Acting Chairman Michael A. Khouri Summary Testimony
United States Senate
Committee on Commerce, Science, and Transportation
Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security
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Chairman Fischer, Ranking Member Booker, Senators, thank you for the opportunity today to discuss issues related to the Federal Maritime Commission.

I am pleased to be joined at the table by my colleague, Commissioner Rebecca Dye. And I want to especially recognize our friend, Commissioner and former Chairman Mario Cordero and thank him for his exemplary service and leadership of the FMC. This will be his last week with us as he moves on to become the Executive Director of the Port of Long Beach, California. We look forward to his comments today and wish him well as he takes the helm of a seaport that is such a critical part of our Nation's maritime supply chain.

The United States has always been a nation that has engaged in trade, even from the earliest days of our existence as a group of colonies. Transporting goods of all descriptions by ocean, coastal and inland ships is an integral part of American commerce. There is simply no more efficient or economical way to move large volumes of commodities than aboard vessels, and the sectors of our economy tied to international trade depend on an efficient global intermodal transportation system. As the Acting Chairman of the Federal Maritime Commission, I am proud of the dedicated men and women of our agency and the work they do every day to safeguard competition in ocean transportation for the benefit of the America's exporters, importers and ultimately, our Nation's consumers.

One of the most positive ways to benefit our American consumers is by helping to keep the end cost paid for goods as low as possible. Identifying and addressing regulations in the ocean transportation sector that are out of date with current commercial practices and technology or have become unreasonably burdensome will always increase consumer choices and lower costs. At the Federal Maritime Commission, we view a commitment to deregulation in the ocean container supply chain as an essential and critical factor in expanding America's economic competitiveness.

As such, we are working to be a more efficient organization by making a concerted and focused effort to reduce regulatory burdens on our constituents. The Commission is aggressively looking for ways to make compliance with its statutory and regulatory requirements easier and more cost effective for shippers, carriers, and ocean transportation intermediaries. An example of the sort of common sense deregulatory action the Commission can take was exhibited on March 6th when we approved key changes to regulatory requirements for ocean carrier service contract filings and non-vessel-operating common carrier (NVOCC) service arrangement filings. The Commission will make it easier and more efficient for shippers and carriers to do business.

Further toward the goal of eliminating or reforming regulations, we have designated Ms. Karen V. Gregory, the Managing Director of the Commission, as our Regulatory Reform Officer. Ms.

Gregory is now leading an internal team that is identifying those regulations that have become less relevant in today's fast moving commerce, are more burdensome than current business needs require, and otherwise need updating and revision. They will then establish a definitive timeline within the agency to move those items to a vote before the Commission. This initiative is consistent with the January 30th "Presidential Executive Order on Reducing Regulations and Controlling Regulatory Costs." While the Commission may not be technically required as an independent agency to take this step, I believe that it is the right action to take and is consistent with the broader deregulatory history and scope of the Shipping Act.

Over the past two to three years, there have been tremendous changes to the ocean transportation services marketplace. This period has been marked by considerable merger and acquisition activity among shipping lines, as well as the bankruptcy of a "top ten" carrier late last summer. As a result of these events, the number of major shipping lines operating in the international trades has dropped from 20 in 2015 to what will be 13 by next year when the three Japan-based carriers create a new, consolidated container line. Of equal consequence, consolidation among the liner carriers has led to a reordering of the carrier alliance system and the creation of two new organizations - "THE Alliance" and "The OCEAN Alliance" - that will join the already existing "2M Alliance."

Some stakeholders have expressed concern about these changes, especially developments related to alliances. It is important to note that the evidence shows that carrier and marine terminal alliances can be very beneficial for U.S. exporters, importers, and consumers. Alliances are not permanent mergers like those reviewed by DOJ, but are much more dynamic arrangements that – number one – preserve price and service competition between and among participants. The ocean common carrier members of the alliance do obtain efficiencies and cost-savings that have historically been passed on to domestic consumers especially when healthy competition exists among vessel operators. The benefits of alliances and other forms of joint commercial arrangements are recognized and addressed in the Shipping Act of 1984, as amended, and the contemporaneous Congressional record.

A reassuring data trend that we receive through our alliance monitoring programs shows us that the individual ocean carriers within each alliance continue to independently and vigorously compete on pricing. Further, individual ocean carriers within the alliances continue to add and withdraw vessels from trades both inside and outside the alliances in which they participate, demonstrating that competition remains in both vessel capacity decisions and pricing decisions within the alliances. Finally, these joint ventures provide ocean carriers with flexibility and may facilitate the survival of independent companies, preserving competition and averting further industry concentration. The interests of the American shipping public and the American consumer will not be well served if carrier consolidations ultimately result in only a handful of mega-carriers remaining to transporting the Nation's cargo.

Clearly, the industry is entering a new era and it is not surprising that some question whether ocean carriers will move into a position to exert some level of market power on freight rates. In fact, by all economic benchmarks used by the Department of Justice (DOJ), the Federal Trade Commission (FTC), and the FMC, the ocean liner marketplace is not concentrated. Concentration is assessed using the Herfindahl-Herschman Index (HHI). The greater the degree of market concentration by virtue of fewer competitors, then the HHI rises. In DOJ's merger guidelines, their Antitrust Division regards markets as not concentrated if the HHI is below 1,500. Following the last ocean common carrier merger, the HHI for the container shipping industry in the international U.S. trades today is 752, far down into the "safe harbor" area.

The reduced number and increased size of the major alliances (2M, THE Alliance, and OCEAN Alliance) has indeed changed the way in which the Commission approaches these joint ventures. The Commission carefully and thoroughly reviews filed agreements and engages in extensive consultations with filing parties to assure that an agreement that ultimately goes into effect is narrowly crafted and only permits specific authorities that provide specific operational benefits. Broad agreements with imprecise authority language will not go unchallenged.

Since these are ongoing cooperative agreements rather than mergers, the Commission is further charged by Congress with continuous monitoring after the initial review and following the effective date of the agreements. The Commission checks for anticompetitive behavior that would violate the Shipping Act. The Commission may challenge an agreement at any time after the effective date. Just as the marketplace has changed, so has how the Commission monitors agreements. Over the past five years, the FMC has been steadily refining reporting requirements mandated of agreement parties both in terms of the information our economic analysis team wants to review, as well as how often data must be provided to the Commission. Additionally, we are working to reinforce our already very capable team of economists and analysts in order to increase our capacity to review and monitor agreements and the marketplace. Finally, I would note that in recent months, the Commission has twice rejected agreement filings, one on jurisdictional grounds and the second for failing to meet the clear and definite disclosure standard required by law, demonstrating that we are far from being a rubberstamp agency.

The current circumstances in the international container industry perfectly illustrate why the Federal Maritime Commission was created, what its job is, and how the agency provides a benefit to American shippers, to our citizen consumers, and to our economy more broadly. The FMC is an independent agency of specialized expertise that administers an antitrust regulatory regime tailored to the special factors affecting the international ocean liner trade. The Shipping Act of 1984, and the Federal Maritime Commission that administers the Act, are related to, but separate from Department of Justice and the Federal Trade Commission and the competition and antitrust statutes they administer.

Under the Shipping Act, cooperative or collaborative agreements between or among competitor international ocean liner carriers are filed with the Commission and reviewed under the Shipping Act's competition standard to prevent anticompetitive behavior in these agreements. This standard the Commission uses to review carrier agreements, 46 U.S.C. §41307(B)(1) - "Anticompetitive Agreements," commonly referred to as 6(g), is analogous to the standard employed by DOJ and the FTC to review mergers, acquisitions, and competitor collaborations. Under 6(g), an agreement filed with the Commission goes into effect *UNLESS* the Commission determines (and convinces a judge to agree) that the agreement *is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost. In the event of such determination, the Commission then must go to a Federal District Judge as discussed below.*

The Commission's process for agreement review under 6(g) is modeled on the Hart-Scott-Rodino Act of 1976 governing premerger clearance of proposed acquisitions and mergers. Congress adapted this process for the Commission as part of the Shipping Act of 1984. Prior to 1984, the Commission reviewed and *approved* agreements under a broad "public interest" standard. Because approval became a lengthy process sometimes stretching into years, Congress put a Hart-Scott-Rodino type framework in place for Commission review of carrier agreements under the Shipping Act to ensure that that potential efficiencies and cost-savings would not be lost by consumers because of delay in agreement effective dates. Agreements filed with the Commission go into effect automatically in 45 days *unless* the Commission determines (and a judge agrees) that the agreement is anticompetitive under the 6(g) standard referred to above. Under certain circumstances, the Commission may ask for additional information necessary to make a determination under 6(g), extending for an additional 45 days after receiving that information the time before the agreement becomes effective. In order to prevent the agreement from going into effect, the Commission must bring a civil action in the United States District Court for the District of Columbia and successfully obtain an injunction to halt the operation of the agreement. The burden of proof is on the Commission.

If parties agree to undertake activities that are governed by the Shipping Act, but do not comply with the Commission's process of review, they risk not only Shipping Act sanctions, but also federal criminal sanctions prosecuted by DOJ under the Sherman Act.

Some claim that section 6(g) is ineffective because it presents too high a bar to a successful court challenge of an anticompetitive agreement by the Commission. On the contrary, the paucity of 6(g) cases and the historical absence of the Commission's need to challenge agreements in court is testament to the Commission's successful efforts to mitigate or eliminate potentially anticompetitive provisions in pending agreements through detailed discussions with filing parties during the review process. One need only look at the THE Alliance and the OCEAN Alliance to see recent examples of cases where the major carrier alliance agreements, as originally filed, requested authority to jointly negotiate for goods and services. Following Commission review, however, the agreements lacked these joint purchasing authorities when they went into effect. By its terms, the Shipping Act provides an opportunity for the public to express its concerns about filed agreements. The Commission takes these comments seriously, and uses them together with its own economic analysis under 6(g) during the review process to consider and address anticompetitive concerns.

In addition to the review of carrier agreements for potentially anticompetitive effects under 6(g), the Commission may use section 10, the "Prohibited Acts" provisions in the Shipping Act, to preserve competition. This section of the Act includes prohibitions on a number of business practices on concerted carrier conduct acting outside of approved authority (such as price fixing or market allocation), unreasonable practices, discrimination in price or accommodations, refusal to deal, retaliation, boycotts, predatory practices, and discrimination based on shipper affiliation., 46 U.S. Code § 41105(4), prohibits carriers from jointly negotiating with non-ocean carriers *if doing so would violate antitrust laws* (emphasis added).

These prohibited practices mirror remedies found in other competition statutes, such as the Robinson-Patman Act of 1936. The Commission, of course, may enforce section 10; but private litigants may bring actions under these Shipping Act provisions to protect their interests.

Since 1916, Congress has recognized that the international ocean liner industry, which transports a large percentage of the international exports and imports so essential to this Nation's economy, requires special consideration because of the industry's critical role in our international commerce, its international dimension, and the competing and potentially conflicting regulatory regimes and interests of our international trading partners. The FMC reviews and monitors international ocean liner carrier joint collaborations or agreements under the Shipping Act to ensure that procompetitive efficiencies and cost savings are obtained for the benefit U.S. consumers and anticompetitive effects are prevented or properly mitigated.

The global supply chain that has been built around the ocean container is essential to the modern American economy and the competitiveness of the Nation. The Federal Maritime Commission plays a vital role in assuring a fair, efficient, and reliable international ocean transportation system. Thank you for your attention and interest in the work of the Commission, I am happy to answer any questions you might have.