Dated: May 26, 1999.

John H. Hankinson, Jr.,

Regional Administrator, Region IV.

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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: Proposed rule.

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

DATES: Comments due August 24, 1999.

ADDRESSES: Send comments (original and fifteen copies) to: Bryant L. VanBrakle, Secretary, Federal Maritime Commission, 800 North Capitol Street, NW., Room 1046, Washington, DC 20573, (202) 523–5725.

FOR FURTHER INFORMATION CONTACT: Thomas Panebianco, General Counsel, Federal Maritime Commission, 800 North Capitol Street, NW., Room 1018, Washington, DC 20573, (202) 523–5740.

SUPPLEMENTARY INFORMATION: In one of its several rulemaking proceedings to implement the Ocean Shipping Reform Act of 1998, Pub. L. 105–258, 112 Stat. 1902 (''OSRA''), the Federal Maritime Commission (''FMC'' or ''Commission'') proposed to amend its regulations governing agreements among ocean common carriers and marine terminal operators. 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. One of the proposed changes was a new definition of ''ocean common carrier'' to address perceived deficiencies in the definition of that term contained in section 3(16) of the Shipping Act of 1984 (''1984 Act''), 46 U.S.C. app. § 1702(16), (''a vessel-operating common carrier''), and to clarify the dividing line between ocean common carriers and non-vessel-operating common carriers (''NVOCCs''). The proposed rule sated that:

> *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 Commission received comments on this particular aspect of the proposed rule from Croatia Line and the Council of European & Japanese National Shipowners Association (''CENSA''). While generally supporting the Commission's proposed definition, CENSA suggested that it be further clarified to include a carrier that provides part of a vessel service in a U.S. trade. In addition, Croatia Line claimed that the Commission failed to disclose the facts necessitating such a change, and failed to discuss the effects of the changes on regulated parties. Croatia Line also argued that the proposed definition would adversely affect it, since it is party to two space charter agreements and does not operate vessels making direct calls at U.S. ports. It further argued that the proposal was contrary to the clear language of the 1984 Act and well-established precedent. Croatia Line suggested that changes not required by OSRA should not be subject to such a short comment period.

In light of these comments, and the absence of additional comments from other potentially affected parties, the Commission decided to provide an additional opportunity to comment, 64 FR 11236, March 8, 1999. Accordingly, the Commission is initiating this rulemaking proceeding to further consider the definition of ''ocean common carrier.'' In addition, because the definition of ocean common carrier appears not only in the agreement rules but also in the rules governing ocean transportation intermediaries (part 515), tariffs (part 520), and service contracts (part 530), the Commission is proposing to adopt a definition that is consistent for all rules.

As explained in the preamble to the proposed rule in Docket No. 98–26, the amended definition of ''ocean common carrier'' is proposed to resolve uncertainty generated by the 1984 Act's definition, which is simply ''a vessel-operating common carrier.'' At issue is how to distinguish between ocean common carriers and NVOCCs. The distinction, which was first codified in 1984, has significant implications, inasmuch as the 1984 Act affords ocean carriers, but not NVOCCs, antitrust immunity and other rights and responsibilities, including the ability to offer service contracts. The need for clarity in this area is continued by OSRA, which continues to differentiate between vessel-operating and non-vessel-operating lines with regard to service contracting and other areas.

At first glance, it is difficult to see the ambiguity in the phrase ''vessel-operating.'' However, the Commission's staff has encountered a number of complex situations regarding where and when vessels are operated, and what types of vessels are involved. In this regard, various bureaus have taken the position that an ''ocean common carrier'' is a common carrier that, in providing a common carrier service, operates a vessel calling at a U.S. port. Moreover, if a carrier is an ocean common carrier in one U.S. trade, it has been reasoned, it is an ocean common carrier for all U.S. trades. For example, if a carrier operates vessels from the U.S. East Coast to northern Europe, it has the legal ''status'' of ocean common carrier to enter into space charter agreements for any U.S.-foreign trade.

The proposed definition codifies this approach. It would continue the practice of determining status on a multi-trade basis (*i.e.*, an ocean common carrier in one U.S. trade has that status in all U.S. trades). Any interpretation of the statute requiring status determinations to be made on a trade-by-trade basis would be administratively impractical and might prompt less than efficient redeployment of vessels in the U.S. trades solely to meet regulatory requirements.

The proposed definition would also clarify the issue of whether companies that operate vessels only outside the U.S.—*i.e.*, they have no vessel operations to U.S. ports—can be deemed ''ocean common carriers.'' It appears from the legislative intent of the 1984 Act that 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 1984 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 * * *.

S. Rep. No. 3, 98th Cong., 1st Sess. 9 (1983). We do not believe that Congress intended to provide special privileges or protections to carriers that have not made the financial commitment to providing vessel service to the United States.

A definition of ocean common carrier that encompassed companies that operate vessels only in foreign-to-foreign trades would substantially broaden the scope of antitrust immunity potentially to include a number of small operators whose wholly foreign vessel operations would be difficult for the Commission to monitor or verify. Such a finding would remove such companies from the scope of the Act's NVOCC bonding requirements, even though they have no vessels or assets in the United States that can be attached to satisfy a Commission or U.S. court judgment. Such an approach would also seem to contravene the longstanding judicial policy of narrowly construing antitrust exemptions. *See, e.g., Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973). In addition, from the text of the Act, it appears likely that when Congress used the unadorned term ''vessel'' in the definition of ocean common carrier, it was referring to the vessels specified in the definition of common carrier, *i.e.*, those that operate on the high seas or Great Lakes between the United States and a foreign country.

The proposed definition would continue the policy that the vessels in question must be used in a common carrier service. If an NVOCC operates tankers or tramp vessels, wholly apart from its common carrier service, it does not secure ocean common carrier status from those vessel operations.

The Chairman certifies, pursuant to section 605 of the Regulatory Flexibility Act, 5 U.S.C. 605, that the proposed rules will not, if promulgated, have a significant impact on a substantial number of small entities. The affected universe of parties is limited to ocean common carriers or passenger vessel operators. The Commission has determined that these entities do not come under the programs and policies mandated by the Small Business Regulatory Enforcement Fairness Act as they typically exceed the threshold figures for number of employees and/or annual receipts to qualify as a small entity under Small Business Administration Guidelines.

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 proposed to be amended as follows:

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

1. The authority citation for part 515 continues to read as follows:

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

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.

* * * * *

PART 520—CARRIER AUTOMATED TARIFF SYSTEMS

1. The authority citation for part 520, is revised to read as follows:

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

2. In § 520.2 revise the definitions 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 Lake 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, 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 revised to read as follows:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1702–1704, 1706–1707; 1709–1710, 1712 and 1714–1717.

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, and 17 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.

Byrant L. VanBrakle,

Secretary.

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