

Issued: April 21, 2016

FEDERAL MARITIME COMMISSION

46 CFR Part 535

DOCKET NO. 16-09

RIN 3072-AC65

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

AGENCY: Federal Maritime Commission.

ACTION: Direct final rule; and request for comments.

SUMMARY: The Federal Maritime Commission (FMC or Commission) amends its regulations relating to the method of filing Ocean Common Carrier and Marine Terminal Operator Agreements to provide for optional filing of these agreements through a new electronic filing system. This optional filing system is intended to facilitate more efficient filing, review, and publication of these agreements.

DATES: This rule is effective without further action on June 13, 2016, unless significant adverse comment is received by May 27, 2016. If significant adverse comment is received, the Federal Maritime Commission will publish a timely withdrawal of the rule in the Federal Register.

ADDRESSES: You may submit comments by the following methods:

- *E-mail:* secretary@fmc.gov. Include in the subject line: "Docket No. 16-09, 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, D.C. 20573-0001. *Phone:* (202) 523-5725. *E-mail:* secretary@fmc.gov.

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/16-09>.

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. For technical questions, contact Florence A. Carr, Director, Bureau of Trade Analysis. *Phone:* (202) 523-5796. *E-mail:* tradeanalysis@fmc.gov. For legal questions, contact Tyler J. Wood, General Counsel. *Phone:* (202) 523-5740. *E-mail:* generalcounsel@fmc.gov.

SUPPLEMENTARY INFORMATION:

On January 18, 2011, President Obama issued Executive Order 13563 (E.O. 13563) to emphasize the importance of public participation in adopting regulations, integration and innovation in regulatory actions, flexible approaches in achieving regulatory objectives, and ensuring the objectivity of any scientific and technological information and process in regulatory actions. E.O. 13563 requires executive agencies to develop a plan to periodically review their existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make such agencies' regulatory programs more effective and less burdensome in achieving the regulatory objectives. On July 11, 2011, Executive Order 13579 was issued to encourage independent regulatory agencies to also pursue the goals stated in E.O. 13563.

On November 4, 2011, the Commission issued its *Plan for Retrospective Review of Existing Rules* (Plan) and invited public comment on how it might improve the current regulations.¹ The Plan included a review schedule for the Commission's existing regulations, which was updated on February 13, 2013. Among the comments received in response to the Plan were the *Comments of Ocean Common Carriers* on May 18, 2012.²

¹ A copy of the Plan and comments filed in response to the Plan that are within the scope of this rulemaking have been placed in the docket.

² The commenting carriers consisted of a total of thirty ocean carriers participating in the following agreements active at that time: the fourteen members of the Transpacific Stabilization Agreement (TSA); ten members of the Westbound Transpacific Stabilization Agreement (WTSA); six members of the Central America Discussion Agreement (CADA); eleven members of the West Coast South America Discussion Agreement (WCSADA); five members of the Venezuela Discussion Agreement (VDA); three members of the ABC Discussion Agreement (ABCDA); six members of the United States Australasia Discussion Agreement (USADA); and, the three members of the Australia New Zealand United States Discussion Agreement (ANZUSDA). The carriers' recommendations with respect to agreements, with one exception, are being considered by the Commission under FMC Docket No. 16-04. See Advance Notice of Proposed Rulemaking, *Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984*, 81 FR 10188 (Feb. 29, 2016). The exception referenced is the subject of this rulemaking.

The carriers' comments included a request for the Commission to "adopt rules and procedures pursuant to which carrier and marine terminal operator agreements can be filed electronically." The carriers pointed out that "virtually all filings made with the Commission, other than agreement filings, are made electronically (e.g., agreement minutes, monitoring reports and guidelines, OTI license applications)" and noted that "[i]ronically, the Commission maintains an electronic library of agreements on its website, so these agreements are retained electronically in any event." While the carriers conclude that the electronic filing of agreements "would reduce the burden and expense of filing for the industry," the Commission notes that doing so would also streamline its internal business processes, thereby resulting in a more efficient regulatory process and expediting public access to agreement filings through the Commission's website. These benefits are consistent with Executive Order 13579.

Under the Commission's existing rules at 46 CFR 535.401, "a true copy and seven additional copies of the executed agreement" must be submitted in paper format to the Commission's Secretary during the regular business hours of 8:30 a.m. to 5:00 p.m., Monday through Friday. The agreement's filing must be accompanied by a letter of transmittal, and, where required, an original and five copies of the completed Information Form, also in paper format. To respond to the industry's request to reduce the regulatory burden associated with the filing of multiple copies of agreements and supporting documents in paper format, the Commission determined that automating the agreement filing process should be given priority.

The FMC's Office of Information Technology (OIT), in conjunction with the Bureau of Trade Analysis (BTA), commenced efforts in October 2015 to automate the process of filing agreements with the Commission. BTA met with various agreement filers during development to

ensure that the new system would not only provide a user-oriented electronic filing environment but also deliver more robust public search capabilities for the online agreement library based on a variety of filters. Further enhancement of the online agreement library's search capabilities is planned in the future.

Initial software development and associated testing to support the electronic agreement filing system has been completed. The Commission now plans to make this technology available as an optional method to file agreements and supporting documents. Use of the automated system will not be required, however, as parties may continue to submit agreements in paper format. Paper filings will be received and processed in the same manner as before.

Under the new electronic agreement filing system, supporting documentation previously submitted in paper form may also be appended electronically as part of the filing process. Validity checks incorporated into the automated filing process will allow the filer to verify Commission information regarding agreement parties, thereby ensuring a more accurate public online agreement library, as well as facilitating review and oversight of agreements by the Commission. The system may be accessed through the Commission's website at <http://www.fmc.gov> under Public FMC Databases/Agreement Notices and Library. Prospective filers may register for the electronic agreement filing system and obtain a login and password by following the instructions on the system's webpage. As with current practice, the public will have the ability to view all agreements in the online agreement library; however, the public will not be able to view the filer's letter of transmittal and Information Form, if any. In addition, the filing system is password-protected to ensure the security of information being collected, primarily in supporting documents,

and to appropriately restrict external filing permission to the agreement filer and its authorized filing agents.

The Commission's rules presently require that each agreement and modification filed must be signed by an official or authorized representative of each of the parties and that the original signature page(s) accompany the agreement's filing. The rules allow some measure of flexibility to filers by permitting faxed or photocopied signatures to accompany the agreement's filing if the copies are replaced with original signatures prior to the agreement's effective date. § 535.403(d). Many times, the individuals who sign an agreement are located overseas or are traveling and may be required to transmit a signature page electronically to filing counsel in order to expedite an agreement's filing, and consequently, its effectiveness. In such cases, agreement counsel submits a photocopy of the parties' signature pages with the agreement's filing, and must follow up by sending the original signatures by mail or courier to the Commission prior to the effective date.

While the Commission's rules presently require that the original signatures of the parties executing an agreement must be filed with the Commission, the Shipping Act of 1984 (the Act) 46 U.S.C. 40101 *et seq.*, provides only that "a true copy of every agreement...shall be filed with the Federal Maritime Commission" and permits the Commission to prescribe the form and manner in which agreements are filed. 46 U.S.C. 40302(a), (c). As the Act does not require the filing of the original agreement with the Commission, removing the parties' requirement to provide original signatures with an agreement's filing would eliminate an unnecessary regulatory burden. The Commission is, therefore, removing this requirement and will begin accepting photocopies and scanned electronic copies of the agreement parties' original signatures. The Commission is

similarly removing the requirement that transmittal letters accompanying agreement filings include an original signature.

Congressional Review Act

The rule is not a “major rule” as defined by the Congressional Review Act, codified at 5 U.S.C. 801 *et seq.* The rule will not result in: (1) an annual effect on the economy of \$100,000,000 or more; (2) a major increase in costs or prices; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies. 5 U.S.C. 804(2).

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the Chairman of the Federal Maritime Commission certifies that this direct final rule will not have a significant economic impact on a substantial number of small entities. The rule applies to 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.³ This rule implements an alternative electronic method for filing

³ See *FMC Policy and Procedures Regarding Proper Considerations of Small Entities in Rulemakings*, page 4 (February 7, 2003), from the website of the FMC at http://www.fmc.gov/assets/1/Page/SBREFA_Guidelines_2003.pdf.

agreements with the Commission that is optional for the industry. The current regulations require that agreements be filed with the Commission in paper form. The new electronic system should significantly reduce the burden and expense of filing on the industry. Further, in comments to the Commission's *Plan for the Retrospective Review of Existing Rules*, a majority of VOCCs specifically requested that the Commission implement an electronic system for filing agreements.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (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 and before making substantive or material modifications to a previously approved information collection. 44 U.S.C. 3507; 5 CFR 1320.5(a), (g). The information-collection contained in Part 535, including the agreement-filing requirements, have been approved by OMB and assigned OMB Control Number 3072-0046. The Commission is modifying this information collection by allowing electronic filing of agreements and expects that this change will reduce the paperwork burdens on regulated entities. The Commission will, however, continue to allow paper filing of agreements. Accordingly, this modification is neither substantive nor material. The expiration date for the Part 535 information collection is November 30, 2016, and the Commission will note the modification and any resulting changes to the burden hour estimate when it seeks an extension of the information collection later this year.

Direct Final Rule Justification

The Commission expects the amendments to be noncontroversial. Under the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(B), a final rule may be issued without notice

and comment when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. This rule provides an optional electronic method of filing agreements and supporting documents as a more flexible and less burdensome alternative for the regulated parties to those agreements, and maintains the present paper format filing procedures for filers that wish to continue utilizing the current method. The electronic agreement filing system was developed at the behest, in 2012, of thirty global ocean common carriers participating in the major rate discussion agreements filed with the Commission to relieve the regulatory burden of paper filings. Further, the requirement to include original signatures to agreements and transmittal letters, rather than photo- or electronic copies, burdens filers and appears to provide limited, if any, public benefit. Thus, the Commission has determined that providing an opportunity for comment is unnecessary.

Therefore, pursuant to 5 U.S.C. 553, notice and comment are not required and this rule may become effective after publication in the Federal Register, unless the Commission receives significant adverse comments within the specified period. The Commission recognizes that parties may have information that could impact the Commission's views and intentions with respect to the revised regulations, and the Commission intends to consider any comments filed. The Commission will withdraw the rule if it receives significant adverse comments. Filed comments that are not adverse may be considered for modifications to Part 535 at a future date.

If no significant adverse comment is received, the rule will become effective 15 days after the close of the comment period without additional action. The Administrative Procedure Act generally requires a minimum of 30 days before a final rule can go into effect, but excepts from this requirement rules that relieve a restriction. 5 U.S.C. 553(d)(1). Because this final rule

provides for an additional, optional method of filing agreements and removes the requirement that agreement filings and accompanying transmittal letters include original signatures, the rule falls within this exception.

List of Subjects in 46 CFR part 535

Freight, Maritime carriers, Reporting and recordkeeping requirements.

Regulatory Text

For the foregoing reasons, the Commission amends 46 CFR part 535 as follows:

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

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

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

2. Amend § 535.401 by revising paragraphs (a) and (b)(4) to read as follows:

§ 535.401 General requirements.

(a) All agreements (including oral agreements reduced to writing in accordance with the Act) subject to this part and filed with the Commission for review and disposition pursuant to section 6 of the Act (46 U.S.C. 40304, 40306, 41307(b)-(d)), must be submitted to the Commission

either in paper during regular business hours to the Secretary, Federal Maritime Commission, Washington, DC 20573, or electronically using the automated agreement filing system.

(1) *Paper filings.* Paper filings must include:

(i) A true copy and seven additional copies of the executed agreement;

(ii) Where required by this part, an original and five copies of the completed Information Form referenced at subpart E of this part; and

(iii) A letter of transmittal as described in paragraph (b) of this section.

(2) *Electronic filings.* (i) Electronic filings using the automated agreement filing system must be made in accordance with the instructions found on the Commission's home page, <http://www.fmc.gov>.

(ii) Electronic filings must include searchable Portable Document Format (PDF) copies of the following:

(A) A true copy of the executed agreement;

(B) Where required by this part, a completed Information Form referenced at subpart E of this part; and

(C) A letter of transmittal as described in paragraph (b) of this section.

(b) * * *

(4) Be signed by the filing party or on the filing party's behalf by an authorized employee or agent of the filing party. A faxed, photocopied, or scanned signature will be accepted.

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3. Amend § 535.403 by revising paragraph (d) to read as follows:

§ 535.403 Form of agreements.

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(d) Each agreement and/or modification filed must be signed by an official or authorized representative of each of the parties and must indicate the typewritten full name of the signing party and his or her position, including organizational affiliation. Faxed, photocopied, or scanned signatures will be accepted.

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4. Amend § 535.501 by revising the last sentence of paragraph (b) to read as follows:

§ 535.501 General requirements.

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(b) * * * In lieu of submitting paper copies, parties may complete and submit their Information Form in the Commission's prescribed electronic format, either on diskette or CD-ROM, or submit the Information Form using the automated agreement filing system in accordance with the instructions found on the Commission's home page, <http://www.fmc.gov>.

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By the Commission.

Karen V. Gregory
Secretary