



## II.

### Summary of the Comments

- It is agreed that as noted by the FMC, imposing a standard Monitoring Report requirement on all of the MTO conference and discussion agreements would be an unnecessarily broad requirement and is not necessary.
- It is also agreed that provisions for exempted marine terminal service agreements (MTSAs) found at 46 C.F.R. § 535.309, do not at this time require rescission, modification or amendment.
- From the NPRM it is not clear with regard to marine terminal operator agreements what would constitute “an agreement that arises from the authority of an effective agreement, but whose terms are not fully set forth in the effective agreement,” requiring filing and a 45-day review period. While the agency has explained that the suggested revision to 46 C.F.R. § 535.408(b)(3) has been proposed to expressly exclude activities undertaken pursuant to marine terminal agreements, it has not described the type of activity undertaken in furtherance of enumerated authorities in a filed agreement would require a subsequent agreement filing and 45-day review.
- As noted by the FMC, provisions for the treatment of requests for additional information (RFAs) pursuant to 46 C.F.R. § 535.606 do not need to be modified. However, proposed changes to 46 C.F.R. § 535.603 are not objectionable as long as the confidentiality contemplated is limited and that third-party comments remain for the most part available to the public.

### III.

#### **Purpose of the Agreements**

The PONYNJSSA became effective on December 6, 2007. The purpose of the PONYNJSSA is to permit its members to meet, discuss and agree on matters that relate to promoting environmentally-sensitive, efficient, and secure marine terminal operations in the Port of New York and New Jersey. The PONYNJSSA does not meet, discuss or agree on matters relating to MTSAs or the charges or fees covered under such agreements. During the term of the PONYNJSSA, the members have discussed matters related to reducing air emissions from cargo handling equipment, promoting the Port of New York and New Jersey as an attractive destination for cargo interests, enhancing marine terminal security, and providing the shipping community enhanced transparency in the cargo transportation process through a port-wide information portal system. These discussions have also involved issues with port and terminal congestion and potential remediating measures that might be implemented to address such congestion. Most recently, cyber security has become a topic of discussion as well. While the members of the PONYNJSSA have acted collectively under the authorities enumerated in their agreement, most of the activity spawned in agreement discussions have been implemented through independent actions.

The PAMTOA became effective on February 10, 2011. The purpose of the PAMTOA is also to permit its members to meet, discuss and agree on matters that relate to promoting environmentally-sensitive, efficient, and secure marine terminal operations in the Port of New York and New Jersey. In addition, the PAMTOA authorizes its members to assist the Port Authority of New York and New Jersey in implementing its Clean Air Strategy. This has been done through the multi-purposing of a port-wide RFID-based truck identification system created

by the members of the PONYNJSSA. The PAMTOA does not meet, discuss or agree on matters relating to MTSAAs or the charges or fees covered under such agreements.

#### IV.

#### **Submission of Marine Terminal Services Agreements**

The Agreements support the position of the FMC that imposing a standard Monitoring Report requirement on all of the MTO conference and discussion agreements would be an unnecessarily broad requirement. Such a standard that would have required all members of a discussion agreement to submit to the FMC their effective terminal services agreements and amendments thereto would have chilled the operation of agreements that address *inter alia* air emissions, security, and port congestion. These are areas of vital importance to marine terminal operators and their customers as well as the communities in which are ports are located and stakeholders in the international supply chain. The Agreements questioned the reasoning of the agency in seeking terminal services agreements from MTO members of discussion agreements that do not involve matters that pertain to the areas of service that would be the subject of a MTSA. *See* 49 C.F.R. § 535.309.

The Agreements would not support a future proposal that would require all MTO members of a discussion agreement, regardless of the authorities contained in such an agreement, to submit Monitoring Reports. Inasmuch as all discussion agreements are required to timely file minutes of their discussions with the FMC, the agency already has a mechanism to monitor the activities and discussions of these agreements.

That said, the Agreements support the agency's proposed amendment to 46 C.F.R. § 535.301, in that it recognizes the agency's authority to obtain additional information from agreement members when and if necessary for the agency to determine if an agreement's actions

are more likely to affect competition in the terminal services market. The Agreements understand and agree that the agency should have certainty as to when such information is to be produced.

V.

**Exempted Agreements**

It is the position of the Agreements that the current provisions for exempted MTSAAs at 46 C.F.R. § 535.309, do not at this time require rescission, modification or amendment.

VI.

**Activities That May Be Conducted Without Further Filings**

The Agreements have reviewed the agencies proposal that includes amending the language of 46 C.F.R. § 535.408(b)(3) by expressly limiting the filing exemption to ocean carrier agreements and simultaneously amending 46 C.F.R. § 535.402 by adding a second paragraph that contemplates the mandatory filing of an agreement that “arises from the authority of an effective agreement, but whose terms are not fully set forth in the effective agreement....” It is unclear as to what activities the agency is seeking to curtail through this potential amendment. The FMC has not articulated examples of what type of agreement arising from the authority of an effective agreement would be subject to the filing requirement and 45 day review period.

For example, if a MTO agreement already has authority to discuss and agree on extended or off-peak marine terminal operations, facility access control procedures, or a collective purchasing program for equipment or spare parts, and discussions and agreements on these issues have been recorded in the minutes of the agreement, what types, if any, of subsequent agreements would be required under a new 46 C.F.R. § 535.402(b)? Would the new § 402(b) require the filing of an agreement and a 45-day review period for:

- the specific extended hours, even when these hours could be subject to modification depending on utilization? Would the agency also require another agreement to be filed modifying a 7:00 p.m. extended gate to a 7:15 p.m. gate and subject that agreement to another 45-day waiting period?
- business rules that may be attendant with the implementation of a truck reservation system, when those rules may only outline the length of a particular appointment or the hours in a day that an appointment may be mandatory?
- each spare part or piece of equipment that may be purchased?

This is confusing because in general (except for the purchasing example) these are matters that would be the subject of a MTO schedule that would be effective upon publication. With regard to issues related to extended hours, if a MTO individually opted for providing extended hours, the MTO would not have to file its intention with the FMC and wait 45 days to implement the extended hours. Similarly, if an individual MTO opted to require reservations to access its facility, it may do so without such a filing and waiting period. Moreover, a MTO may choose to purchase spare parts or equipment without filing an agreement with the FMC.

If a filed and effective agreement enumerates an authority for an intended program or procedure, even if such a program or procedure is implemented collectively by its members, there is no need for the filing of what may be the agreement members' subsequent agreement on technical operational details related to the program or procedure. Promulgating such filing requirements would unduly burden MTOs and impede their ability to respond to rapidly emerging situations and business necessities. Any cost savings or operational efficiencies enjoyed by implementing such programs or procedures will be threatened by an overwhelming paperwork and regulatory burden. Moreover, this will erode the purpose of MTOs banding

together to establish agreements to give them the flexibility of implementing port-wide solutions to operational challenges. Such agreements bolster the purpose of the Shipping Act by enhancing the quality of transportation services provided and should not be threatened.

While the Agreements appreciate that the agency has oversight responsibilities and therefore must have an understanding of how agreements are using the authorities contained in their respective agreements, this responsibility should be weighed against creating a requirement for the filing of “every” subsequent agreement that may merely address routine operational matters of procedure promulgated pursuant to an authority enumerate in a filed and effective agreement. Perhaps the agency can strike a balance between what would be expected from an agreement that “fully sets forth” its terms and the need operational efficiency and flexibility and provide guidance in a statement accompanying a final rule.

The Agreements view the proposed amendment to 46 C.F.R. § 535.402 as unnecessary and redundant with the language that already appears in 46 C.F.R. § 535.408(a). Notwithstanding the suggestion that the agency publish a guidance statement along with the final rule, it is also recommended that the agency undertake a review of all existing discussion agreements and inform such agreements of what subsequent agreements may be required depending upon what programs or procedures the agreements are contemplating as reflected in the filed agreement and the agreement’s minutes.

## VI.

### **Regulations on Exempted Marine Terminal Services Agreements Should Remain Unchanged**

The Agreements support the agency’s decision not to amend 46 C.F.R. § 535.309. The provisions for exempted marine terminal operator service agreements at 46 C.F.R. § 535.309, do not at this time require rescission, modification or amendment. Moreover, the agency’s proposed

changes to 46 C.F.R. § 535.301(d), which addresses concerns about the agency's need for information regarding the competitive structure of the marine terminal services markets and its receipt of this information in a timely manner, is not objectionable.

## VI.

### **Requests for Additional Information/Public Information**

The Agreements agree with the agency's decision to maintain the *status quo* with respect to the treatment of requests for additional information (RFAIs) pursuant to 46 C.F.R. § 535.606. While the Agreements support the agency's proposed amendments to 46 C.F.R. § 535.603 pertaining to the confidentiality of third-party comments submitted regarding a filed agreement, there is concern that confidentiality may become the norm as opposed to limited exceptions. Making comments public encourages accuracy, and affords the parties to the agreement the opportunity to provide the Commission with their perspective on the issues raised. It also promotes dialogue between the agreement parties and the parties filing the comments.

## VII.

### **Conclusion**

The Agreements urge the Commission to modify its proposals in accordance with the foregoing comments.

Respectfully submitted,

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October 17, 2016