NPR), the Commission addresses the comments to the ANPR and seeks further public comments on the proposed modifications to its regulations in parts 501 and 535.

**II. The definition of capacity rationalization in § 535.104(e), a new exemption for space charter agreements in § 535.308, and the exemption for low market share agreements in § 535.311.**

*A. Background*

To receive immunity from the U.S. antitrust laws, the Shipping Act of 1984 (Shipping Act or Act) requires that parties file a true copy of their agreement with the Commission, 46 U.S.C. 40302, and that agreement filings be subject to an initial review period of 45 days before they may become effective, 46 U.S.C. 40304(c). The regulations in § 535.311 provide an exemption from the 45-day waiting period for low market share agreements that do not contain certain types of authority, such as rate or capacity rationalization authority.<sup>4</sup> To qualify for this exemption, the combined market shares of the parties in any of the affected sub-trades must be less than 30 percent (if all of the parties are members of another agreement in the same trade or sub-trade with one of the excluded authorities (e.g., rate or capacity rationalization)) or 35 percent (if at least one party is not a member of such an agreement in the same trade or sub-

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<sup>4</sup> These authorities are listed under § 535.502(b) as: (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.

trade). The regulations in § 535.104(e) define capacity rationalization to mean a concerted reduction, stabilization, withholding, or 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.

Agreements that contain capacity rationalization authority do not qualify for an exemption from the waiting period under § 535.311. Further, such agreements are assigned specific Information Form and Monitoring Report requirements. Although the definition could be interpreted quite broadly in the context of operational agreements, the Commission has, in practice, limited it to meaning agreements that fix the supply of capacity, such as vessel sharing and alliance agreements, and include exclusivity provisions<sup>5</sup> on the ability of the parties to operate outside of the agreement.

In its ANPR, the Commission considered clarifying the definition of capacity rationalization to mean the authority in an agreement by or among ocean common carriers to discuss, or agree on, the amount of vessel capacity supplied by the parties in any service or trade within the geographic scope of the agreement. The Commission explained that the proposed definition would apply to voluntary discussion agreements between carriers where the parties discuss and/or agree on the amount of vessel capacity supplied in a trade. On an operational level, the proposed definition would apply to all forms of vessel sharing agreements (VSAs) between carriers where the parties discuss and/or agree on the number, capacity, and/or allocation of vessels or vessel space to be shared in the operation of a service between the parties to the agreement. Further, to avoid confusion, the proposed definition would apply to all such identified capacity agreements regardless of whether they contain any form of exclusivity

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<sup>5</sup> Exclusivity provisions place conditions or restrictions on the parties' agreement participation, and/or use or offering of competing services within the geographic scope of the agreement. In effect, they are non-compete clauses.

clauses. As such, this definition would exclude all VSAs from qualifying for a low market share exemption.

The Commission also introduced a new potential waiting period exemption in § 535.308 that would apply to agreements among ocean common carriers that contain non-exclusive authority to charter or exchange vessel space between two individual carriers and do not contain any authority identified in § 535.502(b) (i.e., forms of rate, pooling, service contract or capacity rationalization authorities). The Commission explained that non-exclusive authority means that the agreement contains no provisions that place conditions or restrictions on the parties' agreement participation, and/or use or offering of competing services. The Commission explained that a waiting period exemption was better suited for such space charter agreements because there is more of an operational urgency for them to become effective upon filing.

The Commission further considered simplifying the application of the low market share exemption in § 535.311 by eliminating the lower market share threshold of 30 percent in cases where the parties to the agreement are members of another agreement in the same trade or sub-trade containing any of the authorities identified in § 535.502(b) (i.e., forms of rate, pooling, service contract or capacity rationalization authorities). As such, the market share threshold would be set at 35 percent or less regardless of whether the parties to the agreement participate in any other agreements in the same trade or sub-trade. The Commission explained that the application of the tiered 30 and 35 percent threshold (based on the parties' participation in other agreements by sub-trade) is unnecessarily complicated and time consuming for the industry to analyze. Further, with the proposed modification to the definition of capacity rationalization, only simple operational agreements would be eligible for the exemption, such as space charter and sailing agreements, that would not otherwise be automatically exempted under the proposed space charter exemption in § 535.308. Accordingly, the Commission stated that limiting the low

market share exemption to such simple operational agreements would reduce the competitive concerns about the parties' participation in other agreements in the same trade or sub-trade and eliminate the need for the lower 30 percent market share threshold.

*B. Summary of Comments*

The carriers were the only interested parties that submitted comments on these proposals. On the definition of capacity rationalization, the carriers favor retaining the present definition in § 535.104(e), which they argue was intended to include: *(i) An agreement that prohibits or restricts the introduction of vessels into the agreement trade in a service other than that operated under the agreement; (ii) an agreement that prohibits or restricts the use of space on non-agreement vessels in the agreement trade by an agreement party (e.g., chartering space from a non-agreement carrier); and (iii) an agreement that results in an artificial withholding of vessel capacity (i.e., a "roping off" of a portion of vessel capacity).* Carriers at 4. The carriers recommend that if the Commission wants to clarify the definition, it should be revised to reflect this intended meaning and proposes the following definition:

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

Carriers at 12.

The carriers further argue that the Commission's proposed definition and its application under the low market share exemption would potentially subject many more agreements to the 45-day waiting period and quarterly monitoring reports, regardless of their impact or market

share. Further, time sensitive modifications of such agreements would also be subjected to the waiting period. While they acknowledge that the regulations in § 535.605 allow for expedited review of agreements on request, the carriers claim that Commission staff is burdened by such requests and a fee is being proposed for each such request in another Commission rulemaking. They further explain that the filing fee for non-exempt agreements is much higher than the fee for exempt agreements, and the Commission is proposing to raise the fees. Carriers at 7.

The carriers believe that the Commission's proposed definition of capacity rationalization assumes that any agreement where the parties agree on vessels results in a reduction in capacity, which they state is untrue and provide examples of such. They argue that even if an agreement reduces capacity, it is not a concern in trades suffering from excess capacity, and where agreements do not contain exclusivity provisions, the parties are free to pursue their own commercial objectives. Carriers at 8-9.

The carriers find the Commission's proposed definition to be unclear and overly broad and are concerned that it may be interpreted to include unintended forms of agreements. They explain that simple space charter agreements may allocate vessel space and/or set forth the number and size of vessels to be provided by the carrier selling the space. Further, they contend that subjecting more agreements to the 45-day waiting period reduces the carriers' operational flexibility and responsiveness to demand and imposes a serious administrative burden on carriers and Commission staff by requiring more agreements to file Information Forms and Monitoring Reports. Carriers at 9-10.

On the proposed exemption for space charter agreements in § 535.308, the carriers are supportive of the exemption but believe that the Commission's proposed definition for capacity rationalization creates uncertainty in distinguishing which agreements would qualify for the exemption. The carriers also see no reason why the exemption is limited to two party

agreements and believe that space charter agreements involving more than two parties should be exempted as well. Carriers at 12.

On the proposed single 35 percent threshold for the low market share exemption in § 535.311, the carriers support the proposed modification but continue to argue that the market share should be based on the agreement-wide trade, rather than sub-trade. Carriers at 13.

*C. Discussion*

The Commission is unpersuaded by the carriers' arguments and does not believe that its proposed modifications to these sections, as set forth in the ANPR, should be altered. The requirements of the Shipping Act are clear. Agreements by or between ocean common carriers and/or marine terminal operators (MTOs) on matters set forth in 46 U.S.C. 40301 must be filed with the Commission to receive immunity from the U.S. antitrust laws and are subject to an initial review period of 45 days before they may become effective, except for assessment agreements.<sup>6</sup> The Commission may at its discretion exempt by order or rule any class of agreements or activities of parties to agreements, if it finds that the exemption will not result in a substantial reduction in competition or be detrimental to commerce. Further, the Commission may attach conditions to an exemption and may, by order, revoke an exemption. 46 U.S.C. 40103.

The ANPR explained in detail the basis for the present low market share exemption and the definition of capacity rationalization, as well as the need to modify these regulations. At present, almost any form of agreement involving capacity could fall within the current definition of capacity rationalization. Even agreements that simply coordinate sailing schedules among the

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<sup>6</sup> An assessment agreement is 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. 46 U.S.C. 40102. Assessment agreements must be filed with the Commission and are effective upon filing. 46 U.S.C. 40305(a)

parties can impose a concerted limitation on capacity as described under the present definition. The ambiguity of the definition has created uncertainty over which types of agreements would qualify for a low market share exemption under § 535.311. As discussed above, the Commission has, in practice, limited the definition to mean agreements that fix the supply of capacity, such as vessel sharing and alliance agreements, and include exclusivity provisions on the ability of the parties to operate outside of the agreement. Operational agreements between carriers to fix capacity with exclusivity provisions are viewed as one of the most potentially anticompetitive forms of capacity rationalization.

Technically, however, the Commission views an agreement on the amount of vessel capacity supplied in a service or trade as the rationalization of capacity between carriers, and is proposing to clarify the definition of capacity rationalization to reflect this view. Under the application of U.S. antitrust law, agreements between competitors to fix supply in a market are viewed as potentially harmful and anticompetitive, and, like agreements between competitors to fix prices, are *per se* illegal, regardless of and without any examination of their purported purposes, harms, benefits, or effects.<sup>7</sup> *Per se* illegal agreements are not acceptable activities that are permitted within a “safety zone” for collaboration between competitors under the FTC/DOJ guidelines.<sup>8</sup> In part, it was this principle of a “safety zone” of competitor collaboration that was used as a basis for the low market share exemption.<sup>9</sup>

At the time of the previous rulemaking in 2004, many of the vessel sharing and alliance agreements contained exclusivity clauses and even rate authority. Since that time, agreements that manage capacity have changed and continue to evolve, which supports the need for the

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<sup>7</sup> *Antitrust Guidelines for Collaborations Among Competitors*, issued by the Federal Trade Commission and the U.S. Department of Justice (FTC/DOJ), April 2000, p. 3.

<sup>8</sup> *Ibid*, p. 26.

<sup>9</sup> 69 FR 64398, 64399-64400 (Nov. 4, 2004).

Commission's review and update of its present regulations. Carriers are expanding their cooperation of services through larger alliances and using service centers to manage capacity. Such agreements authorize the parties to exchange vessel space and agree on capacity to form and operate collective services and VSAs in the global liner trades. The Commission tentatively affirms that agreements with such authority clearly rationalize capacity, and therefore should not be exempted from the waiting period under § 535.311, regardless of whether exclusivity provisions are imposed on the parties.

The Commission emphasizes that the proposed definition of capacity rationalization does not mean that every agreement that contains such authority necessarily presents competitive concerns. The Commission acknowledges that VSAs and alliances can promote economic efficiencies and cost savings in the offering of services to shippers. Depending on market conditions, however, agreements with such a direct impact on capacity, especially in trades where their parties may discuss and agree on rates, can potentially be used to reduce competition and unreasonably affect transportation services and costs within the meaning of section 6(g) of the Act (46 U.S.C. 41307(b)), which justifies a thorough initial review of their competitive impact under the 45-day waiting period.

In their comments, the carriers propose an alternative definition of capacity rationalization that would appear to limit it to agreements that impose exclusivity provisions, or artificially withhold, i.e., "rope off," vessel capacity, as contemplated in the old definition of "capacity management," which the Commission replaced with the definition of "capacity rationalization" in the 2004 Final Rule.<sup>10</sup> The carriers' definition is identical in meaning to their

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<sup>10</sup> Previously, the definition in § 535.104(e) was limited to capacity management, which was defined as an agreement between two or more ocean common carriers that authorized withholding some part of the capacity of the parties' vessels from a specified transportation market, without reducing the real capacity of those vessels.

alternative definition proposed in the Commission's previous rulemaking in 2004.<sup>11</sup> In that rulemaking, the Commission rejected the carriers' proposed definition and reasoned that:

We decline to adopt the definition suggested by OCCA, as it would omit some conference and discussion agreements that contain authority for members to discuss and agree upon rationalization of capacity by members in specific trades. In addition, the Commission continues to be of the view expressed in the NPR that the potential effects of such arrangements are heavily dependent on conditions particular to an agreement trade and how the agreement is related to other agreements.<sup>12</sup>

For these same reasons, tentatively, the Commission finds the carriers' proposed definition in this rulemaking to be deficient and again declines to adopt it. The carriers' proposed definition seems to reflect past trends in carrier agreements as opposed to current trends, and part of the purpose of this rulemaking is to update and correct part 535 to reflect current carrier agreements. As explained above, while limiting the application of capacity rationalization to operational agreements with exclusivity provisions may have been appropriate in the past, carrier agreements have evolved since 2004 and are continuing to evolve. The Commission's proposed definition seeks to clarify the meaning of capacity rationalization as the authority to discuss, or agree on, the amount of vessel capacity supplied in a service or trade, which includes VSAs and alliances as well as voluntary discussion agreements with such authority. The Commission believes its proposed definition accurately captures the practice of capacity rationalization and narrows the scope and application of the present definition in a way that is preferable to the current practice of informally applying additional limitations that are not explicitly included in the current definition, such as the presence or absence of exclusivity provisions.

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<sup>11</sup> 69 FR at 64401.

<sup>12</sup> *Ibid.*

Likewise, the practice of implementing capacity management programs to “rope off” vessel space in a trade has become obsolete, and the inclusion of such practices in the definition would have no application in the present day. In place of such programs, carriers have increased their cooperation in VSAs and alliances, and utilize service centers to manage and maintain set capacity levels among the parties. Further, under the carriers’ proposed definition, to state that *the term does not include adjustments to capacity made by adding or removing vessels or strings of vessels pursuant to and within the existing authority of a filed and effective agreement* would likely exclude almost every VSA and alliance agreement, regardless of whether it contains exclusivity provisions.

The carriers assert that the Commission’s proposed definition assumes that any agreement where the parties agree on vessels results in a reduction in capacity. The Commission does not make any such assumption; however, the Commission must analyze agreement filings during the initial review period to determine their competitive impact in the trades where the parties operate. The Commission’s proposed definition would provide for this initial review of VSAs and alliances before they take effect under the Shipping Act.

The carriers further assert that the Commission’s proposed definition could include unintended forms of agreements, such as simple space charter agreements that allocate vessel space or specify the number and size of vessels. On the contrary, the Commission believes that its proposed definition would more clearly and narrowly define the meaning of capacity rationalization to correct the overly broad ambiguity of the present definition, which could be interpreted to include almost any form of agreement involving vessel capacity. It is the interpretation of the Commission that space charter agreements can be distinguished from VSAs in that the parties to space charter agreements traditionally are not authorized to discuss or agree on the amount of vessel capacity to be deployed in a service or trade, which would place a

concerted limit or restriction on the supply of vessel capacity made available by the parties. Referencing the number or size of vessels in a space charter agreement is not the same as providing the authority for the parties to discuss and agree on the amount of vessel capacity in a service or trade. The Commission believes that this distinction is made clear in § 535.104(gg) by the definition that:

*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 equipment interchange and receipt/delivery of cargo, but may not include capacity rationalization as defined in this subpart.

A VSA, on the other hand, generally authorizes space chartering but also involves two or more carriers contributing and sharing vessels and vessel space to form and collectively operate a liner service, and such authority to discuss and agree on the amount of vessel capacity the parties plan to make available in their service is explicitly stated in the agreement.

The carriers complain that the Commission's proposal would subject more agreements and modifications to agreements to the 45-day waiting period, reporting, and higher filing fees. The carriers fail to consider the corresponding reduction in filings associated with the Commission's proposed exemption for space charter agreements in § 535.308. As noted in the ANPR, in terms of the overall impact of its proposed modifications to agreement filings, the Commission estimated that the filing burden could actually be reduced.<sup>13</sup> In addition, the carriers requested and the Commission is proposing in this rulemaking that agreement modifications to reflect changes in the number or size of vessels within the range specified in an

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<sup>13</sup> Based on new and amended agreement filings for fiscal year 2014, the Commission estimates that 15 filings that were effective on filing under the low market share exemption would be subject to the 45-day waiting period as a result of the proposed revisions to the definition of capacity rationalization. Conversely, 20 filings that were subject to the 45-day waiting period would be effective on filing as new two-party space charter agreements or amendments thereof under the new proposed exemption. In fiscal year 2014, there were a total of 186 agreement filings, including new and amended agreements. 81 FR at 10192.

agreement (which would include VSAs and alliances) should be exempt from the waiting period as non-substantive modifications in § 535.302. In terms of reporting, the proposed Information Form and Monitoring Report<sup>14</sup> would simply require parties to VSAs and alliances to file certain service and vessel capacity data, which any party to such agreements readily tracks and has available. The most reliable sources of information on an agreement are the parties to the agreement.<sup>15</sup> In cases where agreement parties believe reporting is unnecessary or too onerous, the parties may apply for a waiver in accordance with the regulations in § 535.705.

On the proposed space charter exemption in § 535.308, the carriers believe that agreements involving more than two parties should be exempted as well. The Commission points out that space charter agreements involving more than two parties may qualify for a low market share exemption in § 535.311, where the market share of the parties in any of the agreement's sub-trades is equal to or less than 35 percent and the agreement does not contain forms of rate or capacity rationalization authority, as proposed. Cases where a space charter agreement would not qualify under either waiting period exemption are generally rare, and the Commission believes that such agreements would require a full review under the 45-day waiting period. For instance, such cases have occurred in the past when a carrier decides to remove all of its vessels from a trade and enter into a space charter agreement with an alliance or a large VSA, which exceeded the threshold for the low market share exemption. In these cases, the Commission would need to examine the probable competitive impact of the removal of vessel space from the trade and the resulting market supply and demand levels, under a full 45-day review.

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<sup>14</sup> The Monitoring Report would only require reporting from agreements authorizing capacity rationalization that involve three or more carrier parties.

<sup>15</sup> 2003 NPR, 68 FR 67510, 67522 (Dec. 2, 2003).

The carriers continue to argue that the market share threshold for the low market share exemption in § 535.311 should be based on the agreement-wide trade, rather than sub-trade. The ANPR addressed this matter at length.<sup>16</sup> The Commission does not believe that the exemption should be modified in this manner because it could result in agreements taking effect upon filing without an initial review where the parties hold a competitively significant share of the market in the smaller sub-trades. Further, using an agreement-wide threshold may encourage parties to structure their agreements as broadly as possible to evade the waiting period by setting their scopes at a regional, continental, or worldwide level rather than by the applicable trade lane.

Based on the foregoing, the Commission is proposing the modifications to § 535.104(e), § 535.308, § 535.311 as described in the ANPR without any changes. The Commission requests additional comments on these proposals.

### **III. Marine terminal services agreements in § 535.309.**

#### *A. Background*

Section 535.309 provides an exemption from the filing and waiting period requirements of the Act for terminal services agreements<sup>17</sup> between MTOs and ocean carriers to the extent that the rates, charges, rules, and regulations of such agreements were not collectively agreed upon under a MTO conference agreement.<sup>18</sup> Parties may optionally file their terminal services agreements with the Commission. 46 CFR 535.301(b). If the parties decide not to file the

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<sup>16</sup> 81 FR at 10191.

<sup>17</sup> Section 535.309(a) defines marine terminal services agreement to mean 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, docking, 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.

<sup>18</sup> Section 535.309(b)(1) defines a marine terminal conference agreement as 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.

agreement, however, no antitrust immunity is conferred with regard to terminal services provided under the agreement. 46 CFR 535.309(b)(2). Parties to any agreement exempted from filing by the Commission under Section 16 of the Act, 46 U.S.C. 40103, are required to retain the agreement and make it available to Commission staff upon request during the term of the agreement and for a period of three years after its termination. 46 CFR 535.301(d).

In the ANPR, the Commission indicated that it was reconsidering this exemption with the view toward requiring certain terminal services agreement information to be submitted to the FMC because of the increased cooperation of MTOs in conference and discussion agreements. Within the past decade, MTOs at major U.S. ports have become more active in cooperating through agreements to implement new programs addressing security and safety measures, environmental standards, and port operations and congestion. While such programs may potentially be beneficial, agreements between MTOs can also affect competition in the terminal services market and reduce transportation services and costs within the meaning of section 6(g), such as agreements on the levels of free-time, detention, and demurrage charged by MTOs to port users. Under the exemption, as MTOs have increased their cooperation under agreements, no empirical data on the terminal services market has been readily available to the Commission to analyze the competitive impact of such cooperative programs and activities. The filing of terminal services agreements would provide the Commission with timely market data to analyze and monitor the competitive impact of programs and activities of MTOs in agreements.

In the ANPR, the Commission considered a standard Monitoring Report requirement to provide that all of the MTOs participating in any conference or discussion agreement on file and in effect with the FMC, submit to the FMC all of their effective terminal services agreements and amendments thereto. The Commission invited public comments on this proposed Monitoring Report requirement for MTOs, along with estimates of the probable reporting burden. In

addition, recommendations from commenters were solicited on alternative Monitoring Report requirements for MTOs. Further, the Commission considered modifying § 535.301 to establish a procedure by which staff would send a written request for exempted agreements and the parties would have 15 days to respond.

*B. Summary of Comments*

Comments on these proposals were submitted by the carriers, NAWE, PMSA, Port of NY/NJ, WCMTOA/OAKMTOA, and SCPA. None of the interested parties that submitted comments favor a Monitoring Report requirement for MTO parties to conference and discussion agreements to submit their terminal services agreements to the FMC. All of the commenters presented similar arguments opposing the proposed requirement.

Commenters argue that the submission of terminal services agreements would be unduly burdensome from an administrative and cost perspective to both the industry and Commission. They explain that terminal services agreements are frequently amended on such matters as operating conditions, equipment variations, labor issues, environmental laws, port requirements, inland transport issues and numerous other factors. They claim that the burden would be too onerous if amendments had to be filed with the FMC every time adjustments are made to their terminal services agreements. NAWE also notes that under the Fixing America's Surface Transportation (FAST) Act (Pub. L. No. 114-94, 129 Stat. 1312 (Dec. 4, 2015), substantial reporting requirements on port performance statistics will likely be imposed on MTOs, and it cautions against imposing simultaneous overlapping regulatory burdens. NAWE at 5.

SCPA stresses that unlike most port authorities, as a marine terminal operating port, it must meet the same regulatory requirements as private MTOs. SCPA at 4. As such, SCPA finds the proposed requirement to be unnecessarily broad, and believes that a more narrowly defined

rule could address the Commission's concerns without unduly burdening operating ports. SCPA at 6.

Commenters argue that the filing of their terminal services agreements would have little or no regulatory value in analyzing the impact of MTO conference and discussion agreements or understanding the terminal services market. They explain that for the most part, terminal services agreements are negotiated on an individual and confidential basis between the MTO and the carrier, and MTOs actively compete against each other for carrier business. They reason that terminal services agreements containing any matters collectively agreed upon under an MTO conference or discussion agreement are already required to be filed with the FMC pursuant to § 535.309(b)(1),<sup>19</sup> and as such, the FMC is being provided with the necessary information to monitor the impact of the MTO conference or discussion agreement. Both PMSA and NAWA noted that because there are only a few terminal services agreements on file with the FMC, this is evidence that MTO agreements have no real impact on the terms of individually negotiated terminal services agreements. PMSA at 1-2 and NAWA at 3.

Commenters further reason that MTO conferences and discussion agreements are required to file minutes of their meetings under the regulations and some agreements provide monitoring data. Thus, they contend that the Commission already receives a sufficient amount of information to monitor MTO agreements. Also, instead of a blanket Monitoring Report requirement, when the Commission may need specific information, the Commission has the authority to request terminal services agreements through a more focused inquiry on an *ad hoc* basis. The carriers support the proposed modifications to § 535.301 for a deadline to a written request, noting that such procedures provide greater certainty of receiving the requested agreements in a timely manner. Carriers at 15.

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<sup>19</sup> At present, there are 19 terminal services agreements on file at the FMC.

In terms of the terminal services market, commenters argue that conclusions cannot be drawn from comparing terminal services agreements. They explain that the characteristics of marine terminals are unique from each other in their physical configurations, efficiency levels, operating procedures, and customer needs. Terminals have different berthing capabilities, equipment, customers with different vessels and cargo volumes, and attempting to understand the market by comparing terminal services agreements is not valid without accounting for the unique features of each marine terminal. Commenters contend that even if comparisons of terminal services agreements provided some conclusion about the market, it would shed no light on the activities of MTO conference or discussion agreements.

Commenters believe that the proposed requirement could also discourage MTOs from joining and participating in agreements that develop and implement beneficial programs addressing such critical matters as air emissions, security, and port operations and congestion, and as such, the Commission would be acting in a manner that hinders such beneficial programs. SCPA added that new groupings of carrier alliances are placing novel demands on ports and MTOs, and the proposed requirement would stifle, rather than encourage innovation. SCPA at 6.

Further, Commenters stress that terminal services agreements contain extremely sensitive and competitively significant information on not only rates, but duration, throughput and other items. They caution that if such information were disclosed (whether through subpoena, FOIA request, Congressional inquiry or otherwise), the parties to the agreement could suffer serious commercial harm. In this regard, the carriers request that if the Commission proceeds with the proposed requirement, regulations be added specifically protecting terminal services agreements from disclosure under 46 U.S.C. 40306. Carriers at 16.

The carriers conclude by recommending that the Commission discontinue its proposed Monitoring Report requirement for MTOs in favor of its proposed modifications to § 535.301.

However, if the Commission chooses to proceed with the proposed requirement, the carriers request that § 535.309(b)(2) be revised to provide that the parties to the terminal services agreements be granted antitrust immunity, as the agreements would be in the possession of the Commission. Carriers at 16.

*C. Discussion*

The Commission disagrees with the idea that terminal services agreements have no value in analyzing the impact of MTO conference and discussion agreements or understanding the terminal services market. A terminal services agreement between an MTO and a carrier is an agreement that by statute is required to be filed with the FMC and subject to the 45-day review period,<sup>20</sup> but was exempted from the filing requirements by the Commission in a final rule in 1992.<sup>21</sup> The Commission may amend its exemption, or revoke it entirely, if the Commission finds that the circumstances that merited the exemption have materially changed.

Terminal services agreements directly reveal the extent to which rates, terms, and programs agreed upon by MTOs in conference and discussion agreements have been implemented in the market. A review of terminal services agreements can provide a basis for the Commission to gauge the competitive impact and costs of actions by MTOs in conference and discussion agreements, and the extent to which any Commission action may be necessary. Further, terminal services agreements show the extent to which MTOs are competing on pricing and other terms, which provides the Commission with an understanding of the competitive structure of the terminal services market at a port and between ports. A uniformity of pricing and terms between MTOs at a port or ports would indicate a lack of competition in the terminal

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<sup>20</sup> 46 U.S.C. 40301-40304.

<sup>21</sup> 57 FR 4578 (Feb. 6, 1992).

services market that may be attributable to the actions of MTOs in conference and discussion agreements.

In its review of a sampling of terminal services agreements in connection with the *Pacific Ports Operational Improvements Agreement* (PPOIA), FMC No. 201227,<sup>22</sup> the Commission gleaned useful information on the rates and competitive structure of the terminal services market at U.S. Pacific ports, which it would not otherwise have been able to discern without requesting and reviewing the terminal services agreements of the PPOIA parties. In its regulatory oversight of carrier and MTO agreements, the Commission strives to obtain and utilize the most accurate information to monitor the competitive impact of agreements, particularly where there are complaints against the agreement, as in the case of PPOIA.

As such, the Commission finds the commenters' arguments dismissing the relevance of terminal services agreements to be unpersuasive. While affected by various cost factors, container terminal operations at a port, or between ports, are not so different that the rates and terms of the terminal services offered by MTOs cannot be directly compared. While the exemption in § 535.309 does not apply to rates, charges, rules, and regulations of an MTO conference, it does not exclude from the exemption rates, charges, rules and programs established under a MTO discussion agreement, which is voluntary on the parties. It is this increased activity of MTOs under discussion agreements, such as the PierPASS program under WCMTOA, that has caused the most concern among consumers and affected third parties and which the Commission has endeavored to monitor more closely. Minutes of agreement meetings reveal the decisions made under an MTO conference or discussion agreement; however, market

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<sup>22</sup> By Order on July 10, 2015, the Commission requested certain terminal service agreements from carrier parties to PPOIA.

data is needed to determine the competitive impact of the agreement decisions, and few MTO agreements are required to provide consistent market data.

On concerns of filing burden and confidentiality, the Commission does not believe that a Monitoring Report requirement to submit terminal services agreements and their amendments would be too onerous a burden on MTOs. The filing would require little, if any, preparation. A copy of the agreement and its amendments could be electronically and securely filed with the FMC in the same manner that service contracts and their amendments are filed, which in fiscal year 2015 exceeded 700,000 filings.

As a Monitoring Report requirement, the submission of terminal services agreements could be protected from public disclosure under 46 U.S.C. 40306 and the regulations in § 535.701(i), which protects information provided by parties to a filed agreement from being disclosed in response to a Freedom of Information Act (FOIA) request.

On the other hand, the Commission tentatively agrees with the commenters that, at the present time, imposing a standard Monitoring Report requirement on all of the MTO conference and discussion agreements may be unnecessarily broad. The Commission believes that the most imminent need for terminal services agreement information pertains to particular MTO discussion agreements whose actions are more likely to affect competition in the terminal services market. The Commission tentatively concludes that it can acquire such agreements under its present authority in § 535.301. If the Commission is going to use such authority, however, the Commission believes that § 535.301(d) should be strengthened by adding a provision requiring exempted agreements to be submitted to the FMC within 15 days of a written request from the Director, Bureau of Trade Analysis. If conditions change, the Commission could revisit the proposal to institute standard Monitoring Report requirements for all MTO

conference and discussion agreements, or possibly amend, or revoke, the exemption in § 535.309. The Commission requests comment on this proposal.

**IV. Complete and definite agreements in § 535.402, and Activities that may be conducted without further filings in § 535.408.**

The Shipping Act requires that a “true copy” of every agreement be filed with the Commission.<sup>23</sup> In administering these requirements, the Commission has endeavored to provide parties to agreements with guidance and clarity on what constitutes a “true copy” of an agreement through its regulations in § 535.402, which require that 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.

Section 535.408 exempts from the filing requirements certain types of agreements arising from the authority of an existing, effective agreement.<sup>24</sup> Specifically, agreements based on the authority of effective agreements are permitted without further filing to the extent that: (1) the effective agreement itself is exempted from filing, pursuant to subpart C of part 535, or (2) it relates to one of several technical or operational matters stemming from the effective agreement’s express enabling authority. Such matters include stevedoring, terminal, and related services.<sup>25</sup>

A. § 535.402

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<sup>23</sup> 46 U.S.C. 40302(a).

<sup>24</sup> As discussed above, the Commission may, under 46 U.S.C. 40103, exempt classes of agreements and activities of regulated entities from the requirements of the Shipping Act if it finds that the exemption will not result in a substantial reduction in competition or be detrimental to commerce.

<sup>25</sup> 46 CFR 535.408(b)(3).

In the ANPR, the Commission stated that it was concerned about confusion among regulated entities regarding the requirement that further agreements arising from the authority of a filed agreement must generally be filed with the Commission.<sup>26</sup> In order to address this issue, the Commission indicated that it was considering proposing to amend § 535.402 to expressly state that an agreement that arises from the authority of an effective agreement, but whose terms are not fully set forth in the effective agreement to the extent required by the current text of § 535.402, must be filed with the Commission unless exempted under § 535.408.

Only the carriers commented on this potential proposal, stating that although they do not believe that revision to the regulation was necessary, they have no objection to the proposal under consideration.<sup>27</sup> Accordingly, the Commission is proposing to add a second paragraph to § 535.402 as contemplated in the ANPR.

*B. § 535.408(b)(3)*

The Commission also noted in the ANPR that it was concerned that the filing exemption in § 535.408(b)(3) for further agreements addressing stevedoring, terminal, and related services is unclear and overly broad. The Commission indicated that it was considering proposing to remove the exemption and replace it with a list of more narrowly defined, specific services and requested comment on what specific services might be appropriately included within the revised exemption and how to define those services. The Commission also requested comments on whether the specific examples of stevedoring, terminal, and related services listed in § 535.408(b)(3), i.e., the operation of tonnage centers or other joint container marshaling facilities, continue to be relevant and suitable exempted activities.

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<sup>26</sup> 81 FR at 10194.

<sup>27</sup> Carriers at 16.

The carriers and several of the groups consisting of MTOs or MTOs and carriers<sup>28</sup> (MTO groups) question the need for any changes to the exemption and assert that, given the few situations in which the scope of the provision had been discussed by agreement parties and Commission staff, the Commission was overstating concerns about the clarity and potential abuse of the provision.<sup>29</sup> Those groups also express concern that it would be extremely difficult to make a comprehensive list of all services to exempt from filing, and any list developed now could be obsolete in the future.<sup>30</sup> The groups argue that because any agreement related to service omitted from the list would have to be filed with the Commission and subject to the 45-day waiting period (regardless of how minimal the competitive impact or how great the benefit to the public), the proposal under consideration would increase the burdens on both agreement parties and Commission staff, and delay the operational or business requirements of the parties.<sup>31</sup>

In order to avoid these alleged problems, the groups recommend that the Commission retain the existing exemption.<sup>32</sup> As an alternative, WCMTOA/OAKMTOA suggest that the Commission consider requiring that agreement parties provide the Commission with confidential notice of further agreements falling under the exemption, allowing the Commission to review those agreements without a “full-blown agreement amendment” process and enabling the Commission to better understand how the exemption is being used and whether further action on the issue is required in the future.<sup>33</sup>

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<sup>28</sup> OAKMTOA, WCMTOA, NAWA, PMSA, Port of NY/NJ.

<sup>29</sup> Carriers at 19; WCMTOA/OAKMTOA at 5–6; NAWA at 6; PMSA at 2–3; Port of NY/NJ at 8.

<sup>30</sup> Carriers at 18–19; WCMTOA/OAKMTOA at 6; NAWA at 6–7; PMSA at 3; Port of NY/NJ at 7–8.

<sup>31</sup> Carriers at 22–23; WCMTOA/OAKMTOA at 6; NAWA at 7; PMSA at 3; Port of NY/NJ at 7–8.

<sup>32</sup> WCMTOA/OAKMTOA at 6; NAWA at 7; PMSA at 3; Port of NY/NJ at 8.

<sup>33</sup> WCMTOA/OAKMTOA at 7.

In addition to the points described above, the carriers offer several additional comments not raised by the MTO groups. Specifically, the carriers state that the exemptions in § 535.408(b) represent a delicate and difficult exercise in balancing the Commission's need for information and oversight and one of the Shipping Act's stated purposes, to regulate with a minimum of government intervention and regulatory costs.<sup>34</sup> The carriers argue that the concerns voiced by the Commission in the ANPR are inapplicable to operational carrier agreements such as vessel and space charter agreements, which almost always create the need for carriers to come to an understanding about how to deal with terminals and stevedores and, therefore, generally include authority to discuss and agree on these issues.<sup>35</sup> The carriers argue that such arrangements are a routine part of such agreements and there is no need to change the existing exemption.<sup>36</sup>

In the alternative, the carriers recommend clarifying the current exemption rather than replacing it with a list of specific services.<sup>37</sup> With respect to tonnage centers, the carriers assert that the exemption should be retained because a tonnage center is merely an administrative mechanism through which agreement parties carry out existing authorities in the agreement; it neither adds nor detracts from such authority.<sup>38</sup>

With regard to joint container marshaling facilities, the carriers assert that the exemption should be retained and made part of a new provision exempting from further filing the implementation of authority to jointly procure facilities and services, providing three reasons

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<sup>34</sup> Carriers at 17.

<sup>35</sup> *Ibid.* at 18.

<sup>36</sup> *Ibid.* at 19.

<sup>37</sup> *Ibid.* at 20.

<sup>38</sup> *Ibid.*

supporting such an exemption.<sup>39</sup> First, the carriers argue that it is unlikely that joint procurement activities could result in an unreasonable increase in transportation cost or unreasonable reduction in transportation service. Rather, they assert that such activities will generally result in a reduction in costs to carriers and more efficient service, thereby lowering costs and improving service for shippers. Second, the carriers state that joint procurement activities do not represent further agreement among the carriers, but an agreement between the carriers and a third party entered into under the authority of a filed agreement. Finally, the carriers argue that joint procurement arrangements, by their nature, are ill-suited to further filing and appropriate for exemption. Specifically, the carriers assert that these are routine, everyday transactions that would be conducted by the individual carriers themselves if not done jointly. In addition, the carriers express concern and confusion over the mechanics of filing such arrangements and the danger that competitively sensitive information would be made public.

The Commission notes that the exemptions in § 535.408(b) were promulgated under the authority in 46 U.S.C. 40103 and were predicated on a finding that the exempted activities would not result in a substantial reduction in competition or be detrimental to commerce.<sup>40</sup> Against that backdrop, we first respond to the MTO groups' comments, which are based on the understanding that the exemption in § 535.408(b)(3) applies, and was intended to apply, to MTO agreements. Although, by its plain language, § 535.408(b)(3) does not limit the applicability of the exemptions to any particular type of agreement, the rulemaking history of the provision and the Commission's subsequent statements indicate that the Commission's focus was on activities under ocean common carrier agreements, rather than MTO agreements, when it promulgated § 535.408(b).

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<sup>39</sup> *Ibid.* at 20–23

<sup>40</sup> 2003 Proposed Rule, 68 FR at 67518.

First, all of the exemptions in § 535.408(b) concern matters that can arise during the implementation of ocean common carrier agreements, and some of these are clearly limited to such agreements (e.g., establishing and jointly publishing tariff rates, rules, and regulations; matters relating to space allocation and slot sales). In addition, the Commission's discussion of the exemptions in the 2003 Proposed Rule and 2004 Final Rule focused solely on ocean common carrier agreements.<sup>41</sup> Finally, the scope of § 535.408(b) was clarified by the Commission in the preamble to the 2009 final rule eliminating the general exemption from the 45-day waiting period for marine terminal agreements.<sup>42</sup> Specifically, the Ports of Los Angeles and Long Beach expressed concern in their comments to that rulemaking that the exemptions in § 535.408 are specific to VOCCs and do not address marine terminal operators.<sup>43</sup> In response, the Commission stated the following:

[T]he Commission acknowledges that the exemption under section 535.408 primarily addresses carrier agreements. Section 535.408 states that “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 thus exempts certain amendments having technical or operational effects from the Shipping Act’s filing requirement. While not part of Docket No. 09–02, the Commission is open to reviewing this latter section to determine if additional flexibility can be provided for amendments addressing technical or operational matters of marine terminal operator agreements.<sup>44</sup>

The MTO groups thus misconstrue the proposal under consideration as the revocation or revision of an exemption that the Commission granted to activities under MTO agreements after determining that such an exemption would not result in a substantial reduction in competition or be detrimental to commerce. As demonstrated by the history described above, no such determination has ever been made by the Commission, and part of the purpose of this rulemaking

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<sup>41</sup> 68 FR at 67517–67519; 69 FR at 64400–64401.

<sup>42</sup> Final Rule, Repeal of Marine Terminal Agreement Exemption, 74 FR 65034 (Dec. 9, 2009).

<sup>43</sup> *Ibid.* at 65034.

<sup>44</sup> *Ibid.* at 65035–67036.

is to clarify the scope of the exemption as originally intended while also providing interested persons with the opportunity to put forth routine technical and operational matters related to terminal, stevedoring, and related services under MTO agreements that would be appropriate for an exemption.

The “few situations” in which this exemption has arisen in the context of MTO agreements are thus troubling. They demonstrate that: (1) Contrary to the Commission’s original intent, the exemption in § 535.408(b)(3) is worded broadly enough potentially to apply to activities under MTO agreements; and (2) in the context of MTO agreements, the exemption is potentially broad enough to encompass activities that raise competitive concerns (i.e., much more than routine operational or administrative activities).

Unlike other exemptions in § 535.408(b) that could be read as applying to MTO agreements, but have the same minimal impact on competition and commerce as they do in the ocean common carrier agreement context,<sup>45</sup> “stevedoring, terminal and related services” cover a much broader set of activities in the MTO agreement context. In ocean common carrier agreements, these activities generally involve the joint negotiation of services from MTOs and other waterfront entities, some of which, like terminal services agreements, are currently exempt from the filing requirements when they involve a single carrier.<sup>46</sup> In contrast, “stevedoring, terminal, and related services”<sup>47</sup> generally represent the primary subject matter of MTO agreements, and § 535.408(b)(3) could be interpreted broadly enough to exempt from further filing, most, if not all, further agreements authorized by a filed agreement, regardless of their competitive impact. The Commission is therefore unable at this time to find that applying such a

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<sup>45</sup> For example, scheduling agreement meetings. 46 CFR 535.408(b)(4)(i).

<sup>46</sup> 46 CFR 535.309.

<sup>47</sup> The Commission’s regulations define terminal services checking, dockage, free time, handling, heavy lift, loading and unloading, terminal storage, usage, wharfage, and wharf demurrage. 46 CFR 525.1(19); 535.309.

broad exemption to MTO agreements would not result in a substantial reduction in competition or be detrimental to commerce. The Commission requests comment on this tentative determination and any information that would support the finding required by 46 U.S.C. 40103 with respect to applying the exemption, as written, to MTO agreements.

For similar reasons, the Commission is tentatively rejecting WCMTOA/OAKMTOA's suggestion that the Commission require further agreements falling under the exemption to be filed confidentially with the Commission rather than subject them to the normal filing requirements. Granting such an exemption would require the same affirmative finding under 46 U.S.C. 40103, and given the potential breadth of further agreements falling under the exemption, and the fact that the Commission would not have the 45-day review period, the benefit of third-party comments, or the opportunity to issue an RFAI if it had concerns with such agreements, the Commission is unable to make such a finding at this time.

Although the Commission has tentatively determined that the current exemption is not appropriate for MTO agreements, we acknowledge that there may be some further agreements dealing with stevedoring, terminal, or related services that have little to no competitive impact. Accordingly, the Commission requested comment in the ANPR on what specific services might be appropriately included within the revised exemption and how to define those services. Unfortunately, none of the MTO groups responded to this request. In the absence of any recommendations regarding specific MTO agreement activities to include within the revised exemption, the Commission is proposing to amend the language of § 535.408(b)(3) to expressly limit the exemption to ocean common carrier agreements as originally contemplated by the Commission (with some additional revisions discussed below).

The Commission is, however, renewing its request for comments on specific stevedoring, terminal, or related services that should be exempted from further filing if authorized by an MTO

agreement.<sup>48</sup> As contemplated in the rulemaking establishing § 535.408(b), these should be routine operational and administrative matters that require day-to-day flexibility and have little to no competitive impact. In addition to describing these services, commenters should provide information sufficient to enable the Commission to determine that exempting them from the further filing requirements would not result in a substantial reduction in competition or be detrimental to commerce.

With respect to the ocean common carrier agreements, the carriers are generally correct in their assertion that the Commission's concerns with § 535.408(b)(3) relate primarily to MTO agreements rather than operational carrier agreements such as vessel and space charter agreements. As discussed above, stevedoring, terminal, and related services (including the operation of tonnage centers and other joint container marshalling facilities) are generally discrete, ancillary matters in these agreements and do not raise the same competitive concerns that they do in the MTO agreement context. Accordingly, the Commission is proposing to retain the exemption for joint contracting of stevedoring and terminal services by parties to an ocean common carrier agreement<sup>49</sup> and the express exemption for the operation of tonnage centers and other joint container marshaling facilities under those agreements. In addition, the Commission is proposing to tie the definition of terminal services to § 535.309 and to specify that the exemption only applies to those services that are provided to and paid for by the agreement parties.

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<sup>48</sup> The commenters' arguments regarding the difficulties of creating and maintaining a list of specific services are not compelling. Should the need arise to amend the list in the future, the Commission can initiate a new rulemaking on its own initiative or in response to a petition for rulemaking filed by an interested party. 46 CFR 502.51.

<sup>49</sup> This proposal is based, in part, on the Commission's tentative determination to retain the exemption for marine terminal services agreements in § 535.309. Should the Commission reconsider this determination, the proposal related to § 535.408(b)(3) may be affected.

The Commission is also proposing to remove the phrase “or related services” from the exemption. It is unclear what might comprise the universe of such related services (other than the operation of tonnage centers and joint container marshaling services), and it is therefore difficult for the Commission to find that exempting such activities would not result in a substantial reduction in competition or be detrimental to commerce. The Commission invites comment on these revisions and any additional, specific related services for which exemption would be appropriate.

For similar reasons, the Commission is tentatively rejecting the carriers’ request to create a general joint procurement exemption for ocean common carrier agreements, to the extent that their proposal contemplates something beyond the joint procurement activities that would be exempted under the proposed language. Although agreements that involve joint purchasing can often reduce costs and create efficiencies, such agreements also have the potential for anticompetitive outcomes.<sup>50</sup> Without knowledge of what upstream markets might be affected by such joint procurement activities, the Commission would have limited ability to determine their competitive impact. Similar to the request noted above with respect to “related services,” however, the Commission requests comment on specific, additional joint procurement activities that may be appropriate for exemption.

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<sup>50</sup> By unduly increasing the bargaining power of the parties, in certain circumstances, such agreements potentially could extract prices so low (and/or an over-provision of service) that the sustainability of long-term investment in the affected upstream market(s) is jeopardized.

**V. The Information Form requirements in subpart E of part 535.**

*A. Proposed Changes*

In conjunction with its proposed changes to the agreement definitions and exemptions, the Commission proposes the following changes to the corresponding Information Form requirements. As discussed in its ANPR, the Commission proposes to modify Section I of the Information Form to specify that space charter agreements exempted under the new proposed exemption in § 535.308 would not be subject to these requirements, and to revise or add the proposed modifications to the definitions of agreement authorities listed in Section I.

In Section II, the Commission proposes to eliminate the Information Form requirements for simple operational agreements. The Commission believes that the present requirements to list port calls and provide a narrative statement of operational changes for such agreements are unnecessary.

The Commission proposes that Section III be renumbered as Section II and modified to apply to agreements with authority to charter vessel space (unless exempted under § 535.308 or § 535.311), or with authority to discuss or agree on capacity rationalization. The Commission believes that parties to agreements with such authority should provide before and after data on their service strings, vessel deployments, port itinerary, annual capacity, and vessel space allocation for the services pertaining to the agreement. Further, it is proposed that parties to such agreements provide vessel capacity and utilization data for the services pertaining to the agreement for the preceding calendar quarter, as well as a narrative statement discussing any significant operational changes<sup>51</sup> to be implemented under the agreement and the impact of those changes.

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<sup>51</sup> The Commission believes that the definition of significant operational changes should be standardized and applied consistently throughout the regulations to mean an increase or decrease in a party's liner service, ports of call, frequency of vessel calls at ports, and/or amount of vessel capacity deployment for a fixed, seasonally planned, or

The Commission proposes that Section IV be renumbered as Section III and that the requirements for rate agreements be reduced to data on market share by agreement-wide trade instead of sub-trade, average revenue, vessel capacity and utilization, and a narrative statement on any anticipated or planned significant operational changes and their impact. The Commission believes that market share data derived on the total geographic scope of the agreement, rather than by sub-trade, should be sufficient for its analysis and less burdensome on the parties. Further, the Commission favors eliminating the present requirement for data regarding the revenue and cargo volume of the top ten major moving commodities for reasons explained in the ANPR. In addition, the Commission proposes to eliminate the requirement for data on the number of port calls.

The Commission proposes that Section V be renumbered as Section IV with no changes to the present requirements for contact information and a signed certification of the Form. Further, it is proposed that the instructions to the Information Form be streamlined by removing many of the same definitions repeated throughout each section of the Form and stating them in paragraphs at the beginning of the Form, with the understanding that they apply to each section. The Commission believes that this proposed modification would improve the clarity and readability of the instructions.

*B. Summary of Comments*

Comments to these proposals were submitted by the carriers and the NCBFAA. The carriers favor the proposed modifications that reduce the reporting requirements. However, consistent with their objections to the proposed change in the definition of capacity

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indefinite period of time. The amended definition would exclude incidental or temporary alterations or changes that have little or no operational impact.

rationalization authority, the carriers object to the increase in the reporting requirements for VSA and alliance agreements and urge the Commission to reduce the requirements. Further, the carriers question why parties to rate agreements must continue to provide market share data on their Information Form when it has been eliminated elsewhere, and the Commission can use its own commercial sources of data to determine the market share of the agreement. They request that the requirement for market share be eliminated from the Information Form. Carriers at 23-24.

The NCBFAA supports the increased reporting for VSA and alliance agreements and encourages the Commission to seek a greater amount of detailed information on the potential costs and service impact of such agreements. They explain that VSA and alliance agreements encourage carriers to deploy increasingly larger vessels through the benefit of sharing the economic risk of such new purchases. They believe that the inadequate infrastructure at U.S. ports in combination with the deployment of these larger vessels has resulted in severe port congestion, extended delays in the delivery of cargo, and added costs to shippers. NCBFAA at 2-3.

The NCBFAA identified the congestion problems at the Ports of Los Angeles, Long Beach, and New York/New Jersey as particularly severe in the recent past, noting that delays in cargo delivery resulted in significant demurrage and detention charges to shippers. The NCBFAA believes that the deployment of larger vessels through VSAs has exacerbated the problems of port congestion, the inability of the current infrastructure to handle the flow of containers, and the increased costs for participants in the supply chain. They complain that while the use of larger vessels causes more congestion and delays, carriers do not vary free time for vessel size, and merchant haulers grapple to find sufficient trucking to dray double and triple the container volume in the allotted free time. NCBFAA at 3.

The NCBFAA further questions the purported cost savings associated with using larger vessels, stating that the costs associated with the congestion and infrastructure problems outweigh any savings of such vessels. They explain that the use of larger containerships results in increased equipment costs for MTOs; dredging costs for port authorities; infrastructure improvement costs for governments; and congestion costs for transportation companies, including trucking, barge and rail companies as well as ocean transportation intermediaries. In support of its argument, the NCBFAA cites a report on the impact of large containerships prepared by the Organization for Economic Cooperation and Development (OECD).<sup>52</sup> In its report, the OECD determined that cost savings are decreasing as containerships become bigger, and this tendency of decreasing cost savings continues with the introduction of the newest generation of containerships, which it estimates at four to six times smaller than the savings associated with the preceding round of vessel deployments.<sup>53</sup> NCBFAA at 4-5.

The NCBFAA advises the Commission to examine whether the carriers' move toward increasingly larger vessels and alliance arrangements would result in an inappropriate transfer of risks and costs to the shipping public. As such, they recommend that the narrative statement of the Information Form requirements for parties to VSAs be expanded to include: (1) Carriers' plans for addressing delays in the loading and discharging of containers on and off vessels at ports; (2) sufficient chassis availability to handle the movement of containers at ports; (3) sufficient drayage availability to handle the movement of containers at ports; (4) carriers' plans for eliminating duplicative container handling operations at ports; (5) projected dwell times; (6) allotted free time for container movements based on vessel size and drayage availability; and (7) unfounded demurrage or detention costs due to delays that are beyond the control of shippers.

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<sup>52</sup> OECD/ITF, *The Impact of Mega-Ships*, International Transport Forum (2015), available at [http://www.itf-oecd.org/sites/default/files/docs/15cspa\\_mega-ships.pdf](http://www.itf-oecd.org/sites/default/files/docs/15cspa_mega-ships.pdf).

<sup>53</sup> *Ibid*, p. 26.

NCBFAA at 6-7. Further, the NCBFAA recommends that parties to VSA and alliance agreements be required to provide the Commission with their contingency plans for handling cargo when their vessels cannot access ports as scheduled due to congestion. NCBFAA at 8.

*C. Discussion*

The carriers request that the proposed Information Form requirements for VSAs be reduced but they do not provide any specifics or alternative recommendations. The proposed service and capacity reporting requirements for VSA and alliance agreements should provide the Commission with a clearer understanding of any service changes and the impact of those changes in its initial review of the agreement, without having to request additional information. The Commission believes that such service data is prepared and readily available because parties to VSAs would likely examine such data to conduct their own analysis when entering into such agreements. The parties are the source of the most accurate firsthand information. Therefore, such data should not be an unreasonable burden to report, and the Commission is disinclined to reduce these Information Form requirements.

Regarding the market share requirement for rate agreements, while the Commission can and does conduct its own market analysis, it is important at the initial filing stage of the agreement that the parties present to the Commission their analysis and understanding of the market and the market share of the agreement. The interpretation of the market might vary depending on the authority and geographic scope of the agreement, and the parties' view of the market might differ from the Commission's view. In addition, the Commission is proposing to require only agreement-wide market share and eliminate the requirement of market share by sub-trade, which would significantly reduce the reporting burden on the industry.

The Commission appreciates all of the concerns expressed in the comments of the NCBFAA regarding the competitive impact of VSA and alliance agreements. The Commission

believes that the NCBFAA raises valid concerns on how the size of vessels deployed under these arrangements can impact port and terminal operations and the cost of handling containers within the meaning of unreasonable service decreases and unreasonable cost increases under section 6(g). The Commission will take these concerns into consideration in its review of such agreements. However, as a matter of standard reporting, the Commission does not believe that such an extensive line of inquiry is necessary for reviewing every VSA. The Commission believes that information on terminal and cargo handling matters would be more meaningful in the review of major alliance agreements, and the Commission has formally requested information on such matters in its past review of alliance agreements pursuant to its authority under 46 U.S.C. 40304(d). Therefore, the Commission tentatively declines to adopt the recommendations of the NCBFAA as a standard Information Form reporting requirement, but reserves these recommendations as matters for consideration in the Commission's review of major VSA and alliance agreements that it may seek additional information on through its statutory authority.

The Commission requests additional comment on the proposed changes to the Information Form requirements.

## **VI. Comments in § 535.603, and Requests for additional information in § 535.606.**

### *A. Requests for Additional Information*

The Shipping Act permits the Commission to request from the person filing the agreement any additional information and documents the Commission considers necessary to make the determinations required by the Act during the 45-day waiting period before an agreement may go into effect.<sup>54</sup> In accordance with 46 U.S.C. 40304(d) and the Commission's general rulemaking authority under 46 U.S.C. 305, the Commission has promulgated regulations

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<sup>54</sup> 46 U.S.C. 40304(d).

regarding the issuance of RFAIs at 46 CFR 535.606. The regulations state that the Commission will publish a notice in the Federal Register that it has requested additional information and serve that notice on any commenting parties, but the notice will indicate only that a request was made and will not specify what information is being sought.<sup>55</sup> The purpose of this notice is to allow further public comment on the agreement.<sup>56</sup>

In the ANPR, the Commission noted that its general policy is not to disclose questions issued by the Commission in an RFAI and requested comment on the policy and whether it should be modified.<sup>57</sup> All of the commenters that discussed the issue supported the current policy of not releasing RFAI questions and urged the Commission not to change it. Several commenters asserted that the policy promotes the frank exchange of questions and responses on issues of concern to the Commission, and that publication of the questions could lead to questions being asked for reasons other than regulatory concerns and could prejudice the parties to an agreement as a result of public reaction to the questions.<sup>58</sup> The carriers stated that a RFAI is rooted in large part on confidential information in the possession of the Commission and is a part of the deliberative process, and, just as the Commission does not disclose staff recommendations, it should not disclose the questions that form part of the basis for those recommendations.<sup>59</sup>

Given the comments received, the Commission is not proposing any changes to the treatment of RFAI questions.

#### *B. Third-Party Comments*

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<sup>55</sup> 46 CFR 535.606(d).

<sup>56</sup> Final Rule, Rules Governing Agreements by Ocean Common Carriers and Other Persons Subject to the Shipping Act of 1984. 49 FR 45320, 45338 (Nov. 15, 1984).

<sup>57</sup> 81 FR at 10196.

<sup>58</sup> WCMTOA/OAKMTOA at 7–8; Port of NY/NJ at 8–9.

<sup>59</sup> Carriers at 25–26.

The Commission's regulations regarding third-party comments on agreement filings are found at 46 CFR 535.603, which provides that persons may file with the Secretary written comments regarding a filed agreement. Section 535.603 provides that, if requested, comments and any accompanying material will be accorded confidential treatment to the fullest extent permitted by law and that such requests must include a statement of legal basis for confidential treatment. The regulation further provides that when 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.

In the ANPR, the Commission requested comment on its policy with respect to the disclosure of third-party comments. The commenters who discussed the issue universally opined that third-party comments on agreements should be made public unless the submitter asserts that they fall within one of the exemptions from disclosure under FOIA, and the Commission determines that assertion to be valid.<sup>60</sup> These commenters asserted that publishing the comments encourages accuracy, affords agreement parties with the opportunity to provide the Commission with their perspective on the issues raised, and promotes dialogue between the agreement parties and the commenters.

During the past several years, there has been some confusion about how the Commission handles third-party comments to agreements and their accessibility by agreement parties and the public, leading the Commission to tentatively determine that § 535.603 does not sufficiently advise commenters and the public about this process. The Commission tentatively concludes, however, that the current process, which permits requests for copies of third-party comments, has the same advantages as those cited by commenters with respect to publishing comments. Accordingly, the Commission is proposing to amend § 535.603 to describe in more detail the

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<sup>60</sup> WCMTOA/OAKMTOA Comments at 8; Carrier Comments at 26; PNYNJPA Comments at 9.

Commission's current process for handling third-party comments and requests comment on any modifications that should be considered.

When the Commission receives a comment on a filed agreement, it is distributed internally to the Commissioners and relevant staff. If the commenter requests confidential treatment, the Secretary will make a prompt determination as to the Commission's ability to protect any comment or portion of a comment from disclosure and inform the submitter. If a member of the public, press, or agreement counsel request a copy of a comment, the Office of the Secretary will provide any comment or part of a comment unless the Secretary has determined that the comment or part of the comment should be afforded confidential treatment.

Currently, late-filed comments are only accepted by leave of the Commission upon a showing of good cause. In order to more efficiently handle late-filed comments, the Commission is proposing to amend § 501.24 to delegate to the Secretary the authority to determine whether to accept such comments.

The Commission requests comment on the proposed revisions to §§ 501.24 and 535.603, which reflect the process described above, and any modifications that should be considered to the process.

## **VII. Agreement reporting requirements in subpart G of part 535.**

### *A. Background*

Under subpart G of part 535, parties to agreements that contain certain authority are required to file periodic Monitoring Report and/or other prescribed reports. Further, parties to agreements with certain types of authority (e.g., rate authority) are required to provide minutes of their meetings. For reasons identified in its ANPR, the Commission is proposing the following modifications to these reporting requirements.

There are currently three sections of the Monitoring Report. Sections I and II apply according to the authorities contained in the agreement. Section III applies to all agreements subject to Monitoring Reports and requires contact information and a signed certification of the Report. The Commission proposes that Section I be modified to apply to agreements between or among three or more ocean common carriers that contain the authority to discuss or agree on capacity rationalization, under the new proposed definition of this authority in § 535.104(e). Agreements subject to reporting under Section I would include vessel sharing and alliance agreements among three or more carriers regardless of whether such agreements contain exclusivity clauses.

There, however, may be agreements below the threshold of three or more members agreeing on the supply of capacity in a trade or service that the Commission may need to monitor. In such cases, the Commission may decide to prescribe reporting requirements pursuant to § 535.702(d). In this regard, the Commission proposes to revise § 535.702(d) to clarify that it applies to any filed agreements, not just to those agreements subject to the Monitoring Report requirements. Further, the Commission proposes to move this authority from § 535.702(d) under the Monitoring Reports section to § 535.701(c) under the general requirements section for reporting requirements in subpart G of part 535. Sections 535.701(c)-(j) of the current regulations would be redesignated sequentially.

In terms of requirements, the Commission proposes to require that parties to capacity rationalization agreements subject to Section I submit quarterly Reports with data on their vessel capacity and utilization separately showing each month of the quarter for the liner services pertaining to the agreement. The provision for advance notice of significant reductions in capacity would be retained along with the narrative statement on any other significant operational changes implemented during the quarter.

Section II of the Monitoring Report applies to carrier agreements containing rate authority with a market share of 35 percent or more. The Commission proposes that the requirements for these agreements be reduced by eliminating the market share, commodity components, and the narrative statement on significant operational changes.

The market share requirement delays the Report because most of the carriers supply this information using commercial data sources, which causes a lag in the Report of 75 days after the end of the quarter. 46 CFR 535.701(f). The Commission subscribes to commercial sources of data and can run periodic data reports as needed. Without the market share requirement, the Commission proposes that the filing deadline for the Report be shortened from 75 to 45 days after the end of each quarter, which would provide more timely data.

Further, the Commission proposes that the reporting requirement for data by commodity be eliminated for the Monitoring Report. However, when essential to monitoring an agreement, the Commission could prescribe specific commodity data reporting pursuant to its authority.

The Commission is also proposing that parties to rate agreements no longer be required to report on the significant operational changes in their services. The Commission believes that reporting this information under VSA and alliance agreements should provide a sufficient understanding of significant operational changes in the U.S. trade lanes. When needed, the Commission could request specific operational information from the parties.

With the elimination of these requirements, it is proposed that parties to rate agreements with a market share of 35 percent or more submit quarterly Monitoring Reports with data on their average revenue, vessel capacity, and utilization for each month of the quarter for the liner services operated by the parties within the geographic scope of the agreement.

As with the Information Form, it is proposed that the Monitoring Report instructions be streamlined by removing definitions repeated within each section and stating them in paragraphs at the beginning of the Report with the understanding that they apply to each section.

Section 535.704(b) defines a “meeting” between the parties to an agreement for the purpose of the filing of meeting minutes with the Commission. The Commission proposes that the definition be modified to clarify that the discussions of parties using different forms of technology (e.g., telephone, electronic device, electronic mail, file transfer protocol, electronic or video chat, video conference) still constitute discussions for the purpose of filing minutes.

*B. Summary of Comments*

The carriers were the only interested parties to submit comments on the proposed changes to the Monitoring Report requirements. The carriers support the changes to reduce the reporting burden but again raise objections to the increase in reporting in connection with the proposed change in the definition of capacity rationalization as it applies to VSA and alliance agreements. They urge the Commission to reduce the reporting burden for these agreements. Further, the carriers generally support the reduction in the filing deadline from 75 to 45 days with the understanding that occasional and reasonable requests for extensions of the deadline would be available as needed. Carriers at 23-24.

*C. Discussion*

The carriers urge that the Commission reduce the reporting burden for agreements subject to the proposed definition of capacity rationalization, but they provide no specifics or alternative recommendations. As explained above in the section discussing the Information Form, parties to VSA and alliance agreements closely track their service and capacity, and such data is readily available to the parties. The Commission does not believe that the reporting requirements pose an undue regulatory burden. The data is essential for the Commission to monitor the actions of

the agreement parties and their impact on the supply of capacity in the U.S. liner trades, and the parties are the best source of information. Further, the Commission proposes to limit the application of the requirements to capacity rationalization agreements between three or more carriers, and eliminate the reporting of information on service changes for parties to rate agreements. Where agreement parties believe reporting is unnecessary or overly burdensome, they may apply and the Commission shall consider an application for waiver of some or all of the Monitoring Report requirements in accordance with § 535.705. Such regulatory relief includes extensions of time to file the reports, which the Commission may grant on a case-by-case basis for good cause.

#### **VIII. Non-substantive modifications to update and clarify the regulations in parts 501 and 535.**

##### *A. Background*

As explained in its ANPR, to update and clarify the regulations, the Commission proposes that:

1. The CFR citation for the delegated authority of the Director of the Bureau of Trade Analysis to prescribe reporting requirements in § 501.27(o) be revised from § 535.702(d) to § 535.701(c) to reflect the proposed change to these regulations;
2. The delegated authority of the Director of the Bureau of Trade Analysis in § 501.27(p) to require the reporting of commodity data on a sub-trade basis from agreement parties be removed, in conjunction with the proposed changes to the reporting requirements;
3. The definition of sailing agreement in § 535.104(bb)<sup>61</sup> be revised to mean an agreement by or among ocean common carriers to coordinate their respective sailing or service schedules of

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<sup>61</sup> Section 535.104(bb) presently defines a sailing agreement as 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

ports, and/or the frequency of vessel calls at ports. The Commission believes that the present definition is more broadly descriptive of the authority of carriers in a VSA where the parties would conceivably rationalize capacity;

4. The regulations in § 535.301(b) on the optional filing of exempt agreements be revised to add that such filings are also exempt from the 45-day waiting period requirement and may become effective upon filing with the FMC;

5. The CFR reference on the application for exemption procedures cited in § 535.301(c) be corrected and revised from § 502.67 to § 502.74;

6. Per the carriers' request in comments submitted to the Commission's retrospective review plan of its regulations, the regulations in § 535.302(a) on non-substantive modifications to effective agreements be amended to add agreement modifications in the number or size of vessels within the range of capacity specified in the agreement pursuant to the express enabling authority for operational matters identified in § 535.408(b)(5)(ii). The Commission expects that this revision to § 535.302(a) would encourage carriers to amend their agreements accordingly with more accurate information, which would improve the clarity of the agreement;

7. The regulations in § 535.302(d) be revised to specify that agreement parties may seek assistance from the Director of the Bureau of Trade Analysis on whether an agreement modification would qualify for an exemption based on the types of exemptions strictly listed and identified in § 535.302, as intended, and not on a general basis as parties have mistakenly interpreted the regulations;

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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.

8. The regulations in § 535.404(b) be revised to require that where parties reference port ranges or areas in the geographic scope of their agreement, the parties identify the countries included in such ranges or areas so that the Commission can accurately evaluate the agreement;
9. The formatting requirements for the filing of agreement modifications in § 535.406 be revised to apply to all agreements identified in § 535.201 and subject to the filing regulations of part 535, except assessment agreements;<sup>62</sup>
10. In § 535.501(b) on the electronic submission of the Information Form, the reference to diskette or CD-ROM be removed;<sup>63</sup>
11. The phrase “whether on a binding basis under a common tariff or a non-binding basis” in § 535.502(b)(1) be removed from the description of rate authority;
12. In § 535.502(c), the expansion of membership, in addition to the expansion of geographic scope as presently provided, be a modification that requires an Information Form for agreements with any authority identified in § 535.502(b), i.e., rate, pooling, capacity, or service contracting;
13. Section 535.605(c) be added to indicate that a fee specified in § 535.401(h) shall be assessed to process a request for expedited review of a filed agreement;
14. In § 535.701(e) (as redesignated from the current § 535.701(d)) on the electronic submission of Monitoring Reports, the reference to diskette or CD-ROM be removed and replaced with “as provided in § 535.701(f) of this part;”
15. The regulations in § 535.701(f) (as redesignated from the current § 535.701(e)) be revised to state simply that the submission of reports and meeting minutes pertaining to

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<sup>62</sup> Section 535.104(d) defines assessment agreements to mean 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. Section 535.401(e) requires that assessment agreements be filed and effective upon filing with the FMC.

<sup>63</sup> Subsequent to the ANPR, the Commission implemented its automated agreement filing system by direct final rule. 81 FR 24703 (Apr. 27, 2016).

agreements that are required by these regulations may be filed by direct secure electronic transmission in lieu of hard copy, and that detailed information on electronic transmission is available from the Commission's Bureau of Trade Analysis;

16. The phrase “whether on a binding basis under a common tariff or a non-binding basis” in § 535.702(a)(2)(i) be removed from the description of rate authority;

17. The regulations in § 535.702(b) be revised to indicate that rather than using market share data filed by the parties to agreements, the Bureau of Trade Analysis would notify the parties of any changes in their reporting requirements;<sup>64</sup>

18. In § 535.703 on the Monitoring Report Form, the reference to part 2(C) of section I of the Monitoring Report be revised to part 2(B) of section I in conjunction with the proposed modifications to the report; and

19. The regulations in § 535.703(d) on the commodity data requirements of the Monitoring Report be removed.

*B. Summary of Comments and Discussion*

The carriers were the only interested parties to submit comments on the proposed changes in the regulations. The carriers support the proposal in § 535.302(a) on non-substantive modifications to effective agreements to add agreement modifications in the number or size of vessels within the range specified in the agreement, with the understanding that such amendments to agreements are not required. Carriers at 27. This is the understanding of the Commission because such changes in the number or size of vessels [within the range stated in the agreement] are activities that may be conducted without further filing under the regulation in § 535.408(b)(5)(ii).

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<sup>64</sup> As discussed, only parties to rate agreements with a combined market share of 35 percent or more are required to file Monitoring Reports. 46 CFR 535.702(a)(2). If the market share of a rate agreement drops below 35 percent, the Bureau would notify the parties that the agreement is no longer subject to the Monitoring Report regulations.

The carriers support the proposal in § 535.404(b) to require that agreement parties identify the countries included in a port range or area of the geographic scope of the agreement, provided that the parties need not call directly at each specified country and may change direct calls without filing an amendment to the agreement. The carriers cite an example for the East Coast of South America that includes Brazil, Uruguay, and Argentina. Under this scope, the agreement parties may not directly call in Uruguay but serve the country via feeder from the other ports of call, or may change their services to begin directly calling in Uruguay and serve the other countries via feeder. Carriers at 27.

The Commission believes that so long as the countries are within the range of service whether by direct calls or transshipment via feeder service, there would not be a need to file an amendment to the agreement. If the VSA or alliance agreement is subject to the proposed Monitoring Report requirements, the change in the ports of call would be reported in the parties' quarterly report. However, changes that would completely discontinue service to a country or add new countries would require the filing of an amendment to the geographic scope of the agreement.

On the proposed change to § 535.502(c) to add the expansion of membership as an agreement modification that would require an Information Form, the carriers find it acceptable if clarified that this requirement applies only to agreements that are subject to the Information Form in the first instance, and that only the new member(s) be required to submit the Information Form data. Carriers at 27-28. It is the Commission's understanding that this proposal would only apply to agreements subject to the Information Form requirements because § 535.502(c) states that it pertains to agreements containing any authority identified in § 535.502(b), which lists the types of rate and capacity authorities contained in agreements that would be required to file an Information Form in the first instance. The Commission believes

that limiting the amount of Information Form data to only the new members may be sufficient to assess the impact of the agreement modification. The Commission will consider the carriers' proposal and invites public comments on it. In some cases, however, limiting the Information Form data to only new members may require the Commission to seek additional information to fully understand the impact of the agreement modification within the context of the entire membership and scope of the agreement.

## **IX. Regulatory Analyses and Notices**

### *A. Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501-3521) requires an agency to seek and receive approval from the Office of Management and Budget (OMB) before collecting information from the public. 44 U.S.C. 3507. The agency must submit collections of information in proposed rules to OMB in conjunction with the publication of the notice of proposed rulemaking. 5 CFR 1320.11.

The information collection requirements in Part 535-Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984, are currently authorized under OMB Control Number 3072-0045. In compliance with the PRA, the Commission has submitted the proposed revisions to the information collection contained in this proposed rule to the Office of Management and Budget (OMB).

In terms of the estimated public burden of collection, the proposed rule would exempt certain space charter agreements from the 45-day waiting period and Information Form requirements, which amounted 39 initial agreement filings in fiscal year 2015. It proposes to adjust the market share threshold for the waiting period exemption in § 535.311 to 35 percent or less. It would increase the number of capacity rationalization agreements required to submit

Information Forms, which amounted to nine agreements in fiscal year 2015. However, it would eliminate the Information Form data requirements for basic operational agreements and significantly reduce the data requirements for carrier agreements with rate authority. There were no new carrier rate agreements filed in the past fiscal year. Further, the proposed rule would require that new members joining existing capacity rationalization or rate agreements provide their Information Form data with the agreement modification. There were two such agreement modifications for new members in fiscal year 2015.

For Monitoring Reports, the proposed rule would require that parties to capacity rationalization agreements with three or more members submit quarterly reports, which at present equates to 22 effective agreements. The rule would also significantly reduce the Monitoring Report data requirements for parties to carrier agreements with rate authority, and at present, there are 10 carrier rate agreements that submit Monitoring Reports. Further, for the filing of meeting minutes with the FMC, the rule proposes to clarify the definition of meeting to include discussions between parties conducted by electronic mail, file transfer protocol, electronic or video chat, and video conference, which is estimated to increase the number of annual minute filings by 20 percent to 942 from 785 in fiscal year 2015. With these proposed reporting changes, the total estimated annual public burden of collection would be 12,027 hours, which would be 1,602 hours, or 12 percent, less than the current annual burden of 13,629 hours, which was last reviewed and approved by OMB in September 2013. Specifically, the reduction in the collection burden primarily reflects the proposed changes associated with the Information Form and Monitoring Report requirements. As noted, the collection burden for carrier parties to rate agreements would be reduced. The collection burden for carrier parties to capacity agreements would increase because of the increase in the number of agreements subject to the reporting requirements.

Comments are invited on:

- Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
- Whether the Commission's estimate for the burden of the information collection is accurate;
- Ways to enhance the quality, utility, and clarity of the information to be collected;
- Ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Please submit any comments, identified by the docket number in the heading of this document, by any of the methods described in the **ADDRESSES** section of this document.

*B. Regulatory Flexibility Act*

The Regulatory Flexibility Act, 5 U.S.C. 601-612, provides that whenever an agency is required to publish a notice of proposed rulemaking under the Administrative Procedure Act (APA) (5 U.S.C. 553), the agency must prepare and make available for public comment an initial regulatory flexibility analysis (IRFA) describing the impact of the proposed rule on small entities, unless the agency head determines that the rule, if promulgated, will not have a significant impact on a substantial number of small entities. 5 U.S.C. 603, 605. The Chairman of the Federal Maritime Commission certifies that the proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. The proposed rule would revise the filing requirements for agreements by or among vessel-operating common carriers (VOCCs) and/or marine terminal operators (MTOs). The Commission has previously determined that VOCCs and MTOs do not qualify as small entities because the number of employees and/or

gross receipts of these regulated businesses typically exceed the thresholds set under the guidelines of the Small Business Administration.<sup>65</sup>

## **List of Subjects**

### *46 CFR Part 501*

Authority delegations, Organization and functions, Seals and insignia.

### *46 CFR Part 535*

Administrative practice and procedure, Maritime carriers, Reporting and recordkeeping requirements.

For the reasons stated in the supplementary information, the Federal Maritime Commission proposes to amend parts 501 and 535 of Title 46 of Code of Federal Regulations as follows:

## **PART 501-THE FEDERAL MARITIME COMMISSION-GENERAL**

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

**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. 301-307, 40101-41309, 42101-42109, 44101-44106; Pub. L. 89-56, 70 Stat. 195; 5 CFR Part 2638; Pub. L. 104-320, 110 Stat. 3870.

2. Amend § 501.24 by adding paragraph (i) to read as follows:

### **§ 501.24 Delegation to the Secretary**

\* \* \* \* \*

(i) Authority to accept late-filed comments to agreement filings submitted under § 535.603 of this title.

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<sup>65</sup> See FMC Policy and Procedures Regarding Proper Considerations of Small Entities in Rulemakings 4 (Feb. 7, 2003), from the Web site of the FMC at [http://www.fmc.gov/assets/1/Page/SBREFA\\_Guidelines\\_2003.pdf](http://www.fmc.gov/assets/1/Page/SBREFA_Guidelines_2003.pdf).

3. Amend § 501.27 by revising paragraph (o) and removing paragraph (p) to read as follows:

**§ 501.27 Delegation to and redelegation by the Director, Bureau of Trade Analysis.**

\* \* \* \* \*

(o) Authority to prescribe periodic reporting requirements for, or require Monitoring Reports from, parties to agreements under §535.701(c) and §535.702(c) of this chapter.

(p) [Removed]

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

4. The authority citation for part 535 continues to read as:

**Authority:** 5 U.S.C. 553; 46 U.S.C. 305, 40101-40104, 40301-40307, 40501-40503, 40901-40904, 41101-41109, 41301-41302, and 41305-41307.

5. Amend § 535.104 by revising paragraphs (e) and (bb) to read as follows:

**§ 535.104 Definitions.**

\* \* \* \* \*

(e) *Capacity rationalization* means the authority in an agreement by or among ocean common carriers to discuss, or agree on, the amount of vessel capacity supplied by the parties in any service or trade within the geographic scope of the agreement.

\* \* \* \* \*

(bb) *Sailing agreement* means an agreement by or among ocean common carriers to coordinate their respective sailing or service schedules of ports, and/or the frequency of vessel calls at ports. The term does not include joint service agreements, or capacity rationalization agreements.

\* \* \* \* \*

6. Amend § 535.301 by revising paragraphs (b) through (d) to read as follows:

**§ 535.301 Exemption procedures.**

\* \* \* \* \*

(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. An agreement that is exempt from the filing requirements of the Act and this part and is optionally filed with the Commission is exempt from the waiting period requirements of the Act and this part. The filing fees for the optional filing of exempt agreements are provided in § 535.401(g).

(c) *Application for exemption.* Applications for exemptions must conform to the general filing requirements for exemptions set forth in §502.74 of this title.

(d) *Retention of agreements by parties and submission to the Commission.* Parties to any agreement that has been exempted from the filing requirements of the Act and this part by the Commission pursuant to section 16 of the Act (46 U.S.C. 40103) must:

(1) Retain the agreement for the term of the agreement and for a period of three years after its termination; and

(2) Upon written request from the Director, Bureau of Trade Analysis, must submit a true and complete copy of the agreement to the Bureau of Trade Analysis within 15 days of the request.

7. Amend § 535.302 by revising paragraph (a)(3), adding paragraph (a)(4), and revising paragraph (d) to read as follows:

**§ 535.302 Exemptions for certain modifications of effective agreements.**

(a) \* \* \*

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

(4) Reflects changes in the number or size of vessels within the range of capacity specified in the agreement pursuant to the express enabling authority for operational matters identified in § 535.408(b)(5)(ii).

\* \* \* \* \*

(d) Parties to agreements may seek a determination from the Director of the Bureau of Trade Analysis on whether a particular modification is exempt as a change identified in paragraphs (a) or (b) of this section.

\* \* \* \* \*

8. Add § 535.308 to subpart C to read as follows:

**§ 535.308 Space charter agreements—exemption.**

(a) An ocean common carrier agreement is exempted from the waiting period in § 535.604 and becomes effective upon filing if the agreement contains non-exclusive authority to charter or exchange vessel space between two individual carriers and does not contain any authorities identified in § 535.502(b). The term non-exclusive authority means authority that contains no provisions that place conditions or restrictions on the parties' agreement participation or use or offering of competing services.

(b) The filing fee for exempted space charter agreements is provided in § 535.401(g).

9. Amend § 535.311 by revising paragraph (a) to read as follows:

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

(a) Low market share agreement means any ocean common carrier agreement which contains none of the authorities identified 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 equal to or less than 35 percent.

\* \* \* \* \*

10. Revise § 535.402 to read as follows:

**§ 535.402 Complete and definite agreements**

(a) 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.

(b) An agreement that arises from the authority of an effective agreement, but whose terms are not fully set forth in the effective agreement to the extent required by paragraph (a) of this section, must be filed with the Commission in accordance with the requirements of this subpart unless exempted under § 535.408.

11. Amend § 535.404 by revising paragraph (b) to read as follows:

**§ 535.404 Agreement provisions.**

\* \* \* \* \*

(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. In referencing geographic port ranges or areas in an agreement, state the name of each country included in such ranges or areas; and

\* \* \* \* \*

12. Amend § 535.406 by revising the introductory text to read as follows:

**§ 535.406 Modifications of agreements.**

The requirements of this section apply to all agreements identified in § 535.201 and subject to the filing regulations of this part, except assessment agreements.

\* \* \* \* \*

13. Amend § 535.408 by revising paragraph (b)(3) to read as follows:

**§ 535.408 Activities that may be conducted without further filings.**

\* \* \* \* \*

(b) \* \* \*

(3) The following matters related to stevedoring, terminal, and related services: (i) Joint contracting for marine terminal services (as that term is defined in § 535.309) or stevedoring services by parties to an ocean common carrier agreement if such services are provided to and paid for by the agreement parties;

(ii) Operation of tonnage centers or other joint container marshalling facilities by parties to an ocean common carrier agreement.

\* \* \* \* \*

14. Amend § 535.501 by revising paragraph (b) to read as:

**§ 535.501 General requirements.**

\* \* \* \* \*

(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 when the agreement is filed. A copy of the Form in *Microsoft Word* and *Excel* format may be downloaded from the Commission's home page at <http://www.fmc.gov>, or a paper copy of the Form may be obtained from the Bureau of Trade Analysis. In lieu of submitting paper copies, parties may complete and submit their Information Form in the Commission's prescribed format electronically using the automated

agreement filing system in accordance with the instructions provided on the Commission's home page.

\* \* \* \* \*

15. Amend § 535.502 by revising paragraphs (a) through (c) to read as follows:

**§ 535.502 Agreements subject to the Information Form requirements.**

\* \* \* \* \*

(a) All agreements identified in §535.201(a), except for exempt agreements identified in §535.308 and §535.311;

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

(1) The discussion of, or agreement on, any kind of rate or charge;

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

(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, capacity rationalization.

(c) Modifications that expand the geographic scope or membership of an agreement containing any authority identified in paragraph (b) of this section. Modifications to expand the membership of an agreement may limit the Information Form requirements to include only the new members that are the subject of the modification.

16. Revise § 535.503 to read as follows:

**§ 535.503 Information Form.**

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

(b) The Information Form must be completed as follows:

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

(2) Section II must be completed by parties to agreements identified in § 535.502 that contain any of the following authorities:

- (i) The charter or use of vessel space in exchange for compensation or services; or
- (ii) The discussion of, or agreement on, capacity rationalization.

(3) Section III must be completed by parties to agreements identified in § 535.502 that contain any of the following authorities:

- (i) The discussion of, or agreement on, any kind of rate or charge;
- (ii) The discussion of, or agreement on, any service contract matter;
- (iii) The establishment of a joint service; or
- (iv) The pooling or division of cargo traffic, earnings, or revenues and/or losses.

17. Revise § 535.603 to read as follows:

**§ 535.603 Comment.**

(a) *General.* Persons may file with the Secretary written comments regarding a filed agreement. Commenters may submit the comment by email to [secretary@fmc.gov](mailto:secretary@fmc.gov) or deliver to Secretary, Federal Maritime Commission, 800 N. Capitol St., NW., Washington, DC 20573-0001 within the time limit provided in the Federal Register notice. Late-filed comments will be received only by leave of the Secretary and only upon a showing of good cause.

(b) *Confidential Information.* Comments and any accompanying material will be accorded confidential treatment to the fullest extent permitted by law. Commenters seeking confidential treatment must mark the comments (or relevant portions thereof) as confidential and must submit, along with their comments, a statement of legal basis for confidential treatment

including the citation of appropriate statutory authority (e.g., Freedom of Information Act exemption). The Secretary will evaluate the basis of the request for confidential treatment and inform the commenter as to the Commission's ability to protect the comment from disclosure.

(c) *Requests for Comments.* (1) Any member of the public may request a copy of a comment to a filed agreement from the Secretary.

(2) The Secretary will provide to the requester any comment or portion of a comment that is not determined to be confidential.

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

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

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

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

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

18. Amend § 535.605 by adding paragraph (c) to read as follows:

**§ 535.605 Requests for expedited review.**

\* \* \* \* \*

(c) A fee to process the request for expedited review of a filed agreement will be assessed as specified in § 535.401(h).

\* \* \* \* \*

19. Amend § 535.701 by:

A. Redesignating paragraphs (c) through (j) as paragraphs (d) through (k), respectively;

B. Adding a new paragraph (c);

C. Revising newly redesignated paragraphs (e), (f), and (g) to read as follows:

**§535.701 General requirements.**

\* \* \* \* \*

(c) The Commission may prescribe, on an agreement-by-agreement basis, periodic reporting requirements for parties to any agreement identified in § 535.201 and subject to the filing requirements of this part but not identified in § 535.702(a) as subject to the Monitoring Report requirements. The Commission may also prescribe, on an agreement-by-agreement basis, periodic reporting requirements in addition to or in lieu of the Monitoring Report requirements for parties to any agreement identified in § 535.702(a) of this part.

\* \* \* \* \*

(e) 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 Report in the Commission's prescribed format electronically as provided in paragraph (f) of this section.

(f) Reports and minutes required to be filed by this subpart may be filed by direct secure electronic transmission in lieu of hard copy. Detailed information on electronic transmission is available from the Commission's Bureau of Trade Analysis.

(g) *Time for filing.* Except as otherwise instructed, Monitoring Reports shall be filed within 45 days of the end of each calendar quarter. Minutes of meetings shall be filed within 21

days after the meeting. Other documents shall be filed within 15 days of the receipt of a request for documents.

\* \* \* \* \*

20. Amend § 535.702 by revising paragraphs (a) and (b) and removing paragraph (d), to read as follows:

**§ 535.702 Agreements subject to Monitoring Report and other reporting requirements.**

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

(1) An agreement between or among three or more ocean common carriers that contains the authority to discuss or agree on capacity rationalization as defined in § 535.104(e); 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 geographic scope of the agreement and the agreement contains any of the following authorities:

(i) The discussion of, or agreement on, any kind of rate or charge;

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

(iii) The establishment of a joint service; or

(iv) The pooling or division of cargo traffic, earnings, or revenues and/or losses.

(b) The determination of an agreement's reporting obligation under § 535.702(a)(2) in the first instance shall be based on the market share data reported on the agreement's Information Form pursuant to § 535.503. Thereafter, the Bureau of Trade Analysis will notify the agreement parties of any change in their reporting requirements.

\* \* \* \* \*

(d) [Removed]

21. Amend § 535.703 by revising paragraph (c) and removing paragraph (d) to read as:

**§ 535.703 Monitoring Report form.**

\* \* \* \* \*

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

(d) [Removed]

22. Amend § 535.704 by revising the last sentence of paragraph (b) to read as follows:

**§ 535.704 Filing of minutes.**

\* \* \* \* \*

(b) \* \* \* Discussions conducted by telephone, electronic device, electronic mail, file transfer protocol, electronic or video chat, video conference, or other means are included.

\* \* \* \* \*

23. Revise Appendix A to part 535 to read as follows:

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

**Information Form Instructions**

1. All agreements and modifications to agreements between or among ocean common carriers identified in 46 CFR 535.502 must be accompanied by a completed Information Form to the full extent required in sections I through IV of this Form. Sections I and IV must be completed by all such agreements. Sections II and III must be completed in accordance with the authority contained in each agreement. As applicable, complete each section of this Form in accordance with the specified format provided in FMC Form-150.

2. 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.

3. 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; 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.

4. When 50 percent or more of the total liner cargo carried by all of the parties in the geographic scope of the agreement was containerized, the required data for each party shall be reported in TEUs. When 50 percent or more of the total liner cargo carried by all of the parties in the geographic scope of the agreement was non-containerized, the required data for each party shall be reported in non-containerized units of measurement. The unit of measurement for the non-containerized data must be specified clearly and applied consistently.

5. Where the geographic scope of the agreement covers both U.S. inbound and outbound

liner movements, inbound and outbound data shall always be stated separately.

6. For purposes of this Form, the term 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 the liner services pertaining to the agreement or operated by the parties to the agreement.

7. For purposes of this Form, the term a significant operational change means an increase or decrease in a party's liner service, ports of call, frequency of vessel calls at ports, and/or amount of vessel capacity deployment for a fixed, seasonally planned, or indefinite period of time. It excludes incidental or temporary alterations or changes that have little or no operational impact. If no significant operational change is anticipated or planned to be implemented or occur after the agreement is scheduled to become effective, it shall be noted with the term "none" in response.

8. When used in this Form, the terms "entire geographic scope of the agreement" or "agreement-wide" refer to the combined U.S. inbound trade and/or the combined U.S. outbound trade as such trades apply to the geographic scope of the agreement, as opposed to the term "sub-trade," which is defined for reporting purposes as the scope of all liner movements between each U.S. port range and each foreign country within the scope of the agreement. U.S. port ranges are defined as: (a) The Atlantic and Gulf, which includes ports along the eastern seaboard and the Gulf of Mexico from the northern boundary of Maine to Brownsville, Texas, 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 (b) the Pacific, which includes all ports in the States of Alaska, Hawaii, California, Oregon, and Washington; and all ports in Guam, American Samoa, Northern Marianas, Johnston Island, Midway Island, and Wake Island.

## **Section I**

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

### **Part 1**

State the full name of the agreement.

### **Part 2**

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

### **Part 3**

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

### **Part 4(A)**

Identify whether the agreement authorizes the parties to discuss, or agree on, any kind of rate or charge

### **Part 4(B)**

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

### **Part 4(C)**

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

Part 4(D)

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

Part 4(E)

Identify whether the agreement authorizes the parties to discuss, or agree on, their respective sailing or service schedules of ports, and/or the frequency of vessel calls at ports.

Part 4(F)

Identify whether the agreement authorizes the parties to charter or use vessel space in exchange for compensation or services.

Part 4(G)

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

Part 4(H)

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

**Section II**

Section II applies to agreements identified in 46 CFR 535.502 that contain any of the following authorities: (a) The charter or use of vessel space in exchange for compensation or services; (b) the discussion of, or agreement on, capacity rationalization as defined in 46 CFR 535.104(e). Parties to agreements identified in this section must complete the following parts:

Part 1(A)

For the period prior to when the proposed agreement would become effective, for the liner services pertaining to the agreement and for each party, provide: (a) The name of each

service; (b) the name of the carrier(s) directly deploying vessels in each service; (c) the number, names, and IMO numbers of the vessels in each service; (d) the name of the operator of each vessel; (e) the operating capacity of each vessel; (f) the frequency of each service; (g) the port itinerary of each service; (h) the total amount of annual vessel capacity supplied by each service; (i) the names of all of the carriers that charter space on each service but do not directly deploy vessels in the service; and (j) the allocation of vessel space in each service to any carrier. Liner services pertaining to the agreement include any services of the parties that would be terminated or altered as a result of the agreement becoming effective.

#### Part 1(B)

For the period after the proposed agreement would become effective, for the liner services pertaining to the agreement and for each party, provide: (a) The name of each service, (b) the name of the carrier(s) that would directly deploy vessels in each service; (c) the number, names, and IMO numbers of the vessels in each service; (d) the name of the operator of each vessel; (e) the operating capacity of each vessel; (f) the frequency of each service; (g) the port itinerary of each service; (h) the total amount of annual vessel capacity that would be supplied by each service; (i) the names of all of the carriers that would charter space on each service but would not directly deploy vessels in the service; and (j) the proposed allocation of vessel space in each service to any carrier.

#### Part 2

For the most recent calendar quarter for which complete data are available, for the liner services pertaining to the agreement and for each party, provide: (a) The name of each service; (b) the total number of sailings of each service; (c) the total amount of vessel capacity made available for each service; (d) the total amount of cargo carried on any vessel space counted above in part (c); and (e) the percentage of utilization on any vessel space counted above in part

(c). For purposes of this Form, the percentage of utilization shall be calculated by dividing the amount of cargo carried in part (d) above by the corresponding amount of vessel capacity in part (c) above, which quotient is multiplied by 100. Liner services pertaining to the agreement include any services of the parties that would be terminated or altered as a result of the agreement becoming effective.

### Part 3

Provide a narrative statement on any significant operational changes proposed to be implemented under the agreement and their impact on each party's liner services, ports of call, frequency of vessels calls at ports, and/or amount of vessel capacity deployment for each service pertaining to the agreement. Liner services pertaining to the agreement include any services of the parties that would be terminated or altered as a result of the agreement becoming effective.

## **Section III**

Section III applies to agreements identified in 46 CFR 535.502 that contain any of the following authorities: (a) the discussion of, or agreement on, any kind of rate or charge; (b) the establishment of a joint service; (c) the pooling or division of cargo traffic, earnings, or revenues and/or losses; or (d) the discussion of, or agreement on, any service contract matter.

Parties to such agreements must complete the following parts:

### Part 1

1. For the most recent calendar quarter for which complete data are available, provide the market shares of all liner operators for the entire geographic scope of the agreement. A joint service shall be treated as a single liner operator, whether it is an agreement line or a non-agreement line.

2 . Market share shall be calculated as: the total amount of liner cargo carried on each liner operator's liner vessels in the entire agreement scope during the most recent calendar quarter for which complete data are available, divided by the total liner cargo movement in the entire agreement scope during that 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.

#### 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 its total liner revenue, total liner cargo movement, and average revenue for its liner services within the geographic scope of the agreement. For purposes of this Form, total liner revenue means the total revenue in U.S. dollars of each party corresponding to the total cargo movement of its liner services within the geographic scope of 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 per-cargo unit quotient of each party's total revenue divided by its total cargo movement.

#### Part 3

For each month of the same calendar quarter used in part 1 of this section, for each liner service operated by the parties to the agreement within the entire geographic scope of the agreement, provide: (a) The name of each service; (b) the total number of sailings for each service; (c) the amount of vessel capacity made available for each service, as measured in terms of: (i) The total amount per service, (ii) the amount allocated to each party of the agreement, and (iii) the amount chartered to non-agreement parties; (d) the total amount of

liner cargo carried on any vessel space counted in part (c) above; and (e) the percentage of utilization on any vessel space counted above in part (c) above. For purposes of this Form, the percentage of utilization shall be calculated by dividing the amount of cargo carried in part (d) above by the corresponding amount of vessel capacity in part (c) above, which quotient is multiplied by 100.

#### Part 4

Provide a narrative statement on any significant operational changes that are anticipated or planned to occur after the agreement is scheduled to become effective that would impact any of the parties' liner services, ports of call, frequency of vessel calls at ports, and/or amount of vessel capacity deployment in any of the liner services operated by the parties to the agreement within the entire geographic scope of the agreement.

### **Section IV**

Section IV 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.

FMC Form-150

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

**Section I**

Part 1

State the full name of the agreement:

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Part 2

Purpose(s) of the agreement and the commercial circumstances that led the parties to enter into the agreement:

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Part 3

List in matrix format, all effective agreements that cover all or part of the geographic scope of this agreement, and indicate which are members of the agreement:

Agreements in all or part of the geographic scope	Parties to this Agreement that are members of the agreements listed (‘x’ as appropriate)					Etc
	Carrier A [name]	Carrier B	Carrier C	Carrier D	Carrier E	
Agmt 1 [name]						
Agmt 2						
Agmt 3						
Etc						

Part 4

Identify whether the agreement:

- (A) authorizes the parties to discuss, or agree on, any kind of rate or charge .... Yes  No
- (B) authorizes the parties to establish a joint service. .... Yes  No
- (C) authorizes the parties to pool cargo or revenues. .... Yes  No
- (D) authorizes the parties to discuss, or agree on, any service contract matter. .... Yes  No
- (E) authorizes the parties to discuss, or agree on, their respective sailing or service schedules of ports, and/or the frequency of vessel calls at ports. .... Yes  No
- (F) authorizes the parties to charter or use vessel space in exchange for compensation or services. .... Yes  No
- (G) authorizes the parties to discuss or agree on capacity rationalization as defined in 46 CFR 535.104(e). .... Yes  No
- (H) contains provisions that place conditions or restrictions on the parties' agreement participation in other agreements, and/or use or offering of services operating within the geographic scope of the Agreement. .... Yes  No

**Section II**

Part 1(A)

Prior to when the proposed agreement would become effective, for the liner services pertaining to the agreement and for each party, provide:

(1) Service Name	xxxx			
(2) Name of carriers deploying vessels	xxxx	xxxx	xxxx	Etc.
(3) Number of Ships	####			
Ship name	xxxx	xxxx	xxxxx	Etc.
IMO number	####	####	####	Etc.
(4) Operator	xxxx	xxxx	xxxx	Etc.
(5) Operating Capacity in TEU	#,###	#,###	#,###	Etc.
(6) Frequency	#### per xxxx			
(7) Port Itinerary	xxxx, xxxx, ....			
(8) Annual Vessel Capacity	#,###			
(9) Space Charterer(s)	xxxx			
(10) Allocation in TEU by carrier:				
Carrier	xxxx	xxxx	xxxx	Etc.
TEU	#,###	#,###	#,###	Etc.

Part 1(B)

After the proposed agreement would become fully operational, for the liner services pertaining to the agreement and for each party, provide:

(1) Service Name	xxxx			
(2) Name of carriers deploying vessels	xxxx	xxxx	xxxx	Etc.
(3) Number of Ships	####			
Ship name	xxxx	xxxx	xxxx	Etc.
IMO number	####	####	####	Etc.
(4) Operator	xxxx	xxxx	xxxx	Etc.
(5) Operating Capacity in TEU	#,###	#,###	#,###	Etc.
(6) Frequency	#### per xxxx			
(7) Port Itinerary	xxxx, xxxx, ....			
(8) Annual Vessel Capacity	#,###			
(9) Space Charterer(s)	xxxx			
(10) Allocation in TEU by carrier:				
Carrier	xxxx	xxxx	xxxx	Etc.
TEU	#,###	#,###	#,###	Etc.

Part 2

For the most recent calendar quarter for which complete data are available, for the liner services pertaining to the agreement and for each party, provide the names of each carrier and liner service, as well as:

	No. of Sailings	Total Vessel Capacity	Total Cargo Lift	Total Utilization %
Carrier A [name]				
Liner Service 1 [name]	##	#,###	#,###	##.##%
Liner Service 2	##	#,###	#,###	##.##%
Liner Service 3, Etc	##	#,###	#,###	##.##%
Carrier B				
Liner Service 1	##	#,###	#,###	##.##%
Liner Service 2	##	#,###	#,###	##.##%
Liner Service 3, Etc	##	#,###	#,###	##.##%
Carrier C, Etc				

Part 3

Narrative statement of any significant operational changes proposed to be implemented under the agreement and their impact on each party's liner services, ports of call, frequency of vessels calls at ports, and/or amount of vessel capacity deployment for each service pertaining to the agreement:

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### Section III

#### Part 1 - Market Share

Agreement-Wide U.S. Inbound (or Outbound)

Time Period: [Calendar Quarter and Year]

	TEUs [or other identified units]	Percent
Agreement Members' Market Share		
Carrier A [Name]	#,###	##.##%
Carrier B	#,###	##.##%
Carrier C	#,###	##.##%
Etc....		
Total Agreement	#,###	##.##%
Non-Agreement Members' Market Share		
Carrier A [Name]	#,###	##.##%
Carrier B	#,###	##.##%
Carrier C	#,###	##.##%
Etc....		
Total Non-Agreement	#,###	##.##%
 Total Trade	 #,###	 100%

#### Part 2 - Total Liner Cargo and Revenues

Agreement-Wide U.S. Inbound (or Outbound)

Time Period: [12-months]

	Total Revenue	TEUs [or other units, identified]	Average Revenue
Carrier A [Name]	\$	#,###	\$
Carrier B	\$	#,###	\$
Carrier C	\$	#,###	\$
Etc....			

Part 3

For each month of the same calendar quarter used in part 1 of this section, for each liner service operated by the parties to the agreement within the entire geographic scope of the agreement, provide:

Service Name:

Direction:

	No. of Sailings	Total Vessel Capacity	Total Cargo Lift	Total Utilization %	Carrier A Capacity	Carrier A Cargo Lift	Carrier B Capacity	Carrier B Cargo Lift	Etc	Third Party Capacity	Third Party Lift
Month 1###	#,###	#,###	##.##%	#,###	#,###	#,###	#,###	#,###	....	#,###	#,###
Month 2###	#,###	#,###	##.##%	#,###	#,###	#,###	#,###	#,###	....	#,###	#,###
Month 3###	#,###	#,###	##.##%	#,###	#,###	#,###	#,###	#,###	....	#,###	#,###
Quarter Total	###	#,###	##.##%	#,###	#,###	#,###	#,###	#,###	....	#,###	#,###

Part 4

Narrative statement of any significant operational changes that are anticipated or planned to occur after the agreement is scheduled to become effective that would impact any of the parties' liner services, ports of call, frequency of vessel calls at ports, and/or amount of vessel capacity deployment in any of the liner services operated by the parties to the agreement within the entire geographic scope of the agreement.

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**Section IV**

Contact Persons and Certification

Part 1(A)

Person(s) to contact regarding Information Form

(1) Name \_\_\_\_\_

(2) Title \_\_\_\_\_

(3) Firm Name and Business \_\_\_\_\_

(4) Business Telephone Number \_\_\_\_\_

(5) Business Fax Number \_\_\_\_\_

(6) Business Email Address \_\_\_\_\_

Part 1(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) Business Fax Number \_\_\_\_\_

(6) Business Email Address \_\_\_\_\_

Part 1(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.

Signature \_\_\_\_\_

Date \_\_\_\_\_

Name (please print or type) \_\_\_\_\_

Title \_\_\_\_\_

Relationship with parties to agreement \_\_\_\_\_

24. Revise Appendix B to part 535 to read as follows:

## **Appendix B to Part 535 — Monitoring Report Form and Instructions**

### **Monitoring Report Instructions**

1. All agreements between or among ocean common carriers identified in 46 CFR 535.702(a) must submit completed Monitoring Reports to the full extent required in sections I through III of this Report. Sections I and II must be completed in accordance with the authority contained in each agreement. Section III must be completed by all agreements subject to the Monitoring Report requirements. As applicable, complete each section of this Report in accordance with the specified format provided in FMC Form-151

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

3. For clarification of the agreement terminology used in this Report, the parties may refer to the definitions provided in 46 CFR 535.104. In addition, the following definitions shall apply for purposes of this Report: liner movement means the carriage of liner cargo; 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.

4. When 50 percent or more of the total liner cargo carried by all of the parties in the geographic scope of the agreement was containerized, the required data for each party shall be reported in TEUs. When 50 percent or more of the total liner cargo carried by all of the parties in the geographic scope of the agreement was non-containerized, the required data for each party shall be reported in non-containerized units of measurement. The unit of measurement for the non-containerized data must be specified clearly and applied consistently.

5. Where the geographic scope of the agreement covers both U.S. inbound and outbound liner movements, inbound and outbound data shall always be stated separately.

6. For purposes of this Report, the term 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 the liner services pertaining to the agreement or operated by parties to the agreement.

7. For purposes of this Report, the term a significant operational change means an increase or decrease in a party's liner service, ports of call, frequency of vessel calls at ports, and/or amount of vessel capacity deployment for a fixed, seasonally planned, or indefinite period of time. It excludes incidental or temporary alterations or changes that have little or no

operational impact. If no significant operational change was implemented or occurred for the quarter, it shall be noted with the term "none" in response.

8. When used in this Report, the terms "entire geographic scope of the agreement" or "agreement-wide" refer to the combined U.S. inbound trade and/or the combined U.S. outbound trade as such trades apply to the geographic scope of the agreement, as opposed to the term "sub-trade," which is defined for reporting purposes as the scope of all liner movements between each U.S. port range and each foreign country within the scope of the agreement. U.S. port ranges are defined as: (a) The Atlantic and Gulf, which includes ports along the eastern seaboard and the Gulf of Mexico from the northern boundary of Maine to Brownsville, Texas, 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 (b) the Pacific, which includes all ports in the States of Alaska, Hawaii, California, Oregon, and Washington, all ports in Guam, American Samoa, Northern Marianas, Johnston Island, Midway Island, and Wake Island.

## **Section I**

Section I applies to agreements identified in 46 CFR 535.702(a)(1) between or among three or more ocean common carriers 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 the following parts:

### **Part 1**

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

### **Part 2(A)**

For each month of the preceding calendar quarter, for the liner services pertaining to the

agreement and for each party, provide: (a) the name of each service; (b) the total number of sailings for each service; (c) the amount of vessel capacity made available for each service, as measured in terms of: (i) The total amount per service, (ii) the amount allocated to each party of the agreement, and (iii) the amount chartered to non-agreement parties; (d) the total amount of liner cargo carried on any vessel space counted in part (c) above; and (e) the percentage of utilization on any vessel space counted in part (c) above. For purposes of this Report, the percentage of utilization shall be calculated by dividing the amount of cargo carried in part (d) above by the corresponding amount of vessel capacity in part (c) above, which quotient is multiplied by 100.

#### Part 2(B)

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

the amount of vessel capacity offered in a liner service or a trade.

### Part 3

Excluding those changes already reported in part 2(B) of this section, provide a narrative statement of any other significant operational changes implemented under the agreement during the preceding calendar quarter and their impact on each party's liner services, ports of call, frequency of vessel calls at ports, and/or amount of vessel capacity deployment for each service pertaining to 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 authorizes any of the following authorities: (a) The discussion of, or agreement on, any kind of rate or charge; (b) the establishment of a joint service; (c) the pooling or division of cargo traffic, earnings, or revenues and/or losses; (d) the discussion of, or agreement on, any service contract matter. Parties to such agreements must complete the following parts.

### Part 1

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

### Part 2

For each month of the preceding calendar quarter and for each party, provide its total liner revenue, total liner cargo movement, and average revenue for its liner services within the entire geographic scope of the agreement. For purposes of this Report, total liner revenue means the total revenue in U.S. dollars of each party corresponding to the total cargo movement of its liner services within the geographic scope of 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 per-cargo unit quotient of each party's total revenue divided by its total cargo movement

### Part 3

For each month of the preceding calendar quarter, for each liner service operated by the parties to the agreement within the entire geographic scope of the agreement, provide: (a) The name of each service; (b) the total number of sailings for each service; (c) the amount of vessel capacity made available for each service, as measured in terms of: (i) The total amount per service, (ii) the amount allocated to each party of the agreement, and (iii) the amount chartered to non-agreement parties; (d) the total amount of liner cargo carried on any vessel space counted in part (c) above; and (e) the percentage of utilization on any vessel space counted in part (c) above. For purposes of this Report, the percentage of utilization shall be calculated by dividing the amount of cargo carried in part (d) above by the corresponding amount of vessel capacity in part (c) above, which quotient is multiplied by 100.

### **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.

FMC Form-151

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

**Section I**

Part 1

State the full name and FMC number of the agreement:

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FMC No.: \_\_\_\_\_

Part 2(A)

For each month of the preceding calendar quarter, for the liner services pertaining to the agreement and for each party, provide:

Service Name:

Direction: [US Inbound or Outbound]

	No. of Sailings	Total Vessel Capacity	Total Cargo Lift	Total Utilization %	Carrier A Vessel Capacity	Carrier A Cargo Lift	Carrier B Vessel Capacity	Carrier B Cargo Lift	Etc.	Third Party Capacity	Third Party Lift
Month 1###	#,###	#,###	##.##%	#,###	#,###	#,###	#,###	#,###	....	#,###	#,###
Month 2###	#,###	#,###	##.##%	#,###	#,###	#,###	#,###	#,###	....	#,###	#,###
Month 3###	#,###	#,###	##.##%	#,###	#,###	#,###	#,###	#,###	....	#,###	#,###
Quarter Total	###	#,###	##.##%	#,###	#,###	#,###	#,###	#,###	....	#,###	#,###

Part 2(B)

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

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Part 3

Narrative statement of any other significant operational changes implemented under the agreement during the preceding calendar quarter and their impact on each party's liner services, ports of call, frequency of vessel calls at ports, and/or amount of vessel capacity deployment for each service pertaining to the agreement:

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**Section II**

Part 1

State the full name and FMC number of the agreement:

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FMC No.: \_\_\_\_\_

Part 2 - Total Liner Cargo and Revenues

For the each month of the preceding calendar quarter and for each party, provide:

Agreement-Wide U.S. Inbound (or Outbound)

Time Period: [Month 1]

	Total Revenue	TEUs [or other units, identified]	Average Revenue
Carrier A [Name]	\$	#,###	\$
Carrier B	\$	#,###	\$

Carrier C	\$	#,###	\$
Etc....			

Time Period: [Month 2]

	Total Revenue	TEUs [or other units, identified]	Average Revenue
Carrier A [Name]	\$	#,###	\$
Carrier B	\$	#,###	\$
Carrier C	\$	#,###	\$
Etc....			

Time Period: [Month 3]

	Total Revenue	TEUs [or other units, identified]	Average Revenue
Carrier A [Name]	\$	#,###	\$
Carrier B	\$	#,###	\$
Carrier C	\$	#,###	\$
Etc....			

### Part 3 – Vessel Capacity and Utilization by Service

For each month of the preceding calendar quarter, for each liner service operated by the parties to the agreement within the entire geographic scope of the agreement, provide:

Service Name:

Direction: [US Inbound/US Outbound]

	No. of Sailings	Total Vessel Capacity	Total Cargo Lift	Total Utilization %	Carrier A Vessel Capacity	Carrier A Cargo Lift	Carrier B Vessel Capacity	Carrier B Cargo Lift	Etc. ....	Third Party Capacity	Third Party Lift
Month 1###	#,###	#,###	##.##%	#,###	#,###	#,###	#,###	#,###	....	#,###	#,###
Month 2###	#,###	#,###	##.##%	#,###	#,###	#,###	#,###	#,###	....	#,###	#,###
Month 3###	#,###	#,###	##.##%	#,###	#,###	#,###	#,###	#,###	....	#,###	#,###
Quarter Total	###	#,###	##.##%	#,###	#,###	#,###	#,###	#,###	....	#,###	#,###

**Section IV**

Contact Persons and Certification

Part 1(A)

Person(s) to contact regarding Monitoring Report

(1) Name \_\_\_\_\_

(2) Title \_\_\_\_\_

(3) Firm Name and Business \_\_\_\_\_

(4) Business Telephone Number \_\_\_\_\_

(5) Business Fax Number \_\_\_\_\_

(6) Business Email Address \_\_\_\_\_

Part 1(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.

Signature \_\_\_\_\_

Date \_\_\_\_\_

Name (please print or type) \_\_\_\_\_

Title \_\_\_\_\_

Relationship with parties to agreement \_\_\_\_\_

By the Commission.

Karen V. Gregory  
Secretary