

vessels provide a through service between the United States and a foreign port. However, the Commission also recognizes that the ocean transportation industry has substantially evolved since the Commission's current agreement rules were drafted. One notable change is the increased use of vessel sharing or space charter agreements by ocean common carriers to replace or augment their direct services. This change may have led to the development of what the Commission considers to be nontraditional transshipment arrangements, such as those in which a publishing carrier provides a transshipment service solely by taking space on vessels operated by other ocean common carriers. In an effort to provide a regulatory environment that promotes commercial flexibility and the resulting economic efficiencies for the carriers involved and the shipping public, the Commission is amending its definition of transshipment agreement to clarify that such arrangements between two ocean common carriers may be considered to be a transshipment agreement subject to the Shipping Act if the publishing carrier operates its own vessel in the through movement or provides service on its leg of the through service in accordance with a filed and effective space charter agreement.

The Commission acknowledged that there is some overlap between transshipment agreements and space charter agreements in promulgating the final rules implementing the Shipping Act, by stating that "a transshipment agreement is a type of space charter."<sup>49</sup> FR 45324 (November 15, 1984). This observation remains accurate in today's marketplace. Just as a space charter agreement permits an ocean common carrier to offer service in a trade without having to introduce its own vessels, a transshipment agreement permits a carrier to offer a service that it would not otherwise be able to provide unless it operated vessels on both legs of the transshipment. The publishing carrier pays the connecting carrier for space on the connecting carrier's vessel, just as a space charterer pays for the space that it uses on another ocean common carrier's vessel. Inevitably, therefore, a transshipment agreement includes space chartering.

In 1984, the Commission exempted nonexclusive transshipment agreements from the filing requirements for policy and practical considerations. Though the publishing carrier provides certain information regarding the transshipment arrangement in its tariff pursuant to

Section 535.306(b) and (c),<sup>29</sup> the filing exemption has resulted in reduced transparency for transshipment arrangements. As a result, the shipping public may lack a clear understanding of how the through transportation is being provided. To address the issue of transparency that arises when an ocean common carrier does not use its own vessels in the through transportation as well as to clarify the Commission's view of what constitutes a transshipment agreement, the Commission is proposing the addition of new language to the definition of a transshipment agreement.

The added language would clearly set forth the Commission's position that an ocean common carrier offering a transshipment service must either operate a vessel involved in the through movement or have a filed and effective space charter agreement to cover the portion of its service between the United States and the port of transshipment. The Commission believes that it is consistent with the provisions of the Shipping Act relating to agreements (46 U.S.C. app. §§ 1703, 1704) to require an ocean common carrier offering a transshipment service pursuant to a transshipment agreement to operate at least one vessel involved in the through movement. Nevertheless, in recognition that many ocean common carriers in U.S. trades now depend on space charter agreements, in addition to their own vessels, to provide their services, the Commission is including such arrangements in the revised definition of a transshipment agreement. In both instances, the goal of transparency would be achieved.

### 3. Confidentiality of Sensitive Commercial Information in Filed Agreements

The Commission has determined not to re-examine its interpretation of section 6(j) of the Shipping Act at this time. That provision reads,

(j) Nondisclosure of Submitted Material.

Except for an agreement filed under section 5 of this Act, information and documentary material filed with the Commission under section 5 or 6 is exempt from disclosure under section 552 of title 5, United States Code [FOIA] and may not be made public except as may be relevant to an administrative or judicial action or proceeding.

<sup>29</sup> Under Section 535.306, nonexclusive transshipment agreements are exempt from the filing requirement of the Shipping Act provided that the publishing carrier publishes in its tariff the through rate, the routings, any additional charges, and the participating carriers. The publishing carrier also issues the bill of lading.

The Commission's current regulation at 46 CFR 535.608(a) states,

(a) Except for an agreement filed under section 5 of the Act, all information submitted to the Commission by the filing party will be exempt from disclosure under 5 U.S.C. 552. Included in this disclosure exemption is information provided in the Information Form, voluntary submission of additional information, reasons for non-compliance, and replies to requests for additional information.

Section 6 (j) of the Shipping Act should be read harmoniously with the notice provision of section 6(a), which states that "[w]ithin 7 days after an agreement is filed, the Commission shall transmit a notice of its filing to the **Federal Register** for publication." 46 U.S.C. app. § 1705(a). In this regard, current Commission regulations further define what the notice of filing must contain, reflecting a long-held understanding that the Commission should make the complete agreement as filed available to the public. 46 CFR 535.602(b)(5). The current regulation is nearly identical to that originally adopted under the Shipping Act, 1916. 46 CFR 572.6(1997); 46 CFR 522.6; General Order 24 (1968).

The Commission has long interpreted the Shipping Act to require the public availability of the complete filed agreement, and to protect from Freedom of Information Act ("FOIA") disclosure only information supplementing the agreement. The Commission has never provided by rule for the protection of information contained in a filed agreement and no objection has ever been filed to the disclosure of such information. Most of the commenters appear to assume that the only means of protecting sensitive information contained in agreements is through filing exemptions.

Although no other statute precisely mirrors the Shipping Act procedures, especially as to the public's role in agreement review and their generally automatic effectiveness, we recognize that some agencies responsible for filings similar to agreements under the Shipping Act provide for confidentiality.<sup>30</sup> While it may be

<sup>30</sup> See, e.g., DOT (14 CFR 302.39(b)), STB (49 CFR 1001.4) and SEC (17 CFR 230.406). It is unclear what effect Executive Order 12,600 of June 23, 1987, may have on the Commission's ability to protect sensitive commercial information in filed agreements. Section 2(b) of that order directs Federal agencies "to permit submitters of confidential commercial information to designate, at the time the information is submitted to the Federal government or a reasonable time thereafter, any information the disclosure of which the submitter claims could reasonably be expected to cause substantial competitive harm." The Commission's rules provide for such protection