

# ORIGINAL

(S E R V E D)  
( May 2, 2000  
(FEDERAL MARITIME COMMISSION;

## FEDERAL MARITIME COMMISSION

46 CFR PARTS 515, 520, 530 AND 535

[DOCKET NO. 99-10]

### OCEAN COMMON CARRIERS SUBJECT TO THE SHIPPING ACT OF 1984

AGENCY: Federal Maritime Commission

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission is amending its regulations implementing the Shipping Act of 1984 to clarify the definition of "ocean common carrier" to reflect the Commission's interpretation of the term. As a result, only common carriers that operate vessels in at least one United States trade will be subject to these rules.

DATES: This rule becomes effective [insert date 90 days after date of publication in the FEDERAL REGISTER]

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#### SUPPLEMENTARY INFORMATION:

##### BACKGROUND

The Federal Maritime Commission initiated this proceeding by Notice of Proposed Rule ("NPR") published in the Federal Register on June 25, 1999. 64 FR 34183. The NPR noted that the Commission

was proposing to amend several of its regulations to clarify the definition of "ocean common carrier" contained in section 3(16) of the Shipping Act of 1984 ("Shipping Act"), 46 U.S.C. app. § 1702(16), as amended by the Ocean Shipping Reform Act of 1998 ("OSRA"), P.L. 105-258, 112 Stat. 1902, to reflect the Commission's then-interpretation of that term. In essence, the proposed rule defined "ocean common carrier" to include only common carriers that operate vessels serving ports in at least one United States trade.

The NPR solicited comment on the proposed rule from the public, and the Commission received comments from: (1) the Ocean Carrier Working Group ("OCWG"); (2) Maersk, Inc.; (3) Samskip Hf ('Samskip') ; (4) the Council of European & Japanese National Shipowners' Associations ("CENSA"); (5) the Calcutta, East Coast of India and Bangladesh Conference and Waterman Steamship Corporation ("India Carriers");(G) the National Industrial Transportation League ("NITL") ; (7) the American International Freight Association & Transportation Intermediaries Association ("AIFA/TIA"); and (8) Ocean World Lines, Inc. ("OWL").

#### The NPR

The NPR noted that the Commission had previously proposed a new definition for the term "ocean common carrier" in the context of the rulemaking governing agreements which was undertaken to implement OSRA. Docket No. 98-26, Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984, 64 FR 11236, March 8, 1999. However, the Commission received only

two comments on that particular proposal and subsequently decided to provide the public an additional opportunity to comment through this proceeding. The NPR then stated that the heart of the matter was how to distinguish between ocean common carriers ("OCCs") and non-vessel-operating common carriers ("NVOCCs"). The distinction is significant under the Shipping Act because only OCCs can enter into and file agreements with the Commission and receive antitrust immunity therefor. In addition, only OCCs can offer service contracts to shippers, although NVOCCs can enter into service contracts as shippers.

The NPR conceded that at first glance the defining of an OCC as a "vessel operator" does not appear to be ambiguous. However, the Commission stated that its staff has encountered several complex situations in attempting to apply the term, e.g., where and when vessels operated and what type of vessels are employed. In this regard, the NPR noted that various bureaus have interpreted the Shipping Act to require that an OCC must operate a vessel calling at a U.S. port, and that if a carrier is an OCC in one trade, it should be considered an OCC for all U.S. trades. The proposed rule therefore codified this approach and stated:

Ocean common carrier means a common carrier that operates, for all or part of its common carrier service, a vessel on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker.

The NPR noted that this multi-trade approach avoids making interpretations as to a carrier's status on a trade-by-trade basis, which would be administratively impractical and might prompt a less efficient redeployment of vessels. The proposal was also intended to clarify that companies that operate vessels solely outside the U.S. are not deemed to be OCCs. The NPR suggested that the proposal was consistent with legislative intent that a "vessel operator" be one whose vessels call at U.S. ports and all other common carriers should be classified as NVOCCs.

The NPR further stated that if the definition of OCC included carriers that operate vessels only in foreign-to-foreign trades, it could expand the scope of antitrust immunity and also remove certain carriers from NVOCC financial responsibility requirements in U.S. trades even though they have no vessels or assets in the U.S. Lastly, the NPR concluded, based on principles of statutory construction, that when Congress used the term "vessel" in the definition of OCC, it likely was referring to those vessels specified in the definition of "common carrier," i.e., those that operate on the high seas between the U.S. and a foreign country.

COMMENTS ON PROPOSED RULE

A. OCWG

The OCWG agrees with the Commission that the distinction between OCCs and NVOCCs is significant. It also supports continuation of the Commission's past practice that a common carrier that operates a vessel in one U.S. trade is an OCC for all

U.S. trades. It contends that this practice is consistent with the Shipping Act and, as a practical matter, has worked well in the past, presenting no problems.

The OCWG submits that the proposed rule would require members of vessel sharing agreements ("VSAs") to deploy vessels in the U.S. solely to meet regulatory requirements, something the Commission has indicated it wishes to avoid, citing the NPR at 5. The OCWG asserts that various types of VSAs have grown significantly, and offer more efficient and frequent service at lower cost. It contends that it is possible, for a variety of operational factors, that the parties may decide that all of the vessels of a member be deployed in non-U.S. trades and it will only serve the U.S. via the vessels of its fellow members. The OCWG concludes that such a carrier would not be considered an OCC and would have to withdraw from the U.S. portion of the agreement or restructure its service.

The OCWG therefore suggests a modified definition. It would allegedly preserve the ability of VSAs to function efficiently, while at the same time maintaining a distinction between carriers that commit assets to a service in U.S. trades and those that do not.

Next, the OCWG argues that the proposed definition should not change the applicable law regarding transshipment agreements. It contends that for over 50 years the Commission has held that a person may be an OCC, within the meaning of the Shipping Act and its predecessor legislation, without having a vessel call directly

at a U.S. port, citing Restrictions on Transshipment at Canal Zone, 2 U.S.M.C. 675 (1943). It notes further that in adopting OSRA, Congress did not change the statutory definition of "common carrier" and contends, therefore, that there is no statutory basis for the change in law being proposed by the Commission.

In addition, the OCWG maintains that the proposed change would overturn longstanding Commission precedent that a carrier providing a portion of a through vessel service to or from the U.S. qualifies as an OCC even though its vessels do not call at a U.S. port, citing Transshipment & Apportionment Agreements from Indonesian Ports to U.S. Atlantic & Gulf Ports, 10 F.M.C. 183 (1964); and Transshipment and Through Billing Arrangements Between East Coast Ports of South Thailand and U.S. Atlantic and Gulf Ports, 10 F.M.C. 201 (1966). These carriers therefore urge the Commission to clarify in the supplemental information that a common carrier offering a through bill of lading to or from the U.S. that operates a vessel on which part of the service is provided meets the definition of OCC, even if its vessels do not call directly at a U.S. port. The OCWG further notes that these carriers would be subject to tariff publication and other regulatory requirements of the Shipping Act and would maintain the distinction between carriers that commit assets to a service to or from the U.S. and those that do not. Lastly, the OCWG argues that the proposed approach would have the effect of removing all transshipment

agreements from the scope of the Commission's jurisdiction and require the Commission to repeal 46 C.F.R. § 535.306.

B. Maersk

Maersk observes that the Commission's proposed definition would exclude feeder operators providing foreign-to-foreign transportation from the definition of OCC. It suggests that the final rule should accommodate such activity. In addition, Maersk believes that a carrier signatory to a vessel sharing agreement ("VSA") should be considered an OCC when another carrier participating in the agreement contributes ships making U.S. port calls.

C. Samskip

Samskip, a self-defined vessel-operating common carrier, argues that the proposed rule overturns Commission precedent that carriers providing a portion of vessel service to or from the U.S. qualify as OCCs even though their vessels do not actually call at U.S. ports. It suggests, therefore, that the supplemental information to the final rule state that a common carrier which offers a through bill of lading and operates a vessel on which part of the service is provided is an OCC, even if the vessels it operates do not call directly at a U.S. port. Lastly, Samskip urges the Commission to adopt a definition of OCC that provides that a common carrier that becomes an OCC by virtue of carriage in a transshipment situation should be considered an OCC for purposes

of entering into slot chartering and vessel space sharing agreements with other OCCs.

D. CENSA

CENSA supports that portion of the proposed rule that states that a carrier operating a vessel in one U.S. trade is an OCC for all U.S. trades. However, CENSA believes that the requirement that a carrier must have at least one vessel calling at a U.S. port may exclude two categories of carriers - those involved in VSAs and transshipment arrangements.

CENSA contends that most OCCs are parties to one or more forms of VSAs - space charters, slot charters, and alliances - many of which are global in scope. CENSA submits that it is possible that a VOCC member of a VSA will deploy its vessels in non-U.S. trades, but will serve the U.S. via the vessels of the agreement members. CENSA believes that under the proposed definition such a carrier would not be an OCC and would consequently have to withdraw from the U.S. portion of the agreement or restructure its service to have a vessel call at a U.S. port. It suggests amending the definition to include a VOCC that contributes vessels to a VSA.

CENSA further asserts that longstanding Commission precedent holds that carriers that provide a portion of vessel service to or from the U.S. qualify as OCCs even though their vessels do not call at U.S. ports. CENSA suggests that there is no need to overrule this precedent and that Congress is presumed to have been aware of it when it adopted the definition of "common carrier" in OSRA.

E. India Carriers

The India Carriers contend that the proposed rule would classify a carrier which operates oceangoing vessels as an NVOCC, if the vessels did not call at U.S. ports. They believe that this contradicts the definition of NVOCC in the Shipping Act - i.e., a common carrier that does not operate the vessels by which the ocean transportation is provided. They further submit that an OCC that serves the U.S. trades by slot-chartering space on another carrier's vessels, but issues its own bills of lading, would be held to be a "shipper" under the proposed definition. This, they argue, could confuse the traditional liability relationship between shipper and carrier under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. §§ 1310-1315.

The India Carriers also argue that the proposed rule would exclude carriers that operate vessels as only part of their U.S. service, thereby overturning longstanding precedent. In addition, they contend that the rationalization of vessel space through various cooperative agreements allows carriers to provide service more efficiently and at a reduced cost. The proposed rule allegedly might prompt carriers to redeploy vessels solely to satisfy a regulatory requirement.

The India Carriers note that vessels operating under slot charters or other VSAs are presently subject to the Commission's regulatory requirements, including that they publish tariffs. They also contend that FMC or court judgments could be enforced by

requiring carriers who offer through service but do not call at U.S. ports to maintain a bond or other guarantee similar to that required of NVOCCs.

F. NITL

NITL supports the interpretation that a carrier that operates a vessel in a single trade is an OCC in all trades. It maintains that the plain language of the statute does not require a trade-by-trade analysis and to do so would lead to inefficiencies. NITL is concerned, however, about the exclusion of carriers that do not offer direct port calls but instead offer indirect ocean transportation by way of VSAs or similar arrangements.

NITL asserts that the proposed definition is narrower than the statutory definition, which simply defines an OCC as a "vessel-operating common carrier" and does not restrict the trade lanes in which the vessel can operate. NITL contends that there is no support for the Commission's assertion that the "vessel" in the definition of OCC was likely the vessels specified in the definition of "common carrier." NITL further states that under that definition a common carrier does not need to operate a vessel; it must merely "utilize" a vessel in U.S. trades for part or all of the transportation. It concludes that the "other part" of the transportation can be wholly outside the U.S., i.e., foreign-to-foreign. It further contends that the plain language of the statute, unchanged by the passage of OSRA, does not restrict the

provision of OCC service to only those carriers that make direct calls at U.S. ports.

NITL also finds the proposed definition inconsistent with the policy objective of OSRA, particularly section 2(4), which requires the FMC to administer the law in a manner that promotes competitive and efficient ocean transportation services and relies to a greater extent on the marketplace. It notes that carriers may decide that the U.S. market is more efficiently and economically served through a VSA and claims that the Commission's narrow definition of OCC would prevent some VOCCs from offering such services to shippers through service contracts.

Ultimately, NITL believes the FMC should maintain the existing statutory definition of OCC in its regulations and should broadly construe it. It contends that there is nothing in the Shipping Act or OSRA that indicates that Congress intended a more narrow definition.

G. AIFA/TIA

AIFA/TIA supports the proposed definition as providing necessary, clear, and precise guidance to the ocean transportation industry. It notes that the definition of "common carrier" in section 3(6) of the Shipping Act refers to a person who provides transportation by water and utilizes a vessel for all or part of that transportation, and that an OCC is defined simply as "a vessel-operating common carrier." AIFA/TIA submits that the Commission should put these two definitions together and issue a

statement that an entity that otherwise meets the definition of common carrier and operates a single vessel on a single route between a single U.S. port and a single foreign port, over either the high seas or the Great Lakes, must be treated as an OCC for all of its operations in U.S. trades. This interpretation would allegedly extend the status of OCC to the largest possible universe of operators.

AIFA/TIA also does not object to proposals that carriers involved in nonexclusive transportation agreements also should be accorded OCC status even if they have no operations directly between a U.S. and foreign port.

H. OWL

OWL, one of the largest NVOCCs in the world, proposes a significant change in the traditional carrier/shipper relationship between VOCC and NVOCC. Instead of obtaining space from a vessel owner by a service contract, OWL presents a scenario in which an NVOCC would obtain space via a slot charter with a VOCC. Under such circumstances, OWL argues that the NVOCC would no longer be a shipper, vis-a-vis the VOCC, and would instead be a co-venturer, who should likewise be permitted to hold itself out to the public as an OCC in the trade lanes. OWL thus suggests a bifurcated approach to the definition of OCC: (1) the Commission's multi-trade approach for vessel operators in one or more trade lanes; and (2) a trade-by-trade approach for NVOCCs slot chartering with VOCCs.

OWL's proposal is premised on the assumption that a slot charter between a VOCC and an NVOCC provides the NVOCC with sufficient operational interest or nexus in the voyages to warrant classification as an OCC in that trade. If the Commission decides otherwise, then OWL asserts that the Commission should not allow a VOCC in one trade to become a VOCC in another by virtue of a slot charter. At the very least, OWL submits that the FMC should set out guidelines similar to those recently adopted by the U.S. Customs Service ("Customs") which require a slot or time-chartering common carrier to have significant responsibility or involvement in the actual operation of the vessels before being considered a VOCC.

OWL concedes that slot charters would be inherently risky for Nvoccs, but it is willing to face those risks in order to be able to offer service guarantees (i.e., service contracts) to its underlying shipper clients. It contends further that the enhanced competition of new entrants would outweigh any possible adverse impact of possibly broadening the scope of antitrust immunity. OWL also believes that the Commission's concerns about its and shippers' ability to arrest or attach a vessel are unfounded. It suggests that the best way to protect shippers is by requiring adequate insurance or a surety bond, such as it already possesses.

OWL contends that there is no statute, code or policy that would prohibit it from obtaining space on vessels by means of space charters, and the fact that such space charters are not within the scope of the Shipping Act does not mean they are prohibited. In

this regard, OWL references a decision of the European Commission ("EC") relating to the Trans-Atlantic Conference Agreement ("TACA"). Commission Decision of 16 September 1998 Relating to a Proceeding Pursuant to Articles 85 and 86 of the EC Treaty. (Case No. I/35.134) ("EC Decision"). That decision discussed two types of NVOCCs -- (1) those that operate vessels in another trade, and (2) those that do not operate vessels anywhere. The EC stated that neither type competes with VOCCs in terms of quality of service, but the first is able to compete on price. OWL further asserts that the EC Decision recognizes three types of common carriers: (1) a VOCC in the trade; (2) VOCCs in another trade; and (3) NVOCCs. It submits that the critical distinction is not that the second owns vessel in another trade, but that it has the ability to compete with VOCCs on price through its space charter arrangements. OWL seeks this ability to compete on price by means of space charters and be deemed an OCC.

OWL further contends that the term "vessel operator" is growing increasingly ambiguous in light of vessel sharing and consortia agreements. It submits that the Commission has not faced the difficult question of what degree of involvement is required to be considered a vessel operator and has instead taken a rudimentary approach of defining a VOCC as a common carrier that operates a vessel somewhere in the U.S.

OWL notes that Customs has struggled with the definition of VOCC for the past 25 years in the context of the Sixth Proviso to

the Jones Act, 46 U.S.C. app. § 883, that exempts coastwise movements of empty containers owned or leased by the "owner or operator" of a vessel transporting those containers for its own use in the foreign commerce of the U.S. In this regard, Customs has issued several rulings dealing with carriers involved in slot charter agreements. In 1977, Customs purportedly issued a ruling holding that a time charterer was not a vessel operator and, in 1983, expanded this position to slot charterers. In that case, Customs allegedly looked at one trade lane without reference to status in other lanes. In 1999, Customs reviewed a joint service agreement between Italian Line and d'Amico Line. It determined that both were VOCCs because they shared operational control under the agreement.

#### THE FINAL RULE

##### General discussion

For the reasons set forth below, and in full consideration of all of the comments, the Commission has decided to adopt the proposed rule as the final rule. As a result, the term "ocean common carrier" will include only those common carriers who actually operate a vessel in at least one United States trade. In addition, if a common carrier is an ocean common carrier in one U.S. trade, it can act as an ocean common carrier in all U.S. trades.

This decision is fully supported by a straightforward reading of the relevant definitions contained in the Shipping Act. Section

3(16) of the Shipping Act defines an "ocean common carrier" as "a vessel-operating common carrier." And, section 3(6) of the Shipping Act defines a "common carrier", in part, as:

. . . a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that -

(A) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and

(B) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country . . . .

When these two definitions are read together, it is logical to conclude that the vessels operated by an ocean common carrier are those referenced in the common carrier definition, i.e., those "operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country."

The Commission recognizes that the definition of common carrier refers to one who "utilizes, for all or part of that transportation" a vessel operating between the U.S. and a foreign country. Congress employed the word "utilize" so that the definition of common carrier could encompass both ocean common carriers and NVOCCs; the very definition of ocean common carrier as "vessel-operating common carrier" indicates that Congress intended ocean common carriers actually to operate, not merely utilize, vessels. The reference to "all or a part of the transportation" simply reflects the fact that a common carrier can offer port-to-

port transportation or point-to-point through transportation, using inland carriers for the latter.

The final rule is also consistent with Congress' intent to delineate between ocean common carriers and NVOCCs. In adopting the Shipping Act, Congress clearly wanted to distinguish between those common carriers that operate vessels and those that do not. The former are ocean common carriers and the latter are NVOCCs. As the House Committee on Merchant Marine and Fisheries noted with respect to H.R. 1878:

The Shipping Act does not contain a definition of "non-vessel-operating common carrier." One is added to this bill so that the distinction may be made between those carriers that operate vessels and those that do not. Both types are included in the term "common carrier."

The term "ocean common carrier" is based on the definition of "common carrier by water in foreign commerce" in section 1 of the Shipping Act with the added provision that the carrier must operate the vessel providing the transportation by water.

H.R. Rep. No. 53, 98<sup>th</sup> Cong., 1<sup>st</sup> Sess. 29 (1983) ("House Report"). See also, S. Rep. No. 3, 98<sup>th</sup> Cong., 1<sup>st</sup> Sess. 20 (1983) ("Senate Report"). In addition, Congress wanted to ensure that carriers operating solely through ports of contiguous nations not be included in the definition of "common carrier." See, House Report at 29; Senate Report at 19. Congress' concern not to establish the Commission's jurisdiction over carriers operating through ports in countries contiguous to the United States reflects its overall determination not to expand the Commission's jurisdiction, and with

it, the conferring of antitrust immunity, to carriers operating solely between foreign ports.

As noted in the preamble to the NPR, Congress viewed vessel operators as those whose vessels call at U.S. ports and classified all other common carriers in U.S. commerce as non-vessel-operating common carriers. For example, in its report on the Shipping Act, the Senate Commerce, Science, and Transportation Committee observed:

The Committee strongly believes that it is in our national interest to permit cooperation among carriers serving our foreign trades to permit efficient and reliable service. . . . Our carriers need; a stable, predictable, and profitable trade with a rate of return that warrants reinvestment and a commitment to serve the trade; greater security in investment . . . .

Senate Report at 9. We continue to believe that Congress intended to provide antitrust immunity and other special privileges and protections only to those carriers that have made the financial commitment to provide vessel service in United States trades.

The importance of the distinction between OCC and NVOCC was noted in the preamble to the proposed rule: an OCC can be a party to agreements filed with the Commission and receive antitrust immunity therefor, and can enter into service contracts with shippers. An NVOCC can do neither. Moreover, NVOCCs are subject to a financial responsibility requirement, with foreign NVOCCs subject to higher amounts under the scale promulgated by Commission regulation. Thus, there is ample incentive for NVOCCs to characterize themselves as OCCs, and this could inure to the

detriment of their shipper customers who would otherwise have been protected by an NVOCC's financial responsibility.

The Commission continues to be concerned about the effect of the definition of ocean common carrier on the scope of antitrust immunity envisioned by Congress under the Shipping Act. If the definition of OCC somehow included carriers that operated vessels only in foreign-to-foreign trades, this could substantially expand the scope of antitrust immunity beyond that contemplated by Congress. In this regard, we note the longstanding judicial policy of narrowly construing antitrust exemptions. See, Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973).

#### Vessel Sharing Arranaements

Several of the commenters (Maersk, CENSA, OCWG, India Carriers and NITL) suggest that the definition of OCC should be extended to include shipping lines who are parties to VSAs serving U.S. ports but who themselves do not call at U.S. ports. While the term VSA is undefined by the commenters, they suggest it is virtually any cooperative arrangement among OCCs. These commenters note that VSAs have grown over the years and are likely to continue to grow. These arrangements often permit carriers to offer more efficient and frequent service to the shipping public and at a lower cost. The OCWG further contends that a variety of operational and other factors will dictate how a member of a VSA will deploy its vessels in non-U.S. trades and that such a carrier may choose to serve U.S. trades solely with vessel space obtained on its partners' ships.

Some commenters suggest that the proposed definition could discourage the formation of VSAs or prevent the parties from maximizing the benefits of such cooperation by redeploying vessels out of U.S. trades. Maersk, CENSA and the OCWG thus propose an exception to the proposed definition for a vessel operating common carrier that contributes vessels to a VSA that serves the U.S. NITL likewise believes that VSAs should be encouraged, but suggests that this could be accomplished simply by maintaining the existing statutory definition and by broadly construing it. Lastly, OWL argues that if the Commission does not adopt its proposal concerning NVOCC space chartering, then parties to VSAs should be considered OCCs only if they have significant responsibility or involvement in the actual day-to-day operations of the vessels.

While the intended benefit of the exception urged by some of the commenters is to facilitate formation and operation of efficient VSAs, there are several problems with this approach. First, it appears to address a mostly theoretical concern. Commenters do not identify, nor is the Commission aware of, any instances where entities are planning to operate major VSAs with parties who are not in the U.S. trades, or where current, vessel-operating members of VSAs are contemplating withdrawing vessel service from U.S. trades and proposing to serve the U.S. only through space-sharing arrangements with fellow VSA members. In addition, this type of arrangement would expand the reach of antitrust immunity well beyond that envisioned by Congress when it

recently passed OSRA. Since 1984, the only carriers that could enter into agreements subject to the Act and receive antitrust immunity were "ocean common carriers." The inclusion of VSA participants in the OCC definition would effectively confer antitrust immunity to carriers who do not make a commitment to serve the U.S. trades by operating their own vessels.

In addition to these very serious policy-based concerns, the carriers' proposal raises other technical or legal problems, and may generate further confusion or ambiguity. Since the term VSA is undefined, but seems to include an almost unlimited range of carrier relationships, the proposed exemption would appear to encompass a broad and indefinite class of foreign companies. Also, it refers to a vessel sharing agreement that "operates" vessels. However, VSAs do not collectively operate vessels - their individual carrier members do so. Moreover, if the members are subject to an arrangement that covers more than the U.S. trades, those non-U.S. portions of the arrangement would not be in the VSA and filed with the Commission.<sup>1</sup> The Commission could be left unable to determine the full extent of any such arrangement or ascertain whether the carrier involved is a vessel operator in some

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<sup>1</sup> In Transpacific Westbound Rate Agreement v. Federal Maritime Comm'n, 951 F.2d 950 (9th Cir. 1991), the court upheld the Commission's decision that it did not have jurisdiction over foreign-to-foreign portions of agreements that also had U.S.-to-foreign portions. As a result, foreign-to-foreign portions of agreements are generally not filed with the Commission, even for informational purposes.

non-U.S. trade, and not an NVOCC or some other entity unlawfully seeking VOCC status. Lastly, this proposal provides no protection to the shipping public who might use the services of such a carrier in its U.S. service. The carrier would have no attachable assets in the U.S. and might not have an agent for service of process in the U.S. to receive the claims of injured parties. This too would appear to contravene OSRA's general objective of providing more, not fewer, protections to U.S. interests utilizing foreign entities, as reflected in the strengthened ocean transportation intermediary ("OTI") and controlled carrier provisions, for example.

For the reasons stated above, the Commission is not adopting the carrier proposal concerning VSAs. This does not mean that a VSA member without ships calling at a U.S. port would be precluded from offering a common carriage service to the U.S. However, it would simply have to offer its service as an NVOCC. It could then enter into service contracts with OCCs, but could not offer its own service contracts or fix rates with other vessel operators in a trade.

The Commission is fully cognizant of the new policy objective added to the Shipping Act by OSRA - i.e., promoting the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace. The Commission further believes that there may be arrangements between common carriers that offer more efficient and

rationalized services, while at the same time providing shippers with more service options and lower costs for their ocean transportation, and that some of these arrangements may be precluded by the final rule as a result of specific statutory constraints limiting the Commission's flexibility in interpreting the Shipping Act. We appreciate commenters' arguments regarding efficient operations. We fully support and wish to encourage arrangements and operations that enhance efficiency and competition. However, we do not think it appropriate to adopt an overly broad exception to address what, to date, is only a hypothetical problem. We would remind the carriers that the Commission would, as always, give serious consideration to any petition for rulemaking, reconsideration of this rule, or an exemption.

#### Transshipment Arrangements

Transshipment agreements are arrangements between ocean common carriers by which one carrier serving a port of origin and the other carrier serving a port of destination provide transportation between such ports via an intermediate port at which the cargo is transferred from one carrier to the other. See 46 C.F.R. § 535.306(a). Nonexclusive transshipment agreements are exempt from the filing requirements of the Shipping Act, 46 C.F.R. §

535.306(b),<sup>2</sup> but exclusive transshipment agreements must still be filed with the Commission.

Several commenters have raised concerns about the effect of the proposed rule on the status of vessel operator parties to transshipment agreements who do not directly serve the United States. They contend that the rule would overturn longstanding Commission precedent that such carriers are considered to be OCCs. As a result, Maersk has proposed an additional exception to include feeder operators in the rule, while Samskip and the OCWG suggest that the Commission can address the issue in the supplemental information to the final rule without further amending the actual definition.

Beginning in 1943, in the Canal Zone case, the Commission's predecessor found that ocean carriers moving cargo from Colombia or Ecuador to the Canal Zone and then transferring that cargo to carriers moving it to the U.S., under through bills of lading, were "engaged in the transportation by water of property between the United States and a foreign country" and consequently were "common carriers by water" subject to the Shipping Act, 1916. This position was reaffirmed and further explicated by the Commission in 1966, in the two Transshipment Cases. In the first case, the Commission found carriers moving cargo from Indonesian outports to

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<sup>2</sup> Nonexclusive transshipment agreements do not prohibit either carrier from entering into similar agreements with other carriers.

the U.S. under a through bill of lading who transshipped the cargo at a base port to be common carriers by water, and stated:

Where there exists a unitary contract of affreightment such as a through bill of lading by which two or more carriers or conferences of carriers hold themselves out to transport cargo from a specified foreign port to a point in the United States with transshipment at one or more intermediate points from one carrier to another, each of the carriers so involved is "engaged in" transporting cargo by water from a foreign country to the United States.

10 F.M.C. at 191. The Commission reached a similar conclusion in the second Transshipment case, 10 F.M.C. 201 (1966), where carriers moving cargo from Thailand to Singapore were also held to be subject to the 1916 Act.

The Commission does not believe that these cases are controlling today. The Transshipment cases were decided under the 1916 Act, which defined "common carrier by water in foreign commerce" to mean "a common carrier engaged in the transportation by water of passengers or property between the United States . . . and a foreign country." When Congress enacted the Shipping Act it chose different language to define "common carrier" in section 3(6), 46 U.S.C. app. § 1702(6), and separately defined "ocean common carrier" and "non-vessel-operating common carrier." In light of the fact that the Commission decided the Transshipment cases prior to the statutory distinction being drawn between NVOCCs and OCCs, the Commission finds that the Transshipment cases are non-controlling as to these issues and declines to adopt the commenters' recommendations with regard thereto. As noted in the

House Report, the difference between a "common carrier by water" and an "ocean common carrier" is that the latter has "the added provision that the carrier must operate the vessel," a significant distinction. Thus, the Transshipment cases are probably controlling as to whether someone is a "common carrier," but irrelevant to "ocean common carrier" status.

#### Avoidance of OTI Responsibilities

The NPR raised concerns about permitting vessel operators in foreign-to-foreign trades to be considered OCCs in U.S. trades by virtue of VSA or transshipment arrangements. In particular, it noted that this could remove certain companies from the scope of the NVOCC bonding requirement even though they have no vessels or assets in the U.S. that can be attached to satisfy a Commission or U.S. court judgment. NPR at 6. As noted earlier, there is a very strong incentive under the Shipping Act, as modified by OSRA, for NVOCCs to want to be considered OCCs. They can then offer confidential service contracts to their shipper customers and avoid the costs of maintaining a bond as required by the Act and the Commission's regulations. Some NVOCCs are likely to engage in complex machinations to be considered OCCs under some of the proposals suggested by certain commenters. This is not some idle threat or hypothetical fear - even before passage of OSRA many

NVOCCs were simply holding themselves out as OCCs.<sup>3</sup> Now, post-OSRA, a review of the carriers holding themselves out as VOCCs on the Commission's web page reveals that many of these carriers may well be NVOCCs, a matter for probable enforcement action. In addition, it appears that some carriers that may have at one time served U.S. ports with their own vessels are continuing to hold themselves out as OCCs even though they have withdrawn these vessels from service.

#### Multi-trade Approach

Almost all of the commenters support the Commission's multi-trade approach to determining OCC status - if a carrier is an OCC in one U.S. trade, it will be considered an OCC for all U.S. trades. NITL suggests that this approach is supported by the plain language of the statute. The OCWG notes that this is simply a continuation of past Commission practice and avoids having to make status determinations on a trade-by-trade basis. It further argues that making such determinations on a trade-by-trade basis would be impractical and inefficient. As reflected by the endorsement of the commenters, the Commission's position in this regard is a sound one, and the Commission will continue the multi-trade approach to determining OCC status in the final rule.

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<sup>3</sup> In Docket No. 98-31, Publication of Inactive or Inaccurate Ocean Common Carrier Tariffs, order served May 19, 1999, the Commission found that 13 NVOCCs operating in the Far East trades held themselves out to be VOCCs.

OWL's Proposal

OWL's proposal to consider NVOCCs who space charter from VOCCs to be considered OCCs on a trade-by-trade basis is most problematic. At the very least, such a proposal is outside the scope of the proposed rule and would require additional notice and comment were the Commission inclined to pursue such an approach. But, more importantly, OWL's proposal does not appear to be a proper matter for a rulemaking proceeding. OWL is not asking that the Commission explicate some statutory or regulatory provision. Instead, it is asking the Commission to rewrite the Shipping Act to give certain NVOCCs the ability to offer service contracts to their shipper customers. Regardless of whether this is sound policy, Congress recently and very consciously chose not to permit such activity when it enacted OSRA. The Commission will not now do what Congress declined to do.

Effective Date

It appears that there may be some vessel operators currently holding themselves out as ocean common carriers even though they do not operate vessels that directly serve U.S. ports. The Commission understands that these carriers may have been confused about the legitimacy of such services, in light of the Commission's pre-1984 policies implementing the 1916 Shipping Act. Regardless of the validity of this position, the Commission appreciates the situation these carriers are in and desires to give them sufficient time to restructure their services in accordance with the final rule. As

a result, the final rule will not become effective for 90 days. And, of course, the rule will not be enforced retroactively as to such carriers.

It is also possible that some of these carriers operating as OCCs may have entered into service contracts with shippers that may still be effective. At the very least, our decision here should operate as the type of force majeure situation that would warrant the termination of such contracts without any penalty to the shipper. If the parties to such contracts wish to continue operating under them, the Commission believes that this would not be possible since the carrier would no longer be considered an ocean common carrier, but rather would be an NVOCC. However, a similar arrangement might possibly be reflected in the common carrier's tariff rates or perhaps as a time/volume rate.

Amendment to Part 515

In the final rule of Docket No. 98-28, Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries, adding section 515 to part 46 CFR, the Commission stated in the supplementary information section that payment against financial responsibility should only be made on "final" judgments; however, it mistakenly failed to add the word "final" in the actual language of § 515.23(b)(2). In response to petitions for reconsideration of the final rule in 46 CFR § 515, the Commission ordered the correction of this oversight to be made in the instant rulemaking proceeding in order to preserve

resources. Therefore, in accordance with the Commission's decision in Docket No. 98-28, we are amending 46 CFR § 515.23(b)(2) to add the word "final."

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., the Chairman of the Federal Maritime Commission has certified to the Chief Counsel for Advocacy, Small Business Administration, that the rule will not have a significant impact on a substantial number of small entities. In its Notice of Proposed Rulemaking, the Commission stated its intention to certify this rulemaking because the proposed changes affect only ocean common carriers and passenger vessel operators, entities the Commission has determined do not come under the programs and policies mandated by the Small Business Regulatory Enforcement Fairness Act. As no commenter refuted this determination, the certification remains unchanged.

List of Subjects

46 CFR Part 515

Exports; Freight forwarders; Non-vessel-operating common carriers; Ocean transportation intermediaries; Licensing requirements; Financial responsibility requirements; Reporting and recordkeeping requirements.

46 CFR Part 520

Common carrier; Freight; Intermodal transportation; Maritime carriers; Reporting and recordkeeping requirements.

46 CFR Part 530

Freight; Maritime carriers; Reporting and recordkeeping requirements.

46 CFR Part 535

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

Therefore, for the reasons set forth above, Parts 515, 520, 530, and 535 of Subchapter C of Title 46 Code of Federal Regulations, are amended as follows:

PART 515 -- LICENSING, FINANCIAL RESPONSIBILITY REQUIREMENTS, AND GENERAL DUTIES FOR OCEAN TRANSPORTATION INTERMEDIARIES

1. The authority citation continues to read as follows:

5 U.S.C. 553; 31 U.S.C. 9701; 46 U.S.C. app. 1702, 1707, 1709, 1710, 1712, 1714, 1716, and 1718; Pub. L. 105-383, 112 Stat. 3411; 21 U.S.C. 862.

2. In § 515.2 revise paragraph (m) to read as follows:

§ 515.2 Definitions

\* \* \* \* \*

(m) Ocean common carrier means a common carrier that operates, for all or part of its common carrier service, a vessel on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker.

\* \* \* \* \*

3. Revise § 515.23(b) (2) to read as follows:

§ 515.23 Claims against an ocean transportation intermediary.

\* \* \* \* \*

(b) \* \* \*

(2) If the parties fail to reach an agreement in accordance with paragraph (b) (1) of this section within ninety (90) days of the date of the initial notification of the claim, the bond, insurance, or other surety shall be available to pay any final judgment for damages obtained from an appropriate court. The financial responsibility provider shall pay such judgment for damages only to the extent they arise from the transportation-related activities of the ocean transportation intermediary ordinarily within 30 days, without requiring further evidence related to the validity of the claim; it may, however, inquire into the extent to which the judgment for damages arises from the ocean transportation intermediary's transportation-related activities.

\* \* \* \* \*

PART 520 -- CARRIER AUTOMATED TARIFF SYSTEMS

1. The authority citation for part 520 continues to read as follows:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1701-1702, 1707-1709, 1712, 1716; and sec. 424 of Pub. L. 105-383, 112 Stat. 3411.

2. In § 520.2 revise the definition of ocean common carrier to read as follows:

§ 520.2 Definitions

\* . . . . \*

Ocean common carrier means a common carrier that operates, for all or part of its common carrier service, a vessel on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker.

\* \* \* \* \*

PART 530 -- SERVICE CONTRACTS

1. The authority citation for part 530 continues to read as follows:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1704, 1705, 1707, 1716.

2. In § 530.3 revise paragraph (n) to read as follows:

§ 530.3 Definitions.

\* \* \* \* \*

(n) Ocean common carrier means a common carrier that operates, for all or part of its common carrier service, a vessel on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker.

\* \* \* \* \*

PART 535 -- AGREEMENTS BY OCEAN COMMON CARRIERS AND OTHERS SUBJECT TO THE SHIPPING ACT OF 1984.

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

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1701-1707; 1709-1710, 1712 and 1714-1718; Pub. L. 105-383, 112 Stat. 3411.

2. Revise § 535.101 to read as follows:

§ 535.101 Authority.

The rules in this part are issued pursuant to the authority of section 4 of the Administrative Procedure Act (5 U.S.C. 553), sections 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 15, 16, 17 and 19 of the Shipping Act of 1984 ("the Act"), and the Ocean Shipping Reform Act of 1998, Pub. L. 105-258, 112 Stat. 1902.

3. In § 535.104 revise paragraph (u) to read as follows:

§ 535.104 Definitions.

\* \* \* \* \*

(u) Ocean common carrier means a common carrier that-operates, for all or part of its common carrier service, a vessel on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker.

\* \* \* \* \*

By the Commission.

  
Bryant L. VanBrakle  
Secretary

TABLE 8 TO SUBPART PPP.-ROUTINE REPORTS REQUIRED BY THIS SUBPART

Reference	Description of report	Due date
§ 63 1439(b) and subpart A of this part . . . . .	Refer to § 63 1439(b), Table 1 of this subpart, and to subpart A of this part.	Refer to subpart A of this part.
§ 63 1439(e)(3) . . . . .	Initial notification . . . . .	New affected sources w/ initial start-up at least 90 days after June 1, 1999 submit the application for approval of construction or reconstruction in lieu of the initial notification report New affected sources w/ initial start-up prior to 90 days after June 1, 1999 by 90 days after June 1, 1999
§ 63.1439(e)(4) . . . . .	Precompliance Report <sup>a</sup>	Existing affected sources. 12 months prior to compliance date New affected sources with the application for approval of construction or reconstruction. Within 150 days after the compliance date.
§ 63.1439(e)(5) . . . . .	Notification of Compliance Status <sup>b</sup>	Semiannually, no later than 60 days after the end of each 6-month period. See § 63 1439(e)(6)(1) for the due date for this report
§ 63 1439(e)(6) . . . . .	Periodic Reports . . . . .	No later than 60 days after the end of each quarter
963 1439(e)(6)(iii) . . . . .	Quarterly reports for sources with excursions (upon request of the Administrator)	At least 30 days prior to the refilling of each storage vessel or the inspection of each storage vessel
§ 63 506(e)(7)(i) . . . . .	Storage Vessels Notification of Inspection	

<sup>a</sup> There may be two versions of this report due at different times; one for equipment subject to § 63 1434 and one for other emission points subject to this subpart.

<sup>b</sup> There will be two versions of this report due at different times, one for equipment subject to § 63.1434 and one for other emission points subject to this subpart

\* \* \* \* \*

[FR Doc. 00-10418 Filed 5-5-00; 8:45 am]  
BILLING CODE 6560-60-P

**FEDERAL MARITIME COMMISSION**

**46 CFR Parts 515, 520, 530 and 535**

[Docket No. 99-10]

**Ocean Common Carriers Subject to the Shipping Act of 1964**

**AGENCY:** Federal Maritime Commission.  
**ACTION:** Final rule.

**SUMMARY:** The Federal Maritime Commission is amending its regulations implementing the Shipping Act of 1984 to clarify the definition of "ocean common carrier" to reflect the Commission's interpretation of the term. As a result, only common carriers that operate vessels in at least one United States trade will be subject to these rules.

**DATES:** This rule becomes effective August 7, 2000.

**FOR FURTHER INFORMATION CONTACT:** Thomas Panebianco, General Counsel, Federal Maritime Commission, 800 North Capitol Street, N.W., Room 1018, Washington, D.C. 20573, (202) 523-5740.

**SUPPLEMENTARY INFORMATION:**

**Background**

The Federal Maritime Commission initiated this proceeding by Notice of Proposed Rule ("NPR") published in the Federal Register on June 25, 1999. 64 FR 34183. The NPR noted that the Commission was proposing to amend several of its regulations to clarify the definition of "ocean common carrier" contained in section 3(16) of the Shipping Act of 1984 ("Shipping Act"), 46 U.S.C. app. § 1702(16), as amended by the Ocean Shipping Reform Act of 1998 ("OSRA"), P.L. 105-258, 112 Stat. 1902, to reflect the Commission's then-interpretation of that term. In essence, the proposed rule defined "ocean common carrier" to include only common carriers that operate vessels serving ports in at least one United States trade.

The NPR solicited comment on the proposed rule from the public, and the Commission received comments from: (1) The Ocean Carrier Working Group ("OCWG"); (2) Maersk, Inc.; (3) Samskip Hf ("Samskip"); (4) the Council of European & Japanese National Shipowners' Associations ("CENSA"); (5) the Calcutta, East Coast of India and Bangladesh Conference and Waterman Steamship Corporation ("India Carriers"); (6) the National Industrial Transportation League ("NITL"); (7) the American International Freight Association & Transportation Intermediaries Association ("AIFA/

TIA"); and (8) Ocean World Lines, Inc. ("OWL").

**The NPR**

The NPR noted that the Commission had previously proposed a new definition for the term "ocean common carrier" in the context of the rulemaking governing agreements which was undertaken to implement OSRA. Docket No. 98-26, Ocean Common **Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984**, 64 FR 11236, March 8, 1999. However, the Commission received only two comments on that particular proposal and subsequently decided to provide the public an additional opportunity to comment through this proceeding. The NPR then stated that the heart of the matter was how to distinguish between ocean common carriers ("OCCs") and non-vessel-operating common carriers ("NVOCCs"). The distinction is significant under the Shipping Act because only OCCs can enter into and file agreements with the Commission and receive antitrust immunity therefor. In addition, only OCCs can offer service contracts to shippers, although NVOCCs can enter into service contracts as shippers.

The NPR conceded that at first glance the defining of an OCC as a "vessel operator" does not appear to be ambiguous. However, the Commission stated that its staff has encountered

several complex situations in attempting to apply the term, e.g., where and when vessels operated and what type of vessels are employed. In this regard, the NPR noted that various bureaus have interpreted the Shipping Act to require that an OCC must operate a vessel calling at a U.S. port, and that if a carrier is an OCC in one trade, it should be considered an OCC for all U.S. trades. The proposed rule therefore codified this approach and stated:

**Ocean common carrier** means a common carrier that operates, for all or part of its common carrier service, a vessel on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker.

The NPR noted that this multi-trade approach avoids making interpretations as to a carrier's status on a trade-by-trade basis, which would be administratively impractical and might prompt a less efficient redeployment of vessels. The proposal was also intended to clarify that companies that operate vessels solely outside the U.S. are not deemed to be OCCs. The NPR suggested that the proposal was consistent with legislative intent that a "vessel operator" be one whose vessels call at U.S. ports and all other common carriers should be classified as NVOCCs.

The NPR further stated that if the definition of OCC included carriers that operate vessels only in foreign-to-foreign trades, it could expand the scope of antitrust immunity and also remove certain carriers from NVOCC financial responsibility requirements in U.S. trades even though they have no vessels or assets in the U.S. Lastly, the NPR concluded, based on principles of statutory construction, that when Congress used the term "vessel" in the definition of OCC, it likely was referring to those vessels specified in the definition of "common carrier," i.e., those that operate on the high seas between the U.S. and a foreign country.

#### Comments on Proposed Rule

##### A. OCWG

The OCWG agrees with the Commission that the distinction between OCCs and NVOCCs is significant. It also supports continuation of the Commission's past practice that a common carrier that operates a vessel in one U.S. trade is an OCC for all U.S. trades. It contends that this practice is consistent with the Shipping Act and, as a practical matter, has worked well in the past, presenting no problems.

The OCWG submits that the proposed rule would require members of vessel sharing agreements ("VSAs") to deploy vessels in the U.S. solely to meet regulatory requirements, something the Commission has indicated it wishes to avoid, citing the NPR at 5. The OCWG asserts that various types of VSAs have grown significantly, and offer more efficient and frequent service at lower cost. It contends that it is possible, for a variety of operational factors, that the parties may decide that all of the vessels of a member be deployed in non-U.S. trades and it will only serve the U.S. via the vessels of its fellow members. The OCWG concludes that such a carrier would not be considered an OCC and would have to withdraw from the U.S. portion of the agreement or restructure its service.

The OCWG therefore suggests a modified definition. It would allegedly preserve the ability of VSAs to function efficiently, while at the same time maintaining a distinction between carriers that commit assets to a service in U.S. trades and those that do not.

Next, the OCWG argues that the proposed definition should not change the applicable law regarding transshipment agreements. It contends that for over 50 years the Commission has held that a person may be an OCC, within the meaning of the Shipping Act and its predecessor legislation, without having a vessel call directly at a U.S. port, citing **Restrictions on Transshipment at Canal Zone, 2 U.S.M.C. 675 (1943)**. It notes further that in adopting OSRA, Congress did not change the statutory definition of "common carrier" and contends, therefore, that there is no statutory basis for the change in law being proposed by the Commission.

In addition, the OCWG maintains that the proposed change would overturn longstanding Commission precedent that a carrier providing a portion of a through vessel service to or from the U.S. qualifies as an OCC even though its vessels do not call at a U.S. port, citing **Transshipment & Apportionment Agreements from Indonesian Ports to U.S. Atlantic & Gulf Ports, 10 F.M.C. 183 (1964)**; and **Transshipment and Through Billing Arrangements Between East Coast Ports of South Thailand and U.S. Atlantic and Gulf Ports, 10 F.M.C. 201 (1966)**. These carriers therefore urge the Commission to clarify in the supplemental information that a common carrier offering a through bill of lading to or from the U.S. that operates a vessel on which part of the service is provided meets the definition of OCC, even if its vessels do not call directly at a U.S. port. The OCWG

further notes that these carriers would be subject to tariff publication and other regulatory requirements of the Shipping Act and would maintain the distinction between carriers that commit assets to a service to or from the U.S. and those that do not. Lastly, the OCWG argues that the proposed approach would have the effect of removing all transshipment agreements from the scope of the Commission's jurisdiction and require the Commission to repeal 46 C.F.R. § 535.306.

##### B. Maersk

Maersk observes that the Commission's proposed definition would exclude feeder operators providing foreign-to-foreign transportation from the definition of OCC. It suggests that the final rule should accommodate such activity. In addition, Maersk believes that a carrier signatory to a vessel sharing agreement ("VSA") should be considered an OCC when another carrier participating in the agreement contributes ships making U.S. port calls.

##### C. Samskip

Samskip, a self-defined vessel-operating common carrier, argues that the proposed rule overturns Commission precedent that carriers providing a portion of vessel service to or from the U.S. qualify as OCCs even though their vessels do not actually call at U.S. ports. It suggests, therefore, that the supplemental information to the final rule state that a common carrier which offers a through bill of lading and operates a vessel on which part of the service is provided is an OCC, even if the vessels it operates do not call directly at a U.S. port. Lastly, Samskip urges the Commission to adopt a definition of OCC that provides that a common carrier that becomes an OCC by virtue of carriage in a transshipment situation should be considered an OCC for purposes of entering into slot chartering and vessel space sharing agreements with other OCCs.

##### D. CENSA

CENSA supports that portion of the proposed rule that states that a carrier operating a vessel in one U.S. trade is an OCC for all U.S. trades. However, CENSA believes that the requirement that a carrier must have at least one vessel calling at a U.S. port may exclude two categories of carriers—those involved in VSAs and transshipment arrangements.

CENSA contends that most OCCs are parties to one or more forms of VSAs—space charters, slot charters, and alliances—many of which are global in

scope. CENSA submits that it is possible that a VOCC member of a VSA will deploy its vessels in non-U.S. trades, but will serve the U.S. via the vessels of the agreement members. CENSA believes that under the proposed definition such a carrier would not be an OCC and would consequently have to withdraw from the U.S. portion of the agreement or restructure its service to have a vessel call at a U.S. port. It suggests amending the definition to include a VOCC that contributes vessels to a VSA.

CENSA further asserts that longstanding Commission precedent holds that carriers that provide a portion of vessel service to or from the U.S. qualify as OCCs even though their vessels do not call at U.S. ports. CENSA suggests that there is no need to overrule this precedent and that Congress is presumed to have been aware of it when it adopted the definition of "common carrier" in OSRA.

#### **E. India Carriers**

The India Carriers contend that the proposed rule would classify a carrier which operates oceangoing vessels as an NVOCC, if the vessels did not call at U.S. ports. They believe that this contradicts the definition of NVOCC in the Shipping Act—i.e., a common carrier that does not operate the vessels by which the ocean transportation is provided. They further submit that an OCC that serves the U.S. trades by slot-chartering space on another carrier's vessels, but issues its own bills of lading, would be held to be a "shipper" under the proposed definition. This, they argue, could confuse the traditional liability relationship between shipper and carrier under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. 1310–1315.

The India Carriers also argue that the proposed rule would exclude carriers that operate vessels as only part of their U.S. service, thereby overturning longstanding precedent. In addition, they contend that the rationalization of vessel space through various cooperative agreements allows carriers to provide service more efficiently and at a reduced cost. The proposed rule allegedly might prompt carriers to redeploy vessels solely to satisfy a regulatory requirement.

The India Carriers note that vessels operating under slot charters or other VSAs are presently subject to the Commission's regulatory requirements, including that they publish tariffs. They also contend that FMC or court judgments could be enforced by requiring carriers who offer through

service but do not call at U.S. ports to maintain a bond or other guarantee similar to that required of NVOCCs.

#### **F. NITL**

NITL supports the interpretation that a carrier that operates a vessel in a single trade is an OCC in all trades. It maintains that the plain language of the statute does not require a trade-by-trade analysis and to do so would lead to inefficiencies. NITL is concerned, however, about the exclusion of carriers that do not offer direct port calls but instead offer indirect ocean transportation by way of VSAs or similar arrangements.

NITL asserts that the proposed definition is narrower than the statutory definition, which simply defines an OCC as a "vessel-operating common carrier" and does not restrict the trade lanes in which the vessel can operate. NITL contends that there is no support for the Commission's assertion that the "vessel" in the definition of OCC was likely the vessels specified in the definition of "common carrier." NITL further states that under that definition a common carrier does not need to operate a vessel; it must merely "utilize" a vessel in U.S. trades for part or all of the transportation. It concludes that the "other part" of the transportation can be wholly outside the U.S., i.e., foreign-to-foreign. It further contends that the plain language of the statute, unchanged by the passage of OSRA, does not restrict the provision of OCC service to only those carriers that make direct calls at U.S. ports.

NITL also finds the proposed definition inconsistent with the policy objective of OSRA, particularly section 2(4), which requires the FMC to administer the law in a manner that promotes competitive and efficient ocean transportation services and relies to a greater extent on the marketplace. It notes that carriers may decide that the U.S. market is more efficiently and economically served through a VSA and claims that the Commission's narrow definition of OCC would prevent some VOCCs from offering such services to shippers through service contracts.

Ultimately, NITL believes the FMC should maintain the existing statutory definition of OCC in its regulations and should broadly construe it. It contends that there is nothing in the Shipping Act or OSRA that indicates that Congress intended a more narrow definition.

#### **G. AIFA/TIA**

AIFA/TIA supports the proposed definition as providing necessary, clear, and precise guidance to the ocean transportation industry. It notes that the

definition of "common carrier" in section 3(6) of the Shipping Act refers to a person who provides transportation by water and utilizes a vessel for all or part of that transportation, and that an OCC is defined simply as "a vessel-operating common carrier." AIFA/TIA submits that the Commission should put these two definitions together and issue a statement that an entity that otherwise meets the definition of common carrier and operates a single vessel on a single route between a single U.S. port and a single foreign port, over either the high seas or the Great Lakes, must be treated as an OCC for all of its operations in U.S. trades. This interpretation would allegedly extend the status of OCC to the largest possible universe of operators.

AIFA/TIA also does not object to proposals that carriers involved in nonexclusive transportation agreements also should be accorded OCC status even if they have no operations directly between a U.S. and foreign port.

#### **H. OWL**

OWL, one of the largest NVOCCs in the world, proposes a significant change in the traditional carrier/shipper relationship between VOCC and NVOCC. Instead of obtaining space from a vessel owner by a service contract, OWL presents a scenario in which an NVOCC would obtain space via a slot charter with a VOCC. Under such circumstances, OWL argues that the NVOCC would no longer be a shipper, vis-a-vis the VOCC, and would instead be a co-venturer, who should likewise be permitted to hold itself out to the public as an OCC in the trade lanes. OWL thus suggests a bifurcated approach to the definition of OCC: (1) The Commission's multi-trade approach for vessel operators in one or more trade lanes; and (2) a trade-by-trade approach for NVOCCs slot chartering with VOCCs.

OWL's proposal is premised on the assumption that a slot charter between a VOCC and an NVOCC provides the NVOCC with sufficient operational interest or nexus in the voyages to warrant classification as an OCC in that trade. If the Commission decides otherwise, then OWL asserts that the Commission should not allow a VOCC in one trade to become a VOCC in another by virtue of a slot charter. At the very least, OWL submits that the FMC should set out guidelines similar to those recently adopted by the U.S. Customs Service ("Customs") which require a slot or time-chartering common carrier to have significant responsibility or involvement in the actual operation of the vessels before being considered a VOCC.

OWL concedes that slot charters would be inherently **risky** for NVOCCs, but it is willing to face those risks in order to be able to offer service guarantees (i.e., service contracts) to its underlying shipper clients. It contends further that the enhanced competition of new entrants would outweigh any possible adverse impact of possibly broadening the scope of antitrust immunity. OWL also believes that the Commission's concerns about its and shippers' ability to arrest or attach a vessel are unfounded. It suggests that the best way to protect shippers is by requiring adequate insurance or a surety bond, such as it **already** possesses.

OWL contends that there is no statute, code or policy that would prohibit it from obtaining space on vessels by means of space charters, and the fact that such space charters are not within the scope of the Shipping Act does not mean they are prohibited. In this regard, OWL references a decision of the European Commission ("EC") relating to the Trans-Atlantic Conference Agreement ("TACA"). **Commission Decision of 16 September 1998 Relating to a Proceeding Pursuant to Articles 85 and 86 of the EC Treaty.** (Case No. II 35.134) ("EC Decision"). That decision discussed two types of NVOCCs—(1) those that operate vessels in another trade, and (2) those that do not operate vessels anywhere. The EC stated that neither type competes with VOCCs in terms of quality of service, but the first is able to compete on price. OWL further asserts that the EC Decision recognizes three types of common carriers: (1) A VOCC in the trade; (2) VOCCs in another trade; and (3) NVOCCs. It submits that the critical distinction is not that the second owns vessel in another trade, but that it has the ability to compete with VOCCs on price through its space charter arrangements. OWL seeks this ability to compete on price by means of space charters and be deemed an OCC.

OWL further contends that the term "vessel operator" is growing increasingly ambiguous in light of vessel sharing and consortia agreements. It submits that the Commission has not faced the difficult question of what degree of involvement is required to be considered a vessel operator and has instead taken a rudimentary approach of defining a VOCC as a common carrier that operates a vessel somewhere in the U.S.

OWL notes that Customs has struggled with the definition of VOCC for the past 25 years in the context of the Sixth Proviso to the Jones Act, 46 U.S.C. app. 883, that exempts coastwise movements of empty containers owned

or leased by the "owner or operator" of a vessel transporting those containers for its own use in the foreign commerce of the U.S. In this regard, Customs has issued several rulings dealing with carriers involved in slot charter agreements. In 1977, Customs purportedly issued a ruling holding that a time charterer was not a vessel operator and, in 1983, expanded this position to slot charterers. In that case, Customs allegedly looked at one trade lane without reference to status in other lanes. In 1999, Customs reviewed a joint service agreement between Italian Line and d'Amico Line. It determined that both were VOCCs because they shared operational control under the agreement.

## The Final Rule

### General Discussion

For the reasons set forth below, and in full consideration of all of the comments, the Commission has decided to adopt the proposed rule as the final rule. As a result, the term "ocean common carrier" will include only those common carriers who actually operate a vessel in at least one United States trade. In addition, if a common carrier is an ocean common carrier in one U.S. trade, it can act as an ocean common carrier in all U.S. trades.

This decision is fully supported by a straightforward reading of the relevant definitions contained in the Shipping Act. Section 3(16) of the Shipping Act defines an "ocean common carrier" as "a vessel-operating common carrier." And, section 3(6) of the Shipping Act defines a "common carrier", in part, as:

\* \* \* a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that—

(A) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and

(B) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

When these two definitions are read together, it is logical to conclude that the vessels operated by an ocean common carrier are those referenced in the common carrier definition, i.e., those "operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country."

The Commission recognizes that the definition of common carrier refers to one who "utilizes, for all or part of that transportation" a vessel operating

between the U.S. and a foreign country; Congress employed the word "utilize" so that the definition of common carrier could encompass both ocean common carriers and NVOCCs; the very definition of ocean common carrier as "vessel-operating common carrier" indicates that Congress intended ocean common carriers actually to operate, not merely utilize, vessels. The reference to "all or a part of the transportation" simply reflects the fact that a common carrier can offer port-to-port transportation or point-to-point through transportation, using inland carriers for the latter.

The final rule is also consistent with Congress' intent to delineate between ocean common carriers and NVOCCs. In adopting the Shipping Act, Congress clearly wanted to distinguish between those common carriers that operate vessels and those that do not. The former are ocean common carriers and the latter are NVOCCs. As the House Committee on Merchant Marine and Fisheries noted with respect to H.R. 1878:

The Shipping Act does not contain a definition of "non-vessel-operating common carrier." One is added to this bill so that the distinction may be made between those carriers that operate vessels and those that do not. Both types are included in the term "common carrier."

The term "ocean common carrier" is based on the definition of "common carrier by water in foreign commerce" in section 1 of the Shipping Act with the added provision that the carrier must operate the vessel providing the transportation by water.

H.R. Rep. No. 53, 98th Cong., 1st Sess. 29 (1983) ("House Report"). See also, S. Rep. No. 3, 98th Cong., 1st Sess. 20 (1983) ("Senate Report"). In addition, Congress wanted to ensure that carriers operating solely through ports of contiguous nations not be included in the definition of "common carrier." See, House Report at 29; Senate Report at 19. Congress' concern not to establish the Commission's jurisdiction over carriers operating through ports in countries contiguous to the United States reflects its overall determination not to expand the Commission's jurisdiction, and with it, the conferring of antitrust immunity, to carriers operating solely between foreign ports.

As noted in the preamble to the NPR, Congress viewed vessel operators as those whose vessels call at U.S. ports and classified all other common carriers in U.S. commerce as non-vessel-operating common carriers. For example, in its report on the Shipping Act, the Senate Commerce, Science, and Transportation Committee observed:

The Committee strongly believes that it is in our national interest to permit cooperation among carriers serving our foreign trades to permit efficient and reliable service. \* \* \* Our carriers need; a stable, predictable, and profitable trade with a rate of return that warrants reinvestment and a commitment to serve the trade; greater security in investment. \* \* \*

Senate Report at 9. We continue to believe that Congress intended to provide antitrust immunity and other special privileges and protections only to those carriers that have made the financial commitment to provide vessel service in United States trades.

The importance of the distinction between OCC and NVOCC was noted in the preamble to the proposed rule: an OCC can be a party to agreements filed with the Commission and receive antitrust immunity therefor, and can enter into service contracts with shippers. An NVOCC can do neither. Moreover, NVOCCs are subject to a financial responsibility requirement, with foreign NVOCCs subject to higher amounts under the scale promulgated by Commission regulation. Thus, there is ample incentive for NVOCCs to characterize themselves as OCCs, and this could inure to the detriment of their shipper customers who would otherwise have been protected by an NVOCC's financial responsibility.

The Commission continues to be concerned about the effect of the definition of ocean common carrier on the scope of antitrust immunity envisioned by Congress under the Shipping Act. If the definition of OCC somehow included carriers that operated vessels only in foreign-to-foreign trades, this could substantially expand the scope of antitrust immunity beyond that contemplated by Congress. In this regard, we note the longstanding judicial policy of narrowly construing antitrust exemptions. See, **Federal Maritime Commission v. Seatrain Lines, Inc.**, 411 U.S. 726, 733 (1973).

#### Vessel Sharing Arrangements

Several of the commenters (Maersk, CENSA, OCWG, India Carriers and NITL) suggest that the definition of OCC should be extended to include shipping lines who are parties to VSAs serving U.S. ports but who themselves do not call at U.S. ports. While the term VSA is undefined by the commenters, they suggest it is virtually any cooperative arrangement among OCCs. These commenters note that VSAs have grown over the years and are likely to continue to grow. These arrangements often permit carriers to offer more efficient and frequent service to the shipping public and at a lower cost. The OCWG

further contends that a variety of operational and other factors will dictate how a member of a VSA will deploy its vessels in non-U.S. trades and that such a carrier may choose to serve U.S. trades solely with vessel space obtained on its partners' ships.

Some commenters suggest that the proposed definition could discourage the formation of VSAs or prevent the parties from maximizing the benefits of such cooperation by redeploying vessels out of U.S. trades. Maersk, CENSA and the OCWG thus propose an exception to the proposed definition for a vessel operating common carrier that contributes vessels to a VSA that serves the U.S. NITL likewise believes that VSAs should be encouraged, but suggests that this could be accomplished simply by maintaining the existing statutory definition and by broadly construing it. Lastly, OWL argues that if the Commission does not adopt its proposal concerning NVOCC space chartering, then parties to VSAs should be considered OCCs only if they have significant responsibility or involvement in the actual day-to-day operations of the vessels.

While the intended benefit of the exception urged by some of the commenters is to facilitate formation and operation of efficient VSAs, there are several problems with this approach. First, it appears to address a mostly theoretical concern. Commenters do not identify, nor is the Commission aware of, any instances where entities are planning to operate major VSAs with parties who are not in the U.S. trades, or where current, vessel-operating members of VSAs are contemplating withdrawing vessel service from U.S. trades and proposing to serve the U.S. only through space-sharing arrangements with fellow VSA members. In addition, this type of arrangement would expand the reach of antitrust immunity well beyond that envisioned by Congress when it recently passed OSRA. Since 1984, the only carriers that could enter into agreements subject to the Act and receive antitrust immunity were "ocean common carriers." The inclusion of VSA participants in the OCC definition would effectively confer antitrust immunity to carriers who do not make a commitment to serve the U.S. trades by operating their own vessels.

In addition to these very serious policy-based concerns, the carriers' proposal raises other technical or legal problems, and may generate further confusion or ambiguity. Since the term VSA is undefined, but seems to include an almost unlimited range of carrier relationships, the proposed exemption

would appear to encompass a broad and indefinite class of foreign companies. Also, it refers to a vessel sharing agreement that "operates" vessels. However, VSAs do not collectively operate vessels—their individual carrier members do so. Moreover, if the members are subject to an arrangement that covers more than the U.S. trades, those non-U.S. portions of the arrangement would not be in the VSA and filed with the Commission.<sup>1</sup> The Commission could be left unable to determine the full extent of any such arrangement or ascertain whether the carrier involved is a vessel operator in some non-U.S. trade, and not an NVOCC or some other entity unlawfully seeking VOCC status. Lastly, this proposal provides no protection to the shipping public who might use the services of such a carrier in its U.S. service. The carrier would have no attachable assets in the U.S. and might not have an agent for service of process in the U.S. to receive the claims of injured parties. This too would appear to contravene OSRA's general objective of providing more, not fewer, protections to U.S. interests utilizing foreign entities, as reflected in the strengthened ocean transportation intermediary ("OTI") and controlled carrier provisions, for example.

For the reasons stated above, the Commission is not adopting the carrier proposal concerning VSAs. This does not mean that a VSA member without ships calling at a U.S. port would be precluded from offering a common carriage service to the U.S. However, it would simply have to offer its service as an NVOCC. It could then enter into service contracts with OCCs, but could not offer its own service contracts or fix rates with other vessel operators in a trade.

The Commission is fully cognizant of the new policy objective added to the Shipping Act by **OSRA-i.e.**, promoting the growth and development of United-States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace. The Commission further believes that there may be arrangements between common carriers that offer more efficient and rationalized services, while at the same time providing shippers with more service options and lower costs for their ocean

<sup>1</sup> In *Transpacific Westbound Rate Agreement v. Federal Maritime Comm'n*, 951 F.2d 950 (9th Cir. 1991), the court upheld the Commission's decision that it did not have jurisdiction over foreign-to-foreign portions of agreements that also had U.S.-to-foreign portions. As a result, foreign-to-foreign portions of agreements are generally not filed with the Commission, even for informational purposes.

transportation, and that some of these arrangements may be precluded by the final rule as a result of specific statutory constraints limiting the Commission's flexibility in interpreting the Shipping Act. We appreciate commenters' arguments regarding efficient operations. We fully support and wish to encourage arrangements and operations that enhance efficiency and competition. However, we do not think it appropriate to adopt an overly broad exception to address what, to date, is only a hypothetical problem. We would remind the carriers that the Commission would, as always, give serious consideration to any petition for rulemaking, reconsideration of this rule, or an exemption.

#### **Transshipment Arrangements**

Transshipment agreements are arrangements between ocean common carriers by which one carrier serving a port of origin and the other carrier serving a port of destination provide transportation between such ports via an intermediate port at which the cargo is transferred from one carrier to the other. See 46 CFR 535.306(a). Nonexclusive transshipment agreements are exempt from the filing requirements of the Shipping Act, 46 CFR 535.306(b),<sup>2</sup> but exclusive transshipment agreements must still be filed with the Commission.

Several commenters have raised concerns about the effect of the proposed rule on the status of vessel operator parties to transshipment agreements who do not directly serve the United States. They contend that the rule would overturn longstanding Commission precedent that such carriers are considered to be OCCs. As a result, Maersk has proposed an additional exception to include feeder operators in the rule, while Samskip and the OCWG suggest that the Commission can address the issue in the supplemental information to the final rule without further amending the actual definition.

Beginning in 1943, in the *Canal Zone* case, the Commission's predecessor found that ocean carriers moving cargo from Colombia or Ecuador to the Canal Zone and then transferring that cargo to carriers moving it to the U.S., under through bills of lading, were "engaged in the transportation by water of property between the United States and a foreign country" and consequently were "common carriers by water" subject to the Shipping Act, 1916. This

position was reaffirmed and further explicated by the Commission in 1966, in the two *Transshipment Cases*. In the first case, the Commission found carriers moving cargo from Indonesian outpoks to the U.S. under a through bill of lading who transshipped the cargo at a base port to be common carriers by water, and stated:

Where there exists a unitary contract of affreightment such as a through bill of lading by which two or more carriers or conferences of carriers hold themselves out to transport cargo from a specified foreign port to a point in the United States with transshipment at one or more intermediate points from one carrier to another, each of the carriers so involved is "engaged in" transporting cargo by water from a foreign country to the United States.

10 F.M.C. at 191. The Commission reached a similar conclusion in the second *Transshipment* case, 10 F.M.C. 201 (1966), where carriers moving cargo from Thailand to Singapore were also held to be subject to the 1916 Act.

The Commission does not believe that these cases are controlling today. The *Transshipment* cases were decided under the 1916 Act, which defined "common carrier by water in foreign commerce" to mean "a common carrier engaged in the transportation by water of passengers or property between the United States \* \* \* and a foreign country." When Congress enacted the Shipping Act it chose different language to define "common carrier" in section 3(6), 46 U.S.C. app. 1702(6), and separately defined "ocean common carrier" and "non-vessel-operating common carrier." In light of the fact that the Commission decided the *Transshipment* cases prior to the statutory distinction being drawn between NVOCCs and OCCs, the Commission finds that the *Transshipment* cases are non-controlling as to these issues and declines to adopt the commenters' recommendations with regard thereto. As noted in the House Report, the difference between a "common carrier by water" and an "ocean common carrier" is that the latter has "the added provision that the carrier must operate the vessel," a significant distinction. Thus, the *Transshipment* cases are probably controlling as to whether someone is a "common carrier," but irrelevant to "ocean common carrier" status.

#### **Avoidance of OTI Responsibilities**

The NPR raised concerns about permitting vessel operators in foreign-to-foreign trades to be considered OCCs in U.S. trades by virtue of VSA or transshipment arrangements. In

particular, it noted that this could remove certain companies from the scope of the NVOCC bonding requirement even though they have no vessels or assets in the U.S. that can be attached to satisfy a Commission or U.S. court judgment. NPR at 6. As noted earlier, there is a very strong incentive under the Shipping Act, as modified by OSRA, for NVOCCs to want to be considered OCCs. They can then offer confidential service contracts to their shipper customers and avoid the costs of maintaining a bond as required by the Act and the Commission's regulations. Some NVOCCs are likely to engage in complex machinations to be considered OCCs under some of the proposals suggested by certain commenters. This is not some idle threat or hypothetical fear-even before passage of OSRA many NVOCCs were simply holding themselves out as OCCs.<sup>3</sup> Now, post-OSRA, a review of the carriers holding themselves out as VOCCs on the Commission's web page reveals that many of these carriers may well be NVOCCs, a matter for probable enforcement action. In addition, it appears that some carriers that may have at one time served U.S. ports with their own vessels are continuing to hold themselves out as OCCs even though they have withdrawn these vessels from service.

#### **Multi-trade Approach**

Almost all of the commenters support the Commission's multi-trade approach to determining OCC status-if a carrier is an OCC in one U.S. trade, it will be considered an OCC for all U.S. trades. NITL suggests that this approach is supported by the plain language of the statute. The OCWG notes that this is simply a continuation of past Commission practice and avoids having to make status determinations on a trade-by-trade basis. It further argues that making such determinations on a trade-by-trade basis would be impractical and inefficient. As reflected by the endorsement of the commenters, the Commission's position in this regard is a sound one, and the Commission will continue the multi-trade approach to determining OCC status in the final rule.

#### **OWL's Proposal**

OWL's proposal to consider NVOCCs who space charter from VOCCs to be considered OCCs on a trade-by-trade basis is most problematic. At the very

<sup>2</sup> Nonexclusive transshipment agreements do not prohibit either carrier from entering into similar agreements with other carriers.

<sup>3</sup> In Docket No 98-31, *Publication of Inactive or Inaccurate Ocean Common Carrier Tariffs*, order served May 19, 1999, the Commission found that 13 NVOCCs operating in the Far East trades held themselves out to be VOCCs

least, such a proposal is outside the scope of the proposed rule and would require additional notice and comment were the Commission inclined to pursue such an approach. But, more importantly, OWL's proposal does not appear to be a proper matter for a rulemaking proceeding. OWL is not asking that the Commission explicate some statutory or regulatory provision. Instead, it is asking the Commission to rewrite the Shipping Act to give certain NVOCCs the ability to offer service contracts to their shipper customers. Regardless of whether this is sound policy, Congress recently and very consciously chose not to permit such activity when it enacted OSRA. The Commission will not now do what Congress declined to do.

#### Effective Date

It appears that there may be some vessel operators currently holding themselves out as ocean common carriers even though they do not operate vessels that directly serve U.S. ports. The Commission understands that these carriers may have been confused about the legitimacy of such services, in light of the Commission's pre-1984 policies implementing the 1916 Shipping Act. Regardless of the validity of this position, the Commission appreciates the situation these carriers are in and desires to give them sufficient time to restructure their services in accordance with the final rule. As a result, the final rule will not become effective for 90 days. And, of course, the rule will not be enforced retroactively as to such carriers.

It is also possible that some of these carriers operating as OCCs may have entered into service contracts with shippers that may still be effective. At the very least, our decision here should operate as the type of *force majeure* situation that would warrant the termination of such contracts without any penalty to the shipper. If the parties to such contracts wish to continue operating under them, the Commission believes that this would not be possible since the carrier would no longer be considered an ocean common carrier, but rather would be an NVOCC. However, a similar arrangement might possibly be reflected in the common carrier's tariff rates or perhaps as a time/volume rate.

#### Amendment to Part 515

In the final rule of Docket No. 98-28, **Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries**, adding section 515 to part 46 CFR, the Commission **stated** in the

supplementary information section that payment against financial responsibility should only be made on "final" judgments; however, it mistakenly failed to add the word "final" in the actual language of § 515.23(b)(2). In response to petitions for reconsideration of the final rule in 46 CFR 515, the Commission ordered the correction of this oversight to be made in the instant rulemaking proceeding in order to preserve resources. Therefore, in accordance with the Commission's decision in Docket No. 98-28, we are amending 46 CFR 515.23(b)(2) to add the word "final."

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the Chairman of the Federal Maritime Commission has certified to the Chief Counsel for Advocacy, Small Business Administration, that the rule will not have a significant impact on a substantial number of small entities. In its Notice of Proposed Rulemaking, the Commission stated its intention to certify this rulemaking because the proposed changes affect only ocean common carriers and passenger vessel operators, entities the Commission has determined do not come under the programs and policies mandated by the Small Business Regulatory Enforcement Fairness Act. As no commenter refuted this determination, the certification remains unchanged.

#### List of Subjects

##### 46 **CFR Part 515**

Exports; Freight forwarders; Non-vessel-operating common carriers; Ocean transportation intermediaries; Licensing requirements; Financial responsibility requirements; Reporting and recordkeeping requirements.

##### 46 **CFR Part 520**

Common carrier; Freight; Intermodal transportation; Maritime carriers; Reporting and recordkeeping requirements.

##### 46 **CFR Part 530**

Freight; Maritime carriers; Reporting and recordkeeping requirements.

##### 46 **CFR Part 535**

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

Therefore, for the reasons set forth above, Parts 515, 520, 530, and 535 of Subchapter C of Title 46 Code of Federal Regulations, are amended as follows:

## **PART 515—LICENSING, FINANCIAL RESPONSIBILITY REQUIREMENTS, AND GENERAL DUTIES FOR OCEAN TRANSPORTATION INTERMEDIARIES**

1. The authority citation continues to read as follows:

Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 46 U.S.C. app. 1702, 1707, 1709, 1710, 1712, 1714, 1716, and 1718; Pub.L. 105-383, 112 Stat. 3411; 21 U.S.C. 862.

2. In § 515.2 revise paragraph (m) to read as follows:

### **§ 515.2 Definitions**

(m) **Ocean common carrier** means a common carrier that operates, for all or part of its common carrier service, a vessel on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker.

3. Revise § 515.23(b)(2) to read as follows:

### **§ 515.23 Claims against an ocean transportation intermediary.**

(b) \* \* \*

(2) If the parties fail to reach an agreement in accordance with paragraph (b)(1) of this section within ninety (90) days of the date of the initial notification of the claim, the bond, insurance, or other surety shall be available to pay any final judgment for damages obtained from an appropriate court. The financial responsibility provider shall pay such judgment for damages only to the extent they arise from the transportation-related activities of the ocean transportation intermediary ordinarily within 30 days, without requiring further evidence related to the validity of the claim; it may, however, inquire into the extent to which the judgment for damages arises from the ocean transportation intermediary's transportation-related activities.

## **PART 520—CARRIER AUTOMATED TARIFF SYSTEMS**

1. The authority citation for part 520 continues to read as follows:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1701-1702, 1707-1709, 1712, 1716; and sec. 424 of Pub. L. 105-383, 112 Stat. 3411.

2. In § 520.2 revise the definition of ocean common carrier to read as follows:

**§ 520.2 Definitions**

\* \* \* \* \*

**Ocean common carrier** means a common carrier that operates, for all or part of its common carrier service, a vessel on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker.

\* \* \* \* \*

**PART 530—SERVICE CONTRACTS**

1. The authority citation for part 530 continues to read as follows:

**Authority:** 5 U.S.C. 553; 46 U.S.C. app. 1704, 1705, 1707, 1716.

2. In § 530.3 revise paragraph (n) to read as follows:

**§ 530.3 Definitions.**

(n) **Ocean common carrier** means a common carrier that operates, for all or part of its common carrier service, a vessel on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker.

\* \* \* \* \*

**PART 535—AGREEMENTS BY OCEAN COMMON CARRIERS AND OTHERS SUBJECT TO THE SHIPPING ACT OF 1984**

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

**Authority:** 5 U.S.C. 553; 46 U.S.C. app. 1701–1707; 1709–1710, 1712 and 1714–1718, Pub. L. 105–383, 112 Stat. 3411.

2. Revise § 535.101 to read as follows:

**§ 535.101 Authority.**

The rules in this part are issued pursuant to the authority of section 4 of the Administrative Procedure Act (5 U.S.C. 553), sections 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 15, 16, 17 and 19 of the Shipping Act of 1984 (“the Act”), and the Ocean Shipping Reform Act of 1998, Pub. L. 105-258, 112 Stat. 1902.

3. In § 535.104 revise paragraph (u) to read as follows:

**§ 535.104 Definitions.**

(u) **Ocean common carrier** means a common carrier that operates, for all or part of its common carrier service, a vessel on the high seas or the Great Lakes between a port in the United

States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker.

\* \* \* \* \*

By the Commission.

**Bryant L. VanBrakle,**  
**Secretary**

[FR Doc. 00–11338 Filed 5–5–00; 8:45 am]

BILLING CODE 6730-01-P

**FEDERAL COMMUNICATIONS COMMISSION****47 CFR Part 54**

[CC Docket No. 96-45; FCC 00-I 26]

**Federal-State Joint Board on Universal Service**

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule; petition for reconsideration.

**SUMMARY:** This document concerning the Federal-State Joint Board on Universal Service clarifies the method by which quarterly line count data will be incorporated in the new high-cost mechanism for purposes of calculating and targeting support amounts. It also clarifies that, until the Commission adopts new line count input values, forward-looking costs for universal service support purposes shall be estimated using the line count input values adopted in the Tenth Report and Order. Finally, it clarifies that high-cost support shall be available on a regular quarterly basis for competitive eligible telecommunications carriers serving lines in areas served by non-rural incumbent local exchange carriers.

**DATES:** Effective May 8, 2000.

**FOR FURTHER INFORMATION CONTACT:** Katie King, Attorney, Common Carrier Bureau, Accounting Policy Division, (202) 418-7400.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Twentieth Order Reconsideration, CC Docket No. 9645; FCC 00-126, released on April 7, 2000. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room CY-A257, 445 Twelfth Street, S.W., Washington, D.C., 20554.

**I. Introduction**

1. In this Order, we clarify certain aspects of the new high-cost universal service support mechanism for non-rural carriers adopted in the *Ninth*

*Report and Order*, 64 FR 67416 (December 1, 1999), on October 21, 1999. Specifically, we clarify the method by which quarterly line count data will be incorporated in the new high-cost mechanism for purposes of calculating and targeting support amounts.

We also clarify that, until the Commission adopts new line count input values, forward-looking costs for universal service support purposes shall be estimated using the line count input values adopted in the *Tenth Report and Order*, 64 FR 67372 (December 1, 1999). This clarification does not alter the methodology adopted in the *Ninth Report and Order* except to account for line growth when the wire center line count data reported quarterly by the carriers differs from the input values used to estimate forward-looking cost.

Finally, we clarify that high-cost support shall be available on a regular quarterly basis for competitive eligible telecommunications carriers serving lines in areas served by non-rural incumbent local exchange carriers.

**II. Discussion**

2. In general, there are four stages in the forward-looking high-cost mechanism for non-rural carriers where line count information is required: (1) To estimate forward-looking costs of providing supported services; (2) to determine statewide support amounts; (3) to target those statewide support amounts to individual wire centers; and (4) to determine the per-line support amounts in individual wire centers.

In addition, the interim hold-harmless provision uses line counts to target carrier-by-carrier hold-harmless support amounts to individual wire centers. The interim hold-harmless provision also uses line counts to determine the per-line support amounts in individual wire centers. As discussed, we provide specific guidance on how these line counts are used in the four stages of the forward-looking mechanism and the interim hold-harmless provision.

**3. Estimating Forward-Looking Costs.** We clarify that the line counts used in the model to estimate forward-looking economic costs shall be used to calculate average forward-looking costs in all the cost calculations in the methodology adopted in the *Ninth Report and Order* for determining support. This approach is consistent with the Commission's and the Federal-State Joint Board's decision to use a cost model. The model estimates the forward-looking costs of providing the supported services in each wire center served by non-rural carriers. We clarify that model lines shall be used in