

**BEFORE THE
FEDERAL MARITIME COMMISSION**

**OCEAN COMMON CARRIER AND
MARINE TERMINAL OPERATOR
AGREEMENTS SUBJECT TO
THE SHIPPING ACT OF 1984**

**DOCKET NO.
16-04**

COMMENTS OF OCEAN COMMON CARRIERS AND AGREEMENTS

The ocean common carrier agreements and the ocean common carriers listed in Appendix A hereto (the “Carriers”) hereby submit their comments in response to the Federal Maritime Commission’s Advance Notice of Proposed Rulemaking in the above-captioned proceeding, 81 *Fed. Reg.* 10188 (February 29, 2016) (the “ANPRM”).

In brief summary of our more detailed comments below, the Carriers commend the Commission’s intention to update and improve the regulations, but respectfully submit that certain of the proposals, if adopted, would dramatically increase the burdens on the industry and on an already overworked Commission staff,¹ would not achieve many of the intended purposes, and are in large part unnecessary.

I.

Interest of the Carriers

The Carriers include discussion agreements that will be directly and substantially affected by the proposals contained in the ANPRM. Virtually all, if not

¹ Testimony of Chairman Cordero Before the Senate Committee on Commerce, Science, and Transportation, Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety and Security (March 8, 2016).

all, of the ocean common carriers participating in these comments also are parties to numerous space chartering, vessel-sharing, and other operational agreements that also will be directly and substantially affected by the proposals.

II.

Background and Summary of Carriers' Position

A. Background

The ANPRM represents the most recent chapter in the regulation of agreements by the Federal Maritime Commission ("FMC" or "Commission"). When the Shipping Act of 1984 entered into effect, the Commission adopted interim and then final regulations reflecting the significant change from the Shipping Act, 1916 system under which carrier and marine terminal operator agreements required the affirmative approval of the Commission before becoming effective. Under the 1984 Act, agreements become effective 45 days after filing unless the Commission takes action to delay or prevent the agreement from becoming effective.

After many years of operating under the original agreement regulations (with some modifications), in 1997 the FMC initiated two proceedings which appeared to signal a change in its interpretation of the regulations insofar as the level of detail required in filed agreements was concerned. See *Possible Unfiled Agreement between Hyundai Merchant Marine Company, Ltd. and Mediterranean Shipping Co., S.A.*, 27 S.R.R. 1028 (1997) and *Possible Unfiled Agreements Among A.P. Moller-Maersk Line, P&O Nedlloyd Limited and Sea-Land Service, Inc.*, 27 S.R.R. 1032 (1997). It also issued a decision in *Compania Sud Americana de Vapores v. Inter-American Freight Conference, et al.*, 28 S.R.R. 137 (1998), which could also be seen as a departure from

its previous interpretation of the extent to which further filings with respect to administrative arrangements were required by the agreement regulations. These proceedings/decisions created substantial uncertainty within the industry with respect to the requirements for agreement content.

This uncertainty was exacerbated when the Commission revised its regulations to implement the Ocean Shipping Reform Act of 1998 (“OSRA”) and, in so doing, deleted most of the requirements with respect to agreement content. Recognizing the uncertainty, the Commission issued a Notice of Inquiry in FMC Docket No. 99-13 as the first step in reviewing what actions, if any, should be taken to clarify the Commission’s rules on carrier agreements. The Commission then revised its regulations in FMC Docket No. 03-15 to address the uncertainty. The ANPRM now seeks comments on possible changes to the current regulations, the vast majority of which were adopted in 2004.

B. The Carriers’ Position

The Carriers support several of the proposals contained in the ANPRM (i.e., the changes to the Information Form and monitoring report requirements, the new exemption for space charter agreements, and the move to a single 35% tier for low market share agreements). However, as explained further below, there are other aspects of the proposal that they believe would have adverse and unintended consequences, or that would impose an undue burden on the industry, the Commission, or both. Accordingly, the Carriers request certain modifications to the proposals described in the ANPRM with respect to the definition of “capacity

rationalization,” the submission of marine terminal services agreements, and the content of carrier agreements. These requests are set forth below.

III.

Definition of “Capacity Rationalization; New Exemption for Space Charter Agreements; Low Market Share Agreements

A. Definition of “Capacity Rationalization”

The Carriers believe the Commission’s proposed revisions to the definition of “capacity rationalization” would result in a definition that is overly broad, and which would be burdensome in practice for both the industry and the Commission.

When it adopted the current definition of “capacity rationalization” in 2004, the FMC explained that it wanted to replace the term “capacity management” and to include restrictions on capacity other than just the “artificial” reduction of space on a per vessel basis that was covered by the term “capacity management.” 68 *Fed. Reg.* at p. 67520 (December 2, 2003). Based on the supplemental information that accompanied the 2004 rulemaking, the Commission sought to include three types of agreements within the meaning of “capacity rationalization”: (i) an agreement that prohibits or restricts the introduction of vessels into the agreement trade in a service other than that operated under the agreement; (ii) an agreement that prohibits or restricts the use of space on non-agreement vessels in the agreement trade by an agreement party (e.g., chartering space from a non-agreement carrier); and (iii) an agreement that results in an artificial withholding of vessel capacity (i.e., a “roping off” of a portion of vessel capacity).

Although the Commission ultimately adopted a definition of “capacity rationalization” that is broader on its face than the objectives outlined above, it has in

practice interpreted the definition in a narrower fashion that is consistent with those objectives. 81 *Fed. Reg.* at 10190.

The Commission now proposes revising its definition of “capacity rationalization” to mean the authority in an agreement to discuss or agree on the amount of vessel capacity supplied by the parties in any service or trade within the geographic scope of the agreement. In the context of operational agreements, the Commission indicates that this definition would apply to “all forms of vessel sharing agreements between carriers where the parties discuss and/or agree on the number, capacity, and/or allocation of vessels or vessel space.” 81 *Fed. Reg.* 10191.² This proposal is intended to eliminate the ambiguity which the Commission believes exists in the current definition, as well as to address the alleged need to treat more agreements as having capacity rationalization authority. Regardless of whether one focuses on clarity or breadth, the Carriers believe that the Commission’s proposal is flawed and should not be adopted.

With respect to the issue of clarity, the Carriers believe that the Commission has overstated the extent to which there is “ambiguity,” “uncertainty,” or “lack of clarity” that could cause the regulations to be applied inconsistently and unfairly. Indeed, the Carriers’ experience is that the current definition of “capacity rationalization” is and has been well-understood, and that the definition has been applied consistently and fairly. The Carriers are aware of only a small number of instances in which there has been some question as to whether or not an agreement

² In the context of discussion agreements, the definition would cover agreements under which the parties discuss and/or agree on the amount of vessel capacity supplied in a trade.

contained capacity rationalization authority, and these have been resolved informally with the Commission staff with little or no difficulty. Accordingly, the Carriers see no need to clarify the current definition of “capacity rationalization.” To the extent the Commission believes that such confusion exists, the Carriers believe the appropriate remedy would be to revise the definition to reflect more clearly the Commission’s current interpretation of the regulation, rather than to expand the definition to cover more agreements. The Carriers consider it unlikely that any ambiguity which exists due to the breadth of the current definition would be cured by making the definition even broader.

With respect to the expansion of the definition, the Carriers question the need to classify more agreements as having capacity rationalization authority. The vast majority of the so-called alliances are already subject to a 45-day waiting period (whether by virtue of market share, agreement authority, or both), and all of the alliances are subject to extensive quarterly monitoring requirements imposed by the Commission. The same would be true of significant vessel-sharing agreements and alliances that might be formed in the future. In light of these realities, the proposed change would appear to provide the Commission with little or no additional insight into the operations of those agreements about which it appears to be most concerned. If an agreement becomes effective upon filing because it meets the criteria for such treatment, the Commission has the option of imposing monitoring requirements on that agreement to enable it to oversee the functioning of that agreement. Dealing with unusual cases on a case-by-case basis is preferable to an overly broad, wholesale

change in the regulations.

Although the proposed change would provide little or no additional insight into the most significant agreements, it would potentially subject many agreements which have little or no competitive impact to a 45-day waiting period and quarterly monitoring report requirements. This is true regardless of the agreement's impact on capacity in the trade or the market share of the parties. Thus, a vessel-sharing agreement between two niche carriers with small market shares in which the carriers agree to deploy two vessels would be subject to a 45-day waiting period, even though it has little or no impact on the trade. See, e.g., Agreement No. 011649.³ This burden would be multiplied by the fact that the waiting period would apply not just to the original filing, but to every subsequent modification of that agreement. Such modifications are usually quite time sensitive, with plans to start by an agreed sailing, quite often less than 45 days from the day on which they are ready for filing. Although parties may request expedited review, the Commission has indicated that the staff is already burdened by such requests, and has in another ANPRM proposed to charge a fee for such requests. Finally, the filing fee for a non-exempt amendment within delegated authority is almost three times the fee for exempt agreements, and the Commission is currently proposing to raise that fee even higher.

³ The Commission appears to concede that its definition of "capacity rationalization" is overly broad when it proposes that only capacity rationalization agreements involving three or more carriers will need to file quarterly monitoring reports. Why should an agreement that would meet the current definition of a low market share agreement be subject to a 45-day waiting period under the proposed revisions to the regulations if it is not significant enough to monitor?

The Carriers believe that the Commission's proposed definition of "capacity rationalization" is based in part on an implicit assumption that any agreement under which the parties agree on the number and size of vessels to be deployed results in a reduction in capacity. This is simply not true. For example, if two carriers agree to operate a vessel string in a particular U.S. trade, it will almost always be necessary for them to agree on the number of vessels to be deployed in that string, the size of the vessels, who will provide the vessels, and how space on those vessels will be allocated. However, this does not mean that such an agreement necessarily involves a reduction in or limitation on capacity. If the carriers are new entrants to the trade, the new service will be an increase in capacity in the trade. If the carriers are existing participants in the trade, the agreement may still result in an increase in capacity. For example, two or three carriers may combine to provide service (and capacity) that none of them would be able or willing to provide alone. An agreement might also have no impact on capacity or result in a reduction in the amount of capacity deployed. It is not correct to assume that the agreement will necessarily reduce capacity.

Even if an agreement does result in an initial reduction in the amount of capacity deployed, this is not necessarily a cause for concern. If the trade in question is suffering from an excess of vessel capacity, removal of some of the excess is desirable. Indeed, when considering the Shipping Act of 1984, House Committee on Merchant Marine and Fisheries Congress indicated:

Clearly, it is in the best interest of the American shipper to support a shipping policy which encourages high utilization rates.

Regardless of the membership restrictions and regardless of the form of concerted action taken by ocean common carriers, it is the underlying purpose of this legislation to provide the means by which common

carriage will become more efficient in an industry in which fixed costs remain high regardless of the amount of cargo being carried. Conferences, consortia, or joint service arrangements can provide the public with the full benefits of common carriage only if they are not unduly inhibited in their ability to pool earnings, losses, or traffic; regulate the number and character of sailings; and otherwise order their joint business activity.

H.R. Rep. 98-53. Pt. 1 (98th Cong., 1st Sess.) at p. 14 (emphasis added). Moreover, even if an agreement results in an initial reduction in capacity, as long as it does not contain an exclusivity provision, each of the parties is free to introduce additional tonnage into the trade covered by the agreement, either alone or in cooperation with one or more other carriers. Thus, such an agreement does not limit capacity in and of itself and each of the parties remains free to respond to changes in demand and to pursue its own commercial strategy in the trade.

The breadth of the Commission's proposed definition would also result in other agreements that do not necessarily result in a reduction of or cap on capacity being categorized as having capacity rationalization authority. Some one-way space charter agreements set forth the number and size of vessels to be provided by the carrier selling space, either in the agreement itself or by reference to another agreement under which the service is operated. See, e.g., Agreements No. 012163, 012326, 012349 and 012387. In these circumstances, the agreement provision setting forth the number and size of vessels either operates as a floor, or is included merely for descriptive purposes. Nonetheless, these agreements would arguably have capacity rationalization authority under the Commission's proposed approach. The fact that these agreements would now be considered to have capacity rationalization authority

demonstrates that the Commission's proposed definition of capacity rationalization is overly and unnecessarily broad.

Another difficulty with the breadth of the FMC's proposed definition is that it would appear to categorize any vessel-sharing agreement under which the parties agree on the number, capacity and/or allocation of vessels or vessel space as capacity rationalization agreements. However, simple space charter agreements involve agreements on the allocation of vessel space. It is unclear to the Carriers whether an agreement that involves agreement on the allocation of vessel space, without agreement on the number or size of vessels deployed, would have capacity rationalization authority. Because the proposed definition of capacity is so broad, it risks ensnaring agreements which it need not and may not intend to cover. This needs to be clarified.

The breadth of the Commission's proposed definition of "capacity rationalization" would also impose significant new burdens on the carrier industry. Operational flexibility and the ability to respond to trade demands would be reduced because many agreements which would now qualify as low market share agreements would be subject to a 45-day waiting period. Any such agreement to which three or more carriers are party would be subject to quarterly monitoring report requirements as well, adding to the administrative burden of both the carrier parties and the Commission staff. Indeed, the Carriers believe that the proposed definition would subject so many agreements to the Information Form and monitoring report requirements that the ability of the Commission staff to oversee the most significant agreements could be adversely impacted by the sheer volume of Information Forms

and monitoring reports filed by competitively insignificant “capacity rationalization” agreements.

The current definition of “capacity rationalization” and the existing low market share agreement exemption have worked well. There have been no significant problems with respect to either the clarity or the breadth of the current definition as interpreted. Rather than casting a wide regulatory net that would result in a wasteful and burdensome by-catch of less important agreements, the Carriers respectfully submit that the Commission ought to use a smaller and more artfully designed net that will catch only those agreements that have the greatest potential impact on competition and which are therefore of greatest interest to the Commission.⁴ The Carriers believe these are the agreements that have capacity rationalization authority as that term is presently interpreted.

Thus, if the Commission believes the existing definition needs to be clarified, the Carriers believe that the definition should be revised so that it clearly reflects the current interpretation, rather than being expanded. This could be done by revising the current definition of the term “capacity rationalization” to read along the following lines:

⁴ The Carriers urge the FMC to exercise the type of discretion and restraint exhibited by the Federal Trade Commission in its administration of the Hart-Scott-Rodino Act (“HSRA”) (upon which the agreement filing mechanism of the Shipping Act is based). In adopting many of its exemptions from the pre-merger notification requirements, the FTC noted that the benefits of reviewing certain transactions otherwise subject to reporting would be outweighed by the burden on the industry and the agency of reviewing such transactions, particularly in light of the ability of the FTC and other agencies to address any concerns at a later date. See, e.g., 43 Fed. Reg. at pp. 33490 through 33492 (July 31, 1978). This is precisely the issue presented by the definition of “capacity rationalization” proposed by the FMC, which (like the FTC) has mechanisms available to address anti-competitive agreements after they have come effective.

Capacity rationalization means any agreement between or among two or more ocean common carriers that: (i) restricts or limits the ability of any or all of those carriers to provide transportation in one or more trades covered by the agreement on vessels other than those utilized under that agreement; (ii) restricts or limits the ability of any or all of those carriers to provide services that are alternate to or in competition with the services provided under that agreement; or (iii) which results in the withholding of vessel capacity on vessels being operated in the trade covered by that agreement. The term does not include adjustments to capacity made by adding or removing vessels or strings of vessels pursuant to and within the existing authority of a filed and effective agreement.

B. New Exemption for Space Charter Agreements

The Carriers support the proposal to create an exemption from the waiting period requirements for non-exclusive space charter agreements. The Carriers agree that such agreements are unlikely to present competitive issues and that shippers, carriers and the Commission would all be well-served by allowing such agreements to become effective upon filing. As noted above, however, the Carriers believe that the description of the proposed definition of “capacity rationalization” as involving agreement on the allocation of vessel space could present problems in distinguishing between agreements that qualify for this new exemption and those that do not.

The Carriers also question the limitation of the proposed exemption to space charters between only two parties. If Carrier A is selling space on a particular service to each Carrier B and Carrier C, it can under the proposal qualify for the exemption only if it signs two separate agreements – one with B and one with C -- rather than one agreement with B and C together for space on the same service. This quirk in logic exalts form over substance, and encourages multiplication of agreements (and costs).

C. Low Market Share Agreements

The Carriers support the proposal to utilize a single market share threshold of 35% for determining whether an agreement constitutes a low market share agreement, although they note that its benefit would be severely curtailed by the proposed re-definition of capacity rationalization. The current two-tier analysis is unnecessarily complex, and the Carriers believe that the Commission's experience with the low market share exemption to date shows that an agreement which qualifies as a low market share agreement based on the authority it contains is unlikely to raise substantive issues if its members have an aggregate market share of less than 35%. The Carriers also continue to urge the Commission to apply this market share threshold to the entire inbound and/or outbound trade covered by an agreement, rather than a sub-trade basis.⁵

IV.

Submission of Marine Terminal Services Agreements

The Carriers oppose the requirement that marine terminal operators that belong to a conference or discussion agreement be required to submit their marine

⁵ If the Commission does not adopt a trade-wide approach to determining market share, the Carriers request that it at least consider providing some flexibility in the market share definition so that an agreement that would otherwise qualify as a low market share agreement does not become subject to a 45-day waiting period on the basis of one or two small sub-trades, or a sub-trade which involves primarily transshipment cargo. For example, the regulations might provide that an agreement could be considered as a low market share agreement if the combined market share of the parties was below the 35% threshold in all sub-trades that accounted for over 20% of the total volume of cargo lifted by the agreement parties within the agreement scope during the most recent calendar quarter.

terminal services agreements to the FMC confidentially.⁶

This proposal appears to be a reaction to a single circumstance in which the Commission had some difficulty in timely obtaining such an agreement. However, as in the case of the definition of “capacity rationalization,” the Carriers believe that the proposal goes beyond what is required and would have unintended negative consequences.

The current filing exemption for marine terminal services agreements applies only to such agreements that do not include matter agreed upon within a marine terminal conference or discussion agreement. 46 C.F.R. §535.309(b)(1). Thus, any marine terminal services agreement which contains matter collectively agreed upon under a marine terminal operator agreement should already be filed with the Commission. The Commission also receives minutes of the meetings of marine terminal operator conferences and discussion agreements. 46 C.F.R. §535.704(a)(1). Thus, by comparing the marine terminal services agreements on file with it under the above requirement to the minutes of the meetings of marine terminal operator agreements, the Commission already has the information it needs to monitor the activity of marine terminal operator agreements as such activity may relate to and impact marine terminal services.

⁶ The Carriers assume that the requirement to submit “all” marine terminal services agreements means all marine terminal services agreements that apply within the geographic scope of the marine terminal conference or discussion agreement to which the MTO in question belongs. In the unfortunate event the FMC were to decide to proceed with this proposal, it should clarify this point.

To the extent the Commission believes that in a particular case it requires marine terminal services agreements beyond those already on file with it, it can require production of those agreements under 46 C.F.R. §535.301(d). The Carriers support the inclusion of a deadline in this regulation to provide the Commission with greater certainty that it will receive the documents it requests in a timely manner.

Given the foregoing, the Carriers believe that any incremental benefit to the Commission of receiving a large number of marine terminal services agreements is outweighed by the burden on the industry of providing such documents as a matter of course. The burden increases if amendments to previously provided agreements must also be submitted to the Commission. The Commission's proposal is silent on this point, and does not address the need for submission of amendments or the timing of such submissions. Requiring marine terminal operators to submit amendments making minor changes to a marine terminal services agreement would be unnecessarily burdensome and time consuming.

Moreover, marine terminal services agreements contain extremely sensitive and competitively significant information on not only rates, but duration and throughput arrangements. Carriers' costs are highly important business information for them, given the difficulty of obtaining sustainable rates in the market environment that has prevailed for several years. Thus, their ability to stay competitive on costs is essential. The Carriers are extremely concerned about the possibility that such agreements, once in the hands of the Commission, may need to be produced in response to a Congressional inquiry or a subpoena. While the Carriers believe the Commission has an excellent record of maintaining the confidentiality of materials provided to it, there

always remains concern that such highly confidential information may escape to third parties, in which case the Commission would have no control over what those parties might do with this commercially and competitively sensitive information. Accordingly, should the Commission decide to go forward with this proposal despite the many important reasons not to do so, the Carriers request that the Commission add a specific provision stating that such documents are protected from disclosure by 46 U.S.C. §40306.

Rather than establish a burdensome new filing requirement and increase the risk that extremely sensitive information is made available to competitors and the public, the Commission should add a deadline to 46 C.F.R. §535.301(d) and rely on its existing oversight mechanisms.

If the Commission decides to proceed with the proposal to require certain MTOs to submit their marine terminal services agreements, then at a minimum it would have to revise 46 C.F.R. §535.309(b)(2) to provide the parties to such agreements with antitrust immunity (since such agreements would be in the possession of the Commission) and also establish reasonable procedures and timelines for submission of the agreements and amendments thereto.

V.

**Complete and Definite Agreements/
Activities That May Be Conducted Without Further Filings**

A. 46 C.F.R. §535.402

The Carriers believe that existing 46 C.F.R. §535.402 is clear, and that no revision to this regulation is necessary. Having said this, they have no objection to the Commission's proposed revision.

B. 46 C.F.R. §535.408(b)

It is unclear to the Carriers whether the Commission is considering replacing existing §535.408(b) which pertains to activities that may be conducted without further filings with “a list of more narrowly defined, specific services,” or if this proposal relates solely to Section 408(b)(3). They assume that the proposal relates primarily to 408(b)(3), since the remainder of 408(b) is already a specific list, and comment accordingly.⁷

Stevedoring, terminal and related services. The Carriers are concerned about the Commission’s proposals with respect to 46 C.F.R. §535.408(b)(3). In the view of the Carriers, section 408(b) generally and section 408(b)(3) in particular represent a delicate and difficult exercise in balancing the Commission’s legitimate regulatory need for information and oversight, on the one hand, with the Shipping Act’s stated purpose of regulating with a “minimum of government intervention and regulatory costs,” 46 U.S.C. §40101(1), as well as the needs of the industry to operate on a day-to-day basis, on the other hand.

This is hardly the first time the Commission has visited this issue. As far back as 1927, the Commission interpreted the requirement that “every agreement” be filed as inapplicable to “routine operations’ relating to current rate changes and other day-to-day transactions.” *Boston Shipping Association v. Port of Boston Marine Terminal*, 11

⁷ The Carriers oppose any deletions from or narrowing of the exemptions contained in section 535.408 of the regulations, and other than 4.08(b)(3), the Commission does not appear to contemplate any such deletions.

F.M.C. 1, 5 (1967), citing *Section 15 Inquiry*, 1 U.S.S.B. 121, 125 (1927). Elsewhere, the Commission has distinguished between decisions which affect a substantive change in the scope of an agreement (which must be filed) and those which neither create nor destroy rights (which do not). *In the Matter of the Modification of Agreement 5700-4*, 10 F.M.C. 261, 273 (1967).

In the agreement regulations implementing the Shipping Act of 1984, the issue was phrased in terms of open-ended authority (which was not permissible) and interstitial agreements (which did not require filing). However, even in the context of the 1984 rulemaking, there was significant disagreement over the predecessor to what is now section 535.408(b) of the regulations. In describing the comments received on its Interim Rule, the Commission noted: "The comments were unanimous in expressing concern with this provision." 49 *Fed. Reg.* at 45320 (November 15, 1984). Mostly recently, the Commission sought to clarify the issue in FMC Docket No. 03-15, in which it adopted current sections 402 and 408. Clearly, this is not a simple issue.

Having said this, the Carriers believe that the concerns voiced by the Commission in the ANPRM are particularly inapplicable to operational carrier agreements such as vessel-sharing and space charter agreements. When two or more carriers share vessels, or one carrier charters space to another, there is almost always a need for the carriers to come to some understanding about how to deal with terminals and stevedores. For this reason, virtually all operational carrier agreements, and agreements that include marine terminal operators, include authority for the parties to discuss and agree on these issues. The existing exemption quite properly recognizes that terminal and stevedoring arrangements are a routine part of such

agreements, and exempts specific understandings on these topics reached pursuant to general authority from a further filing requirement. There is no need to change this.

Indeed, any effort to replace the current exemption in 408(b)(3) with a more detailed list is likely to increase rather than decrease confusion, since it is difficult, if not impossible, to prepare a comprehensive list of specific activities that would be exempt. Any service or activity not specifically listed would require a further filing. Moreover, since the provision of terminal and stevedoring services evolves over time with the use of technology, the deployment of larger vessels, changes in environmental and labor rules (and numerous other factors), such a list would need to be reviewed and revised frequently. Accordingly, adoption of such an approach is likely to create uncertainty and unnecessarily increase the filing burden on agreements. This confusion and burden are unwarranted since, as noted above, the application of existing §535.408(b)(3) does not appear to be an issue insofar as operational carrier agreements and marine terminal operator agreements are concerned.

The ANPRM does not establish any need to change the current 408(b)(3) exemption. No major problems have been cited with its application over the years, only a vague concern that parties may interpret it to permit “large or potentially costly” programs without filing. The carriers are familiar with only one example in recent years in which this exemption has even come into play, and do not believe any serious problems arose as a result. In any event, a single situation is not a reasonable basis for a change in the regulation as a whole.

If, despite the foregoing observations, the Commission believes some action is required, the Carriers believe that revising the current exemption to clarify it would be more appropriate rather than replacing it with a list of specific services.

Tonnage Centers, etc. The Carriers believe that the current exemption for tonnage centers and other joint container marshaling facilities should be retained. A tonnage center is nothing more than an administrative mechanism through which the parties to an agreement carry out the existing authorities in that agreement – a tonnage center does not add to or detract from the authority of the carriers under the agreement. Thus, the Carriers believe the existing exemption for tonnage centers should be retained and, if necessary, added to the list of administrative activities exempt under current 408(b)(4).

With respect to joint container marshaling facilities, the Carriers believe that this exemption also should be retained and made part of a new exemption that should be added to section 408(b) for the implementation of authority to jointly procure facilities and services in accordance with agreement authority authorizing such procurement. There are three primary reasons for such an exemption. First and most importantly, it is unlikely that this type of activity could result in an unreasonable increase in transportation cost or an unreasonable reduction in transportation service. Rather, joint procurement will virtually always result in a reduction in cost to the carriers, thereby helping to keep shipper costs lower than they might otherwise be. Joint procurement will virtually always result in more efficient service, thereby avoiding any reduction in service. Second, a contract between the carrier parties to an agreement on the one hand and the provider of a service or facility on the other hand

is not a further agreement among the carriers, but an agreement between the carriers and a third party (which third party is often not subject to Commission regulation) entered into pursuant to the authority in a filed and effective agreement. Thus, it should not be required to be filed as a legal matter. Third, as explained more fully below, the Carriers believe that by their very nature such arrangements are ill-suited to further filing and appropriate for an exemption.

In this regard, the services or facilities which an agreement authorizes the parties to procure jointly (e.g., containers, line handling, feeder services) are the sort of day-to-day operational services and facilities that each carrier would be procuring on its own if it were not doing so jointly. Thus, such procurement is very much the run of the mill type of everyday transaction that should not be required to be filed. (In this regard, they are very similar to terminal and stevedoring services, which are presently exempt and which are discussed above.)

The workaday nature of these services, and the lack of a need for any further filing, is demonstrated by considering what the parties to the agreement would file. Suppose, for example, that a vessel-sharing agreement authorizes the lines to enter into joint leases for containers. If the lines conclude such a lease, what would they file? A copy of the lease, giving competitively sensitive information to their competitors and to other potential customers of the container provider? An amendment to their agreement saying "and, pursuant to this authority, we have entered into a lease with XYZ Co. for 500 containers?" If the latter, what terms of the lease would need to be reflected in the FMC agreement? Would the FMC agreement have to be amended any time one of the lease terms was amended? Similarly, if a discussion agreement

authorizes the parties to jointly contract with a third-party vendor for the collection of certain charges, what would the parties file if they decided to enter into such a contract?

If the Commission requires filings along the lines of the examples set forth immediately above, it would convert joint procurement authority in an agreement into a mere “agreement to agree,” since no actual agreement could be carried out without a further filing. However, the Commission itself has repeatedly stated that the Shipping Act and its predecessor statute do not require the filing of agreements to agree. See, e.g., *Transshipment and Through Billing Arrangement between West Coast Ports of South Thailand and United States Atlantic and Gulf Ports*, 10 F.M.C. 201, 215 (1966); 68 F.R. 67516 (December 2, 2003). The Commission ought not revise its regulations to convert agreements presently on file to unnecessary “agreements to agree.”

Moreover, an unduly broad definition of what is required to be filed could present significant operational problems that could disrupt cargo flows. For example, assume a vessel-sharing agreement with authority to jointly contract with terminals is required to make a further filing before it can enter into such a contract with a marine terminal operator at a particular port. The amendment becomes effective and the contract is executed. Sometime thereafter, the terminal operator announces it is ceasing operations at that port in a very short time. Presumably, the carriers will need to amend their agreement before they can enter into a contract with a different terminal. Given that the amendment will be subject to a 45-day waiting period, the parties may not have the authority to enter into a new terminal contract before their existing terminal ceases operation.

An overly broad filing requirement would also result in considerable burden for the Carriers and the Commission. If some level of detail regarding a procurement contract needs to be reflected in the agreement filed with the Commission, then an amendment to the FMC agreement will be required every time one of the terms of the procurement contract reflected in the FMC agreement is revised. Again, with an expanded definition of capacity rationalization, such amendments would be subject to a 45-day waiting period. The number of filings that would have to be made, and the inefficiencies that could result while parties are awaiting the effectiveness of their filed amendments, would be considerable.

The Carriers understand and appreciate the Commission's concern with respect to open-ended authority. However, they do not believe the problem is as extensive or severe as the Commission suggests in the ANPRM. The Carriers urge the Commission to exercise care in drawing the line between that which needs to be filed and that which does not, in order to avoid the pitfalls and problems described above.

VI.

Information Form Monitoring Report Requirements

The Carriers generally support the proposed revisions to the Information Form and quarterly monitoring report requirements, since these proposals appear to reduce the burden on the industry of complying with these requirements while still providing the Commission with the information it needs to carry out its oversight responsibilities.

However, the Carriers note that application of the monitoring report requirements hinges to a large extent on the definition of “capacity rationalization.” As explained above, there is ample reason why the Commission should not expand that definition. If the Commission nevertheless decides to issue a proposed rule that includes an expanded definition of “capacity rationalization” that would require a significant number of agreements not presently subject to the monitoring report requirements to file such reports, the Carriers would urge more extensive revisions to the monitoring report requirements to reduce the burden of reporting on such agreements.

In addition, it is not clear why the Commission appears to propose eliminating the need to provide market share data from all portions of the Information Form except current Section IV (which is to be renumbered Section III). There, the Commission indicates that market share data would need to be provided on a trade-wide instead of sub-trade basis. However, if the market share requirement is being eliminated elsewhere because this data is already available to the Commission from other sources, then the Carriers believe it would also make sense to eliminate the market share data requirement from current Section IV altogether.

Finally, the Carriers’ support of a reduction in time to filing monitoring reports from 75 days to 45 days after the end of the relevant calendar quarter is subject to the understanding that occasional and reasonable requests for extensions of the filing deadline will be available should the need arise (e.g., if a filing deadline falls during a holiday period or during a busy service contract season).

VII.

Requests for Additional Information/Public Information

The Carriers believe that Commission should maintain the status quo with respect to the treatment of requests for additional information ("RFAI"), i.e., RFAs and the responses thereto should be confidential, and the public should continue to receive notice of the fact that a request for additional information has been filed.

The response to an RFAI is confidential pursuant to statute. The ANPRM quite appropriately proposes no change to that confidential status. The Carriers believe that it is important for the RFAI itself to remain confidential as well. When an RFAI is issued, it is because the Commission believes it requires further information in order to carry out the analysis required of it under the Shipping Act. The Commission staff undoubtedly relies on the data contained in the Information Form and the response to an RFAI in formulating its recommendation to the Commission, and the Commissioners themselves rely on the staff recommendation and the responses to the RFAI in deciding what action to take with respect to the agreement in question. Thus, the RFAI is rooted in large part in confidential information in the possession of the Commission, and itself is a critical part of the Commission's deliberative process and is exempt from disclosure under FOIA. See 5 U.S.C. §552(b)(5). Just as the Commission does not disclose the recommendations it receives from the staff, it should not disclose the questions that are a significant part of the basis for those recommendations.

Moreover, making RFAs public could have a negative impact on the Commission's information gathering process and/or prejudice the parties to a pending

agreement. For example, in some cases the FMC may find it necessary to include confidential information about an agreement in an RFAI in order to ask a question effectively (e.g., a question may be based on data about changes in port service contained in the Information Form). If the RFAI is public, the Commission could not include the confidential information in the RFAI.

The Carriers believe that when the Commission has sufficient concerns about an agreement to warrant the issuance of an RFAI, the satisfactory resolution of those concerns is best brought about by the type of frank and thorough exchange that results from a confidential process.

In contrast to the RFAI and the response thereto, third-party comments on a filed agreement are not protected by statute and are not likely to contain confidential information. They are filed voluntarily with the Commission, and are presumed to be available to the public under the Freedom of Information Act. Accordingly, the Carriers believe all comments filed with the agency should be made public unless the person filing the comments asserts that the comments qualify for one of the exemptions under FOIA (see, e.g., 552(b)(4) and 81 *Fed. Reg.* 1018 (February 29, 2016)) and the Commission determines that assertion to be valid.

Making comments public encourages accuracy in such submissions, and affords the parties to the agreement the opportunity to provide the Commission with their perspective on the issues raised by the comments. It also allows the agreement parties to speak directly with the party filing the comments to address their concerns, a type of outreach and interaction that the Commission has encouraged in recent years. In contrast, if the Commission does not make public comments it receives on

an agreement, then the agreement parties are effectively denied the ability to provide the Commission or the commenters with their response to the comments.

VIII.

Miscellaneous Proposals

The Carriers support the following proposals contained in the ANPRM: (i) the electronic filing of agreements; and (ii) an exemption from the waiting period requirement for agreement amendments that the agreement parties choose to file simply adjust the number of vessels deployed thereunder within a range already defined in the agreement (it being understood that amendments of this type are not required).

The Carriers support the following proposals contained in the ANPRM, subject to clarification or a certain understanding of the proposal. The proposal to require that an agreement which defines its geographic scope by reference to a port or other range contain a list of the specific countries covered by the agreement is acceptable, provided it is clarified that the parties to that agreement need not call directly at each country specified, and that the parties may change their direct call from one country to another without further amendment to the agreement. For example, an agreement which covers the East Coast of South America would list Brazil, Argentina and Uruguay. The parties might initially call only in Brazil and Argentina, but would move cargo to/from Uruguay via ports in Argentina. If they later decide to switch their call from Argentina to Uruguay, no amendment would be required.

Similarly, the requirement that an Information Form be submitted when a new party joins an agreement is acceptable if it is clarified that this requirement applies

only to agreements that are subject to the Information Form requirement in the first instance, and that only the new member is required to submit the Information Form data.

IX.

Conclusion

The Carriers believe that the Commission's proposed regulations address many of the concerns raised by carriers in the past, and generally support the proposals. They urge the Commission to address those few provisions that may be unclear or burdensome by revising the proposals in accordance with these comments.

Respectfully submitted,



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Attachment A

The following agreements and their ocean common carrier members, also listed, are participating in the foregoing comments⁸:

1. ABC Discussion Agreement
 - Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft KG
 - Seaboard Marine, Ltd.
 - King Ocean Services Limited
 - Crowley Caribbean Services, LLC

2. Australia and New Zealand-United States Discussion Agreement
 - Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft KG
 - Hapag-Lloyd AG
 - ANL Singapore PTE Ltd./CMA CGM S.A. (acting as a single party)
 - MSC Mediterranean Shipping Company S.A.

3. Caribbean Shipowners Association
 - CMA CGM S.A.
 - Seaboard Marine, Ltd.
 - Zim Integrated Shipping Services, Ltd.
 - Tropical Shipping and Construction Company Limited
 - Crowley Caribbean Services, LLC
 - King Ocean Services Limited
 - Hybur Ltd.

4. Central America Discussion Agreement
 - King Ocean Services Limited
 - Crowley Latin America Services, LLC
 - Seaboard Marine, Ltd.
 - Dole Ocean Cargo Express
 - Great White Fleet Liner Service Ltd.

5. Transpacific Stabilization Agreement
 - American President Lines, Ltd./APL Co. Pte Ltd.
 - CMA CGM S.A.
 - COSCO Container Lines Company Ltd.
 - Evergreen Line Joint Services Agreement
 - Hanjin Shipping Co., Ltd.
 - Hapag-Lloyd AG
 - Hyundai Merchant Marine Co., Ltd.
 - Kawasaki Kisen Kaisha, Ltd.

⁸ Some carriers may file individual comments in addition to their participation in these comments. To the extent these comments and individual participating carrier comments are in conflict, the individual comments shall be controlling for that carrier.

- Maersk Line A/S
MSC Mediterranean Shipping Company S.A.
Nippon Yusen Kaisha
Orient Overseas Container Line Limited
Yangming Marine Transport Corp.
Zim Integrated Shipping Services, Ltd.
6. U.S./Australasia Discussion Agreement
CMA CGM S.A.
Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft KG
Hapag-Lloyd AG
Compagnie Maritime Marfret S.A.
ANL Singapore PTE Ltd.
Pacific International Lines (PTE) Ltd.
7. Venezuelan Discussion Agreement
Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft KG
Seaboard Marine, Ltd.
King Ocean Services Limited
8. West Coast of South America Discussion Agreement
Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft KG
Seaboard Marine, Ltd.
Trinity Shipping Line, S.A.
King Ocean Services Limited
CMA CGM S.A.
Hapag-Lloyd AG