

**Prepared Statement of**

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Subcommittee on the Administrative State, Regulatory Reform, and Antitrust

**Hearing on Pier Pressure: Regulation and Competition in Maritime Shipping**

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Chairman Fitzgerald, Ranking Member Nadler, and distinguished Members of the Subcommittee, thank you for the opportunity and privilege to appear before you.

My name is Erika Douglas. I am an Associate Professor of Law at Temple University in Philadelphia. I have been dedicated to antitrust law for over 15 years, first in private practice at major law firms, and now as a professor and leader at antitrust organizations like the American Bar Association. I regularly write and publish on the interaction of antitrust and industry regulation.

The ocean shipping industry plays a fundamental role in the success of the U.S. economy, by enabling the international shipment of imports and exports. Part 1 of this statement examines the current risks to free competition in ocean shipping common carriage. Part 2 explains that a statutory exemption blocks antitrust law from applying to certain ocean shipping agreements, and why that exemption no longer makes sense. Part 3 observes that the substitute regime for antitrust law is not being enforced by the Federal Maritime Commission, and explains why this is a problem. Part 4 considers legislative solutions to fix this gap.

## 1. There is Significant Antitrust Risk in Ocean Shipping

The ocean shipping industry displays several classic hallmarks of antitrust risk: high and growing concentration among firms, significant price spikes, widespread competitor agreements, a history of anticompetitive conduct, and recent cartel cases where antitrust jurisdiction remains.<sup>1</sup>

**First**, ocean shipping has seen a trend of dramatic, recent consolidation. Major global shipping carriers have combined into just three alliances, with one large independent that recently split from a prior alliance.<sup>2</sup> This is down from four alliances that existed as recently as 2016,<sup>3</sup> and about 360 conferences in the early 1970s.<sup>4</sup> The major alliances are listed in **Appendix A** (as of 2025).

The Federal Maritime Commission (FMC), an independent agency, holds responsibility for the regulation of ocean-borne transportation between the United States and foreign countries.<sup>5</sup>

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1. For further discussion of the issues here, see Erika Douglas, *Antitrust Abandonment*, 42 YALE J. ON REG. 1 (2025).

2. 63rd Annual Report for Fiscal Year 2024, FED. MAR. COMM'N (Apr. 1, 2025), <https://www.fmc.gov/wp-content/uploads/2023/04/61stAnnualReport.pdf> (noting three major alliances but also a shift in the alliance participants); 2025 Global Container Shipping Alliances, LOGISTICS+ (Jan. 3, 2025) <https://www.logisticsplus.com/2025-global-container-shipping-alliances/> (identifying the three major alliances as Gemini, Premier and The OCEAN Alliance, along with participants in each).

3. Letter from Renata B. Hesse, Acting Assistant Att'y Gen., Dep't of Just., to Sec'y, Fed. Mar. Comm'n Re: The OCEAN Alliance Agreement, FMC Agreement (Sept. 19, 2016), <https://www.justice.gov/atr/file/909131/download> [<https://perma.cc/K9Y5-LB35>] at 2 [hereinafter DOJ Letter on The OCEAN Alliance Agreement].

4. Chris Sagers, *The Demise of Regulation in Ocean Shipping: A Study in the Evolution of Competition Policy and the Predictive Power of Microeconomics*, 39 VAND. J. TRANSNAT'L L. 779, 790 n.41 (2006).

5. The term "ocean shipping" is used here to refer to such shipping between the U.S. and other countries by common carriers, over which the Federal Maritime Commission (FMC) holds authority. Domestic shipping within the U.S. is not addressed by these comments. Power under the Shipping Act was initially granted to the FMC's

The FMC estimates that the combined market share of these three alliances ranges from 89% to 95% of imports and exports on Atlantic and Pacific trade routes. Contrast this with the period from 1996 to 2011, when “the leading three alliances operated only about 30% of global container shipping.”<sup>6</sup>

Ocean shipping uses several different market share measurements. For example, some measures include only exports or imports, some only Atlantic routes or Pacific routes. Some market shares are based on available capacity, while others measure actual shipment volumes in TEU (Twenty-Foot Equivalent Units), weight or other measurements.<sup>7</sup> Shifting alliances also complicate the measurement of market shares.<sup>8</sup> What is clear across these estimates is a trend of increasing concentration within these alliances.

**Second**, policymakers, scholars, and antitrust enforcers have sounded the anticompetitive alarm in ocean shipping for years. Container shipping rates “recorded strong increases” in 2024, with growing volatility.<sup>9</sup> This is consistent with a 2022 White House report that rates in several areas of ocean shipping had skyrocketed—in some cases by 1,000%—with profit margins of carriers expanding dramatically.<sup>10</sup> The report expressed concern that ocean carriers were using their market power to impose surprise fees, to change bookings, and to refuse carriage of goods from the United States.<sup>11</sup>

The DOJ Antitrust Division (DOJ) has brought several recent cartel cases in ocean shipping where it retains antitrust jurisdiction (beyond the edges of the antitrust exemption discussed in Part 2 below). The DOJ brought a series of cases from 2014 to 2016 for price-fixing, bid-rigging, and market allocation in non-containerized (roll-on, roll-off) ocean shipping, which ended with fines

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precursor agency, the Shipping Board within the Department of Commerce. The Shipping Board later became the redundantly named Shipping Board Bureau, then the U.S. Maritime Commission, the Federal Maritime Board and, finally, the Federal Maritime Commission.

6. Press Release, White House, Fact Sheet: Lowering Prices and Leveling the Playing Field in Ocean Shipping (Feb. 28, 2022), <https://perma.cc/36LV-8QD5>; OECD International Transportation Forum, *The Impact of Alliances in Container Shipping* (2018), [https://www.oecd.org/content/dam/oecd/en/publications/reports/2018/11/the-impact-of-alliances-in-container-shipping\\_f95dd18e/61e65d38-en.pdf](https://www.oecd.org/content/dam/oecd/en/publications/reports/2018/11/the-impact-of-alliances-in-container-shipping_f95dd18e/61e65d38-en.pdf) (similarly estimating a 29% share).

7. *Compare* 63rd Annual Report for Fiscal Year 2024, *supra* note 2 (alliance shares) to Logistics+, 2025 Global Container Shipping Alliances, *supra* note 2 (unstated basis for shares) to Alphaliner, Top 100 March 13, 2026, <https://alphaliner.axsmarine.com/PublicTop100/> (individual company shares by TEU), which can be compiled into alliance shares based on known alliance participation. TEUs are a standard measure of volume of an ISO-certified shipping container, which measures 20 x 8 feet.

8. Global Container Shipping Alliances to Restructure in 2025, TRANSMODAL (Dec. 30, 2024), <https://blog.transmodal.net/global-container-shipping-alliances-to-restructure-in-2025> (discussing impending changes in the composition of the major alliances).

9. UNCTAD, 2025 Review of Maritime Transport (Sept. 24, 2025), available at <https://unctad.org/publication/review-maritime-transport-2025>.

10. See Press Release, White House, *supra* note 6.

11. *Id.* Congress responded to this concern in part with 2022 amendments to the Shipping Act that placed new emphasis on competition in the Act’s purpose clause and imposed new rules limiting carriers from engaging in unfair or unreasonable refusals to ship goods. Ocean Shipping Reform Act of 2022, Pub. L. No. 117-146, § 2, 136 Stat. 1272, 1272 (codified at 46 U.S.C. § 40101) (emphasizing “competiti[on]” and “a greater reliance on the marketplace” in the purpose clause); *id.* § 7, 136 Stat. at 1274-76 (codified at 46 U.S.C. §§ 41102 note, 41104 & note) (prohibiting common carriers from denying available cargo space and from assessing unfair late fees called “demurrage” and “detention” fees).

of over \$230 million and several prison terms.<sup>12</sup> This widespread conspiracy impacted the shipment of vehicles and farm equipment. The DOJ has also convicted freight transporters for price-fixing and bid-rigging in shipments of food, medicine and other goods between the United States and Puerto Rico.<sup>13</sup> Finally, DOJ has scrutinized mergers in related industries such as shipping-container handling equipment<sup>14</sup> and refrigerated shipping containers.<sup>15</sup> These cases highlight the risk of anticompetitive conduct in ocean shipping and adjacent industries. They also signal that, if given greater authority over ocean shipping competition, DOJ is likely to be a vigilant enforcer.

**Third**, ocean shipping has an unusual degree of agreement among competitors. The most recent FMC Annual Report indicates that there are 360 agreements on file with the Agency.<sup>16</sup> This includes agreements between common carriers who are competitors in ocean shipping.

In particular, each of the three global alliances have agreements filed with the FMC.<sup>17</sup> Any action under such agreements remains immune from antitrust law as long as the agreements are effectively filed with the FMC. Some provisions in these agreements may have procompetitive benefits, such as vessel space sharing, which could increase efficiency by making it more likely that available space is used on each sailing. However, these agreements also raise a number of significant anticompetitive risks that depend on how the agreements are implemented in practice. The key risks include the following:

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12. Brent Snyder, Deputy Assistant Att’y Gen., Dep’t of Just., Remarks at the Yale Global Antitrust Enforcement Conference (Feb. 19, 2016), <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-yale-global-antitrust> [<https://perma.cc/H9Q2-J2GS>] (referring to these shipping conspiracy cases as “the largest domestic conspiracy ever prosecuted in terms of affected commerce”); Press Release, Dep’t of Just., International Shipping Executives Indicted for Colluding on Bids and Rates (Jun. 27, 2017), <https://www.justice.gov/opa/pr/international-shipping-executives-indicted-colluding-bids-and-rates> [<https://perma.cc/4TB9-8FAE>] (summarizing fines in ocean shipping cases involving non-containerized cargo). Non-containerized cargo is also termed “roll-on, roll-off” cargo. As the name implies, this cargo is rolled onto and off of a vessel instead of being placed into cargo containers.

13. Press Release, Dep’t of Just., Former Executive Convicted for Role in Price-Fixing Conspiracy Involving Coastal Freight Services Between the Continental United States and Puerto Rico (Jan. 29, 2013), <https://www.justice.gov/opa/pr/former-executive-convicted-role-price-fixing-conspiracy-involving-coastal-freight-services> [<https://perma.cc/ELE9-8EJW>] (describing coastal water freight cases ending in \$46 million in criminal fines and prison sentences for five individuals). As domestic transportation, this business is not subject to the Shipping Act exemption.

14. Press Release, Dep’t of Just., Shipping Equipment Giants Cargotec and Konecranes Abandon Merger After Justice Department Threatens to Sue (Mar. 29, 2022), <https://www.justice.gov/opa/pr/shipping-equipment-giants-cargotec-and-konecranes-abandon-merger-after-justice-department> [<https://perma.cc/EYK5-323N>]. The parties ultimately abandoned the transaction.

15. Press Release, Dep’t of Just., Global Shipping Container Suppliers China International Marine Containers and Maersk Container Industry Abandon Merger after Justice Department Investigation (Aug. 25, 2022), <https://www.justice.gov/opa/pr/global-shipping-container-suppliers-china-international-marine-containers-and-maersk> [<https://perma.cc/W6TT-2DV7>]. Here too, the parties ultimately abandoned the transaction.

16. 63rd Annual Report for Fiscal Year 2024, *supra* note 2, at 5. This dramatic variation in the number of agreements filed in various years relates to the deregulation of shipping competition from the late 1990’s onward, which made more rate and service competition and agreements possible.

17. Filed agreements are available on the FMC’s website, here: <https://www2.fmc.gov/FMC.Agreements.Web/Public?Sort=TimeSinceFiled%2Cdesc&AgreementTypeIdFilter=7&CargoTypeIdFilter=>

- **These agreements allow rivals to decide jointly on the scheduling of their services.** This ability to agree on scheduling creates the potential for rivals to allocate the markets in which they compete. For example, if the parties agree that only one carrier will serve a route where there used to be multiple carriers scheduled, that could amount to market allocation. Market allocation agreements are a classic violation of antitrust law. A recent case found that a similar scheduling agreement between airlines decreased capacity, harmed competition, and violated Section 1 of the Sherman Act.<sup>18</sup> The court applied the rule of reason to this conduct, but observed that it “closely resembled per se illegal market allocation.”<sup>19</sup>
- **These agreements allow rivals to decide jointly on the number and capacity of vessels they operate.** This creates the potential for rivals to agree to limit output, which is a classic violation of antitrust law. For example, if parties agreed to deploy fewer vessels or carry less cargo on certain routes than in a competitive market, that would reduce available shipping capacity, and likely drive up rates to the detriment of shippers and consumers.
- **These agreements create the potential for the exercise of monopsony (buyer) power over U.S. terminal operators.** Alliance agreements contemplate joint negotiation or other action by the alliance parties in their interactions with terminal operators. This joining together of previously independent buyers increases the potential for the exercise of power against U.S. terminal operators.
- **These agreements allow rivals to share a wide array of competitively sensitive information, including forward-looking plans.** This includes ongoing information exchange on topics such as forecasts and projections, schedules, and performance metrics. While not a violation of antitrust law standing alone, the sharing of competitively sensitive information can facilitate collusion and reduce competitive vigor.
- **The agreements give cover for rivals to discuss and coordinate decisions and operations.** The agreements contemplate wide-ranging collaboration on joint decision making and committees, as the parties deem necessary, to operationalize their terms. While such interactions may be benign, they also create avenues for discussion that risk diminishing incentives to compete, and that may spill over into collusion or anticompetitive cooperation.

This discussion does not set out to prove that antitrust violations are occurring in ocean shipping, which would require a fact-specific analysis of how these agreements are being implemented, and their effects on competition. Rather, it points to flaws in the design and operation of the legislative scheme that may be allowing such misconduct to go unchecked, and

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18. *United States v. Am. Airlines Grp. Inc.*, 121 F.4th 209, 220 (1st Cir. 2024), *cert. denied*, 145 S. Ct. 2866, 222 L. Ed. 2d 1148 (2025).

19. *Id.* (quoting *United States v. Am. Airlines Grp. Inc.*, 675 F. Supp. 3d 65, 116 (D. Mass. 2023), *aff'd*, 121 F.4th 209 (1st Cir. 2024)).

where those risks lie.

In gauging the antitrust risk, it is important to note that the nature of these filed agreements has changed over time. Under the historical conference system, the filed ocean carrier agreements were price-fixing agreements which, but for the statutory exemption from antitrust law, would be considered among the most egregious of antitrust violations. As shipping deregulated, carriers have replaced this direct rate-fixing with “voluntary guidelines” on rates, and information sharing across the industry. Today, the filed agreements often relate to information sharing, operational partnerships for vessel space sharing, and other coordination.<sup>20</sup>

This discussion focuses on the potential risks to competition posed by these agreements among ocean shipping competitors. However, like any industry, competition in ocean shipping is shaped by other forces as well. The industry has seen significant changes, driven by massive technological evolution, global crises (a pandemic, and now a war), and increasing globalization of trade.<sup>21</sup> These forces impact consolidation, pricing, and other industry dynamics in ways that are not examined here.

## **2. Antitrust Law is Blocked from Applying to Ocean Shipping Agreements Among Rivals**

The current state of the ocean shipping industry—highly concentrated, with a history of competitor agreement, and recent anticompetitive conduct—points to the need for competition oversight. Yet instead of such oversight, there is a gap created by an unusual legislative scheme. General antitrust law is blocked from applying to ocean shipping agreements by an arcane, legislative exemption. The only agency that can take action against these agreements is the FMC, and it has never brought a case against ocean carriers (see Part 3).

Since 1916, the FMC and its precursors have exercised an array of oversight in ocean shipping and have established rules and regulations for the industry.<sup>22</sup> The FMC’s power over ocean shipping includes an antitrust-like authority over agreements among ocean common carriers. The FMC’s statutory power is exclusive; it displaces general antitrust law and its enforcers, leaving the FMC with the sole power to police such agreements and conduct under them.

The scope of this authority rests on the Shipping Act’s requirement that specified types of agreements be filed with the FMC.<sup>23</sup> The agreements that must be filed are listed in the Act and include those between ocean carriers on prices; allocation of markets; shipping volumes; information and facilities sharing; and “exclusive, preferential, or cooperative” arrangements; as

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20. See, e.g., 63<sup>rd</sup> Annual Report for Fiscal Year 2022, *supra* note 2 (describing the nature of the filed agreements).

21. See Sagers, *supra* note 4, at 786-95.

22. See Edward Mansfield, *The Federal Maritime Commission*, in *THE POLITICS OF REGULATION* 42, 42-74 (James Q. Wilson ed., 1980) at 46, 69.

23. See 46 U.S.C. §§ 40301-40302 (2018) (requiring that all agreements by or among ocean common carriers or marine terminal operators for the specified activities be filed with the Commission, including agreements to fix rates or conditions of service; pooling cargo revenue; allocating ports or sailings; limiting the volume or character of cargo or passengers to be carried; engaging in exclusive or preferential arrangements; or controlling or prevent competition).

well as other agreements to “control, regulate, or prevent competition” in international ocean transportation.<sup>24</sup> Many of the listed agreements would otherwise constitute classic violations of antitrust law. Price-fixing and market-allocation agreements among horizontal competitors are the most egregious violations of section 1 of the Sherman Act.<sup>25</sup>

The Shipping Act, however, exempts these agreements from antitrust law once effective and filed with the FMC.<sup>26</sup> Since its passage in 1916, the Shipping Act has included this antitrust exemption for ocean common carrier agreements.<sup>27</sup> Today, antitrust immunity is obtained automatically forty-five days after the effective filing of an agreement.<sup>28</sup> The exclusion of antitrust law blocks both expert antitrust agencies—the DOJ and the FTC—from overseeing these ocean shipping agreements.

During its lengthy history, there have been at least four major amendments to the Shipping Act—in 1984, 1998, 2018, and 2022.<sup>29</sup> Each has moved the ocean shipping industry closer to open competition in certain ways. For example, the 1998 amendments introduced greater price competition by making it much easier for shippers to reach independent service agreements with carriers and to keep the terms of those agreements confidential. Yet antitrust law still does not apply. There have been numerous efforts to repeal the antitrust exemption in the Shipping Act in whole or in part.<sup>30</sup> So far none have succeeded, making it one of the oldest surviving statutory exemptions from antitrust law.<sup>31</sup>

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24. *See id.* § 40301.

25. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972) (“[B]ecause of their pernicious effect on competition and lack of any redeeming virtue,” such agreements “are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.”).

26. 46 U.S.C. § 40302 (2018) (setting out the filing requirement and statutory exceptions). Operation under a listed agreement that is not filed with the FMC is itself a violation of the Shipping Act. *Id.*

27. Shipping Act of 1916, ch. 451, § 15, 39 Stat. 728, 734 (codified as amended at 46 U.S.C. §§ 40102(2), 40307).

28. *Id.* § 40304(c). The Act provides that the agreement must meet certain technical and content requirements before coming into effect, but none are particularly onerous. *Id.* § 40304(b) (requiring agreements to comply with certain provisions in the Act); *id.* § 40303 (setting out certain required content in agreements).

29. Shipping Act of 1984, Pub. L. No. 98-237, 98 Stat. 67; Ocean Shipping Reform Act of 1998, Pub. L. No. 105-258, §§ 101-118, 112 Stat. 1902, 1902-14; Frank LoBiondo Coast Guard Authorization Act of 2018, Pub. L. No. 115-282, §§ 701-714, 132 Stat. 4192, 4293-99; Ocean Shipping Reform Act of 2022, Pub. L. No. 117-146, 136 Stat. 1272.

30. *See, e.g.,* Ocean Shipping Antitrust Enforcement Act of 2023, H.R. 1696, 118th Cong. § 3 (2023) (proposing to repeal 46 U.S.C. § 40307 (2018), which grants the antitrust exception, but preserving the exception for certain other agreements); Free Market Antitrust Immunity Reform (FAIR) Act of 2001, H.R. 1253, 107th Cong. (2001) (proposing the elimination of the antitrust exemption for ocean shipping agreements, except those among marine terminal operators); Free Market Antitrust Immunity Reform Act of 1999, H.R. 3138, 106th Cong. (1999) (same).

31. Organisation for Econ. Co-operation & Dev. [OECD], Contribution from the United States on Competition Issues in Liner Shipping, at 2, DAF/COMP/WP2/WD(2015)13 (May 26, 2015), [https://one.oecd.org/document/DAF/COMP/WP2/WD\(2015\)13/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2015)13/en/pdf) [<https://perma.cc/JQW5-FQRT>].

**a. The Rationales for the Antitrust Exemption in Ocean Shipping No Longer Make Sense, and May Never Have**

Congress created the shipping regulatory regime in response to a 1914 House document—commonly called the Alexander Report<sup>32</sup>—which concluded that free competition among ocean carriers would lead to ruinous overcapacity on ships and the eventual collapse of the industry.<sup>33</sup> The Alexander Report observed that the members of shipping conferences were engaged in flagrant violations of the Sherman Act, such as predatory practices, tying, and exclusive dealing.<sup>34</sup> Yet it recommended against restoring open competition among shipping carriers.<sup>35</sup> The Report found that the special economics of ocean shipping made horizontal collusion necessary to avoid ruinous rate wars and chronic overcapacity, which would otherwise lead to unprofitable operations and industry collapse.<sup>36</sup> This thinking led to the creation of the antitrust law exemption for ocean shipping.

The DOJ and many scholars now agree that the original excess-capacity rationale for the antitrust exemption has been proven unsound by modern economic theory, and by the experience of the industry itself as it became increasingly deregulated.<sup>37</sup> As DOJ leadership testified before the House Judiciary Committee in 2000, the overcapacity defense for ocean shipping agreements amounts to an argument that inefficient carriers need collusive agreements to protect themselves from competition—to impose higher prices on buyers so they can cover the capital costs that the carriers are too poorly operated to recover.<sup>38</sup> Such protection of inefficient actors is at odds with modern antitrust law, which promotes economic efficiency, and encourages the protection of

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32. H.R. Doc. No. 63-805, at 417-18 (1914). The “Alexander Report” was named for the House Committee on the Merchant Marine and Fisheries then-Chairman, Joshua W. Alexander. Congress commissioned the Alexander Report because, from the late 1890s onward, steamship carriers had been operating price-fixing cartels in open violation of (what was then) new legislation, the Sherman Act. *See* Mansfield, *supra* note 22, at 43.

33. H.R. Doc. No. 63-805, at 416.

34. *See* Fed. Mar. Bd. v. Isbrandtsen Co., 356 U.S. 481, 488 (1958) (summarizing the anticompetitive conduct uncovered by the Alexander Report, which was “designed to give the conferences monopolies upon particular trades by forestalling outside competition and driving out all outsiders attempting to compete”).

35. H.R. Doc. No. 63-805, at 416 (“These advantages . . . can be secured only by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under Government supervision and control.”).

36. *Id.* at 416-418 (finding that the restoration of unrestricted competition among ocean carriers would be contrary to the public interest because restraints on competition are necessary for a functional industry).

37. Free Market Antitrust Immunity Reform (FAIR) Act of 1999: Hearing on H.R. 3138 Before the H. Comm. on the Judiciary, 106th Cong. 22 (2000) [hereinafter Hearing on Shipping Act Reforms (2000)] (statement of John Nannes, Deputy Assistant Att’y Gen., Department of Justice) (“Supporters of the antitrust exemption for ocean carriers have been reciting essentially the same rationales from the beginning. Whatever may have been the force of those rationales at the time the exemption was first enacted in 1916, they have become increasingly dubious in the years since, and, when they are floated in the current economic and legal environment, they quickly take on water and begin to list.”).

38. *Id.* at 19 (refuting the economic justifications for the Shipping Act antitrust exemption and arguing that “simply because competitors desire to collude in order to maximize their joint profits does not mean that it is good public policy to allow them to do so”); *see also* ADVISORY COMM’N ON CONFS. IN OCEAN SHIPPING, REPORT TO THE PRESIDENT AND THE CONGRESS 67 (1992), <https://perma.cc/BFB8-2ZFX>, at 68 (describing the economic theory behind the Shipping Act, but finding that “rather than being a problem to be avoided, rate wars may be an essential part of a free market mechanism” as market forces eventually eliminate overcapacity through the exit of inefficient operators, and rates stabilize); DOJ Letter on The OCEAN Alliance Agreement, *supra* note 3 at 2 (“The ocean shipping industry exhibits no extraordinary characteristics that warrant departure from competition policy.”).

overall competitive processes rather than individual actors. The Alexander Report feared that open competition would see “the elimination of the weak and the survival of the strong,”<sup>39</sup> but modern economics and antitrust view precisely such weeding out of inefficient competitors as a benefit of fair competition.<sup>40</sup>

Scholars and practitioners also criticize the overcapacity justification as circular.<sup>41</sup> Ocean shipping overcapacity may well be caused by the same Shipping Act carrier agreements that this rationale is invoked to defend: once price competition was removed from the industry by lawful, collusive agreements, ocean carriers were left to compete based only on other, non-price factors—primarily, increased shipping frequency and quality.<sup>42</sup> This meant running more ships, which led to the very excess capacity invoked by the industry and the FMC to justify the need for those price-fixing agreements.<sup>43</sup>

A secondary rationale that drove the creation of the antitrust exemption was the international nature of the ocean shipping industry.<sup>44</sup> On one hand, Congress was concerned that applying U.S. antitrust law would provoke trade disputes.<sup>45</sup> On the other, it worried that applying antitrust law *only* to U.S. carriers would unfairly disadvantage those companies in international competition.<sup>46</sup> Today, this rationale is no longer relevant. There are no major U.S.-owned carriers left. And there is little need to even the playing field with international carriers who benefit from antitrust exemptions; the European Union long ago narrowed its equivalent antitrust exemption and, as of 2024, fully eliminated it.<sup>47</sup>

### 3. The FMC Has Never Brought a Case to Enjoin an Ocean Carrier Agreement

While commonly referred to as an “exemption” from antitrust law, it is perhaps more accurate to say that the Shipping Act creates an antitrust substitute scheme. This is due to another important provision: section 41307 of the Act. This section grants the FMC the power to challenge in court any ocean carrier agreements that turn out to have “unreasonable” anticompetitive

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39. H.R. Doc. No. 63-805, at 416 (1914).

40. *See, e.g.*, Sagers, *supra* note 4, at 808-09.

41. *See id.* at 804-05 (“While the [shipping] industry surely has suffered overcapacity, there are competing explanations for this phenomenon. . . . [T]here is reason to believe that the carriers themselves have deliberately contributed to capacity problems through the inefficient service competition typical of regulated or price-stabilized industries.”); Hearing on Shipping Act Reforms (2000), *supra* note 37, at 19 (statement of Nannes) (“[E]conomists have often found that a regulated cartel yields the worst of both worlds—high prices and low profitability, as companies over-invest in capacity, and lose the incentive to innovate and operate efficiently.”).

42. *See* Sagers, *supra* note 4, at 804-05; Hearing on Shipping Act Reforms (2000), *supra* note 37, at 19 (statement of Nannes).

43. *See* Sagers, *supra* note 4, at 804-05; Hearing on Shipping Act Reforms (2000), *supra* note 37, at 19 (statement of Nannes).

44. Hearing on Shipping Act Reforms (2000), *supra* note 37, at 54 (statement of Nannes).

45. *Id.*

46. *Id.*

47. Press Release, European Commission, Commission Decides Not To Extend Antitrust Block Exemption For Liner Shipping Consortia (Oct. 9, 2023) [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_4742](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4742) (explaining that after a study of the effects of antitrust law exemption for ocean shipping, the EU declined to re-extend the legislation that had created the exemption).

effects.<sup>48</sup> Once an agreement is filed, the provision empowers the FMC to pursue an injunction in federal court against any agreement that is “likely, by a reduction in competition,” to result in either “an unreasonable reduction in transportation service,” or “an unreasonable increase in transportation cost.”<sup>49</sup>

The FMC has now held the power to challenge anticompetitive ocean shipping agreements under section 41307 of the Shipping Act for over forty years.<sup>50</sup> In those decades, the FMC has never brought a case against the powerful ocean shipping carriers that dominate shipping markets. A Westlaw search of all decisions citing this provision as of late 2024 produces just one complaint brought by the FMC in 2008—and it was against ports, not ocean carriers.<sup>51</sup> There are no reported FMC cases under section 41307 against any ocean carriers. Over several decades and thousands of agreements, in the face of expert criticism and changing economics, law, and industry conditions, the FMC has never challenged an ocean carrier agreement as anticompetitive in court.

This FMC power to seek a judicial remedy for anticompetitive agreements was introduced in 1984, when the process for filing these agreements changed.<sup>52</sup> Before the 1984 amendments, there was no need for such a provision because the FMC (then the Board) had full authority to reject such agreements as anticompetitive at any time. During this historical period, agreements were not effective—or immune from antitrust law—until approved by the FMC.

This is solely an analysis of the FMC’s use of certain competition provisions of the consolidated Shipping Act. It does not express a view on the FMC’s wide array of other regulatory responsibilities over shipping, which include matters such as the adjudication of Shipping Act violations, international shipping relations, licensing and cruise ship regulation.<sup>53</sup>

**a. There is a Lack of Transparency in the FMC’s Competitive Analysis of Ocean Shipping Agreements, and Monitoring Alone May be Inadequate to Ensure Competition**

A possible explanation for the lack of FMC challenges under section 41307 is that the Agency carries out its competition oversight internally, rather than in the courts. This explanation of internal supervision does not seem well supported historically, although a lack of transparency around the FMC’s current internal actions makes it difficult to assess.

The FMC’s annual reporting on the use of this authority emphasizes “monitoring” of filed agreements, and reports on the number of agreements, but offers little further detail. The DOJ has

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48. *Id.* § 41307(b)(1).

49. *Id.* The FMC also has the supporting powers to investigate and hold hearings regarding any potential violations of § 41307, as well as to issue certain reparations. *See id.* §§ 41302-41305 (empowering FMC to investigate potential violations of the Act of its own volition, to hold hearings, and to require reparations).

50. *See infra* note 52.

51. *FMC v. City of Los Angeles*, 607 F. Supp. 2d 192 (D.D.C. 2009) (an unsuccessful challenge under § 41307(b)(1) to enjoin agreements between trucking programs at ports in Southern California).

52. Shipping Act of 1984, Pub. L. No. 98-237, §§ 6(g), (h), 11(c), 98 Stat. 67, 72-73, 80 (codified as amended at 46 U.S.C. § 41307(b)).

53. *See generally* 63rd Annual Report for Fiscal Year 2024, *supra* note 2 (discussing the various FMC regulatory actions and authorities).

repeatedly and openly criticized the FMC’s “monitoring and reporting” approach as inadequate to ensure competition among carriers.<sup>54</sup> This includes the DOJ’s public challenges to the FMC’s view that particular agreements are harmless for competition, and urging the FMC to use its statutory power to enjoin anticompetitive agreements.<sup>55</sup>

The Agency’s annual reports do not indicate the number of investigations, agreement modifications, or other similar actions that have occurred.<sup>56</sup> The FMC at times refers to its use of “traditional antitrust law principles and economic models to evaluate the potential competitive impacts” of these agreements, but it does not specify which principles or how they are applied.<sup>57</sup> There are no guidelines on how the Agency analyzes agreements, or the effects that FMC action may be having on anticompetitive terms in carrier agreements. This makes it difficult to determine whether the Agency is, in fact, engaging in effective antitrust oversight. Any such monitoring has never identified an agreement or conduct that merited a section 41307 challenge, which suggests that the monitoring may not be particularly effective. If the FMC is working internally with common carriers to modify and resolve competition concerns in filed agreements to avoid judicial challenges, such activity is difficult to discern.

Prior to 1984, the FMC had the power to reject anticompetitive agreements without recourse to the courts,<sup>58</sup> so the explanation of internal action may have been more plausible then. This changed in 1984 when Congress, largely in response to the FMC’s lengthy delays in approving agreements, eliminated the FMC’s power to reject at filing and instead implemented the current system under which antitrust immunity goes into effect automatically “on the 45th day after filing.”<sup>59</sup> Since these changes, at filing the FMC is empowered only to check for technical compliance with the specific content requirements of the Act, or request further information.<sup>60</sup> Then, if the FMC thinks the agreement is anticompetitive, it must file in federal court to challenge the agreement.<sup>61</sup> It has not done so.

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54. DOJ Letter on The OCEAN Alliance Agreement, *supra* note 3 at 7 (“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.”).

55. Department of Justice Comment to the Federal Maritime Commission on the Gemini Cooperation Agreement August 15, 2024 <https://www.justice.gov/atr/media/1364036/dl?inline> (encouraging the FMC to enjoin the agreement); DOJ Letter on The OCEAN Alliance Agreement, *supra* note 3 at 1 (urging FMC to seek to enjoin a particular agreement among four ocean shippers as anticompetitive or at least “to ensure the Agreement is narrowly tailored to achieve procompetitive benefits while limiting the risk of anticompetitive harm”).

56. For example, the Shipping Act empowers the Agency to ask parties for more information in its review of agreements, but in recent reporting it is unclear whether or to what extent the FMC exercises this power. 46 U.S.C. § 40304(d) (2018).

57. *See, e.g.*, 61st Annual Report for Fiscal Year 2022, Fed. Mar. Comm’n (Mar. 31, 2023), at 17.

58. *See* Shipping Act of 1916, ch. 451, § 15, 39 Stat. 728, 733-34 (amended 1984); *see also* Bureau of Econ., *supra* note 24, at 10 (describing the changes introduced by the 1984 statutory amendments to the process for challenging agreements).

59. Shipping Act of 1984, Pub. L. No. 98-237, § 6(c), 98 Stat. 67, 72 (codified as amended at 46 U.S.C. § 40304(c)). This immunity applies unless FMC seeks to prevent this or later challenges the agreement based on 46 U.S.C. § 41307(b)(1) (2018). *See* § 6(b), (c), 98 Stat. at 72 (codified as amended at 46 U.S.C. § 40304(b), (c)).

60. 46 U.S.C. § 40304(b) (2018) (allowing FMC to reject agreements that do not meet the requirements of the Act as set out in its regulations pursuant to § 40302—none of which had been issued as of 2024—and § 40303, which requires certain content in agreements, such as a purpose statement and a withdrawal mechanism for carriers, and prohibits certain other content such as terms that disallow independent service agreements); *see id.* §§ 40302-40303.

61. *See id.* § 41307(b)(1) (providing for civil action).

## b. The FMC's History is At Odds with Robust Competition

Another potential explanation for FMC's lack of cases is that the filed common carrier agreements are not, and never have been, anticompetitive. This has long been FMC's primary explanation and defense for its scant record of enforcement.

This view may stem in part from the FMC's identity as an institution which emphasized protectionism, not competition. FMC's precursor agency was created in response to the Alexander Report which, as discussed above, took the view that free competition was not possible in the ocean shipping industry.

From the Alexander Report onward, the historical record suggests that the FMC has taken a softer approach to competition than antitrust law, and at certain points has even used its powers to stymie competition. From the early 1960s until 1984, the FMC had the power to reject common carrier agreements outright.<sup>62</sup> Yet one FMC analyst gave this alarming description of the Agency's reviews of filed agreements:

I joined in '61. At the time all we looked for was grammar and punctuation. Those of us conversant with the problem thought there ought to be some justification [for anticompetitive agreements]. Something sophisticated like a pooling agreement would come in and we'd say, "What do you want it for?" The carriers would say, "None of your business."<sup>63</sup>

Around this same period, the FMC used its powers to endorse carrier actions to *block* competition. In *Federal Maritime Board v. Isbrandtsen Co.*, the FMC's precursor agency endorsed an agreement that enabled seventeen ocean-carrier conference members to act collectively to exclude the sole remaining independent competitor on certain shipping routes.<sup>64</sup>

In the late 1970s, the DOJ was the primary author of "protest" filings, through which third parties could force the FMC to hold hearings on potentially anticompetitive agreements.<sup>65</sup> An administrative law judge at the FMC lamented this intervention, complaining that "the Justice Department has taken it upon itself to protest every agreement that's filed. [They] would like to see us abolished."<sup>66</sup>

By the 1980s, Edward Mansfield interviewed FMC reviewers who continued to characterize the agreement-review process as "more show than substance."<sup>67</sup> One attorney referred

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62. See *supra* text accompanying notes 58-59.

63. Mansfield, *supra* note 22, at 56.

64. *Isbrandtsen*, 356 U.S. at 484, 486.

65. See Mansfield, *supra* note 22, at 60 (observing a 1977 DOJ estimate of "fourteen or fifteen" protests and a total of twenty-eight docketed agreements for the year). The FMC is required to hold a hearing on "any formally protested agreement that is a per se violation of the antitrust laws." *Id.* at 61; see *Marine Space Enclosures, Inc. v. FMC*, 420 F.2d 577, 583 (D.C. Cir. 1969).

66. See Mansfield, *supra* note 22, at 61.

67. *Id.* at 58.

to it as “a pure paper-shuffling operation.”<sup>68</sup> During congressional scrutiny in the late 1990s, the FMC still maintained the position that there could be no competition issues in ocean shipping because of widespread overcapacity, which made it almost impossible to charge supracompetitive prices for shipping services.<sup>69</sup>

Today, the FMC is somewhat more focused on competition, but still seems to reach similar conclusions. In a 2022 special report ordered by Congress,<sup>70</sup> the FMC found that competition was vigorous among ocean carriers and their three major shipping alliances.<sup>71</sup> This was followed by legislative amendments to the Shipping Act that placed new emphasis on competition in the Act’s purpose clause and imposed new rules limiting carriers from engaging in unfair or unreasonable refusals to ship goods.<sup>72</sup> The FMC continues to emphasize an approach of “monitoring” agreements. This longstanding FMC view on the adequacy of ocean shipping competition is difficult to square with the perspectives of Congress, scholars, and the DOJ on competition in ocean shipping discussed in Part 1.

#### **4. Next Steps to Ensure Oversight of Ocean Shipping Competition: Repeal the Antitrust Exemption, or Increase Transparency**

This analysis suggests a problem in the legislative approach to ocean shipping competition. Antitrust enforcers are blocked from acting by an arcane statutory exemption. In their place, an industry-specific regulator, the FMC, has exclusive litigation authority that it does not use. This is despite several indicators of risk to competition in ocean shipping (see Part 1).

**This analysis suggests the need to repeal the antitrust law exemption in ocean shipping, Section 40307 of the consolidated Shipping Act.** Such a repeal would enable the DOJ and/or the FTC to begin applying general antitrust law to ocean carrier agreements. This legislative change would eliminate one of the most outdated statutory exemptions in antitrust law. It would bring antitrust law’s more robust oversight of competition to bear on ocean shipping, and help to eliminate the risks to competition discussed here. A repeal of this exemption has long been justified.

To be clear, this is not necessarily a call for the elimination of competition powers held by the FMC. The Agency’s disused antitrust-like powers could be left in their original form. The

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68. *Id.* (noting further that in inquiring about the impact on competition, “the only justification [needed] is that the parties want the agreement”).

69. *See* Advisory Comm’n on Confs. in Ocean Shipping, at 25 (noting that FMC “believes” it has not “had to bring” any such cases because “the overcapacity which plagues the market has made it unlikely that any agreement could cause the unreasonable rise of rates.”).

70. *See* Ocean Shipping Reform Act of 2022, Pub. L. No. 117-146, § 18(b)(1)(A), 136 Stat. 1272, 1281-82.

71. *See* Fact Finding Investigation 29, Final Report, Effects of the COVID-19 Pandemic on the U.S. International Ocean Supply Chain: Stakeholder Engagement and Possible Violations of 46 U.S.C. § 41102(c), FED. MAR. COMM’N 6 (May 31, 2022) [hereinafter Fact Finding Investigation 29], <https://www.fmc.gov/wp-content/uploads/2022/06/FactFinding29FinalReport.pdf> [<https://perma.cc/XDE7-QEH6>] (describing an analysis using “established antitrust analytical tools” that found that “the current market for ocean liner services in the Trans-Pacific trade is not concentrated and [that] the Trans-Atlantic trade is only minimally concentrated”).

72. Ocean Shipping Reform Act of 2022, Pub. L. No. 117-146, § 2, 136 Stat. 1272, 1272 (codified at 46 U.S.C. § 40101).

proposal is additive: two or more agencies rather than one inactive regulator would have the power to ensure competition in this economically important industry.

**In the absence of a repeal, at a minimum, it would be helpful to require greater disclosure on ocean shipping agreements among rivals.** A full assessment of how these agreements are impacting competition requires greater transparency and disclosure on: (i) how the ocean carrier agreements are being implemented in practice, not just as written, and (ii) how the FMC analyzes the competitive effects of these agreements and their implementation, beyond the brief treatment in the FMC’s annual reports.<sup>73</sup>

Thank you for your attention to this important issue.

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73. See similar calls in J. WYATT FORE & KATHLEEN BRADISH, AM. ANTITRUST INST., COMPETITION ENFORCEMENT, PRIVATE ACTIONS AND THE SHIPPING ACT *passim* (2023), [https://www.antitrustinstitute.org/wp-content/uploads/2023/05/AAI-Shipping-Paper-Summary\\_05.02.03.pdf](https://www.antitrustinstitute.org/wp-content/uploads/2023/05/AAI-Shipping-Paper-Summary_05.02.03.pdf) [<https://perma.cc/F6JF-DRTY>] at 6, 15 (“There is almost no public information about the standards used by the FMC when evaluating the competitive effect of a filed agreement. . . . there appear to be no guidelines or other public comment on the subject.”).

## APPENDIX A: Shipping Alliances and Major Independents (2025)<sup>74</sup>

	<b>Alliance or Shipper Name</b>	<b>Participants</b>
1.	Gemini Alliance	Maersk Hapag-Lloyd
2.	Ocean Alliance	CMA-CGM COSCO (owns OOCL, sometimes listed separately) Evergreen
3.	Premier Alliance	ONE HMM Yang Ming
4.	Mediterranean Shipping Company	N/A

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<sup>74</sup> 2025 Global Container Shipping Alliances, LOGISTICS+ (Jan. 3, 2025) <https://www.logisticsplus.com/2025-global-container-shipping-alliances/>.