

Federal Maritime Commission

Plan for Retrospective Review of Existing Rules November 4, 2011

I. Executive Summary of Plan

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significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make such agencies' regulatory program more effective and less burdensome in achieving the regulatory objectives.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

In a Memorandum on the Implementation of Retrospective Review Plans that was issued on October 26, 2011, the Administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget emphasized:

When implementing their retrospective review plans, agencies should give high priority to those reforms that will promote economic growth, innovation, competitiveness, and/or job creation. These high-priority reforms should include those with the greatest potential to produce significant quantifiable cost savings and significant quantifiable reductions in paperwork burdens. Agencies should give special consideration to reforms that would reduce, simplify, or harmonize regulatory or reporting requirements imposed on small businesses.

The Federal Maritime Commission's (FMC or Commission) plan is designed to create a defined principle and schedule for identifying and reconsidering certain significant rules that are obsolete, unnecessary, unjustified, excessively burdensome, or counterproductive. Its review processes are intended to facilitate the identification of rules that warrant repeal or modification, or strengthening, complementing, or modernizing rules where necessary or appropriate.

II. Scope of Plan

E.O. 13579 encourages independent regulatory agencies, such as the Federal Maritime Commission, to review “existing significant regulations.” The E.O. incorporates the definition of “[s]ignificant regulatory action” in E.O. 12866 issued on October 4, 1993 (58 Fed. Reg. 51735, 51738), which defines a significant regulatory action as follows:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof;
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive [O]rder.

It appears that most of the Commission's existing regulations are not “significant regulations” as defined in the E.O. The Commission, however, fully endorses the E.O.'s recognition that independent regulatory agencies should develop a plan to review its existing significant regulations to make such agencies' regulatory program more effective or less burdensome in achieving the regulatory objectives.

Therefore, the Commission intends to include in the Commission's review plan not only those that may fall within the “existing significant regulations” category, but also the Commission's other regulations (and programs) that may not fall within the category.

III. Public Access and Participation

The Commission endorses the E.O.'s perspective that wise regulatory decisions depend on public participation and on careful analysis of the likely consequences of regulation. The Commission also fully embraces the E.O.'s emphasis that regulatory decisions will be informed and improved by allowing interested members of the public to have a meaningful opportunity to participate in rulemaking.

Although the Commission promulgates regulations in accordance with applicable laws and after considering the shipping public's overall interest, the Commission recognizes that regulated entities or persons may have useful information and perspective as to the costs and burdens of the Commission's existing regulations, especially after the regulations have been implemented. Therefore, the Commission intends to encourage and carefully consider the public's inputs and comments in the Commission's review of its existing regulations.

Consistent with the E.O.'s emphasis on public participation, the Commission intends to seek public's comments and suggestions on how to make the Commission's regulations and programs more effective and less burdensome so that they can be reflected in the Commission's plan and in actually updating and modernizing the Commission's regulations and programs.

IV. Current Agency Efforts Underway Independent of Executive Order 13579

Examples of the Commission's ongoing or recently completed efforts to make its rules more efficient and less burdensome are as follows:

On March 2, 2011, the Commission published a final rule in Docket No. 10-03, *Non-Vessel-Operating Common Carrier Negotiated Rate Arrangements*, exempting licensed non-vessel-operating common carriers (NVOCCs) that enter into negotiated rate arrangements from the tariff rate publication requirements of the Shipping Act and certain provisions and requirements of the Commission's regulations. The Commission intended to lessen the burden and costs of rate publication requirements for licensed NVOCCs. The Commission intends to further review whether the exemption can be extended to foreign unlicensed NVOCCs, which do not go through the Commission's rigorous review process applicable to applicants for NVOCC licenses. There are currently more than 3,400 licensed NVOCCs operating in the United States. They range from very small businesses to very large enterprises. The Commission's Office of Service Contracts and Tariffs estimates that the new exemption will allow the average NVOCC to save approximately 187 person-hours, or \$4,680, per year in reporting and recordkeeping requirements, as well as \$7,800 in payments to tariff publishers. Since the exemption became effective in April 2011, the Commission is aware of 108 NVOCCs invoking it thus far. If they have average savings, their annual savings would exceed 20,000 person-hours, or \$1.3 million including fees paid to tariff publishers. If 25% of licensed NVOCCs take advantage of the exemption, total annual savings could exceed 150,000 person-hours, or \$10 million including fees paid to tariff publishers. If all 3,400 licensed NVOCCs take advantage of the exemption, total annual savings could exceed 600,000 person-hours, or \$40 million including fees paid to tariff publishers. The Commission plans to begin a proceeding by the end of 2011 to consider potential ways to make the exemption more useful and whether to expand the exemption to foreign, unlicensed NVOCCs, with a goal of considering potential options in the Spring of 2012.

On February 24, 2011, the Commission issued a final rule amending its Rules of Practice and Procedure (46 C.F.R. Part 502) to update, clarify, and reduce the burden on parties to proceedings before the Commission. 76 Fed. Reg. 10258-10262. Specifically the Commission intended to make its regulations for Rules of Practice and Procedure less burdensome as follows:

- The Commission reduced the number of documents filed for proceedings before the Commission from an original and fifteen (15) copies to an original and five (5) copies;
- To facilitate electronic filing, the final rule clarified the provisions for electronic filing of documents;
- The final rule removed the requirement that parties file with the Commission a copy of discovery materials. The Commission has found that filed discovery materials were often not used in the proceedings. The final rule reduces the costs and burdens of filing discovery materials consistent with the Federal Rules of Civil Procedure, which states that discovery requests and responses “must not be filed until they are used in the proceeding or the court order filing”;
- The final rule includes a new provision to protect privacy with respect to filed documents; and
- The final rule also streamlined the Commission’s filing rules for ease of reference.

The Commission’s Office of the Secretary estimates that these changes will allow parties with cases before the Commission to save a total of approximately \$260,000 in reproduction, postal, and courier costs annually.

The Commission created an internal staff working group in December, 2010 consisting of administrative law judges and attorneys representing each legal office at the Commission. The working group is reviewing the Commission’s Rules of Practice and Procedure and will make recommendations on how they can be made more efficient and less burdensome.

On April 6, 2011, the Commission issued an Advance Notice of Proposed Rulemaking to seek the public’s comments on how to further update and clarify the Commission’s rules and reduce the burden on parties to proceedings before the Commission. The Commission specifically stated that it intends to amend and update its rules in order to improve their effectiveness and enhance administrative efficiency. Further, the Commission sought the public’s comments to revise its discovery rules to conform more closely with the Federal Rules of Civil Procedure, which has been amended many times since the Commission’s last amendment of its discovery rules.

On September 8, 2011, the Commission voted to move forward with a recommendation by the staff Container Freight Index and Derivatives Working Group, which the Commission created in May, 2011, to initiate a rulemaking to give ocean carriers and shippers more freedom and flexibility in their commercial arrangements. Published on October 13, 2011, the proposed rule recognizes new tools common carriers and shippers may wish to use to manage risk of ocean freight market volatility.

V. Plan for Review of Existing Rules

The Commission endorses the E.O.'s recommendation that independent regulatory agencies should develop a plan to periodically review their existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agencies' regulatory program more effective and less burdensome in achieving the regulatory objectives. Before a rule has been tested, it is difficult to be certain of its consequences, including its costs and benefits. If interested members of the public inform the Commission of the actual effects of the Commission's regulations, the Commission's rules can be improved to reflect the real costs and benefits to the shipping industry. The Commission intends to reflect its stakeholders' inputs in reviewing its existing regulations.

Under the above-referenced principle, the Commission has scheduled to review its existing important regulations as follows. The Commission intends to update the plan to reflect the shipping public's input and suggestions with respect to the plan or its rules. In addition to the ongoing reviews described above of the Commission's NVOCC tariff filing requirement and the Commission's Rules of Practice and Procedure, the Commission has begun reviewing its ocean transportation intermediary licensing and financial responsibility rules. One of the motivating factors for this review is the potential for savings from improvements and updates that could reduce the time required to complete license applications and streamline the review process.

The Commission may modify the review timeframe depending on the public comments. The Commission may modify or postpone formal review of specific parts of its rules after an internal review of those parts.

CFR Part	Heading	Review Timeframe
46 CFR Part 501	The Federal Maritime Commission - General	Under ongoing review.
46 CFR Part 502	Rules of Practice and Procedure	Currently under review. Initial amendments effective February 25, 2011. Further updates and amendments planned.
46 CFR Part 540	Passenger Vessel Financial Responsibility	Current regulations under active review.
46 CFR Part 515	Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries	Regulations under active review. Publication of Notice of Proposed Rulemaking planned.
46 CFR Part 532	NVOCC Negotiated Rate Arrangements	Initial regulations adopted in FY 2011. Further review to commence in calendar year 2011 and continue during FY 2012.

CFR Part	Heading	Review Timeframe
46 CFR Part 535	Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984	Review for revisions that would increase transparency and public input in the agreement review process during FY 2012.
46 CFR Part 545	Interpretations and Statements of Policy	Review 2012.
46 CFR Part 531	NVOCC Service Arrangements	Review in 2012-2013.
46 CFR Part 506	Civil Monetary Penalty Inflation Adjustment	Update in 2013.
46 CFR Part 565	Controlled Carriers	Review in 2014.
46 CFR Part 535	Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984	Review in 2014.
46 CFR Part 525	Marine Terminal Operator Schedules	Review in 2015.
46 CFR Part 530	Service Contracts	Review in 2015.
46 CFR Part 520	Carrier Automated Tariffs	Review in 2016.
46 CFR Part 503	Public Information	Review in 2016.
46 CFR Part 504	Procedures for Environmental Policy Analysis	Review in 2016.
46 CFR Part 505	Administrative Offset	Review in 2016.
46 CFR Part 507	Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Federal Maritime Commission	Review in 2016.
46 CFR Part 550	Regulations to Adjust or Meet Conditions Unfavorable to Shipping in the Foreign Trade of the United States	Review in 2016.
46 CFR Part 551	Actions to Adjust or Meet Conditions Unfavorable to Shipping in the U.S. Foreign Trade	Review in 2016.
46 CFR Part 555	Actions to Address Adverse Conditions Affecting U.S.-Flag Carriers that do not Exist for Foreign Carriers in the United States	Review in 2016.
46 CFR Part 560	Actions to Address Conditions Unduly Impairing Access of U.S.-Flag Vessels to Ocean Trade Between Foreign Ports	Review in 2016.

The Commission intends to reassess the review plan so that the Commission's rules can be periodically reviewed to make them more effective and less burdensome in achieving its regulatory objectives.

VI. Publishing Plan Online

The Commission intends to publish its plan on its website at www.fmc.gov. Significant changes or updates to the plan will also be published on the Commission's website.