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**FEDERAL MARITIME COMMISSION  
46 CFR PART 552**

**[DOCKET NO. 95-15]**

**AVAILABILITY OF THE ANNUAL FINANCIAL AND  
OPERATING STATEMENTS FILED BY DOMESTIC OFFSHORE CARRIERS**

**AGENCY:** Federal Maritime Commission.

**ACTION:** Notice of Proposed Rulemaking.

**SUMMARY:** The Federal Maritime Commission proposes amending its regulations governing the availability of the annual financial and operating statements filed by vessel-operating common carriers by water in the domestic offshore trades. Comments are sought on a proposal to allow access to the annual statements by the attorneys general of the non-contiguous states, territories, and possessions having ports in the trade served by the carrier. The proposed rule addresses a comment made in a prior proceeding by the State of Hawaii, and is intended to improve parties' access to the information while avoiding harm to a regulated carrier's competitive position.

**DATES:** Comments due [Insert date thirty (30) days after date of publication in the Federal Register].

**ADDRESS:** Comments (original and fifteen copies) to:

Joseph C. Polking, Secretary  
Federal Maritime Commission  
800 North Capitol Street, N.W.  
Washington D.C. 20573-0001  
202-523-5725

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:**

On September 5, 1995, the Federal Maritime Commission ("FMC" or "Commission") published a final rule in FMC Docket No. 94-07, *Financial Reporting Requirements and Rate of Return Methodology in the Domestic Offshore Trades* ("Docket 94-07"), which amended the provisions governing carriers' financial reporting requirements and rate of return methodology in the domestic offshore trades (60 *Federal Register* 46047). Among other things, the rule changed the method of determining the reasonableness of a carrier's return on rate base from the comparable earnings test to the before-tax weighted average cost of capital methodology ("BTWACC").

In comments on the proposed rule in Docket 94-07, the State of Hawaii ("Hawaii") argued that the proposed BTWACC methodology would require that all interested parties have access to complete and accurate information regarding a carrier's financing and capitalization. Hawaii pointed out that the comparable earnings test, which was previously required to be used, does not rely on company-specific data because it uses a cost of capital estimate based on the rate of return of U.S. manufacturing firms in general. However, under the BTWACC methodology, Hawaii noted that

carriers would be using company-specific data to compute their cost of capital and thus any meaningful rebuttal would require access to such information. Hawaii concluded therefore that: "The Commission's current ruling that a carrier's annual financial report need not be made available to all parties, places the parties at a disadvantage because it is impossible to present meaningful rebuttal testimony without a carrier's cost of capital data." (Hawaii Initial Comments at 5).

The Commission's current regulations require the domestic offshore carriers to file financial and operating data under two circumstances -- annually within 150 days after the close of the carrier's fiscal year and in support of any general rate increases. The annual statement of financial and operating data consists of a rate base exhibit and supporting schedules, an income account exhibit and supporting schedules, and a rate of return exhibit and supporting schedules. The annual statement is to be accompanied by a company wide balance sheet and income statement. The Commission's regulations, at 46 CFR 552.4(c), protect the carriers' annual reports from public disclosure and treats them as confidential information in the files of the Commission.

In support of general rate increases, domestic offshore carriers are required to file, pursuant to 46 CFR 552.2(f), the following material: an actual midyear rate base exhibit and supporting schedules for a twelve-month period commencing not more than fifteen months prior to the proposed increase; a projected midyear rate base exhibit and supporting schedules for a twelve-month period commencing on the first day of the month following the date on which the proposed increase will become effective; a projected income account exhibit and supporting schedules for the same period as the projected midyear rate base exhibit; actual and projected rate of return exhibits; and associated workpapers. In the event the general increase in rates is filed within six months of the end of the carrier's fiscal year, the regulated carrier may submit its annual report in lieu of the actual and

projected income account exhibit. In addition, Rule 67 of the Commission's Rules of Practice and Procedure, 46 CFR 502.67, requires the carrier to file, under oath, testimony and exhibits constituting its direct case. Both the material submitted pursuant to 46 CFR 552.2(f) and the testimony and exhibits submitted pursuant to Rule 67 (which includes the 46 CFR 552.2(f) material) are public.

The Commission has traditionally recognized that disclosing the information contained in the domestic offshore carriers' annual reports (FMC Forms 377 and 378) to third parties may cause harm to the regulated carrier's competitive position. However, given the changes to the rate of return methodology made in Docket 94-07, the Commission believes that Hawaii's statement merits further consideration. For example, the BTWACC methodology prescribes the use of a proxy group to determine the cost of common-stock equity for a company that does not issue its own common-stock equity, and requires selection criteria for proxy group members which are based on information that may be available only from the annual reports (*e.g.*, annual income in the trade). Further, proxy group selection would most probably require historical information beyond that accompanying a general rate increase filing. Even if a carrier were to include all historical information it used in choosing a proxy group, other historical annual report information might suggest a different proxy group selection.

The Commission has found that most federal and state regulatory agencies do not consider the regulated companies' annual reports to be confidential. On the federal level, both the Federal Energy Regulatory Commission and the Federal Communications Commission consider the annual financial and operating reports of the regulated companies as public information. Likewise, of those

state regulatory agencies requiring public utilities to file annual financial reports, the majority regard the contents of those reports to be public information.<sup>1</sup>

The Commission, therefore, is proposing to amend its rules to allow access to the annual reports by the attorneys general of noncontiguous states, commonwealths, possessions or territories having ports in the relevant trade served by the regulated carrier. The government officers and employees given access to the annual statements would be required to certify to the Commission that the information will not be disclosed to the public and will only be used in connection with analyzing the allowable rate of return for the regulated carrier in FMC proceedings. This should allow entities charged with protecting consumer welfare access to complete financial information concerning the carrier, while at the same time avoiding harm to the regulated carrier.

Commenters on this proposal are directed to specifically address the necessity of obtaining the information contained in the carriers' annual reports and whether that information may be obtained from other sources.

The Federal Maritime Commission certifies pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(n), that this rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small government jurisdictions. The rule is procedural only and will provide certain parties with more complete information upon which to base a protest under section 3 of the Intercoastal Shipping Act, 1933, 46 U.S.C. app. 845. This proposed rule does not contain a collection of information within

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<sup>1</sup> See "Table 59, Annual Accounting Report Forms," in *Utility Regulatory Policy in the United States and Canada Compilation 1992-1993*, National Association of Utility Regulatory Commissioners ("NARUC"), Washington, D.C., 1993, pp. 126-7.

the meaning of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, et seq., as implemented by regulations prescribed within 5 CFR Part 1320. Accordingly, OMB review is not required.

**List of Subjects in 46 CFR part 552**

Maritime carriers, Reporting and recordkeeping requirements, Uniform system of accounts.

Therefore, pursuant to 5 U.S.C. 553, sections 18 and 43 of the Shipping Act, 1916, 46 U.S.C. app. 817 and 841a, and sections 2 and 3 of the Intercoastal Shipping Act, 1933, 46 U.S.C. app. 844 and 845, Part 552 of Title 46, Code of Federal Regulations, is proposed to be amended as follows:  
**Part 552 -- FINANCIAL REPORTS OF VESSEL OPERATING COMMON CARRIERS BY WATER IN THE DOMESTIC OFFSHORE TRADES.**

1. The authority citation for Part 552 continues to read as follows:

**AUTHORITY:** 5 U.S.C. 553; 46 U.S.C. app. 817(a), 820, 841(a), 843, 844, 845, 845a and 847.

2. In section 552.4 a new paragraph (d) is added to read as follows.

**§ 552.4 Access to and audit of records**

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(d). The annual statements filed by the carriers with the Commission may be obtained from the Commission by the attorneys general of every noncontiguous State, Commonwealth, possession or territory having ports in the relevant trade that are served by the carrier, and the employees of such attorneys general, upon the submission of the following certification, under oath, to the Commission:

## CERTIFICATION

I, *(Name and title if applicable)*, of *(Full name of entity)*, having been duly sworn, certify that the annual statements of *(Name of Carrier)* will be used solely in order to prepare protests to the Federal Maritime Commission ("FMC") or to participate in FMC proceedings relating to *(Name of Carrier)* and that their contents will not be disclosed to any person who has not signed, under oath, a certification in the form prescribed, which has been filed with the Federal Maritime Commission, unless public disclosure is specifically authorized by an order of the Commission or the presiding officer in an FMC proceeding.

Signature: \_\_\_\_\_

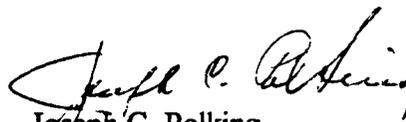
Date: \_\_\_\_\_

Signed and sworn before me this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_

Notary Public: \_\_\_\_\_

My Commission expires: \_\_\_\_\_

By the Commission.

  
Joseph C. Polking  
Secretary