



FEDERAL MARITIME COMMISSION

46 CFR Part 502

[FMC-2025-0074]

RIN 3072-AD06

Rulemaking Procedures

AGENCY: Federal Maritime Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Maritime Commission (FMC or the Commission) is proposing to revise its rulemaking procedures. The changes would: consolidate informal rulemaking and rulemaking petition requirements into subpart D, clarify ambiguities, remove unnecessary, overly restrictive requirements (such as *ex parte* requirements), and allow for the FMC to integrate its rulemaking procedures into the Executive Order 12866 centralized regulatory review process, as directed by Executive Order 14215. This proposal would also make conforming changes associated with the FMC's transition to eRulemaking. The FMC invites public comment on all aspects of this proposed rule.

DATES: Comments and related material must be received by the FMC on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: To view background documents or comments received, you may use the Federal eRulemaking Portal at www.regulations.gov under Docket No. FMC-2025-0074. See the "Public Participation and Request for Comments" portion of the SUPPLEMENTARY INFORMATION section for further instructions on submitting comments. This notice of proposed rulemaking with its plain-language, 100-word-or-less proposed rule summary will be available in this same docket.

FOR FURTHER INFORMATION CONTACT: David Eng, Secretary; Phone: (202)

523-5725; Email: secretary@fmc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

A. Legal Authority

The Federal Maritime Commission is an agency of the United States Government responsible for regulating the U.S. international ocean transportation system for the benefit of U.S. exporters, importers, and consumers. The FMC administers subtitle IV (Parts A through D) of Title 46, United States Code, to ensure a competitive and reliable international ocean transportation supply system that supports the U.S. economy and protects the public from unfair and deceptive practices. It is authorized by 46 U.S.C. 46105 to prescribe regulations to carry out its duties and powers.

B. Formal versus Informal Rulemaking

The Administrative Procedure Act (APA) provides the general procedures for agency rulemaking. Most rulemakings are conducted under the “informal rulemaking” procedures of 5 U.S.C. 553. In limited circumstances, federal agencies must engage in “formal rulemaking,” which has heightened procedural requirements. The formal rulemaking requirements of 5 U.S.C. 556 and 557 are only triggered when Congress explicitly requires rulemaking “on the record after opportunity for an agency hearing.”¹ None of the statutes that the FMC administers require a rulemaking hearing “on the record.” Therefore, the Commission follows the informal, notice-and-comment rulemaking procedures under 5 U.S.C. 553, which does not require trial-type procedures.²

¹ *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972) (“Sections 556 and 557 need be applied ‘only where the agency statute, in addition to providing a hearing, prescribes explicitly that it be on the record.’”); *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 251 (1973).

² This is also true historically. *E.g.*, Report of the Board on Motion to Dismiss: *Carrier-Imposed Time Limits on Presentation of Claims for Freight Adjustments*, 4 F.M.B. 29 (1952) (holding that the Administrative Procedure Act’s formal rulemaking requirements were not applicable to the proceeding).

Section 553 requires: (1) publication of a notice of proposed rulemaking in the FEDERAL REGISTER, (2) opportunity for public participation by submission of written comments, and (3) publication of a final rule in the FEDERAL REGISTER, generally not less than 30 days before the rule’s effective date. An agency may, but is typically not required to, offer an opportunity for oral presentation of comments in informal rulemaking.³ It was once more common for the FMC and its predecessor agencies to hold in-person hearings during informal rulemaking proceedings.⁴ That practice, however, is no longer routine. The purpose of a hearing in informal rulemaking “is to permit the agency to educate itself and not to allow interested parties to choose the issue or narrow the scope of the proceedings...to allow interested parties to make useful comment and not to allow them to assert their ‘rights’ to insist that the rule take a particular form,” and in making its final determination, the agency “can look beyond the particular hearing record.”⁵ Written comments generally achieve this same goal through more economical and more efficient methods while also providing interested members of the public more equal access to the rulemaking proceeding.

C. Ex Parte Communications in Informal Rulemaking

In adjudicatory contexts, “ex parte communication” mean a communication “[o]n or from one party only, usually without notice to or argument from the adverse party,” BLACK’S LAW DICTIONARY (12th ed. 2019). In a rulemaking context, an *ex parte* communication is a “[written or oral communication [] regarding the substance of an

³ Occasionally advanced procedural requirements beyond those required by 5 U.S.C. 553, such as oral submissions and cross-examination, may be required by Due Process if critical issues cannot be otherwise resolved. Implementation of these procedures, however, does not require full adjudicatory procedures under 5 U.S.C. 556 and 557. *O’Donnell v. Schaffer*, 491 F.2d 59, 62 (D.C. Cir. 1974).

⁴ See e.g., Report of the Commission: *Bills of Lading—Incorporation of Freight Charges*, 3 U.S.M.C. 112 (1949) (public hearings before examiner for proceeding under section 4 of the Administrative Procedure Act); Report of the Board on Motion to Dismiss: *Carrier-Imposed Time Limits on Presentation of Claims for Freight Adjustments*, 4 F.M.B. 29 (1952) (public hearings before an examiner for proceeding under section 4 of the Administrative Procedure Act).

⁵ *Pac. Coast Eur. Conf. v. United States*, 350 F.2d 197, 205 (9th Cir. 1965).

anticipated or ongoing rulemaking between...agency personnel and interested persons; and that are not placed in the rulemaking docket at the time they occur.”⁶

The Commission’s current regulations generally prohibit most informal communications between the Commission and interested persons concerning all FMC proceedings. Section 4 of the Government in the Sunshine Act, Pub. L. 94-409 (Sept. 13, 1976) expanded upon the original *ex parte* requirements located in section 5 the Administrative Procedure Act by establishing specific prohibitions against interested persons outside the agency as well as agency members, administrative law judges, and employees involved in the decision process from engaging in *ex parte* communications. In the agency’s implementing regulations the Commission determined that the prohibition on *ex parte* communications should apply to informal rulemaking proceedings.⁷ That policy was supported by several contemporaneous court decisions which expressed the view that *ex parte* communications in informal rulemaking proceedings were inherently suspect.⁸ Accordingly, it has long been the agency's practice to prohibit meetings with individual stakeholders on issues that are the topic of pending informal rulemaking proceedings.⁹ In 1981, however, in *Sierra Club v. Costle*, 657 F.2d

⁶ 79 FR 35988, 35993 (June 25, 2014) (reflecting the Administrative Conference of the United States Recommendation 2014-4).

⁷ *Extraneous and Ex Pare Communications*, 42 FR 14110 (March 15, 1977). (A commenter on the notice of proposed rulemaking (NPRM) suggested that the agency’s rule should make clear that the *ex parte* requirements were not applicable to informal rulemaking. The Commission flatly rejected this suggestion, stating: “The proposed limitation is too narrow and could permit *ex parte* activity in proceedings intended [by the Government in the Sunshine Act] to be covered.”).

⁸ See, e.g., *Home Box Office v. Fed. Commc'ns Comm'n*, 567 F.2d 9, 51-59 (D.C. Cir. 1977) (finding that *ex parte* communications that occurred after the NPRM violated the due process rights of the parties who were not privy to the communications because the written administrative record would not reflect the possible “undue influence” exerted by those stakeholders who had engaged in *ex parte* communications); *Nat'l Small Shipments Traffic Conference v. ICC*, 590 F.2d 345, 351 (D.C. Cir. 1978) (finding *ex parte* communications “violate[d] the basic fairness of a hearing which ostensibly assures the public a right to participate in agency decision making,” foreclosing effective judicial review); *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959) (finding that undisclosed *ex parte* communications between agency Commissioners and a stakeholder were unlawful because the informal rulemaking involved “resolution of conflicting private claims to a valuable privilege, and that basic fairness requires such a proceeding to be carried on in the open”).

⁹ See, e.g., *Action for Children's Television v. Fed. Commc'ns Comm'n*, 564 F.2d 458 (D.C. Cir. 1977) (upholding the agency's decision not to issue proposed rules and finding no APA violation for *ex parte* discussions where the agency provided a meaningful opportunity for public participation and the proceeding did not involve competing claims for a valuable privilege).

298 (D.C. Cir. 1981), the U.S. Court of Appeals for the District of Columbia Circuit significantly clarified and liberalized treatment of this issue. In that case, the court considered the “timing, source, mode, content, and the extent of . . . disclosure” of numerous written and oral *ex parte* communications received after the close of the comment period to determine whether those communications violated the governing statute or due process. *Id.* at 391. The court held that, because the agency docketed most of the *ex parte* communications and none of the comments were docketed “so late as to preclude any effective public comment,” the agency satisfied its statutory requirements. *Id.* at 398. The court also declined to prohibit *ex parte* communications in informal rulemakings on constitutional due process grounds, and even held that not all *ex parte* communications must necessarily be docketed (implicitly concluding that whether such communications require docketing depends on case-specific circumstances). *Id.* at 402–04. Today, *Sierra Club* is considered the most definitive opinion on *ex parte* communications in informal rulemakings and is often cited by courts for the proposition that *ex parte* communications in informal agency rulemaking are generally permissible.¹⁰

More recently, in 2014, the Administrative Conference of the United States (ACUS), the body charged by Congress with recommending agency best practices, provided guidance to agencies indicating that a general prohibition on *ex parte* communications in informal rulemaking proceedings is neither required nor advisable. *Ex Parte Commc'ns in Informal Rulemaking Proceedings (2014 ACUS Recommendation)*,

¹⁰ See, e.g., *Tex. Office of Pub. Util. Counsel v. Fed. Commc'ns Comm'n*, 265 F.3d 313, 327 (5th Cir. 2001) (“Generally, *ex parte* contact is not shunned in the administrative agency arena as it is in the judicial context. In fact, agency action often demands it.”); *Ammex, Inc. v. United States*, 23 Ct. Int'l Trade 549, 569 n.16 (1999) (noting that the decision at issue “constitutes an exercise of ‘informal’ rulemaking under the [APA] and, as such, is not subject to the prohibition on *ex parte* communications set forth in 5 U.S.C. 557(d)(1) (1994)”); *Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534, 1545-46 (9th Cir. 1993) (“The decision in [*Sierra Club*] that the contacts were not impermissible was based explicitly on the fact that the proceeding involved was *informal* rulemaking to which the APA restrictions on *ex parte* communications are not applicable.”).

79 FR 35988, 35994 (June 25, 2014). ACUS concluded that *ex parte* communications in informal rulemaking proceedings “convey a variety of benefits to both agencies and the public,” although it acknowledged that fairness issues can arise if certain groups have, or are perceived to have, “greater access to agency personnel than others.” *Id.* However, in balancing these competing considerations, ACUS urged agencies to consider placing few, if any, restrictions on *ex parte* communications that occur *before* an NPRM is issued because communications at this early stage are less likely to cause harm and more likely to “help an agency gather essential information, craft better regulatory proposals, and promote consensus building among interested persons.” *Id.* ACUS further recommended that agencies establish clear procedures ensuring that all *ex parte* communications occurring *after* an NPRM is issued, whether planned or unplanned, be disclosed.

Based on the developments in case law related to *ex parte* communications and the Commission's own experiences in proceedings, the Commission has determined that it is appropriate to revisit the agency's strict prohibition on *ex parte* communications in informal rulemaking proceedings.

D. Rules of Particular Applicability

The APA distinguishes between rules of “general applicability” and rules of “particular applicability.” *See* 5 U.S.C. 551(4). Rules of particular applicability are rules that only impact the pre-existing legal rights or obligations of persons identified in the rule. A rule of general applicability, by contrast, impacts the legal rights or obligations of anyone within the agency’s jurisdiction engaging in activities covered within the scope of the rule. Unlike rules of general applicability, the APA does not require rules of particular applicability to be published in the FEDERAL REGISTER.

E. Petitions for Rulemaking

Under the APA, federal agencies are required to “give . . . interested person[s] the right to petition for the issuance, amendment, or repeal of a rule,” 5 U.S.C. 553(e). An

agency is not required to grant a petition for rulemaking.¹¹ The APA generally does not establish procedures agencies must observe in connection with petitions for rulemaking. It does, however, require agencies to respond to petitions for rulemaking “within a reasonable time,” *id.* at 555(b), and to give petitioners “prompt notice” when a petition is denied in whole or in part, along with “a brief statement of the grounds for denial,” *id.* at 555(e). Agency denial of a rulemaking petition is subject to judicial review under an extremely deferential version of the arbitrariness and capriciousness standard.¹²

F. eRulemaking

In October 2002, the eRulemaking Program was established as a cross-agency E-Gov initiative under section 206 of the 2002 E-Government Act (Public Law No. 107-347). The General Services Administration (GSA) manages the eRulemaking Program and is responsible for the development and implementation of Regulations.gov (the public-access side) and the Federal Docket Management System (FDMS) (the agency-access side). The Commission began using FDMS for its rulemaking program in 2022. While the FMC had previously made rulemaking materials available online to the public through the Commission’s Electronic Reading room on FMC.gov, by using Regulations.gov the public can comment on rulemakings directly through the system rather than having to email comments to the FMC Secretary. In addition to the benefit to the public, FDMS provides significant benefits to the agency such as adding and managing dockets electronically and running deduplication to identify near-duplicate comments and mass mail campaigns. The FMC’s rulemaking regulations, however, have not been updated to reflect this procedural advancement.

¹¹ *WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 813 (D.C. Cir. 1981) (“[a]lthough the legislative history accompanying section 4(d) makes it plain that an agency must receive and respond to petitions for rulemaking, it is equally clear from the legislative history that Congress did not intend to compel an agency to undertake rulemaking merely because a petition has been filed”).

¹² *Massachusetts v. E.P.A.*, 549 U.S. 497, 527–28 (2007) (removing doubt over the reviewability of denials of petitions for rulemaking; stating that “[r]efusals to promulgate rules are thus susceptible to judicial review, though such review is ‘extremely limited’ and ‘highly deferential’”).

G. Centralized Regulatory Review

Executive Order (EO) 12866 (Regulatory Planning and Review), issued in 1993, requires “significant regulatory actions” to be submitted for review to the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). 58 FR 51735, Oct. 4, 1993. A “significant regulatory action,” as defined by the Executive Order, is generally any regulatory action that is likely to result in a rule that may:

- Have an annual effect on the economy of \$100 million or more; or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or Tribal governments or communities;
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

Executive Order 14215, *Ensuring Accountability for All Agencies*, recently amended Executive Order 12866 to make its centralized regulatory review requirements applicable to the FMC and most other similarly-structured agencies. 90 FR 10447 (Feb. 18, 2025). The FMC’s current prohibition on *ex parte* communications at 46 CFR 502.11, which applies to communications between federal agencies in informal rulemakings, is in direct conflict with this mandate.

III. Summary of Proposed Changes

A. Consolidation of Procedures for Petitions for Rulemaking and Informal Rulemaking into Subpart D

While most FMC rulemaking procedures are currently located within subpart D, there are additional applicable procedural requirements, such as *ex parte* communication requirements, scattered throughout part 502. The FMC is proposing to consolidate

petition for rulemaking and informal rulemaking procedures into subpart D. The one exception would be that alternative dispute resolution provisions in subpart U would not be transferred and would remain applicable to informal rulemaking proceedings.

Consolidation would result in minor instances of duplication of regulatory text but would make it much easier for readers to locate requirements for petitions for rulemaking and informal rulemaking proceedings. This can be particularly useful for individuals who do not routinely engage in these types of proceedings. The proposed changes also reflect the fact that informal rulemaking proceedings are fundamentally different than adjudicatory proceedings, which is the primary focus of most of part 502.¹³ Most importantly, the Administrative Procedure Act does not require formal, trial-like proceedings for petitions for rulemaking or informal rulemaking.

The FMC does not engage in formal rulemaking as it is not required by any of the statutory provisions that authorize Commission rulemaking.¹⁴ Although not currently in use, the Commission would retain formal rulemaking procedures in the FMC's regulations in the event that any future FMC rulemaking is required to be conducted "on the record after opportunity for an agency hearing." Current procedures would remain in their current form and location within part 502 outside of subpart D but would be revised as necessary to reflect that their application is limited to formal rulemakings conducted under sections 7 and 8 of the Administrative Procedure Act. The FMC is accordingly proposing to revise § 502.1 (*Scope of rules in this part*), § 502.14 (*Public hearings*),

¹³ *E.g.*, *Carrier-Imposed Time Limits for Freight Adjustments*, 4 F.M.B. at 35 ("We consider that rule making under section 204(b) of the 1936 Act and within the framework of the Administrative Procedure Act as here proposed is something different from investigation of actual or suspected violations of the 1916 Act pursuant to section 22 thereof.")

¹⁴ *See United States v. Florida East Coast Railway*, 410 U.S. 224 (1973); *see also Pacific Coast European Conference v. FMC*, 350 F.2d 197, 205 (9th Cir. 1965) (sections 7 and 8 of the Administrative Procedure Act were inapplicable to hearings required by section 14b of the Shipping Act as the statute did not require a hearing "on the record").

paragraphs (a) and (b) of § 502.61 (*Proceedings*), and § 502.115 (*Service in rulemaking and petition proceedings*).

Relevant language from § 502.14 and § 502.61(a) would be incorporated into subpart D. Consistent with current agency practice, the FMC would not incorporate the requirement of § 502.61(d) that requires the Commission to establish dates by which the initial and final decisions will be issued in an order instituting a proceeding. It is impracticable to establish dates by which a final rule will be issued in a notice of proposed rulemaking in informal rulemaking and is not required by the Administrative Procedure Act. The Commission's best estimates for timeframes in rulemaking activities are announced to the public in the Fall and Spring Unified Agenda. In accordance with the Administrative Procedure Act, within a reasonable time of filing, the Commission makes a final determination and promptly notifies the petitioner of the final action taken by the Commission.

Section 502.1 would also be revised to reflect potential application of additional subparts to formal rulemaking. This regulation has not been kept up-to-date as various subparts have been added to part 502.

B. Allowance of Ex Parte Communications in Informal Rulemakings

For the reasons discussed earlier in the document, the proposed revisions to § 502.1 would make the *ex parte* communication requirements of § 502.11 inapplicable to informal rulemaking. Consistent with applicable caselaw and ACUS's recommendation, the FMC is proposing to remove limitations on *ex parte* communications in informal rulemakings prior to a notice of proposed rulemaking. Communications, or a summary of those communications in the case of oral communications, received by the agency after the close of the public comment period would be required to be promptly placed into the docket and be made available to the public.

The Commission is proposing an additional change to the current *ex parte* regulation at § 502.11. Paragraph (a) directs readers to see the definition of “proceeding” at § 502.61. Section 502.61, however, does not define the term “proceeding”. Rather, § 502.61 describes how a proceeding is commenced at the Commission. The FMC is proposing to remove this cross-reference. In its place, the Commission is proposing to insert at the end of § 502.1 a cross-reference to the Administrative Procedure Act’s definitional section, 5 U.S.C. 551, which includes a definition of “agency proceeding” at 5 U.S.C. 551(12). The Commission believes it is important to specifically cite this definition in the regulatory text at the front of the part as the Commission is aware that from time to time persons have expressed the misconception that rulemaking is not a “proceeding” for purposes of part 502. Consistent with longstanding practice, the revised regulation would also identify non-adjudicatory investigations as “proceedings.”

C. Rules of Particular Applicability

The Commission is proposing to remove the requirement that, in the event that replies or succeeding rounds of comments are permitted in either an informal rulemaking of particular applicability or a petition for the amendment or repeal of a rule of particular applicability, the commenter must serve copies of their comment on all prior participants in the proceeding. Such service is not required under the APA. This is a pre-internet procedure from a time when the only option other than direct service was physically coming into the agency’s reading room in Washington, D.C., to review supporting documents not published in the FEDERAL REGISTER. All comments to proposed rulemakings, replies to public comments (when permitted by the agency), and petitions (when public comments are solicited) are now posted to the applicable docket at Regulations.gov and are available for inspection by the person(s) named in the rule as well as the general public.

D. Petitions for Rulemaking

In conjunction with the consolidation of requirements into subpart D, the Commission is proposing to make certain substantive revisions to procedures for petitions for rulemaking.

As a matter of law, any change to the effective date of a rule is itself an action that is required to go through the Administrative Procedure Act's rulemaking process.¹⁵ To alert those seeking a modification to an effective date of a rulemaking action of this requirement, the Commission is proposing to revise its subpart D to clearly state that any request for a modification to the effective date of a final rule must be made through a petition for rulemaking.

Rulemaking petitions would no longer be required to be verified. Verification of petitions for rulemaking is not required by the Administrative Procedure Act and is unnecessary. The purpose of verification is to ensure that the information stated in such verified document is true and correct and makes sense for adjudicatory proceedings. However, in rulemaking “[t]ypically, the issues relate not to the evidentiary facts, as to which the veracity... would often be important, but rather to the policy-making conclusions to be drawn from the facts.”¹⁶ As is general practice across the Government, the Commission does not require verification of public comments submitted on rulemakings and petitions for rulemaking. There is no need for a higher standard for the rulemaking petition. In addition: (1) verification of any statements concerning legal authority for an existing rule, or for new rulemaking, must be undertaken independently by the agency regardless of whether a petition for rulemaking is verified; and (2) statements of facts asserted in the rulemaking petition, if necessary, can be verified through agency fact-gathering, including through the solicitation of public comments on

¹⁵ See, e.g., *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017) (“EPA’s stay, in other words, is essentially an order delaying the rule’s effective date, and this court has held that such orders are tantamount to amending or revoking a rule.”); see also *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (“The [APA] makes no distinction, however, between initial agency action and subsequent agency action undoing or revising that action.”).

¹⁶ *American Airlines, Inc. v. C.A.B.*, 359 F.2d 624, 630 (D.C. Cir. 1966).

the petition, and further verified, if necessary, in the rulemaking itself if the petition is granted. While the burdens imposed by § 502.6 are minimal, they could potentially dissuade someone from filing a petition for rulemaking. Documents, exhibits, or other papers or written materials written in a language other than English would still be required to be accompanied by an English translation thereof, duly verified under oath to be an accurate translation.

The Commission is proposing to remove the requirement that a petition for rulemaking for the amendment or repeal of a rule of particular applicability must be accompanied by proof of service on all persons subject to the requirements of the rule. Such service is not required by the APA, and a petition for rulemaking, if granted, does not affect the legal rights or obligations of the named party/parties—only the proceeding rulemaking, if finalized, has the potential to do that. The Commission may seek information from the party/parties subject to the rule of particular applicability during consideration of the petition if the Commission believes it would aid in the Commission’s determination to accept or deny the petition for rulemaking.

The Commission is proposing to expand upon the previous requirement that the petition show the “nature of the relief desired” and require that the petition set forth the text or the substance of the proposed rule or amendment of the proposed rule. Draft regulatory text can be indispensable to understanding and evaluating a petition. For this reason, the Commission considered requiring proposed regulatory text for all petitions. Ultimately, however, this idea was rejected for two reasons. First, doing so might be a barrier to a less sophisticated participant in the rulemaking process. Second, in some situations it might be unnecessarily cumbersome.

The Commission is also proposing to prohibit the filing of confidential information in a petition for rulemaking. We are not aware of any recent incidents where

this has been an issue. The proposal is based on purely policy concerns. Confidential filings at this stage have the potential to stifle public participation in the process.

Finally, the Commission is proposing to eliminate filing fees for rulemaking petitions. The Commission attempted to eliminate these fees in 2016 while updating various other user fees. 81 FR 59141 (Aug. 29, 2016). The Commission stated in the 2016 rule that it was eliminating rulemaking petition filing fees to align with the practice of other agencies and to enhance access to the rulemaking process by making it fairer and more open. Unfortunately, to effectuate this change the Commission inadvertently only amended the regulatory text at 46 CFR 502.51(a), which pertained to the required filing fee for rulemaking petitions. Because the Commission did not make a corresponding change to 46 CFR 502.94, the regulation which establishes fees for petitions in the absence of more particular language in other portions of part 502, persons filing rulemaking petitions inadvertently became subject to the fee provisions of § 502.94(a). The Commission continues to believe that these fees should be eliminated for the same reason it stated in 2016. No change is required to § 502.94 as part of this rulemaking because the proposed changes to § 502.1 make § 502.94 inapplicable to subpart D.

E. e-Rulemaking and Public Commenting Procedures

The proposed revised regulations would codify that public dockets for petitions for rulemaking and informal rulemaking proceedings are now posted at Regulations.gov. Rulemaking dockets would no longer be posted to Proceedings on FMC.gov. Copies of proposed and final rules and regulations of the Commission would continue to be available without the requirement of a FOIA request by contacting the Office of the Secretary, Federal Maritime Commission in accordance with § 503.22.

Because public comments on rulemaking proceedings are available to the public at any time on Regulations.gov, the Commission is proposing to remove the requirements that copies of comments must be served on all prior participants in rulemaking

proceedings in instances where replies or succeeding rounds of public comment are permitted (§ 502.57; see also § 502.53(a)). Corresponding proposed edits are being made in § 502.115. This is not a requirement of the APA and is a hold-over from when members of the public needed to visit the agency's physical reading room to review comments. Service of comments on prior rulemaking participants would still be required under § 502.115 for formal rulemaking proceedings.

The current regulatory text of § 502.53(b) would not be incorporated into the revised regulations in subpart D. Not only is the cross-reference it contains to a regulation that no longer exists, but petitions to intervene are inherently inapplicable to informal rulemaking, regardless of whether they are rules of general or particular applicability. Paragraph (a) of § 502.68 would be revised to include a statement that in formal rulemaking proceedings involving rules of particular applicability, interested persons who wish to participate must file a motion to intervene.

The proposed regulations state that late comments would only be considered to the extent practicable. While the Commission is proposing to revise its *ex parte* policies to allow for communications following the close of a comment period, they are still generally disfavored in most instances. Typically, late-filed comments merely re-state issues that have been raised by previous commenters. A late-filed comment raising significant new issues runs the risk of causing significant delays in the rulemaking process and the further that the agency is in the drafting and review process, the more difficult it is to incorporate such comments. Agencies are required to conduct a variety of in-depth analysis for which the data inputs need to have a cut-off point if the project is ever to be finalized. The agency recognizes, however, that sometimes there are significant circumstances beyond a commenter's control that lead to missing a comment deadline.

F. *Miscellaneous Changes*

The Commission is proposing to eliminate the parenthetical rule identification number at the end of affected paragraphs where they appear (for example “[Rule 11]”). The CFR citation is sufficient to identify these requirements and retaining them imposes significant difficulty when updating and reorganizing regulations within part 502. This information will be removed from the other parts of 502 in future rulemakings as changes are made to the relevant sections.

IV. Public Participation and Requests for Comments

The FMC invites public comment on all aspects of this proposed rule, including the regulatory text and the preliminary regulatory analyses. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data.

Please note that all comments received are considered part of the public record and will be made available for public inspection at <https://www.regulations.gov>. Such information includes personally identifiable information (“PII”) (such as your name and address). Any PII that is submitted is subject to being posted to the publicly accessible <https://www.regulations.gov> site without redaction. The Commission will not accept anonymous comments on this action.

The Commission may withhold from public viewing information provided in comments that it determines may impact the privacy of an individual, is offensive, or raises copyright or other legal concerns. For additional information, please read the Privacy Act notice that is available via the link in the footer of <https://www.regulations.gov>.

How do I submit confidential business information?

The Commission will provide confidential treatment for identified confidential information to the extent allowed by law. If you would like to request confidential

treatment, pursuant to 46 CFR 502.5, you must submit the following, by email, to secretary@fmc.gov:

- A transmittal letter that identifies the specific information in the comments for which protection is sought and demonstrates that the information is a trade secret or other confidential research, development, or commercial information.
- A confidential copy of your comments, consisting of the complete filing with a cover page marked “Confidential-Restricted,” and the confidential material clearly marked on each page.
- A public version of your comments with the confidential information excluded. The public version must state “Public Version—confidential materials excluded” on the cover page and on each affected page and must clearly indicate any information withheld.

V. Rulemaking Analysis

Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This NPRM has been designated a “significant regulatory action” under section 3(f) of Executive Order 12866. Accordingly, OMB has reviewed this regulation.

Executive Order 14192

This action is not an “EO 14192 regulatory action” as defined under EO 14192.

Impact on Small Entities

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612) requires the agency to prepare and make available for public comment an initial regulatory flexibility analysis” which will “describe the impact of the proposed rule on small entities.” Section 605 of the RFA allows an agency to certify a

rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

This proposed rule impacts all persons subject to the FMC's jurisdiction. The Commission presumes all Vessel Operating Common Carriers (VOCCs), Passenger Vessel Operators (PVOs), and Marine Terminal Operators (MTOs) to be large business entities. These organizations are generally very large companies with more than 500 employees and millions of dollars in revenues. The FMC presumes that all Ocean Transportation Intermediaries (OTIs) and Non-Vessel-Operating Common Carriers (NVOCCs) are small entities.

This proposed rulemaking would not impose a significant impact (positive or negative) on these small entities. The changes proposed relieve unnecessary regulatory burdens imposed by the current regulations and make it easier for interested parties to locate and understand the agency's procedural requirements related to rulemaking and rulemaking petitions. These are very important benefits—especially for entities that do not regularly participate in the rulemaking process. The substance of the requirements would remain mostly the same; as a result, these changes are not expected to result in significant time or monetary savings for the public.

If you think that your business or organization qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it. Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121), we want to assist small entities in understanding this proposed rule. If the proposed rule would affect your small business or organization and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Paperwork Reduction Act

This amendment does not contain any collection of information requirements as defined by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). *See* 5 CFR 1320.3(c).

Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards in Executive Order 12988 (Civil Justice Reform) to minimize litigation, eliminate ambiguity, and reduce burden.

National Environmental Policy Act

This rulemaking is exempt from additional environmental review under 46 CFR 504.4(a)(4). The rule consists solely of the promulgation of procedural rules pursuant to 46 CFR part 502.

List of Subjects

46 CFR Part 502

Administrative practice and procedure, Claims, Equal access to justice, Investigations, Lawyers, Maritime carriers, Penalties, Reporting and recordkeeping requirements

For the reasons set out above, the Federal Maritime Commission proposes to amend 46 CFR part 502 as follows:

PART 502—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 502 continues to read as follows:

Authority: 5 U.S.C. 504, 551, 552, 553, 556(c), 559, 561-569, 571-584; 591-596; 18 U.S.C. 207; 28 U.S.C. 2112(a); 31 U.S.C. 9701; 46 U.S.C. 40103-40104, 40304, 40306, 40501-40503, 40701-40706, 41101-41109, 41301-41309, 44101-44106, 46105; 5 CFR part 2635.

2. Revise § 502.1 to read as follows:

§ 502.1 Scope of rules in this part.

(a) The rules in this part govern procedure before the Federal Maritime Commission, hereinafter referred to as the “Commission,” under 46 U.S.C. subtitle IV,

the Administrative Procedure Act, and related acts. They shall be construed to secure the just, speedy, and inexpensive determination of every proceeding. To this end, all persons involved in proceedings conducted under the rules of this part shall be required to consider at an early stage of the proceeding whether resort to alternative dispute resolution techniques would be appropriate or useful.

(b) Informal rulemaking proceedings conducted under section 4 of the Administrative Procedure Act (5 U.S.C. 553), including petitions for rulemaking, are governed only by subparts D (Rulemaking) and U (Alternative Dispute Resolution) of this part. Where rulemaking is required by statute to be made on the record after opportunity for a hearing, such hearing shall be conducted in accordance with 5 U.S.C. 556 and 557, and the procedure shall be governed by subparts G–J, L, N, and U of this part as the Commission determines applicable (Time, Service of Documents, Subpoenas, Disclosures and Discovery), (Presentation of Evidence) (Oral Argument; Submission for Final Decision) (Alternative Dispute Resolution).

(c) Subparts R (Nonadjudicatory Investigations) and S (Informal Procedure for Adjudication of Small Claims) of this part do not apply to proceedings under section 7 or 8 of the Administrative Procedure Act.

(d) The definitions in 5 U.S.C. 551 are applicable to this part. As used in this part, *proceeding* means an *agency proceeding* as defined at 5 U.S.C. 551(12) or a nonadjudicatory investigation.

3. Amend § 502.11 by:

a. Removing the words “as defined in § 502.61” in paragraph (a); and

b. Removing the words “[Rule 11.]” in paragraph (g).

4. Revise § 502.14 to read as follows:

§ 502.14 Public hearings.

The Commission may call informal public hearings not required by statute to be made on the record to obtain information necessary or helpful in the determination of its policies or the carrying out of its duties. The Commission may require the attendance of witnesses and the production of evidence to the extent permitted by law. Informal public hearings will be conducted under the rules in this part where applicable.

5. Revise subpart D to read as follows:

Subpart D—Rulemaking

Sec.

502.51a	Commencement of rulemaking proceedings.
502.51b	Petition for issuance, amendment, or repeal of a rule.
502.52a	Notice of proposed rulemaking.
502.52b	Public docket.
502.53a	Where and when to file comments.
502.53b	Ex parte communications.
502.54a	Informal public hearings.
502.54b	Negotiated rulemaking.
502.55a	Contents of rules.
502.55b	Authentication of rulemakings.
502.56a	Rules of particular applicability—compliance with rules of the Commission.
502.56b	Suspension, amendment, etc. of rules.
502.57a	Waiver of the rules

§ 502.51a Commencement of rulemaking proceedings.

Rulemaking proceedings are commenced by the Commission, either on its own motion or on the basis of a petition for rulemaking.

§ 502.51b Petition for issuance, amendment, or repeal of a rule.

(a) *Who may petition.* Any interested person may petition the Commission for the issuance, amendment, or repeal of a rule. A request to modify the effective date of a final rule must be made through a petition for rulemaking.

(b) *Format of petition.* A petition for rulemaking must be in writing and clearly indicate that it is a petition for rulemaking. In addition, the petition must include a statement setting forth the text or the substance of any proposed rule or amendment desired or specifying the rule the repeal of which is desired, and stating the nature of his

or her interest and his or her reasons for seeking the issuance, amendment or repeal of the rule. Petitioners are encouraged to include in their submission any data, studies, or reports that support their petition. Any document, exhibit or other paper written in a language other than English must be accompanied by an English translation thereof, duly verified under oath to be an accurate translation. Petitioners may not include confidential information in a petition for rulemaking.

(c) *How to file.* A petition shall be electronically filed with the Secretary, Federal Maritime Commission, by emailing the petition to *secretary@fmc.gov* (preferred method), or by mailing an original hard copy to “Secretary, Federal Maritime Commission, 800 N. Capitol Street, NW., Washington, DC 20573-0001.” The Secretary shall acknowledge, in writing, receipt of a complete petition and refer it to the appropriate persons within the agency. Petitions and related documents shall not be filed with or separately submitted to the offices of individual Commissioners, or any other employee or office of the agency. The agency may reject and return an incomplete petition.

(d) *Docketing.* A petition for rulemaking becomes a proceeding when the Commission assigns a formal docket number to the petition. A copy of the docketed petition for rulemaking will be posted on the FMC’s website and on the Federal rulemaking website at: <https://www.regulations.gov>. The Commission will publish a notice of docketing in the *Federal Register* informing the public that the Commission is reviewing the merits of the petition for rulemaking. The notice of docketing will include the docket number and explain how the public may track the status of the petition for rulemaking.

(e) *Public engagement.* Public engagement is not required prior to the Commission’s disposition of a petition for rulemaking. The Commission may solicit public comment or engage in other forms of public engagement if it believes that such

action(s) will aid in the Commission's determination of whether to accept or deny the petition.

(f) *Agency response.* Within a reasonable time of filing the Commission will make a final determination and promptly notify the petitioner of the final action taken by the Commission. If the Commission finds that the petition contains adequate justification, a rulemaking proceeding will be initiated. If the Commission finds that the petition does not contain adequate justification, the petition will be denied by letter or other notice, with a brief statement of the ground for denial. The Commission may consider new evidence at any time; however, repetitious petitions for rulemaking will not be considered.

(g) *Associated rulemaking.* Unless a rule is required by statute to be made on the record after opportunity for agency hearing, if the Commission decides to grant a rulemaking petition, such rulemaking will be conducted under the notice-and-comment rulemaking procedures of 5 U.S.C. 553.

§ 502.52a Notice of proposed rulemaking.

Except where otherwise required by law or when the Commission finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, whenever the Commission proposes to issue, amend, or repeal any rule of general application other than an interpretive rule; general statement of policy; or rule of agency organization, procedure, or practice; or any matter relating to agency management or personnel, the agency shall first publish in the FEDERAL REGISTER a notice of the proposed rulemaking in accordance with 5 U.S.C. 553(b).

§ 502.52b Public docket.

(a) The Commission maintains an electronic public docket for each rulemaking and each petition for rulemaking. Public dockets for petitions for rulemaking and informal rulemaking proceedings are available at <https://www.regulations.gov>.

(b) Each docket contains copies of every document published for the project, public comments received, summaries of public meetings or hearings, regulatory assessments, and other publicly-available information. The Commission may post only a single representative example of identical comments in the public docket, or break-out and post only the non-identical content.

§ 502.53a Where and when to file comments.

(a) *Where to file.* File comments in accordance with the directions provided in the applicable FEDERAL REGISTER notice. No replies to written submissions will be allowed unless, because of the nature of the proceeding, the Commission indicates that replies would be necessary or desirable for the formulation of a just and reasonable rule. The comment process is not a vote. The Commission attempts to formulate the best policy, which is not necessarily the most popular policy. Therefore, the most effective comments explain the commenter's reasons for their position on each piece of a rulemaking action and provide supporting evidence.

(b) *When to file.* Comments should reach the Commission by the deadline set out in the rulemaking document on which you are commenting. The Commission is not required to consider comments filed after the deadline and will only consider such comments to the extent practicable.

(c) *Nonconforming comments.* The Commission may reject comments, or portions of comments, that are not filed in conformance with the instructions provided in the applicable FEDERAL REGISTER notice.

(d) *Confidential information.* You may not submit information whose disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information "CBI") to *Regulations.gov*. Comments submitted through *Regulations.gov* cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted.

To file a comment containing confidential information, email the Secretary of the Commission, secretary@fmc.gov, a public version and a confidential version of comment. The confidential version must include a cover page marked “Confidential-Restricted,” and the specific confidential information must be conspicuously and clearly marked on each page. If confidentiality will end as of a date certain or upon the occurrence of an event, this must be stated on the cover page.

(e) *False statements.*

(1) It is a violation of federal law to knowingly and willfully make a materially false, fictitious, or fraudulent statement or representation including false statements about your identity or your authority to submit a comment on someone else’s behalf, in relation to the development of such federal regulations, including through comments submitted on *Regulations.gov* (see 18 U.S.C. 1001). By clicking the submit button on *Regulations.gov* or by hitting “send” when emailing the Commission, you are verifying that you are not making any materially false, fictitious, or fraudulent statement or representation regarding your identity or your authority to submit on someone else’s behalf with regard to the comment you are submitting, and that you are not using, without lawful authority, a means of identification of another person, real or fictitious, in connection with any comment you are submitting.

(2) Individuals whose names or identifying information have been attached to comments they did not submit may email the Secretary, Federal Maritime Commission to request that the comment be anonymized or removed from the online rulemaking docket.

§ 502.53b Ex parte communications.

(a) *Definition.* For purposes of this section, *ex parte* communication means a written or oral communication, outside of written comments submitted to the public docket during the comment period, regarding the merits or substance of a rulemaking between a Commissioner or employee of the Federal Maritime Commission and a

member of the public after the Commission's issuance of a notice of proposed rulemaking or interim final rule.

(b) *Policy. Ex parte* communications occurring in informal rulemaking proceedings are not prohibited, but do need to be disclosed.

(1) *Written ex parte communications.* The Commission shall promptly place in the rulemaking docket and make available for public inspection: the date and location of the communication; the names and titles of all persons who attended or otherwise participated in the meeting (including via phone or video); and, except as provided by paragraph (c) of this section, all written *ex parte* communications received after the close of the public comment period.

(2) *Oral ex parte communications.* The Commission shall promptly place in the rulemaking docket, and make available for public inspection: the date and location of the communication; the names, titles, and contact information of all persons who attended or otherwise participated in the meeting (including via phone or video); and, except as provided by paragraph (c) of this section, a summary of all oral *ex parte* communications received after the close of the public comment period.

(c) *Confidentiality.* A member of the public engaging in *ex parte* communications must inform the Commission at the time of the *ex parte* communication of any information for which they are asserting confidentiality. If the presenter asserts confidentiality, the presenter must submit to the Commission within three business days of the communication both a public version and a confidential version of document (or summary memorandum in the case of oral *ex parte* communications). The confidential version must include a cover page marked "Confidential-Restricted," and the specific confidential information must be conspicuously and clearly marked on each page. If confidentiality will end as of a date certain or upon the occurrence of an event, this must be stated on the cover page.

502.54a Informal public hearings.

The Commission may call an informal public hearing for the purpose of rulemaking or a petition for rulemaking where such proceedings will aid in the Commission's final determination. Such hearings shall be in addition to any publication of notice of proposed rulemaking in the FEDERAL REGISTER required under section 4 of the Administrative Procedure Act (5 U.S.C. 553). The Commission may impose such procedural requirements on a hearing proceeding as it deems necessary for fairness and efficiency.

§ 502.54b Negotiated rulemaking.

The Commission, either upon petition of interested persons or upon its own motion, may establish a negotiated rulemaking committee to negotiate and develop consensus on a proposed rule, if, upon consideration of the criteria of 5 U.S.C. 563, use of such a committee is determined by the Commission to be in the public interest.

§ 502.55a. Contents of rules.

The Commission will incorporate in any publication of proposed or final rules a concise and general statement of their basis and purpose.

§ 502.55b Authentication of rulemakings.

All rules issued by the Commission shall be signed by the Secretary, Federal Maritime Commission in the name of the Commission.

§ 502.56a Rules of particular applicability—compliance with rules of the Commission.

Person(s) subject to a rule of particular applicability (i.e. named in the rule) shall notify the Commission during business hours on or before the day on which such rule becomes effective whether they have complied therewith, and if so, the manner in which compliance has been made.

§ 502.56b Suspension, amendment, etc. of rules.

To the extent allowable under law, the rules in this subpart may, from time to time, be suspended, amended, or revoked, in whole or in part. Notice of any such action will be published in the FEDERAL REGISTER.

§ 502.57a Waiver of the rules.

Except to the extent that such waiver would be inconsistent with any statute or other legal requirement, any of the rules in this subpart may be waived by the Commission to prevent undue hardship, manifest injustice, or if the expeditious conduct of business so requires.

6. Amend § 502.61 by:

- a. Removing the words “for a rulemaking (Rule 51),” in paragraph (a);
- b. Inserting the word “formal” after “a proceeding for a” in paragraph (b); and
- c. Removing the words “[Rule 61.]” in paragraph (d).

7. Amend § 502.68 by adding a sentence at the end of paragraph (a) to read as follows:

§ 502.68 Motion for leave to intervene.

(a) * * * In formal rulemaking proceedings in which respondents are named, interested persons who wish to participate must file a motion to intervene.

* * * * *

8. Revise § 502.115 to read as follows:

§ 502.115 Service.

Service on all prior participants in a formal rulemaking proceeding must be shown when submitting comments or replies beyond the initial round, including those involving petitions for declaratory order, petitions general, proceedings under section 19 of the Merchant Marine Act, 1920 (46 U.S.C. 42101) (part 550), and proceedings under section 13(b)(6) of the Shipping Act of 1984 (46 U.S.C. 41108(d)) (part 560). A list of all participants may be obtained from the Secretary, Federal Maritime Commission.

By the Commission.

David Eng,
Secretary.

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