

practices by other regulatory entities charged with oversight of commercial agreements affecting competition.²⁷

Appropriately exempted agreements would appear to include those which: (1) have neither pricing nor capacity or trade lane allocation authority; and (2) have less than 20% combined market share in the relevant trade lane and all sub-trades, or 15%, if operating within a rate agreement. This exemption might cover, for example, non-exclusive two-party vessel sharing agreements and slot/space charters and other types of collaborative agreements in which the parties' combined market share falls below the 20% level. A definition of "sub-trade" consistent with the definition in the appendix to the Monitoring Report has been added to the Commission's regulations at § 535.104(hh).

The types of agreements outlined above would appear to meet the criteria under which the Commission has the authority to grant exemptions from requirements of the Shipping Act. The Commission has discretion to grant such exemptions only if doing so (1) will not result in substantial reduction in competition or (2) be detrimental to commerce. 46 U.S.C. app. § 1715. Agreements within the safety zone exemption would appear to cause neither a substantial reduction in competition nor otherwise be detrimental to commerce.²⁸ The Commission, therefore, proposes new section 535.311 providing for an exemption from the 45-day waiting period for agreements meeting the above-discussed criteria.

In connection with this proposed new exemption, the Commission also proposes to introduce a new term, "capacity rationalization," to describe one of the authorities that would prevent an agreement from qualifying for this low market share exemption. The Commission's rules currently utilize the term "capacity management agreement," which is defined very narrowly: only "artificial" reduction of

space on a per vessel basis is contemplated. *See*, 46 CFR 535.104(e). However, sailing or space charter agreements, especially those with exclusivity clauses, such as vessel sharing arrangements or alliances, may also be properly considered agreements which manage or restrict the amount or use of productive capacity. Therefore, the Commission proposes to revise section 535.104(e) to utilize the term "capacity rationalization" rather than the term "capacity management agreement," in order to distinguish between those agreements reflecting simple operational arrangements and those which actively impose restrictions on capacity, thereby raising section 6(g) concerns for effects on price and service, and to promote consistency with other Commission regulations. Agreements with capacity rationalization authority would include, for example, agreements in which the parties restrict their ability to provide transportation in the Trade on vessels other than those utilized by the agreement or to enter into services that are alternate to/or in competition with the services provided under the agreement, without the prior consent of the agreement members.

ii. Revision of the Present Exemptions for Non-substantive Agreements and Amendments, Miscellaneous Modifications (proposed § 535.302), and Public Notice of Filings (proposed § 535.602)

As another effort to address the commenters' concern about the need for flexibility, the Commission proposes to retain and clarify its existing exemptions for certain types of modifications to agreements that may go into effect upon filing, or be filed for informational purposes only: namely, "non-substantive" modifications (46 CFR 535.302) and "miscellaneous" modifications (46 CFR 535.309).

We believe that the current "non-substantive" exemption is unnecessarily broader than the pre-1984 exemption for modifications which it was intended to continue, but which contained no category for "non-substantive" initial agreements. The Commission believes that the scope of this exemption is unclear and thus should be revised. In addition, the Commission has determined to eliminate the practice of determining on an ad hoc basis through delegated authority whether an amendment to an agreement is "non-substantive." 46 CFR 535.302(c). Therefore, the Commission proposes to combine some of the language of section 535.309 with that of a revised section 535.302 to eliminate the exemption for

non-substantive initial agreements and enumerate the "non-substantive" and "miscellaneous" modifications that are exempt from filing.

The Commission proposes to remove the current exemption for "miscellaneous modifications" for changes to parties to a discussion agreement contained in present section 535.309(a)(2)(i). Such additions in members to a discussion agreement may alter the potential competitive impact of the discussion agreement. On the other hand, the Commission believes that it is appropriate to continue the current exemption from the 45-day waiting period otherwise required by the Shipping Act for conferences, which are required to be open to all carriers serving the conference trade. Therefore, the Commission is proposing a revision to former 535.309(a)(2)(i) to indicate this change.

In addition to the specific exemption changes discussed above, the Commission is also proposing to change its current policy regarding publication of notice in the **Federal Register** of agreement filings that are otherwise exempt from the requirements of this part. At present, the Commission does not publish notice of optionally-filed agreements and modifications, or agreements and modifications exempted from the 45-day waiting period. However, the Commission recognizes that public notice is the most effective way for the public to know what agreements and modifications to agreements are being filed. The Commission believes it is important for the public to know, for example, whether a carrier joins a conference agreement or resigns from one, or whether certain marine terminal operators have leases. To that end, the Commission is proposing to revise § 535.602 to indicate that a notice will be published in the **Federal Register** of each new agreement and agreement modification, including those agreements that are exempt from the 45-day waiting period and those that are optionally filed under the various exemptions in subpart C.

iii. Transshipment Agreements (proposed §§ 535.104(jj) and 535.306(a))

The proposed rule changes for transshipment agreements are intended to clarify the Commission's view of what constitutes a transshipment agreement but not remove the filing exemption for nonexclusive transshipment agreements. The Commission has traditionally viewed transshipment agreements as agreements under which two ocean common carriers that both operate

²⁷ The *Antitrust Guidelines for Collaborations among Competitors*, ("Guidelines") issued by the FTC and DOJ in April 2000, provides a "safety zone" for "situations in which anticompetitive effects are so unlikely that [FTC and DOJ] presume the arrangements to be lawful without inquiring into particular circumstances." Guidelines at section 4. To qualify for this exemption the parties to commercial collaborations must meet established market share thresholds as well as meet other enumerated conditions. The European Commission's Competition Directorate has adopted a similar "safety zone" approach for international ocean carrier collaborations which do not involve price-fixing of freight rates and fall below a certain market share threshold.

²⁸ We estimate 87 presently effective agreements would have qualified for this exemption.