

Currently, all Class A, B, and C agreements that are effective under the Shipping Act are required to submit quarterly Monitoring Reports. Section 535.702(a) of the proposed rule would require Monitoring Reports from all agreements with the authority to discuss or agree on capacity rationalization, and from agreements with pricing or pooling authority⁴³ where the parties to a pricing or pooling agreement hold a combined market share of 35 percent or more in the entire U.S. inbound or outbound geographic scope of the agreement.⁴⁴ The Commission estimates that the number of agreements subject to Monitoring Reports would be reduced from 213 to 63. These 63 agreements would include rate discussion, conference, and major global alliance agreements in effect throughout the U.S. trades. The Commission believes that Monitoring Reports from these agreements would generally provide sufficient information to monitor the collective activities of carriers within the U.S. trades pursuant to the standards of the Shipping Act.

The Commission's proposal to apply a market share threshold of 35 percent to monitor pricing or pooling agreements is analogous to the Horizontal Merger Guidelines issued jointly by the U.S. Department of Justice and the Federal Trade Commission in 1992. *1992 Horizontal Merger Guidelines* ("1992 Guidelines"), 57 FR 41552 (Sept. 10, 1992). In analyzing horizontal mergers between firms, the 1992 guidelines set forth economic standards that the agencies use to apply U.S. antitrust law. Part of their analysis involves evaluating the likely effects of a merger on the competitive behavior of firms within a market. The intent is to determine whether a merger would likely lead to increased coordinated

interaction between firms in a market, and/or create the incentive for merging firms to alter their unilateral behavior by increasing prices and suppressing output, *i.e.*, supply. The agencies conclude that:

[w]here the merging firms have a combined market share of at least thirty-five percent, merged firms may find it profitable to raise price and reduce joint output below the sum of their premerger outputs because the lost markups on the foregone sales may be outweighed by the resulting price increase on the merged base of sales.⁴⁵

1992 Guidelines at 41561.

Market share provides a general economic measure to gauge the competitive influence of carrier agreements. Under the Shipping Act, however, the Commission does not solely rely on market share in assessing the competitive impact of a carrier agreement on freight rates and service levels in the U.S. trades. Other factors must be considered, including the authority and terms of the agreement, the competitive structure of the agreement trade, and the prevailing and projected economic conditions within the agreement trade. We note, however, that the 35 percent market share threshold used for application of periodic reporting requirements should not be construed as establishing a determination of the likely impact of an agreement for purposes of section 6(g) of the Shipping Act, nor does it imply that we consider pricing or pooling agreements below this threshold to be economically insignificant.

⁴⁵ As discussed, carriers collectively set freight rates in relation to the supply and demand conditions within trades. The authorities to agree on rate levels and vessel capacity are interrelated and complementary even if such authorities are not contained within a single agreement. Many carriers in a trade may participate in a large rate discussion agreement and separate agreements with capacity rationalization authority, which such carriers may use to control the supply of vessel capacity to further their rate objectives under the discussion agreement. The Commission must examine the collective rate activities of carriers in relation to the vessel capacity supplied by carriers and any collective activities that might affect the supply of vessel capacity in a trade. For these reasons, the Commission believes that the underlying economic rationale used to apply the 35 percent market share standard under U.S. antitrust law makes it comparable and appropriate as a threshold for monitoring agreements with pricing or pooling authority.

The proposed rule does not apply a market share threshold for monitoring agreements with capacity rationalization authority. These arrangements tend to operate globally, which makes it difficult or impractical to apply a standard market share threshold to the entire geographic scope of the agreement, or any one particular trade within the scope of the agreement. The definition of capacity rationalization authority, however, distinguishes it from simpler forms of operational authority, and therefore, limits the application of the Monitoring Report regulations.

The Commission recognizes that the Monitoring Report regulations must be flexible enough to provide for exceptional cases. These cases may occur when a pricing or pooling agreement with a market share below 35 percent constitutes the major rate agreement in a trade, or poses unique anticompetitive or statutory concerns that would require close monitoring. Therefore, section 535.702(c) of the proposed rule provides that the Commission may, as necessary, require Monitoring Reports from an agreement with pricing or pooling authority with a market share below the 35 percent threshold.⁴⁶

In addition, the Commission occasionally may find it necessary to prescribe alternative periodic reports on the use of certain authority contained in an agreement. This may occur when an agreement contains unique authority, the effects of which may require monitoring, but is not captured under the standard Monitoring Reports. For example, the Commission currently requires alternative periodic reports, in addition to Monitoring Reports, from the Trans-Atlantic Conference Agreement on its temporary slot assist chartering authority. Traditionally, these types of reports have been negotiated on an informal basis with the parties when an agreement or an agreement modification was filed with the Commission. Section 535.702(d) of the proposed rule clarifies the Commission's authority in this regard by providing that in addition to or instead of the Monitoring Report, the Commission may, as necessary, prescribe alternative periodic reporting requirements on parties to any agreement subject to section 535.201.⁴⁷

Section 535.705 of the proposed rule provides waiver procedures whereby carriers may request relief from any of the Monitoring Report requirements. Additional data and information in support of the requested relief, however, would be required for the Commission's review.

⁴⁶ The Commission's authority on this matter would be delegated to the Director of BTA in subpart C of part 501.

⁴⁷ Section 535.201 applies to carrier agreements, agreements between marine terminal operators, and agreements between carriers and marine terminal operators. At present, the Commission does not require any specifically prescribed periodic reports from any agreements between marine terminal operators, or between marine terminal operators and carriers. The Commission's jurisdiction to require additional information and documents from all such agreements is stated in section 5(a) of the Shipping Act. The proposed rule would delegate the Commission's authority to prescribe alternative periodic reports to the Director of BTA in subpart C of part 501.

⁴³ "Pricing or pooling authority" as referred to in the Monitoring Report regulations is identical to the use of the term in the Information Form regulations; *i.e.*, it refers to any of the following authorities: (a) The discussion of, or agreement upon, whether on a binding basis under a common tariff or a non-binding basis, any kind of rate or charge; (b) the establishment of a joint service; (c) the pooling or division of cargoes, earnings, or revenues and/or losses; (d) the discussion or exchange of data on vessel-operating costs; and/or (e) the discussion of service contract matters.

⁴⁴ Under section 535.702(b) of the proposed rule, the Commission's Director of BTA may determine the Monitoring Report obligations of agreements with pricing or pooling authority using the 35 percent market share threshold. For newly filed agreements, this would be based on the market share data from the Information Form submitted with the agreement. Thereafter, at the beginning of each calendar year, BTA would notify such agreements of any change in their reporting obligations based on the market share data from their Monitoring Reports for the previous second calendar quarter (April-June).