U.S. DEPARTMENT OF JUSTICE
Antitrust Division

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

Re: The OCEAN Alliance Agreement, FMC Agreement No. 012426

Dear Secretary:

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

Background

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

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

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

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

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

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

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

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

Competitive Concerns with Alliance Realignment

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

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

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

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

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

[6] *Id.* at § 1.

[7] *Id.* at § 5.3.

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

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

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

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

Competitive Concerns with Specific Provisions of the OCEAN Alliance Agreement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Competitive Concerns Should be Addressed Prior to Implementation of the Agreement

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

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

Conclusion

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

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

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

Very truly yours,

Renata Hesse

Renata B. Hesse

APPENDIX A

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

CURRENT ALLIANCES
(effective through ~ March 2017)

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

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

PROPOSED ALLIANCES
(operational ~ April 2017)

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

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