BEFORE THE
FEDERAL MARITIME COMMISSION

Notice of Proposed Rulemaking Definition of Unreasonable Refusal to Deal or Negotiate With Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier	Docket No. 22-24

COMMENTS OF THE UNITED STATES DEPARTMENT OF JUSTICE

The Antitrust Division of the United States Department of Justice ("Division") is responsible for promoting and protecting economic competition, including in the ocean shipping industry, by enforcing the federal antitrust laws. To these ends, the Division has prosecuted a number of companies and individuals for unlawful collusion in the ocean shipping industry, resulting in criminal fines and jail time.[1] In addition, the Division polices mergers in this industry to protect against a substantial lessening of competition. For example, the Division's recent investigation into the proposed acquisition of Maersk Container Industry A/S and Maersk Container Industry Qingdao Ltd. (collectively, MCI) by China International Marine Containers Group Co. Ltd. (CIMC) deal – which would have resulted in a 90 percent control over refrigerated and insulated container box production – resulted in the abandonment of the deal.[2]

As the President's Executive Order on Promoting Competition in the American Economy recognized, "over the last several decades, as industries have consolidated, competition has weakened in many markets," including "the global shipping container industry [which] has consolidated into a small number of dominant foreign-owned lines and alliances, which can

[1] *See e.g.*, Press Release, Two International Shipping Executives Indicted for Participating in Long-Running Antitrust Conspiracy (Jun. 26, 2019), *available at* https://www.justice.gov/opa/pr/two-international-shipping-executives-indicted-participating-long-running-antitrust; Press Release, Former Shipping Executive Sentenced to 48 Months in Jail for His Role in Antitrust Conspiracy (Jan. 30, 2009), *available at* https://www.justice.gov/opa/pr/former-shipping-executive-sentenced-48-months-jail-his-role-antitrust-conspiracy; Press Release, International Shipping Executives Indicted for Colluding on Bids and Rates, , (Jun. 27, 2017), *available at* https://www.justice.gov/opa/pr/international-shipping-executives-indicted-colluding-bids-and-rates; Press Release, Third Company Agrees to Plead Guilty to Price Fixing on Ocean Shipping Services for Cars and Trucks (Dec. 29, 2014), *available at* https://www.justice.gov/opa/pr/third-company-agrees-plead-guilty-price-fixing-ocean-shipping-services-cars-and-trucks.

[2] *See* Press Release, Global Shipping Container Suppliers China International Marine Containers and Maersk Container Industry Abandon Merger after Justice Department Investigation (Aug. 25, 2022), *available at* https://www.justice.gov/opa/pr/global-shipping-container-suppliers-china-international-marine-containers-and-maersk.

disadvantage America exporters."[3] The Division has for decades worked alongside the Federal Maritime Commission ("Commission") to promote and protect competition in the shipping industry, which is essential to lowering prices, improving quality of service, and strengthening supply chain resilience. In July 2021, the Division and the Commission formalized a framework for partnership that enhances cooperation in the enforcement of antitrust and competition laws, including the Shipping Act, 46 U.S.C. §§ 41101-41309.[4] And in February 2022, the Commission and the Division reaffirmed their continuing commitment to jointly enforcing competition laws and strengthening their cooperation to promote competition in the ocean freight transportation system.[5]

On June 16, 2022, the President signed the Ocean Shipping Reform Act of 2022 ("OSRA 2022") into law, which amended the Shipping Act in several important respects.[6] In Section 2 of OSRA 2022, Congress clarified that two core purposes of the Shipping Act are to "ensure an efficient competitive, and economical transportation system in the ocean commerce of the United States of America" and to "promote the growth and development of United States exports through a competitive system for the carriage of goods by water the foreign commerce of the United States, and by placing greater reliance on the marketplace."[7] To these ends, Congress amended the Shipping Act to specifically enumerate additional "unjust or unjustly discriminatory action[s]" that harm competition, including "refusing, or threatening to refuse, an otherwise-available cargo space accommodation."[8] And Congress made clear that a common carrier "shall not," among other things, "unreasonably refuse cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods."[9]

In addition, as relevant here, OSRA 2022 amended 46 U.S.C. § 41104(a)(10) to make clear that that "[a] common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not … unreasonably refuse to deal or negotiate, including with respect to vessel space accommodations provided by an ocean common carrier."[10] To ensure robust and effective enforcement of this prohibition, Congress directed the Commission "initiate a rulemaking to defining unreasonable refusal to deal or negotiate with respect to vessel space under section 41104(a)(10) of title 46."[11]

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[3] Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021), *available at* https://www.federalregister.gov/documents/2021/07/14/2021-15069/promoting-competition-in-the-american-economy.

[4] *See* Memorandum of Understanding between the Federal Maritime Commission and the Antitrust Division Department of Justice Relative To Cooperation with Respect to Promoting Competitive Conditions in the U.S.-International Ocean Liner Shipping Industry (July 12, 2021), *available at* https://www.justice.gov/opa/press-release/file/1411101/download.

[5] *See* FMC Press Release, Justice Department and Federal Maritime Commission Reaffirm and Strengthen Partnership to Promote Fair Competition in the Shipping Industry (Feb. 28, 2022), *available at* https://www.fmc.gov/justice-department-and-federal-maritime-commission-reaffirm-and-strengthen-partnership-to-promote-fair-competition-in-the-shipping-industry/.

[6] *See* Pub. L. 117–146, June 16, 2022, 136 Stat. 1274.

[7] *Id.* at § 2 (codified at 46 U.S.C. § 41101(1), (2)).

[8] *Id.* at § 2 (codified at 46 U.S.C. § 41102(d)).

[9] *Id.* at § 7(a)(1)(B) (codified at 46 U.S.C. § 41104(a)(3)).

[10] *Id.* at § 7(a)(1)(D) (codified at 46 U.S.C. § 41104(a)(10)).

[11] *Id.* at § 7(d).

On September 21, 2022, the Commission issued a Notice of Proposed Rulemaking ("NPRM") pursuant to Section 7(d) seeking public comment in the above-captioned proceeding.[12] As the Commission has made clear, the proposed rule is "solely focused on the OSRA 2022 requirements related to vessel space accommodations provided by an ocean common carrier."[13] Accordingly, the Commission's proposed rule "first lists the elements necessary to establish a violation of Section 41104(a)(10), and then lays out the criteria the Commission will consider in evaluating the reasonableness of the refusal."[14]

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The Division strongly supports the Commission's efforts to ensure that "[a] common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not … unreasonably refuse to deal or negotiate, including with respect to vessel space accommodations provided by an ocean common carrier." 46 U.S.C. § 41104(a)(10). The Commission's enforcement of this statutory prohibition is critical to ensure that shippers are treated fairly and to preserve the benefits of competition in an already highly-concentrated industry. Today, just three foreign-controlled global alliances dominate ocean freight shipping and their power over American consumers and businesses alike has been readily apparent throughout the pandemic.[15] Because unreasonable refusals practices eliminate effective competitive options for shippers and risk higher prices and lower quality access, the Division has a significant interest in ensuring that vessel space accommodations are not unreasonably refused to American shippers. The Commission's enforcement efforts are particularly important in light of the current limitations that have been in place since 1916 on the full application of federal antitrust laws to the ocean shipping industry. The Shipping Act confers an exemption from the antitrust laws for certain agreements between ocean carriers filed with the Commission, including agreements to pool capacity, allocate routes, and fix capacity.[16] The Justice Department has for decades argued that this exemption is unjustified and should be eliminated.[17]

The proposed rule sets forth three basic elements the Commission (or a private party) must establish to allege a violation of Section 41104(a)(10)'s prohibition on "unreasonabl[e] refus[als] to deal or negotiate … with respect to vessel space accommodations provided by an

[12] *See* 87 Fed. Reg. 57,674 (September 21, 2022)
[13] 87 Fed. Reg. at 57,676 at n.14.
[14] 87 Fed. Reg. at 57,674.
[15] *See* Fact Sheet: Lowering Prices and Leveling the Playing Field in Ocean Shipping, White House (Feb. 28, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-lowering-prices-and-leveling-the-playing-field-in-ocean-shipping.
[16] *See* 46 U.S.C. § 40307. *See also* 46 U.S.C. § 40301.
[17] *See, e.g.*, Letter from Renata B. Hesse, Acting Assistant Attorney General, to Secretary, FMC, Re: The OCEAN Alliance Agreement, at 2, FMC No. 012426, Sept. 19, 2016, https://www.justice.gov/atr/file/909131/download; Statement of Charles A. James, Ass't Atty. Gen., before the House Committee on the Judiciary on H.R. 1253, The Free Market Antitrust Immunity Reform Act of 2001 (June 5, 2002), https://www.justice.gov/archive/atr/public/testimony/11244.pdf; Statement of John M. Nannes, Dep. Ass't Atty. Gen., before the House Committee on the Judiciary on H.R. 3138, the Free Market Antitrust Immunity Reform Act of 1999 (March 22, 2000), https://www.justice.gov/archive/atr/public/testimony/4377.pdf.

ocean common carrier."[18] First, "the respondent must be a common ocean carrier as defined in 46 U.S.C. 40102."[19] Second, there must be a showing that the respondent refused to deal or negotiate with respect to vessel space accommodations. And finally, that refusal must be "unreasonable." The summary of the Commission's proposed rule points to scenarios under which refusals to deal or negotiate are presumptively unreasonable. And the proposed rule makes clear that once this initial showing has been made, the burden shifts to the ocean common carrier, which "must establish that its refusal to deal or negotiate with regard to vessel space, which in some cases results in a decision not to accept cargo, was reasonable."[20]

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The Division agrees with the Commission's commitment to the principle that "reasonableness is necessarily a case-by-case determination" and that whether a refusal to either deal or negotiate with respect to vessel space accommodations is unreasonable must be evaluated "on a case-by-case basis, with particular attention paid to the relevant circumstances."[21] The Division also agrees that "[t]he phrase 'refusal to deal or negotiate' does not lend itself to a general definition and instead must be evaluated on a case-by-case basis."[22] However, the Division has identified the following areas in which the proposed rule could benefit from additional clarity.

First, the Division is concerned that, as currently formulated, the standard for establishing the second and third elements of a prima facie case for a Section 41104(a)(10) violation may be too high and may risk killing off meritorious claims of unreasonable refusals to deal or negotiate vessel space accommodations. The summary of the proposed rule suggests that, in the first instance, the complainant "must prove an actual refusal *to even entertain the proposal*."[23] In the Division's view, while this may be a sufficient showing, it should not be treated as a necessary one. Moreover, because the Section 41104(a)(10) inquiry is necessarily fact-intensive and case-specific, the Division cautions against ruling out the possibility that in some cases an unanswered request to negotiate or deal in good faith could constitute an unreasonable refusal within the meaning of the statute.

Second, Section 41104(a)(10) prohibits two arguably district categories of conduct: (1) unreasonable refusals to "deal"; and (2) unreasonable refusals to "negotiate." However, neither of those two key words – "deal" and "negotiate" – are defined by statute or under the Commission's the proposed rule. Indeed, the proposed rule appears to conflate these two terms; it states that "[i]t is important to clarify that this proposed rule concerns the negotiations or discussions that lead up to a decision about whether an import or export load is accepted for transportation."[24] Basic principles of statutory interpretation weigh against presuming that "deal" and "negotiate" mean the same thing; as the Supreme Court has made clear, the word "or"

[18] 46 U.S.C. § 41104(a)(10).
[19] 87 Fed. Reg. at 57,678.
[20] 87 Fed. Reg. at 57,676.
[21] *Id.*
[22] *Id.*
[23] *Id.* (emphasis added).
[24] *Id.*

is "almost always disjunctive, that is, the words it connects are to "be given separate meanings."[25] The Division notes that under the antitrust laws, these two terms have different meanings: "negotiate" refers to the *discussion* about a particular transaction, while "deal" typically refers to the *transaction* itself – whether it be the provision of goods or services.[26] The Division encourages the Commission to address whether the words "deal" and "negotiate" under Section 41104(a)(10) should be given separate meanings and, if so, to define those terms in the Commission's rule.

In addition, to ensure effective enforcement of the prohibition and sufficient guidance to both ocean common carriers and shippers, the Division recommends the proposed rule specifiy in the text of the rule itself conduct or factors that constitute an *unreasonable* refusal.

For example, the Commission's summary of the rule states that "[t]he Commission presumes that every ocean carrier operating in the U.S. market will have the ability to transport exports in addition to imports until further information is provided" and that "an ocean carrier may not categorically exclude U.S. exports from a backhaul trip without showing how this action is reasonable."[27] The text of the rule should make clear that a presumption of an unreasonable refusal will apply under these circumstances.

In addition to clarifying the circumstances under which a refusal is presumptively unlawful, the Commission should clarify each of the three expressly enumerated "factors the Commission deems relevant" in assessing reasonableness – namely: "(i) whether the ocean common carrier follows a documented export strategy that enables the efficient movement of export cargo; (ii) whether the ocean common carrier engaged in good-faith negotiations, and made business decisions that were subsequently applied in a fair and consistent manner; [and] (iii) the existence of legitimate transportation factors[.]"[28] The Division strongly encourages the Commission to explain what is required to qualify as a "documented export strategy" in assessing reasonableness and also to adopt the certification requirement it seeks comment on but did not include in the text of the proposed rule. In addition, the Commission should consider clarifying that the mere existence of either a documented export strategy or "legitimate transportation factors" are insufficient to immunize an ocean common carrier from liability.

Finally, the Division encourages the Commission to consider whether there may be additional factors or indicia that it should expressly address in setting forth the standard for determining whether an ocean common carrier has unreasonably refused to deal or negotiate with a shipper. For example, the Commission might consider whether under certain circumstances, ceasing a profitable prior course of dealing with a shipper could be an indicator of unreasonableness. In addition, although the NPRM suggests that "[c]ommercial convenience alone is not a reasonable basis for a common carrier's refusal to deal or negotiate," the Commission should consider whether an ocean common carrier's refusal of profitable

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[25] *United States v. Woods*, 571 U.S. 31, 45 (2013); *see also Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018) ("or is almost always disjunctive."); *Reiter v. Sonotone Corp*., 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings").
[26] *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585 (1985) (where a refusal to *deal* relates to the sale of a ski ticket).
[27] 87 Fed. Reg. at 57,675.
[28] *See* 87 Fed. Reg. at 57,678.

accommodation for available vessel space without explanation or justification could, in some cases, serve as an important factor to consider in assessing reasonableness. The Division also recommends that the Commission consider the extent and sufficiency of remedial measures that an ocean common carrier took following refusal to deal. An ocean common carrier that refuses to deal with a shipper but offers restitution for failing to make the shipment or helps to secure a suitable replacement vessel for the shipper's goods may indicate that the carrier was acting in good faith. Conversely, a refusal to deal and an outright refusal to engage in any remedial action should be weighed against a carrier in any adjudication regarding the reasonableness of such a refusal. Such a consideration would help to promote procompetitive behavior in the shipping industry and better realize the goal of protecting shippers and promoting exports.

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