

DEPARTMENT OF TRANSPORTATION**Coast Guard****46 CFR Part 67**

[CGD 94-070]

RIN 2115-AE98

Facsimile Filing of Instruments

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: The Coast Guard is amending its vessel documentation regulations to provide for optional filing of commercial instruments by facsimile, and to establish a filing and recording handling fee for filing instruments by facsimile. The option of filing commercial instruments by facsimile complements the centralization of Coast Guard vessel documentation services. Facsimile filing of commercial instruments will assist the centralized vessel documentation center to deliver timely services to distant vessel documentation customers and is responsive to time sensitive matters. Filing commercial instruments by facsimile will further streamline the vessel documentation process.

EFFECTIVE DATE: This rule is effective on October 1, 1995.

ADDRESSES: Unless otherwise indicated, documents referred to in this preamble are available for inspection or copying at the office of the Executive Secretary, Marine Safety Council (G-LRA/3406), U.S. Coast Guard Headquarters, 2100 Second Street SW., room 3406, Washington, DC 20593-0001 between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 267-1477.

FOR FURTHER INFORMATION CONTACT: Ms. Patricia Williams, National Vessel Documentation Center; (800) 799-8362.

SUPPLEMENTARY INFORMATION:**Drafting Information**

The principal persons involved in drafting this document are Lieutenant Commander Don M. Wrye, Project Manager, National Vessel Documentation Center and C. G. Green, Project Counsel, Office of Chief Counsel.

Regulatory History

On March 6, 1995, the Coast Guard published a notice of proposed rulemaking titled "Facsimile Filing of Instruments" in the **Federal Register** (60 FR 12188). The Coast Guard received 11 letters commenting on the proposal. No public hearing was requested and none was held.

Background and Purpose

Significant changes to the vessel documentation program were made in 1988 by Pub. L. 100-710 (the "statute"). Among other things, the statute added chapter 313 to title 46, U.S. Code, to revise, consolidate, and codify into positive law the ship mortgage laws administered by the Department of Transportation. The statute made certain substantive changes to then-existing law to modernize ship mortgages and the filing and recording process.

The legislative history for the statute is contained in House Report No. 100-918. That report noted that one of the primary purposes of chapter 313 of title 46, U.S. Code, is to provide third parties with notice of the existence of mortgages and liens. This rule implements one aspect of the suggestions the report made concerning office automation.

On November 15, 1993, the Coast Guard published a final rule (58 FR 60266) revising 46 CFR Part 67 implementing the substantive changes made by the statute. That rule became effective on January 1, 1994. On June 15, 1995, the Coast Guard published a final rule (60 FR 31602) consolidating all vessel documentation functions in the National Vessel Documentation Center (NVDC) in Martinsburg, WV. That rule became effective on August 1, 1995. In accordance with that final rule, after August 1, 1995, all documents related to vessel documentation functions must be submitted to the NVDC. However, to assist the public in adjusting to the consolidation, all of the previous 14 regional vessel documentation offices will have someone present to receive documents relating to vessel documentation functions on behalf of the NVDC until September 30, 1995. After September 30, 1995, only the office in New Orleans, LA, will have persons attached to receive such documents.

Under subpart O of 46 CFR part 67, instruments to be filed and recorded with the Coast Guard are submitted to the National Vessel Documentation Center. Any instrument submitted for filing and recording must be a completed, executed instrument at the time it is submitted. Upon receipt of the instrument at or on behalf of the NVDC, it is stamped with a date and time received. If the instrument submitted meets the minimal requirements for filing, it is marked "Filed" and the stamped date and time received is noted as the date and time filed. If the instrument submitted does not meet the minimal requirements for filing, it is

rejected and returned to the submitter. Under the terms of 46 U.S.C.

31321(a)(2), filing the instrument with the Coast Guard is the legally significant act which makes it valid against third parties. If all of the necessary elements for recording the instrument are present when it is filed, it can be promptly recorded. Recording the instrument consists of indexing the filed instrument with a book and page number, which serves as a locator for the document, and placing it in the appropriate "book" according to its sequential page number(s). If an instrument is filed but cannot be recorded because of an error or omission, the instrument is deemed "filed subject to termination" and a 90-day period is provided for correction. If corrected within the 90-day period, the instrument may then be recorded and will retain the date and time originally filed. If the instrument is not corrected within the 90-day period, the filing is terminated and the instrument is returned. To preserve the notice purpose of the statute, any instrument filed with the Coast Guard, even if the filing is terminated and the instrument not recorded, is indexed on the vessel's General Index or Abstract of Title (form CG-1332). Allowing for the submission of an instrument by facsimile for filing would not change any of the procedural steps provided in the regulations. However, the submission of an instrument by facsimile for filing will start the process earlier and will result in an earlier date and time of filing.

Discussion of Comments and Changes

Many of the comments addressed concerns beyond the scope of the proposed rule. For example, some comments wanted information regarding how to directly access the Coast Guard's vessel documentation data base and what kind of computer hardware and software were needed for that purpose. Other comments expressed concerns about the impact that consolidation of the Coast Guard's vessel documentation field offices would have on services and suggested that certain functions be privatized. These concerns will not be addressed in this rulemaking. Only those comments that pertain to the proposed rule will be addressed in this document.

One comment requested an extension of the comment period. The person submitting the comment represented an organization scheduled to meet late in the comment period to discuss the proposed rule. It is noted that the individual who requested the extension to the comment period did submit a comment, on behalf of the organization represented, within the original

comment period. The Coast Guard has consolidated its vessel documentation function to the NVDC in Martinsburg, WV. In order to better serve its vessel documentation customers, the Coast Guard decided that it would be in the public interest to make facsimile submission of instruments for filing available at the earliest feasible date. Therefore, the comment period was not extended.

Three comments questioned the legal authority of the Coast Guard to accept instruments submitted by facsimile for filing. The Coast Guard anticipated this comment in the early stages of this rulemaking and conducted research into this matter. At issue is language in 46 U.S.C. 31321(b) that to be filed an instrument must "be signed and acknowledged." The comments opined that this language means that only the original of an instrument may be accepted for filing. One of the comments stated that acceptance of a reproduced instrument, whether reproduced by photocopy or facsimile, would constitute an impermissible attempt to amend the statute.

The filing and recording system administered by the Coast Guard is an informational system intended to provide to interested parties public notice regarding the existence of security interests or maritime liens on a vessel. In this regard, it is similar to the notice filing system employed by Article 9 of the Uniform Commercial Code (UCC). Under both Article 9 of the UCC and 46 U.S.C. 31321, the critical element in determining whether the filing will be effective against third parties is the adequacy of the information contained in the instrument filed to alert potential searchers of the records to preexisting security interests. Another purpose of the filing and recording system of 46 U.S.C. 31321 is to establish the priority of a preferred ship mortgage over various other maritime liens enforceable in Federal courts under admiralty jurisdiction. For this purpose, it is important that the instrument filed not only contain adequate information for a notice filing system, but that the instrument also be a valid document.

The requirements of 46 U.S.C. 31321 that to be filed the instrument must contain all of the informational elements necessary for notice and that it be "signed and acknowledged", are designed to meet both purposes. The purpose of the signature and acknowledgment on the instrument is to demonstrate that the instrument is genuine, that it is what it purports to be, and that it is a validly executed and completed instrument. Further, the

statute requires that the parties "shall use diligence to ensure that the parts of the instrument * * * for which they are responsible are in substantial compliance with the filing and documentation requirements." This placement of the burden of accuracy and completeness on the parties to the instrument was designed to remove the burden from the Coast Guard to carefully check each element of an instrument presented for filing to ensure that it was authentic. Therefore, the scope of the Coast Guard's responsibility regarding the acceptance of an instrument for filing is more of a ministerial function than a quality assurance function.

The primary premise to acceptance of an instrument submitted by facsimile for filing is that it is a completed and executed instrument that has been signed and properly acknowledged, and that has been submitted for filing by use of a reliable medium that accurately reproduces the original instrument. The safeguard to the system is that the filing accomplished by initial facsimile submission is temporary; unless the original is received by the Coast Guard within 10 days of submission by facsimile, the filing is terminated. In addition, a comparison between the original instrument and the duplicate received by facsimile will be made to ensure that the instrument submitted by facsimile was an accurate reproduction of the original. If the original instrument bears any alteration from the duplicate received by facsimile, the filing accomplished by facsimile submission will be terminated. Therefore, the Coast Guard's position is that acceptance of an instrument submitted by facsimile for filing fosters the purposes of the filing and recording system of 46 U.S.C. 31321, and that such acceptance complies with the requirements of the statute.

The comments further noted that language proposed for inclusion in the 1995 Coast Guard Authorization Act (H.R. 1361) renders the rulemaking moot. The Coast Guard disagrees. The proposed language, if enacted, is not self-effecting; implementing regulations would be required. In addition, the proposed language would authorize filing instruments "electronically." Electronic filing is far broader in scope than the submission of instruments by facsimile. The Coast Guard's view of the proposed language is that it would authorize a paperless filing system. This rule permitting the submission of instruments by facsimile for filing purposes does not authorize electronic filing.

Two of the comments requested that the time period for receipt of the original and duplicate of the instrument submitted by facsimile for filing be increased from 10 days to 15 days. The Coast Guard intends the primary use of facsimile submission of instruments for filing to be for those situations where time is of the essence. In such cases, the original and duplicate of the instrument should be mailed in such a manner that prompt receipt by the Coast Guard is ensured. Extending the receipt period could encourage batch processing of routine matters for facsimile submission. The Coast Guard does not want to encourage such use of the facsimile submission option. After the Coast Guard and the public have gained some experience with the facsimile submission option, the Coast Guard will examine whether expansion is warranted. Further, it is noted that the proposed language in the 1995 Coast Guard Authorization Act also requires receipt of the original within 10 days of facsimile submission. Therefore, the period within which the original and duplicate of any instrument submitted by facsimile for filing and the original of any accompanying forms must be received by the NVDC will remain 10 calendar days.

One comment suggested that the original and duplicate of the instrument submitted by facsimile for filing should be received by the NVDC within the 10-day period rather than merely be submitted to the NVDC within the time period. The Coast Guard agrees with the comment and the language in paragraph (b) of § 67.219 has been changed accordingly.

Three comments objected to the paper size limitation of 8½ by 11 inches for the original instrument which may be submitted by facsimile. Over the years, the standard paper size for pleadings and other documents in the Federal Courts has become 8½ by 11 inches. The Coast Guard has followed the lead of the Federal Courts in the vessel documentation program and has reformatted all of its forms, certificates, and other documents to 8½ by 11 inches. This effort has been well received by the courts and attorneys who often submit vessel documentation related documents as exhibits to pleadings. The NVDC has acquired plain paper sheet-by-sheet type facsimile machines. The Coast Guard's experience is that this type of facsimile machine produces a high quality reproduction that is durable and easy to maintain. Although the machines have the capability to receive instruments larger than 8½ by 11 inches the Coast Guard has decided to maintain the 8½

by 11 inch size limitation. This decision is based on the need to ensure that the facsimile transmission reproduces the instrument page-for-page to reduce the risk of error and to facilitate comparison of the instrument submitted by facsimile with the original instrument. Therefore, original instruments on other than 8½-inch by 11-inch paper may not be submitted by facsimile for filing.

Four comments objected to the 10-point type size requirement for instruments submitted by facsimile for filing. The principal complaint was that the application for documentation (CG-1258) is not in 10-point size and yet for a vessel not currently documented, an application must accompany the instrument submitted by facsimile. The 10-point type size limitation applies only to the instrument submitted by facsimile for filing, not additional documents accompanying the instrument. The purpose of the 10-point size requirement is to ensure that instruments submitted by facsimile are easily readable and capable of ready comparison with the original when received. Therefore, the 10-point type size limitation is not changed.

Three comments addressed the contents of the facsimile cover sheet. While the comments agreed with the need for the cover sheet, they suggested that the cover sheet also contain the name of the vessel, either the official number or hull identification number of the vessel, and the name(s) of the vessel owner(s). The Coast Guard agrees with these comments and the change has been made in § 67.219(e).

One comment requested that some sort of confirmation of receipt of the facsimile submission be included. The Coast Guard has decided as a matter of policy that it will provide facsimile confirmation within 24 hours of receipt of an instrument submitted for filing by facsimile. No change to the regulation is required by this policy determination.

One comment suggested that the word "instrument" in paragraphs (e) through (g) of § 67.219 be changed to the word "document" since applications for documentation can be submitted in certain situations. This suggestion appears to be based on the page and type size limitations previously discussed. These requirements are intended to assist in the accurate reproduction and readability of instruments submitted by facsimile for filing. The application form is already on 8½-inch by 11-inch paper, and the type size limitation does not apply. Therefore, the suggestion is not accepted. The language in the rule carefully distinguishes between

instruments and other documents which may also be submitted by facsimile.

Two comments expressed concern about the language in paragraph (f)(3) of § 67.219 that the filing of an instrument submitted by facsimile will be terminated if there is "any variance" between the instrument submitted by facsimile and the original. The comments expressed concern that a transmission error of the instrument by facsimile could cause the filing to be terminated. The Coast Guard's intent is to discourage the use of the facsimile submission option to submit an instrument that is incomplete or subject to change for the purpose of reserving an early filing date and time. An instrument submitted by facsimile for filing must be a completed, executed, and acknowledged instrument to meet the requirements for filing of 46 U.S.C. 31321. However, the Coast Guard understands the concern over the term "any variance" with regard to possible facsimile transmission errors. Therefore, the term has been changed to read "any alteration" to preserve the prohibition against any intentional change of the original instrument after submission by facsimile. As explained earlier in this preamble, the Coast Guard will compare the instrument submitted by facsimile to the original instrument and will terminate the filing of an instrument submitted by facsimile if the original bears any alteration. The filing of an instrument submitted by facsimile will not be terminated for errors that are determined by comparison with the original to have been caused by transmission problems. If the filing of an instrument submitted by facsimile is terminated, the person submitting the original instrument would also be liable for the fees associated with submission of the instrument by facsimile.

Three comments addressed the proposed fee associated with submitting an instrument by facsimile for filing. One of the comments opined that the fee was too low to cover the costs to the Coast Guard. The Coast Guard has been charging user fees for vessel documentation services since January 1, 1995, when the revision to Part 67 became effective. The fee proposed for the submission of instruments by facsimile was determined by using established personnel costs and projected equipment costs, and projecting the handling time and costs for each instrument. The Coast Guard realizes that the \$2.00 per page fee may not reflect the exact cost of the program. However, the Coast Guard periodically reviews its user fees and the basis for those fees, and will make necessary adjustments as experience requires. The

\$2.00 per page fee applies only to the instrument(s) submitted by facsimile for filing and does not apply to any additional documents submitted that will not themselves be filed and recorded. Therefore, the \$2.00 per page fee does not apply to any application required by paragraph (a), or to the facsimile cover sheet required by paragraph (d).

Two of the comments regarding fees stated that the Coast Guard should provide for payment of fees by credit card and should establish payment accounts for frequent customers. While the Coast Guard does not currently permit payment of vessel documentation user fees by charge or credit card or the use of credit/debit accounts, it is exploring those options. Any change to fee payment procedures would be published in the **Federal Register**.

An amendment to the definition of the NVDC in § 67.3 has been included in this rule. This amendment adds a telephone number for the NVDC.

An amendment to § 67.13 has been included in this rule. That amendment merely changes the address of the location in the Coast Guard where material incorporated by reference in part 67 may be inspected.

Regulatory Evaluation

This regulation is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. It has not been reviewed by the Office of Management and Budget under that order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040, February 26, 1979).

The Coast Guard expects the economic impact of this regulation to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary. The Coast Guard anticipates that optional filing by facsimile will be used only in a limited number of cases. For example, when additional financing is being negotiated; when an assignment or assumption of an existing mortgage is pending; when financing at favorable rates is time critical; or when a vessel owner desires to meet a specific sailing date and filing an instrument is critical to that date, are situations when filing by facsimile could be advantageous. Nevertheless, submission by facsimile is an optional method of presenting instruments for filing. A party may always use regular mail or personal delivery if desired. Therefore, any additional costs to the

public associated with this regulation would be due to an election to use the optional method.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Coast Guard must consider whether this regulation will have a significant economic impact on a substantial number of small entities. "Small entities" may include (1) small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields and (2) governmental jurisdictions with populations of less than 50,000.

As explained earlier in this preamble, this regulation merely adds an optional method of submitting certain forms and instruments to the Coast Guard for filing and recording. Since filing by facsimile is optional, any additional costs borne by any users would be at their election. Current methods of submitting instruments for filing, at no increase in costs, remain available. In addition, it is anticipated that the option of filing by facsimile would be used only in limited situations where time is of the essence. Therefore, the Coast Guard certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that this regulation will not have a significant economic impact on a substantial number of small entities.

Collection of Information

This regulation contains no collection-of-information requirements under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This regulation merely describes an additional method which may be used as an option to submit vessel documentation related instruments to the Coast Guard for filing and recording.

Federalism

The Coast Guard has analyzed this regulation under the principles and criteria contained in Executive Order 12612 and has determined that it does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environment

The Coast Guard considered the environmental impact of this regulation and concluded that under paragraph 2.B.2 of Commandant Instruction M16475.1B, it is categorically excluded from further environmental documentation. This regulation has been determined to be categorically excluded because the changes made are administrative and procedural in nature, relate solely to the documentation of

vessels, and clearly have no environmental impact. A "Categorical Exclusion Determination" is available in the docket for inspection or copying where indicated under ADDRESSES.

List of Subjects in 46 CFR Part 67

Fees, Incorporation by reference, Vessels.

For the reasons set out in the preamble, the Coast Guard amends 46 CFR part 67 as follows:

PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

Authority: 14 U.S.C. 664; 31 U.S.C. 9701; 42 U.S.C. 9118; 46 U.S.C. 2103, 2107, 2110; 46 U.S.C. app. 841a, 876; 49 CFR 1.46.

§ 67.3 [Amended]

2. In § 67.3, the definition of "National Vessel Documentation Center" is amended by adding at the end the words "Telephone: (800) 799-VDOC (8362)".

§ 67.13 [Amended]

3. In § 67.13, paragraph (a) is amended by removing the words "Merchant Vessel Inspection and Documentation Division, 2100 Second Street SW., Washington, DC 20593-0001" and adding in their place the words "National Vessel Documentation Center, 2039 Stonewall Jackson Drive, Falling Waters, WV 25419".

4. Section 67.219 is added to read as follows:

§ 67.219 Optional filing of instruments by facsimile.

(a) Any instrument identified as eligible for filing and recording under § 67.200 may be submitted by facsimile for filing to the National Vessel Documentation Center at (304) 271-2400. If the instrument submitted by facsimile for filing pertains to a vessel that is not a currently documented vessel, a properly completed Application for Initial Issue, Exchange, or Replacement Certificate of Documentation; or Redocumentation (form CG-1258); or a letter application for deletion from documentation must already be on file with the National Vessel Documentation Center or must be submitted by facsimile with the instrument being submitted by facsimile for filing.

(b) Within 10 days of submission by facsimile for filing, the original and one copy of any instrument submitted by facsimile for filing must be received by the National Vessel Documentation Center. If not already on file, the original of any application required by paragraph (a) of this section must also

be received by the National Vessel Documentation Center within 10 days of submission of the instrument by facsimile for filing.

(c) Upon receipt of the original instrument and copy in accordance with paragraph (b) of this section, the instrument may be recorded provided it complies with the requirements of this part.

(d) All instruments submitted by facsimile for filing must be clearly legible, be submitted from 8½-inch by 11-inch paper in not less than 10-point type size, and be accompanied by a cover sheet.

(e) The facsimile cover sheet required by paragraph (d) of this section should indicate:

(1) The name, address, telephone number, and facsimile telephone number of the person submitting the instrument by facsimile;

(2) The number of pages submitted by facsimile; and

(3) The name of the vessel, official number or hull identification number of the vessel, and the name(s) of the owner(s) of the vessel to which the instrument relates.

(f) The filing of any instrument submitted by facsimile is terminated and the instrument will be returned to the submitter if:

(1) The instrument is subject to termination for any cause under § 67.217(a);

(2) The original instrument and copy required to be submitted in accordance with paragraph (b) of this section is not received within the 10-day period; or

(3) There is any alteration between the instrument submitted by facsimile for filing and the original instrument and copy received in accordance with paragraph (b) of this section.

(g) When the filing of an instrument submitted by facsimile is terminated for an alteration in accordance with paragraph (f)(3) of this section, the original instrument and copy received in accordance with paragraph (b) of this section will be deemed to be an original filing under this subpart subject to termination. The procedures for written notification of the termination of the filing and for the disposition of instruments described in paragraphs (b) and (c) of § 67.217 will apply.

5. In § 67.500, paragraph (a) is revised to read as follows:

§ 67.500 Applicability.

(a) This subpart specifies documentation services provided for vessels for which fees are applicable. No documentation service for which a fee is applicable will be performed until the

appropriate fee has been paid. Fees are contained in Table 67.550.

* * * * *

6. Section 67.540 is added to read as follows:

§ 67.540 Facsimile handling fee.

A handling fee is charged for processing an instrument submitted by facsimile for filing in accordance with subpart O of this part.

7. In § 67.550, Table 67.550 is amended by adding "Facsimile submission handling" as an entry

following the entry "Notice of claim of lien and related instruments" under the category "Filing and recording:" to read as follows:

§ 67.550 Fee table.

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TABLE 67.550.—FEES

Activity	Reference	Fee
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Facsimile submission handling	Subpart O	¹ 2.00
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¹ Per page.

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Dated: July 27, 1995.

J.D. Card,

Rear Admiral, U.S. Coast Guard, Chief, Office of Marine Safety, Security and Environmental Protection.

[FR Doc. 95-19345 Filed 8-4-95; 8:45 am]

BILLING CODE 4910-14-P