Statement of

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Maritime Transportation Regulatory Programs

Before the
Subcommittee on Coast Guard and Maritime Transportation
Committee on Transportation and Infrastructure
United States House of Representatives

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Good morning, Chairman Hunter, Ranking Member Garamendi, and Members of the Subcommittee. I am Tom Allegretti, President & CEO of The American Waterways Operators, the national trade association for the tugboat, towboat and barge industry. AWO's 350 member companies own and operate barges and towing vessels operating on the U.S. inland and intracoastal waterways; the Atlantic, Pacific and Gulf coasts; and the Great Lakes. Our industry's 5,500 towing vessels and 31,000 barges comprise the largest segment of the U.S.-flag domestic fleet. The tugboat, towboat and barge industry provides family-wage jobs and ladders of career opportunity for more than 50,000 Americans, including 38,000 positions as mariners on board our vessels, and supports more than 300,000 jobs in related industries nationwide. Each year, our vessels safely, securely and efficiently move more than 760 million tons of cargo critical to the U.S. economy, including petroleum products, chemicals, coal, grain, steel, aggregates, and containers. Tugboats also provide essential services in our nation's ports and harbors, including shipdocking, tanker escort and bunkering.

AWO very much appreciates your holding this hearing on maritime transportation regulatory programs. The U.S. Coast Guard is the principal regulator of our industry's operations, and we have worked closely with that agency for more than a quarter-century to improve marine safety, security and environmental stewardship, while facilitating the efficient movement of economically vital maritime commerce. We are very pleased that last June, after more than a decade of intense effort and close consultation with stakeholders through the Congressionally authorized Towing Safety Advisory Committee, the Coast Guard published final regulations (46 CFR Subchapter M) that establish an inspection regime for towing vessels, fulfilling the statutory mandate established by the Coast Guard and Maritime Transportation Act of 2004. Since the

rule's publication, the Coast Guard has worked closely with our industry to answer stakeholder questions, develop practical implementation policy, and prepare for full implementation of this complex regulation with no interruption of maritime commerce.

Given the importance of Subchapter M to our industry, and given the intense focus of AWO member companies on preparing for the regulations to take full effect in July 2018, it may surprise you that neither towing vessel inspection specifically, nor Coast Guard regulations generally, are the focus of my testimony today. Rather, I want to call your attention to – and to implore your assistance in averting – what we believe to be an existential threat to the health and viability of the domestic harbor services industry, if foreign ocean carrier alliances are permitted to negotiate and contract collectively with American service providers that have no counterbalancing ability to take collective action. It is a testament both to the Coast Guard's care in crafting the towing vessel inspection regulations, and to the gravity of our concern about the threat to AWO members in the harbor services sector, that the latter is the focus of my message to you today.

Allow me to explain briefly. As you know, the vast majority of international ocean carriers operate in cooperative groupings known as shipping alliances. Under the alliances, carriers share ships and port facilities in an effort to reduce operational costs. In the United States, the Federal Maritime Commission is responsible for oversight of shipping alliances. In order for alliances to operate legally under the Shipping Act of 1984, they must file all cooperative agreements with

the FMC. If the FMC does not seek to enjoin an agreement, alliance members enjoy antitrust immunity for collective activities conducted pursuant to the agreement.[1]

AWO believes that both the letter of the Shipping Act, and longstanding interpretation of Congressional intent in enacting that statute, preclude collective action in agreements with or among domestic maritime service providers, such as tug and barge operators, stevedores, container equipment lessors, and others. However, over the past year, there have been five instances in which ocean carrier alliances have filed agreements with the FMC seeking authorization to negotiate collectively with domestic service providers. In three of these cases – the 2M agreement, filed on June 14, 2016; the Ocean Alliance Agreement, filed on July 15, 2016; and THE Alliance Agreement, filed on November 4, 2016 – the parties to the agreements elected to withdraw the collective negotiation provisions following discussions with FMC staff. Had the story ended there, we would certainly have been troubled by the repeated expressions of interest on the part of foreign carrier alliances in seeking new authority to negotiate collectively with domestic service providers – concerns also expressed by the Antitrust Division of the U.S. Department of Justice in communications to the FMC on September 19, 2016, and November 22, 2016. (See Attachments A and B) However, our concern might have been tempered by a sense that the FMC understood the illegality and unfairness of granting such authority, and was prepared to intervene with the alliances to secure the removal of the offensive provisions.

[1] The FMC has sought to enjoin an agreement and gone to court to prevent it from taking effect only once in the 33 years since the Shipping Act was enacted. That effort was undertaken against two U.S. ports, not ocean carriers, and was unsuccessful in the courts.

Unfortunately, this was not the case. In January 2017, a group of roll-on/roll-off carriers (WWL/EUKOR/ARC/GLOVIS) filed an amendment to their cooperative agreement that gives members the ability to negotiate jointly with tugboat operators. Over AWO's objections, and without a thorough analysis of the impact on domestic service providers, the FMC allowed the amendment to take effect. The Acting FMC Chairman has defended this decision, citing an internal economic analysis[2] concluding that the amendment would not result in anticompetitive effects or adverse consequences for our nation's ports, importers or exporters.[3] His lack of reference to domestic tugboat operators begs the question of whether the effect of the agreement on harbor service providers was considered in the FMC staff analysis, or in the FMC decision itself.

Following the FMC's acquiescence in the WWL/EUKOR/ARC/GLOVIS amendment, AWO met with each of the FMC Commissioners individually, as well as with FMC staff, on March 8-9 to express our deep concern about the egregious competitive imbalance that could result if foreign ocean carrier alliances are allowed to negotiate collectively with U.S. domestic service providers that have no authority to take joint action of their own. At an April 4 oversight hearing held by this Subcommittee, both Chairman Hunter and Representative Peter DeFazio, Ranking Member of the full Committee on Transportation and Infrastructure, voiced dissatisfaction with the FMC's oversight of shipping alliance agreements. Reps. Hunter and DeFazio challenged the

[2] The FMC's economic analysis has not been made public, and AWO's request for its release under the Freedom of Information Act was denied on April 28.

[3] In October 2016, individual carrier members of this agreement agreed to a multi-million-dollar settlement with the FMC, stemming from accusations of years of price-fixing, collusion, and failure to file required agreements with the FMC. The alliance also pled guilty to a criminal price-fixing conspiracy and paid over $98 million in fines to the Department of Justice in July 2016.

FMC to "do more" in the face of potential for anticompetitive collusion by foreign ocean carrier alliances against domestic service providers, and suggested that Congress should revisit, and perhaps abolish, the limited antitrust immunity granted to carrier alliances by the Shipping Act. We share the Members' concerns and support their proposal to reexamine and consider rescinding this antitrust immunity, especially if it is now to be wielded in a manner that would gravely harm domestic American industries.[4]

Against this backdrop of growing concern expressed by industry, the Department of Justice, and the Congressional committee of jurisdiction, AWO was disappointed, but not surprised, that on March 24, a group of Japanese ocean carriers (Kawasaki Kisen Kaisha, Ltd., Mitsui O.S.K. Lines, Ltd., and Nippon Yusen Kaisha) filed the so-called Tripartite Agreement, Article 5.4. of which authorizes the parties to discuss, negotiate, and implement contractual agreements with feeder, tugs, barge and inland carriers. (Just two weeks earlier, we had told the FMC Commissioners of our grave concern about the precedential effect of their approval of the ro-ro carrier agreement, and warned that other alliances would inevitably seek collective negotiation authority for themselves. Our concerns were dismissed as overblown.)

AWO and other service providers, including the Institute of International Container Lessors, have filed comments with the FMC expressing strong opposition to Article 5.4 and urging the Commission to request additional information from the parties before allowing the provision to

[4] FMC Commissioners have told us that they will review contracts negotiated between ocean carrier alliances and tugboat operators to ensure there is no anticompetitive effect. This gives us little comfort, for two reasons. First, contracts entered into by domestic tugboat operators are confidential and not currently subject to FMC review. This is an expansion of FMC authority that Congress neither condoned nor contemplated when it passed the Shipping Act. Second, seeking to unwind or invalidate a contract after it has been negotiated is much more complex and problematic than simply prohibiting the collective negotiation that gave rise to the problematic agreement in the first place.

take effect. While we are aware that the parties have subsequently modified Article 5.4, the modification is inadequate to address our concerns,[5] and the provision has yet to be removed.[6]

This series of events leads us to three conclusions, all deeply troubling to AWO members:

- First, that foreign ocean carriers of ever-greater size and market power will continue to seek authority to negotiate collectively with American tugboat operators and other domestic service providers who enjoy no relief from the antitrust laws that allows them to take similar action;
- Second, that the FMC is either unwilling or unable to take action to halt and reverse this fundamentally unfair and anticompetitive situation; and,
- Third, that the FMC intends to extend its regulatory review over the tugboat industry, over which it has no statutory authority, and in the process, eviscerate the confidentiality of our contractual arrangements with ocean carriers.

AWO has articulated in repeated comments to the FMC (most recently, in our April 11 letter in response to the Tripartite Agreement filing) that we believe the Shipping Act expressly precludes collective negotiation with domestic service providers. §41105 of the Act provides that: "A conference or group of two or more common carriers may not –

[5]Counsel for AWO filed comments informing the FMC of our continuing concerns with the revised Article 5.4 on April 25.

[6] The FMC process for consideration of carrier agreements is opaque and provides affected – and potentially injured – parties with little opportunity to make their case. AWO and other commenters had a mere 12 days to comment on the Tripartite Agreement, and our request for an extension of the comment period was denied.

> (4) negotiate with a non-ocean carrier or group of non-ocean carriers (such as truck, rail, or air operators) on any matter relating to rates or services provided to ocean common carriers within the United States by those non-ocean carriers unless the negotiations and any resulting agreements are not in violation of the antitrust laws and are consistent with the purposes of this part . . .

The FMC has, apparently, read the caveat to that prohibition in such a way as to render it meaningless, begging the question of why Congress would have established the prohibition in the first place. I will spare you further recitation of the legal arguments here, but attach our comments for the record for your perusal. (Attachment C)

Let me instead cut to the heart of the matter: we submit that it is fundamentally unfair, anticompetitive, and at odds with the interests of the U.S. maritime industry to skew the playing field in favor of massive international shipping conglomerates – which include foreign state-owned enterprises and entities that have paid criminal fines for anticompetitive behavior – at the expense of American tugboat companies and other domestic service providers. If the FMC lacks the will, the firm legal foundation, or the ability to act swiftly and decisively to stop and reverse this growing trend, then AWO members call upon Congress to amend the Shipping Act to unequivocally preclude joint negotiation with non-ocean carriers. It is unconscionable to us that an agency of the U.S. government should sanction the disadvantaging of an essential American industry in favor of foreign shipping alliances. Congress should act to rectify this injustice where the FMC has failed to do so.

Thank you very much for your kind attention. I would be pleased to answer any questions that Members of the Subcommittee may have.

U.S. DEPARTMENT OF JUSTICE
Antitrust Division

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September 19, 2016

Secretary, Federal Maritime Commission
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Re: The OCEAN Alliance Agreement, FMC Agreement No. 012426

Dear Secretary:

The Antitrust Division of the United States Department of Justice ("Department") respectfully submits these comments in response to the filing of the OCEAN Alliance Agreement ("Agreement"), No. 012426. *See* 81 Fed. Reg. 47394 (July 21, 2016). The parties to the proposed Agreement are seeking to undertake joint activities that are likely to reduce competition and also may be inconsistent with the Shipping Act of 1984, as amended. The Department, accordingly, urges the Federal Maritime Commission ("FMC") to seek to enjoin the Agreement or, at least, to ensure the Agreement is narrowly tailored to achieve procompetitive benefits while limiting the risk of anticompetitive harm.

Background

The proposed members of the OCEAN Alliance are COSCO Container Lines Co., Ltd., CMA CGM S.A., Evergreen Marine Corporation (Taiwan) Ltd., and Orient Overseas Container Line Limited, which together control approximately 25 percent of the worldwide ocean container shipping capacity. All four OCEAN members provide container line shipping services to and from the United States. The proposed OCEAN Alliance Agreement contemplates extensive cooperation among members and would grant the parties the ability to broadly coordinate service between the U.S. and Asia, Northern Europe, the Mediterranean, the Middle East, Canada, Central America, and the Caribbean, including setting capacity on those routes. It also contemplates the unfettered exchange of competitively sensitive information. Unless enjoined or modified, conduct covered in the Agreement could enjoy total immunity from the U.S. antitrust laws once the Agreement becomes effective.

The formation of the OCEAN Alliance is part of a broader trend of consolidation and reshuffling of ocean carriers through mergers and alliances. Over the last several years, 16 of the top 20 global liner carriers combined into four alliances that serve the North American trade lanes: CKYHE, G6, Ocean Three (O3) and 2M. In addition, several liner carriers have announced recent mergers: COSCO and China Shipping, both state-owned Chinese carriers, merged in December 2015; French shipping company CMA-CGM recently acquired Singaporean carrier Neptune Orient Lines (NOL), which operates the container shipping line American Presidential Line (APL); and German carrier Hapag-Lloyd and Dubai-based United Arab Shipping Lines have agreed to merge. Ocean carriers now seek to realign into three alliances comprised of 13 carriers beginning in April 2017.[1] According to press reports, the 2M Alliance will gain a member from the G6; the remaining carriers will reshuffle into the proposed OCEAN Alliance and the anticipated THE Alliance, which has yet to be filed with the FMC.[2]

The FMC reviews all ocean carrier agreements prior to their implementation and may seek to enjoin any agreements that are "likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost," *i.e.*, are anticompetitive. 46 U.S.C. § 41307. Congress expressly gave the Commission authority to protect the public from agreements that will result in an unreasonable increase in price or reduction in service. This charge parallels the goal of the antitrust laws: to protect the public from a reduction in competition caused by agreements that unreasonably increase market power, that is, the power to increase price or reduce output.

The Department has long taken the position that the general antitrust exemption for international ocean shipping carrier agreements is no longer justified. The passage of the Ocean Shipping Reform Act in 1998 was a step towards deregulation, but the industry still lacks the full benefits of competition. The ocean shipping industry exhibits no extraordinary characteristics that warrant departure from competition policy. Price fixing and other anticompetitive practices by the industry over the years have imposed substantial costs on our economy through higher prices on a wide variety of goods shipped by ocean transportation.[3] However, to the extent that ocean carrier agreements continue to be immunized under the 1984 Shipping Act, it is important for the agreements to be limited and precise, as it is well-settled that antitrust immunities should be construed as narrowly as possible.[4]

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[1] The charts in Appendix A show the current and proposed alliance structures.

[2] The following ocean carriers have announced the formation of THE Alliance: Mitsui O.S.K Lines (MOL), NYK Line, "K" Line, Hanjin Shipping, Hapag-Lloyd and Yang Ming Line.

[3] *See The Free Market Antitrust Immunity Reform Act of 2001: Hearing on H.R. 1253 Before the H. Comm. on the Judiciary*, 107th Cong. (2002) (statement of Charles James, Ass't. Att'y Gen.); *The Free Market Antitrust Immunity Reform Act of 1999: Hearing on H.R. 3138 Before the H. Comm. on the Judiciary*, 106th Cong. (2000) (statement of John M. Nannes, Dep. Ass't. Att'y Gen.).

[4] *See, e.g., Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982) (antitrust exemptions must be construed narrowly); *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 218 (1966) (the Shipping Act of 1916 does not exempt the entire shipping industry from the antitrust laws); *Otter Tail*

Competitive Concerns with Alliance Realignment

Applying well-accepted antitrust principles, the proposed alliance consolidation raises serious competitive concerns. The collaboration proposed here contemplates such close cooperation among its members that competition among them will be largely eliminated. In these circumstances, the competitive effects are similar to the competitive effects of a merger. The DOJ/FTC Horizontal Merger Guidelines describe the principal analytical techniques used by the antitrust enforcement agencies to determine whether mergers or other changes in market structure proposed by horizontal competitors are likely to reduce competition.[5] These Guidelines also provide useful and appropriate guidance for the Commission to analyze the competitive effects of the Agreement under its mandate. As the Guidelines explain, mergers "should not be permitted to create, enhance, or entrench market power or to facilitate its exercise. . . . A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives."[6]

Market concentration is an important, albeit not determinative, tool in competitive analysis, providing a "useful indicator of likely competitive effects."[7] In general, a reduction in the number of firms in a market may decrease the remaining firms' incentive to compete on price or innovation, particularly when the market is already highly or moderately concentrated. In addition, when a market becomes more concentrated, there is a greater chance that the remaining firms will overcome the difficulties and costs of reaching and enforcing an anticompetitive agreement. *See* DOJ/FTC Horizontal Merger Guidelines §§ 6, 7.

Following the proposed alliance realignment, the 2M Alliance will control approximately 30 percent of worldwide TEU capacity[8], the OCEAN Alliance approximately 25 percent, and THE Alliance approximately 20 percent. Of the top 15 ocean carriers, only Hamburg Süd, with a worldwide TEU share of less than 3 percent, will not be in an alliance. The three resulting alliances will be particularly dominant on Transpacific-U.S. routes: the OCEAN Alliance, THE Alliance and 2M Alliance are

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Power Co. v. United States, 410 U.S. 366, 374 (1973) (narrowly construing antitrust exemptions in the Federal Power Act); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231-32 (1979) (narrowly construing antitrust exemptions in the McCarran-Ferguson Act); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956) (narrowly construing antitrust exemptions in the Miller-Tydings and McGuire Acts); *United States v. Borden Co.*, 308 U.S. 188, 198-200 (1939) (narrowly construing antitrust exemptions in the Agricultural Marketing Agreement Act).

[5] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010), *available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf [hereinafter DOJ/FTC Horizontal Merger Guidelines].

[6] *Id.* at § 1.

[7] *Id.* at § 5.3.

[8] TEU means "Twenty-Foot Equivalent Unit" which is a standard unit used to measure a ship's cargo carrying capacity.

projected to each have capacity shares of approximately 40, 35, and 20 percent, respectively. Under the Horizontal Merger Guidelines, the transpacific container shipping market constitutes a "highly concentrated" market and the worldwide container shipping market constitutes a "moderately concentrated" market. *See* DOJ/FTC Horizontal Merger Guidelines § 5.3. The increase in concentration in the transpacific shipping market is presumed likely to enhance market power under the antitrust laws.[9]

Increases in concentration are of particular concern where, as in the shipping context, there is evidence of past collusion or anticompetitive behavior. For example, four companies (three of which are ocean carriers slated to join THE Alliance[10]) have pled guilty, and eight corporate executives have been indicted or pled guilty in connection with a worldwide conspiracy involving price fixing, bid rigging and market allocation among providers of roll-on, roll-off cargo shipping.[11] In addition, three companies and six individuals have pled guilty or been convicted at trial in connection with a price fixing conspiracy among carriers of domestic freight between the continental U.S. and Puerto Rico.[12] A reduction in the number of competing ocean carrier alliances is concerning, in part, because it may increase the industry's vulnerability to such illegal collusive conduct.

Moreover, the OCEAN Alliance's proposal that it jointly determine capacity on a broad range of trade routes raises serious competition concerns. Although alliance members ostensibly retain independent pricing authority, they propose to determine capacity jointly. It is foreseeable that the members will agree to rationalize schedules, call on ports less frequently, and/or call on fewer ports, resulting in significant harm to shippers in the form of reduced service and increased prices. Current low rates and overcapacity do not justify granting the parties the ability to collude on capacity or any other dimension. The shipping industry is cyclical, like many industries, and approving the current round of alliances now may be harmful in the long term.

Competitive Concerns with Specific Provisions of the OCEAN Alliance Agreement

For the reasons given above, the Commission should seek to enjoin the proposed OCEAN Alliance Agreement outright. If, however, it is not enjoined, it is critical that the

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[9] The presumption is subject to rebuttal by "persuasive evidence" that the transaction would not likely enhance market power. DOJ/FTC Horizontal Merger Guidelines § 5.3.

[10] Kawasaki Kisen Kaisha, Ltd. ("K-Line"), Compañia Sudamericana de Vapores S.A. ("CSAV") (now merged with Hapag-Lloyd), and Nippon Yusen Kaisha ("NYK Line").

[11] Press Release, U.S. Dep't of Justice, WWL to Pay $98.9 Million for Fixing Prices of Ocean Shipping Services for Cars and Trucks (July 13, 2016), *available at* https://www.justice.gov/opa/pr/wwl-pay-989-million-fixing-prices-ocean-shipping-services-cars-and-trucks. Roll-on, roll-off cargo is non-containerized cargo -- such as automobiles, construction equipment, and agricultural equipment -- that are rolled onto and off of a vessel.

[12] Press Release, U.S. Dep't of Justice, Former Sea Star Line President Sentenced to Serve Five Years in Prison for Role in Price-Fixing Conspiracy Involving Coastal Freight Services Between the Continental United States and Puerto Rico (Dec. 6, 2013), *available at* https://www.justice.gov/opa/pr/former-sea-star-line-president-sentenced-serve-five-years-prison-role-price-fixing-conspiracy.

Commission ensure that certain provisions that raise particular competitive concerns are modified or eliminated. As discussed below, certain provisions contain ambiguous language and are overly broad, while others appear to extend beyond the scope of the antitrust exemption.

Several provisions authorize OCEAN alliance members to take unspecified future actions in furtherance of the alliance. For example, Article 5.1 broadly provides that "The parties are authorized to meet, discuss, reach agreement and *take all actions deemed necessary or appropriate* to implement or effectuate any agreement regarding sharing of vessels, chartering or exchange of space, rationalization and related coordination and cooperative activities pertaining to their operations and services . . . ." (emphasis added). Articles 5.2(c), 5.2(d), 5.2(h), 5.6, and 6.1, among others, similarly authorize the alliance members to take undefined steps to coordinate their joint operations, without limitation. Under the test laid out in *Interpool Ltd. v. FMC,* 663 F.2d. 142, 148 (D.C. Cir. 1980), activities taken within the scope of an immunized agreement will be allowed if the actions taken "restrict competition in a manner which can be reasonably inferred from the original...agreement already approved by the Commission." By permitting such broad and vague language in an approved agreement, the FMC could curb the government's ability to challenge collusive actions among OCEAN members in the future, as a court might find that virtually all forms of coordination would be "reasonably inferred" to be immunized under the Agreement. Open-ended authorizations, such as those described above, should be limited or excised from the Agreement so that it is clear what conduct is receiving immunity under the Shipping Act.

Article 5.3 provides for the unfettered exchange of competitively sensitive information among competitors, authorizing all parties to the OCEAN Alliance Agreement to "obtain, compile, maintain, and exchange among themselves *any information* related to *any aspect* of operations in the Trade. . . ." (emphasis added). The exchange of competitively sensitive information (such as third party cost information) goes well beyond the exchanges already permitted under the other provisions of the Act (e.g., § 40502(d), which requires some service contract terms to be disclosed). This broad authorization to share information may increase the likelihood of collusion on competitively sensitive variables, such as price, which would otherwise fall outside the Agreement. *See* Fed. Trade Comm'n & U.S. Dep't of Justice, Antirust Guidelines for Collaboration Among Competitors § 3.31(b) (2000) [hereinafter FTC/DOJ Guidelines for Collaboration Among Competitors] ("Other things being equal, the sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing of information relating to less competitively sensitive variables."). We see no reason that such a broad license to share information is necessary to accomplish the stated goals of the Agreement: "to improve efficiency, minimize costs, and provide high quality services to the shipping public." We therefore recommend that Article 5.3 be struck from the Agreement, or revised to allow only for the exchange of specifically identified information, and only to the extent reasonably necessary to achieve any procompetitive benefits of the Agreement.

Additionally, by authorizing members to jointly contract for services, equipment, and facilities at marine terminals and inland, Articles 5.9 – 5.11 and 5.18 of the OCEAN Alliance Agreement may reach beyond the scope of the Shipping Act of 1984. The Shipping Act governs the ocean commerce of the United States, and permits antitrust immunity to attach to certain agreements among ocean common carriers and marine terminal operators. 46 U.S.C. §§ 40101, 40301, 40307. The Act expressly lists categories of agreements that may receive immunity. 46 U.S.C. § 40301(a). While the Act expressly reaches inland services in foreign countries,[13] agreements relating to domestic marine terminal and inland services are not included (other than intermodal through rates on cargo movements that include an ocean leg).[14] Furthermore, the premise that antitrust exemptions are construed narrowly strengthens the argument that the Act does not extend antitrust immunity to contracts for domestic inland and marine terminal services, equipment, and facilities. *See United States v. Gosselin World Wide Moving, N.V.*, 411 F.3d 502, 509 (4th Cir. 2005) ("nowhere in the 1984 [Shipping] Act did Congress indicate an intention to override the principle of narrow construction for antitrust exemptions that the Supreme Court had long applied to the 1916 [Shipping] Act"). As the Department has stated in the past, agreements among ocean common carriers to coordinate their land-based operations, ancillary to their shipping operations, should not receive antitrust immunity under the Shipping Act. *See* Letter from Sharis A. Pozen to Karen V. Gregory (Dec. 22, 2011) (opposing proposed amendments to the terms of a chassis pool agreement that would permit ocean carriers to engage in business activities removed from actual ocean transportation). Articles 5.9 – 5.11 and Article 5.18 should be eliminated or clarified such that the OCEAN Alliance Agreement does not extend antitrust immunity to activities relating to equipment, facilities, and services at marine terminals and inland within the United States.

Further, coordinated negotiation of supply agreements, permitted by Articles 5.2(e), 5.9 – 5.11, and 5.18, may allow OCEAN Alliance members to exercise monopsony power over suppliers. As explained in the Department's Antitrust Guidelines for Collaborations Among Competitors:

> Purchasing collaborations, for example, may enable participants to centralize ordering, to combine warehousing or distribution functions more efficiently, or to achieve other efficiencies. However, such agreements can create or increase market power (which, in the case of buyers, is called "monopsony power") or

[13] The Shipping Act provides antitrust immunity for agreements or activity relating to transportation services within or between foreign countries, including inland segments of through transportation in foreign countries, and relating to the provision of terminal facilities in foreign countries. *See* 46 U.S.C. §§ 40307(a)(4-6).

[14] Under the e*xpressio unius* rule of statutory interpretation, "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Raleigh & Gaston R.R. Co. v. Reid*, 80 U.S. 269, 270 (1872). *See also Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 216 - 17 (1966) (the inclusion of a list of antitrust exemptions in the Shipping Act of 1916 suggests that other non-enumerated activities are not exempt).

facilitate its exercise by increasing the ability or incentive to drive the price of the purchased product, and thereby depress output, below what likely would prevail in the absence of the relevant agreement.

FTC/DOJ Guidelines for Collaboration Among Competitors at § 3.31(a). Bunker fuel providers, inland terminals operators, tug service suppliers, and warehouse providers are examples of suppliers that could be harmed by this potential monopsony power. Provisions permitting OCEAN Alliance members to jointly negotiate supply contracts should be removed from the Agreement.

Competitive Concerns Should be Addressed Prior to Implementation of the Agreement

Monitoring and periodic reporting requirements, such as those the FMC has required of shipping alliances in the past, are insufficient to preserve competition in the container shipping market. An antitrust remedy should resolve the competitive problem and effectively preserve or restore competition.[15] The Supreme Court has stated that restoring competition is the "key to the whole question of an antitrust remedy." *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961); *see also Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972). Monitoring and reporting requirements, alone, likely would not preserve or restore competition in this instance. In addition, monitoring and reporting requirements can be burdensome, requiring investment of time and resources by both the FMC and the alliance members.

It is preferable to enjoin or revise an anticompetitive alliance agreement, rather than relying on monitoring and reporting, and then "unscrambling" the alliance post-hoc upon discovery of a violation. In the interim, before a violation is detected, harm may occur: a reduction in competition could result in higher prices, a delay in innovation or research and development, or the transfer of trade secrets or other confidential information between carriers. *See FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1508-09 (D.C. Cir. 1986). Congress gave the FMC the authority to review and enjoin ocean carrier agreements prior to their implementation to prevent this very type of harm. *See* 46 U.S.C. § 41307.

Conclusion

The Department strongly urges the FMC to carefully examine the proposed OCEAN Alliance Agreement, and to seek to enjoin it. If it is not enjoined, we believe it is incumbent on the Commission to ensure the Agreement is narrowly tailored to achieve procompetitive benefits while limiting the risk of anticompetitive harm. The Agreement is a concerning step towards industry consolidation. As drafted, many of the Agreement's provisions risk immunizing behavior outside the scope of the Shipping Act

[15] U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies 3 (June 2011), *available at* https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf.

and may create obstacles to the enforcement of the antitrust laws if the lines between permissible and impermissible conduct are not clear. The ocean shipping industry, consumers, shippers, and the economy stand to benefit from vigorous competition, protected by the antitrust laws.

Very truly yours,

Renata Hesse

Renata B. Hesse

APPENDIX A

The charts below show the current alliances and the newly proposed alliances.

CURRENT ALLIANCES
(effective through ~ March 2017)

CKYHE	G6	Ocean Three (O3)	2M
Cosco*	Hapag-Lloyd (H-L)****	CMA-CGM**	Maersk
Hanjin	Hyundai Merchant Marine (HMM)	China Shipping*	Mediterranean Shipping
"K" Line (Kawasaki Kisen)	OOCL	United Arab Shipping****	
Yang Ming	Mitsui OSK Lines (MOL)		
Evergreen	APL (parent NOL)**		
	NYK Line (Nippon Yusen)		

*Cosco and China Shipping have merged.
**CMA-CGM and APL have merged.
***Hapag-Lloyd and United Arab Shipping (UASC) have agreed to merge.

PROPOSED ALLIANCES
(operational ~ April 2017)

2M	OCEAN Alliance (filed with the FMC on July 15, 2016)	THE Alliance (announced)
Maersk	CMA-CGM (with APL)	Hapag-Lloyd (H-L)*
Mediterranean Shipping (MSC)	Cosco/China Shipping	Yang Ming
Hyundai Merchant Marine**	Evergreen	Hanjin***
	OOCL	Mitsui OSK Lines (MOL)
		NYK Line (Nippon Yusen)
		"K" Line (Kawasaki Kisen)
		United Arab Shipping (UASC)*

*Hapag-Lloyd and United Arab Shipping have agreed to merge, so it is anticipated that UASC will become part of "THE Alliance."
**Hyundai Merchant Marine (HMM) is currently part of the G6 alliance. It has signed an agreement to become part of the 2M Alliance.
***Hanjin filed for bankruptcy in August 2016; it is unclear what will happen to its container vessel capacity.

DEPARTMENT OF JUSTICE
Antitrust Division

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November 22, 2016

Secretary, Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573-0001

Re: THE Alliance Agreement, FMC Agreement No. 012439

Dear Secretary:

The Antitrust Division of the United States Department of Justice ("Department") respectfully submits these comments in response to the filing of THE Alliance Agreement ("Agreement"), No. 012439. *See* 81 Fed. Reg. 79028 (November 10, 2016).[1]

THE Alliance Agreement raises a number of significant competitive concerns, particularly as it comes on the heels of the recently approved OCEAN Alliance. The creation of these two new alliances will result in a significant increase in concentration in the industry as the existing four major shipping alliances are replaced by only three. This increase in concentration and reduction in the number of shipping alliances will likely facilitate coordination in an industry that is already prone to collusion. For example, four companies (three of which are slated to join THE Alliance[2]) have pled guilty, and eight corporate executives have been indicted or pled guilty in connection with a worldwide conspiracy involving price fixing, bid-rigging, and market allocation among providers of roll-on, roll-off shipping.[3]

THE Alliance Agreement raises many of the same types of concerns we expressed in connection with the OCEAN Alliance. *See* Letter from Renata B. Hesse to Federal Maritime Commission Secretary (Sept. 19, 2016), attached. For example, Article 5.3 would allow the carriers to exchange a number of categories of competitively sensitive information, which may

[1] Members include Hapag Lloyd Aktiengesellschaft and Hapag-Lloyd USA LLC ("Hapag-Lloyd"), Kawasaki Kisen Kaisha, Ltd. ("K Line"), Mitsui O.S.K. Lines, Ltd. ("MOL"), Nippon Yusen Kaisha ("NYK Line"), and Yang Ming Marine Transport Corp. ("Yang Ming"). United Arab Shipping Company ("UASC") is effectively included in the agreement as well, as Hapag-Lloyd is in the process of acquiring UASC.

[2] K-Line, NYK Line, and Compania Sudamericana de Vapores S.A. (now part of Hapag-Lloyd).

[3] Press Release, U.S. Dep't of Justice, WWL to Pay $98.9 Million for Fixing Prices of Ocean Shipping Services for Cars and Trucks (July 13, 2016), *available at* https://www.justice.gov/opa/pr/wwl-pay-989-million-fixing-prices-ocean-shipping-services-cars-and-trucks.

facilitate collusion around aspects of competition (*e.g.*, rates) that would otherwise fall outside of the agreement. Second, the agreement appears to contemplate collaboration that extends beyond the scope of the Shipping Act. For instance, the joint contracting provisions in Articles 5.2 (e), 5.2(i), 5.2(j), 5.2(l), and 5.10 appear to allow the carriers to coordinate their domestic land-based operations. We have concerns that this could allow the carriers to exercise monopsony power in purchasing land-based ancillary services from third parties. Third, some of the provisions in the proposed agreement are vague and overbroad (*e.g.*, Article 5.7(c)). As drafted, these provisions risk immunizing behavior outside the scope of the Shipping Act and creating obstacles to enforceability if the lines between permissible and impermissible conduct are not clear.

As you are aware, once an agreement among ocean carriers is filed with the FMC and becomes effective, conduct covered in the agreement could enjoy immunity from the antitrust laws. Where, as here, an agreement contemplates extensive cooperation among members, extreme caution is warranted. We strongly urge the Commission to seek additional information from the carriers and to conduct a rigorous review of the record. At the least, the Commission must ensure the Agreement is narrowly tailored to achieve precompetitive benefits while limiting the risk of anticompetitive harm.

Very truly yours,

Renata B. Hesse

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April 11, 2017

VIA ELECTRONIC & FIRST CLASS MAIL

Rachel E. Dickon, Assistant Secretary
Federal Maritime Commission
800 North Capitol Street, NW -- Room 1046
Washington, DC 20573

Re: FMC Agreement No. 012475, Tripartite Agreement – Request by the American Waterways Operators to Submit Comments

Dear Secretary Dickon:

I represent the American Waterways Operators ("AWO") and submit these comments on the above-captioned agreement (referred to herein as the "Tripartite Agreement" or, simply "the Agreement") published in the Federal Register on March 30, 2017, on AWO's behalf. AWO respectfully requests that the Commission consider these comments in its review of the impacts of the Agreement on competitive conditions in the U.S. maritime trades.

AWO is the national trade association for the U.S. tugboat, towboat, and barge industry. AWO members operate on the rivers, coasts, and Great Lakes, and in the harbors of the United States, moving vital commodities safely; reducing air emissions, water pollution, and highway congestion; protecting homeland security; and providing family-wage jobs for tens of thousands of Americans. AWO promotes the long-term economic soundness of the domestic maritime industry and works to enhance its ability to provide safe, efficient, and environmentally responsible transportation.

As drafted, the proposed Tripartite Agreement (which is described as a "Joint Service Agreement" between three Japanese ocean common carriers, Kawasaki Kisen Kaisha, Ltd. ("K Line"), Mitsui O.S.K. Lines, Ltd. ("MOL"), and Nippon Yusen Kaisha ("NYK")) will affect AWO members who provide harbor tug services and those who provide containerized barge services between U.S. ports for cargoes destined for or following international transport. The Agreement, as published, is of indefinite duration and proposes to grant geographically unrestricted authority in the United States to its signatories. It is overbroad and vague and should not be permitted to take effect without a thorough assessment of its economic impact and substantial clarifying and narrowing amendments.

Of particular concern to AWO's members is Article 5.4. of the Agreement. This provision authorizes the parties, "acting directly or through a Joint Service Entity . . . to discuss, agree upon, negotiate and implement . . . decisions and/or agreements" . . . including "contractual arrangements with **feeder, tugs, barge and inland carriers . . .**" [emphasis added]. This Agreement thus presents the Commission and domestic service providers with yet another in a

recent series of ocean common carrier agreements in which foreign shipping interests attempt to gain authority to negotiate collectively with U.S. service companies that are at a decided competitive disadvantage vis-a-vis the combined market power of the ocean carriers. AWO has consistently opposed such provisions in prior agreements and does so here. AWO submits that the Agreement should not be permitted to take effect without deletion of this provision.

While the Shipping Act of 1984 ("the Act") clearly contemplated that ocean carriers in the international trades of the United States could collaborate in pricing their own services in ways not available to other industries because of prohibitions in federal antitrust statutes, we submit that the history and content of the Act did not envision that foreign ocean carriers would be given license to collectively assert their enhanced bargaining power against U.S. interests that provide services to these carriers. In the case of operators of harbor tugs or tugs providing feeder barge services to ocean carriers, there is a marked imbalance of negotiating leverage between large combinations of foreign ocean carriers and small (either in absolute or relative terms) U.S. firms, in a business where barriers to entry are relatively low and assets can be readily moved from place to place. At a time when international ocean shipping is experiencing a high and increasing degree of consolidation and concentration, we urge the Commission to subject proposals by global shipping companies to turn their collective market power against domestic industries to the highest degree of critical analysis, including review of market conditions in each port where the proposed agreement will operate, and in the coastal container barge sector of the industry. Collective negotiations for harbor tug and coastal barge services could depress output or quality of service to an extent that would be harmful not just to the immediate service providers, but also to U.S. commerce generally.

Section 41105 of the Shipping Act of 1984 explicitly prohibits a conference or group of two or more common carriers from "negotiat[ing] with a non-ocean carrier or group of non-ocean carriers (such as truck, rail, or air operators) on any matter relating to rates or services provided to ocean common carriers within the United States by those non-ocean carriers, unless the negotiations and any resulting agreements are not in violation of the antitrust laws...." 46 U.S.C. § 41105(4). Thus, the very authority sought by recent ocean carrier agreements is subject to an express prohibition in the Act. This express prohibition is clear evidence of Congressional misgivings about permitting conferences or groups of common carriers to negotiate with inland providers. While an exception is granted for "resulting agreements" that are antitrust compliant, an effective ocean carrier agreement filed with the Commission renders this prohibition a dead letter before negotiations commence or an agreement is reached. This could not have been the intent of Congress.

In addition to the explicit prohibition against negotiating with inland providers, the Shipping Act of 1984 does not extend antitrust immunity to "an agreement with or among air carriers, rail carriers, motor carriers, or common carriers by water not subject to this part relating to transportation within the United States." 46 U.S.C. § 40307(b)(1). As AWO previously noted in the context of the OCEAN Alliance Agreement, this language is admittedly not dispositive of every issue raised by modern ocean carrier efforts to obtain extensive joint bargaining authority through the means of agreements filed with the Commission. The legislative history of the Shipping Act of 1984, however, illustrates Congressional awareness that collective ocean carrier

activity enabled by the Act might create problematic interactions with deregulated inland transport modes or other domestic service providers that have no legal authority to negotiate jointly with ocean carriers in the international trades.

The current Congress has expressed concern with the prospect of foreign ocean carrier alliances receiving antitrust immunity to negotiate collectively with domestic service providers. At an April 4 oversight hearing held by the Subcommittee on Coast Guard and Maritime Transportation of the U.S. House of Representatives' Transportation and Infrastructure Committee, Representatives Hunter and DeFazio noted growing unease with the Commission's oversight of shipping alliance agreements. Representative Hunter highlighted industry's concern that the Commission's recent actions validate misuse of the Shipping Act's limited antitrust exemption for container shipping companies and expressed the subcommittee's interest in how the Commission "assesses agreement and works with industry to prevent . . . supply chain disruptions and maintain fair shipping practices.[1]" Representative DeFazio echoed the concerns of his colleagues, challenging the Commission to "do more" when the potential for antitrust collusion presents itself. Both suggested that Congress should revisit, and "strip out," the Act's limited antitrust immunity.

Enabling the broad and vague language in Section 5.4 of the Agreement (which allows the parties "to discuss, agree upon, negotiate and implement . . . decisions and/or agreements relating to: . . . **all other matters relating to the operation of a joint service and the business of an ocean common carrier**" [emphasis added]), is exactly what the Commission must *not* do. By acquiescing in such broad and vague language in an agreement, the Commission could limit the government's ability to challenge collusion among the Tripartite members in the future under the test explained in *Interpool Ltd. v. Fed. Mar. Comm'n*, 663 F.2d 142 (D.C. Cir. 1980).[2] With such language, a court may very well find that essentially all aspects of ocean carrier business could be "reasonably inferred" as covered under the Tripartite Agreement and further expand the scope of potentially anticompetitive behavior by Tripartite members.

AWO is aware of trade press reports that the parties to the Tripartite Agreement plan to merge in early 2018, and that there may be some sentiment that the subject agreement merely anticipates that merger. A merged ocean common carrier entity in which the continuing individual identities of the merger participants are extinguished might not require the submission to the Commission of a memorializing agreement such as the one at issue here.[3] The Agreement as drafted, however, commences its effect *prior* to the projected merger date and continues without limitation indefinitely. Moreover, the Agreement's terms are not contingent on the effectuation of a

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[1] *Hearing on "Reauthorization of Coast Guard and Maritime Transportation Programs" Before the Subcomm. On Coast Guard and Maritime Transportation*, 115th Cong. (2017) (opening statement of Rep. Duncan Hunter, Chairman, Subcomm. On Coast Guard and Maritime Transportation).

[2] Actions within the scope of an accepted agreement are allowed if the actions "restrict competition in a manner which can be reasonably inferred from the original . . . agreement already approved by the Commission." 663 F.2d. at 148.

[3] *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973). This issue might be affected by the degree to which individual remnants of the predecessors of the merged entity continue to participate in operational decisions. The language of the Agreement suggests that the parties to the Agreement will form a holding company and will designate directors to an operating company.

possible merger. If the planned merger does not occur – because of market conditions, the failure to obtain governmental approvals or other contingencies – the Tripartite Agreement, unless modified, would remain in effect. If the contemplated arrangement is a true merger, there is no need for Commission supervision of the relationship between the parties. If the resulting relationship does require a continuing relationship between competing carriers, AWO's concerns will remain valid over the life of the Agreement.

AWO understands that the parties to the Agreement may offer limiting amendments on this point. However, given AWO's concerns about the tugboat industry being confronted by combinations of foreign ocean carriers, the only amendment sufficient to address these concerns is removal of Section 5.4 in its entirety.

AWO also understands that the Commission's staff is conducting an economic analysis. It is unclear whether this analysis will consider the effect of the Agreement on the domestic tugboat business or will even be complete prior to the expiration of the 45-day review period. As should be clear from AWO's comments above, an economic analysis that does not take into account the Agreement's impact on the domestic industries in each of the affected or potentially affected ports is an incomplete and wholly insufficient analysis. On March 31, AWO urged the Commission to extend the comment period on the Agreement and request additional information from the parties, pursuant to Section 40304(d) of the Shipping Act. This Agreement compels a close, reasoned, and well-informed review by the Commission. It has an immediate potential to negatively impact domestic harbor service providers that do business with foreign ocean carriers. Approval of the Agreement in the absence of such due diligence as urged by AWO is in derogation of the Commission's duty to ensure that agreements between ocean carriers adhere to the requirements of the Shipping Act.[4]

AWO respectfully submits that Section 5.4 of the Agreement violates at least the intent of the limitations imposed on the application of collective market power to certain inland activities. At a time when the international ocean shipping industry has experienced a high degree of increased consolidation and integration through agreements that bestow exemption from antitrust constraints on member ocean carriers, AWO respectfully submits that the Commission should subject proposals to use joint negotiating power in dealings with domestic industries to complete and thorough analysis. We therefore request that Section 5.4 be deleted as a condition of the Commission not seeking injunctive action against the operation of the Agreement. Alternatively, the language of the Agreement should be modified to remove Section 5.4's references to domestic service providers.

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[4] It has been suggested to AWO that any agreement that results from a joint procurement of domestic marine services by ocean common carriers would be subject to separate additional review by the Commission and that abuses of joint procurement authority could be prevented in that review process. This is not reassuring to AWO members. Had Congress wanted to subject domestic marine service providers to the Commission's jurisdiction, it could have done so. It did not. That the contractual arrangements of AWO members might be dragged into FMC review proceedings or otherwise subjected to FMC jurisdiction by operation of new authority being granted regulated ocean common carriers modifies the structure of the Shipping Act without Congressional involvement or approval.

AWO greatly appreciates the Federal Maritime Commission's attention to the comments contained herein.

If you have any questions concerning this submission, please do not hesitate to contact me.

Yours very truly,

C. Jonathan Benner
Counsel to the American Waterways Operators

JB/JP