

**Before the**  
**ANTITRUST MODERNIZATION COMMISSION**  
**REQUEST FOR PUBLIC COMMENT**  
**COMMENTS OF WORLD SHIPPING COUNCIL**  
**REGARDING IMMUNITIES AND EXEMPTIONS (TOPIC V)**  
**AND REGULATED INDUSTRIES (TOPIC IX)**

**INTRODUCTION**

The World Shipping Council ("WSC" or "the Council"), through undersigned counsel, submits the following comments in response to the Request for Public Comment issued by the Antitrust Modernization Commission (the "Commission") on May 19, 2005. 70 Fed. Reg. 28902.

WSC is a Washington, D.C.-based non-profit trade association of thirty-seven international ocean carriers that addresses public policy issues of importance to the international liner shipping industry and to U.S. foreign commerce. WSC's members carry more than 90% of the United States' imports and exports transported by the international liner shipping industry, or roughly \$500 billion worth of America's foreign commerce, each year. The Council's members (a list of whom is attached hereto) include the full spectrum of ocean common carriers, from large global operators to trade-specific niche carriers, offering a wide variety of international transportation and logistics services. However, they are primarily "liner operators" or "common carriers," meaning that they offer regular scheduled service for a wide variety of customers to and from U.S. and foreign ports. This is in contrast with other ocean carriers that transport oil, grain and other commodities in bulk, most often for one particular industrial customer on non-fixed routes and schedules.

These comments will address the Commission's questions of particular interest to ocean common carriers, specifically those regarding Immunities and Exemptions

(Topic V) and Regulated Industries (Topic IX). At the outset, it is important to recognize that WSC's members are subject to a comprehensive regulatory regime governing shipping in the foreign commerce of the United States codified in the Shipping Act of 1984, as amended (46 U.S.C. App. §§ 1701-19) (the "Act"). As an integral part of that regulatory system, WSC's members are parties to a variety of agreements filed with the Federal Maritime Commission ("FMC") that are afforded limited antitrust immunity under the Shipping Act. Accordingly, the questions asked in the Commission's Request for Public Comment, insofar as they relate to ocean shipping, can only be meaningfully addressed within the context of the regulatory system established by the Act.<sup>1</sup> In this regard, the following points merit emphasis:

- The Shipping Act's antitrust immunity is only one part of a comprehensive system of regulation of ocean shipping, and must be considered in that context.
- The Shipping Act's antitrust immunity is limited. It is circumscribed by numerous statutory restrictions and prohibited activities, all of which are monitored and enforced by an independent expert agency, the Federal Maritime Commission, which has broad investigative and enforcement powers.
- Congress has regularly reviewed the Shipping Act. In 1998, after several years of review, oversight, and consideration, Congress significantly amended the Act in a carefully crafted legislative compromise involving all industry segments, including labor, ports, and the major users of ocean carrier services.
- Because of the uniqueness of the shipping industry and the policy goals sought to be achieved by Congress in its regulatory system, international ocean transportation is not amenable to a "one-size-fits-all" analytical methodology to assess the costs and benefits of antitrust immunity.
- Congress has established a complete and thorough regulatory system for the nation's international liner shipping commerce. Congress has thoroughly and recently reviewed, adjusted, confirmed the applicable regulatory regime. That regime is working well. When Congress has clearly established what the law is on a subject, especially when it has recently

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<sup>1</sup> These comments do not address other antitrust immunities designated for study by the Commission.

reviewed and affirmed that law, the “burden of proof” lies on the party proposing to change that law.

Before turning to the specific questions posed by the Commission, we first provide a brief summary of the background on the Shipping Act and the antitrust immunity contained therein.

### **BACKGROUND – THE SHIPPING ACT AND ITS ANTITRUST IMMUNITY**

The system of antitrust immunity and regulation under the Shipping Act had its U.S. origins in the Shipping Act of 1916. The 1916 Act acknowledged the benefits of ocean carrier ratemaking agreements known as “conferences,” then in use worldwide, to ameliorate the destabilizing, and often destructive, economic forces inherent in the liner shipping industry. Congress has reviewed the Act regularly since 1916, recently in 1984, with the enactment of the Shipping Act of 1984, and then again in 1998, with the enactment of the Ocean Shipping Reform Act of 1998 (“OSRA”), which became effective in May 1999. OSRA was the result of nearly four years of legislative review, culminating in a product in which carriers, shippers, ports and labor all participated and which all approved. The resulting amendments to the Shipping Act sharply limited the antitrust immunity provided under the Act and strengthened the regulatory oversight of the FMC.

#### **Shipping Act Antitrust Immunity Is Limited**

The antitrust immunity provided under the Shipping Act is limited in a number of respects. As an initial consideration, the immunity is available only to those engaged in the ocean common carriage of goods in the foreign commerce of the U.S. operating under an effective agreement that has been filed with the Federal Maritime Commission. 46 U.S.C. App. §§ 1703-04. In particular, the immunity relates only to matters affecting transportation of goods between the U.S. and a foreign country.

Those engaged in domestic transport between U.S. ports are not eligible for antitrust immunity under the Act.<sup>2</sup> Certain activities may not receive immunity under any circumstances. See Section 7(b) of the Shipping Act, 46 U.S.C. App. § 1706(b).

Under Section 7 of the Act, antitrust immunity is conferred on agreements only to the extent they have been filed with the FMC and gone into effect. 46 U.S.C. App. § 1706. If an activity is not described in the filed agreement, or if the parties do not have a reasonable basis to conclude that an activity is being conducted pursuant to a filed and effective agreement, it is not immune.

The FMC publishes notice of every filed agreement in the Federal Register for comment by interested parties. A filed agreement becomes effective 45 days after filing. However, the FMC has the option of delaying or preventing agreement effectiveness by issuing a request for further information regarding the agreement or going to court under Section 6(g) of the Act to enjoin its effectiveness. 46 U.S.C. App § 1705(g). A copy of every agreement that has gone into effect in this manner is available to the public at the FMC's offices and on its web site.

For comparison purposes, the procedures whereby an FMC agreement becomes effective are not unlike those applicable to a Hart-Scott-Rodino filing with the Federal Trade Commission or Department of Justice. See Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435 (1976), codified at 15 U.S.C. § 18a.

The authority of rate agreements granted immunity under the Shipping Act has been carefully circumscribed by Congress. Each member of any Shipping Act rate agreement has an absolute right to enter into individual, confidential service contracts with its customers at whatever rates and terms the parties to the contract may negotiate. While agreements may adopt general guidelines relating to the terms of

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<sup>2</sup> Congress has recognized numerous differences between international and domestic commerce, including the establishment of cabotage restrictions in domestic commerce.

their members' individual contracts, such guidelines must be voluntary and must explicitly state that each member is entitled to depart from them. Moreover, agreements cannot, as a condition of membership or otherwise, require disclosure of service contract terms or negotiations to other agreement members. See, 46 U.S.C. App. § 1704(c). None of these individual rights can be abridged or bargained away. In short, Congress has established a system under which ocean carriers cannot enforce collective rate action by rate agreement members.

In addition to these basic limits on antitrust immunity, agreements filed with the FMC are subject to numerous other regulatory requirements and restrictions. Many of these restrictions incorporate antitrust concepts, while others are tailored specifically to the shipping industry and go well beyond antitrust considerations. Examples of the former include prohibitions on boycotts, unreasonable refusals to deal, predatory actions, and allocations of customers. Examples of the latter include discrimination toward shippers and failure to adhere to published tariffs or filed service contracts. In all, there are some 29 prohibited acts set forth in Section 10 of the Act. 46 U.S.C. App. § 1709. These prohibited acts may not be authorized or legitimized through a filed agreement.

### **The Types of Exempt Agreements Have Changed Considerably in Recent Years**

Largely as a result of statutory changes in the Shipping Act, notably those contained in OSRA, along with contemporaneous changes in the economics of the industry, the types of agreements that are filed with the FMC have changed dramatically in recent years. Historically, "conference" agreements, under which ocean carriers set binding (and public) rates to be offered to their customers, were common at one time, and the U.S. government enforced those rates. Today,

conference agreements are virtually extinct, having been supplanted by discussion agreements in which agreements on rates are not binding, are not public, and are not enforced by the government or the parties to the agreement.

Perhaps nothing reflects the significance of these changes more than the changes in the nature of ocean carriers' contracting with their customers. Prior to OSRA, a significant portion of shipping contracts were entered into by conference agreements, and the rates were binding on all carrier members of the conference. Now, virtually all contracts with shippers are negotiated and entered into by individual ocean carriers. The rates in those contracts are confidential, so other agreement members have no way of knowing whether agreed rate guidelines have been followed or not.

The limited immunity and agreement filing system of the Shipping Act has important application beyond carrier rate agreements. Out of 235 agreements presently on file with the FMC, only 14, or 6 percent, are conference agreements. An additional 38 are voluntary discussion agreements. The remaining agreements are primarily operational, and have little or nothing to do with rates. Out of the 235 filed agreements, 163 are "vessel sharing agreements" or "space charter agreements" through which the parties coordinate vessel services and/or exchange vessel space. These agreements have greatly expanded the service options available to the shipping public and have promoted efficiencies and cost savings for carriers by reducing unused space on vessels and reducing the impact of trade imbalances. Further, U.S. marine terminal operators can obtain limited immunity through agreements filed with the FMC, and these agreements are increasingly recognized by shippers and carriers alike as a potentially important and helpful way to help manage the many

transportation infrastructure challenges our nation faces in handling the growth in volume of America's international commerce.

**Agreements Are Regulated and Monitored  
By The Federal Maritime Commission**

The Federal Maritime Commission, an independent regulatory agency, is charged exclusively with the regulation of the shipping industry under the Shipping Act. In carrying out its duties, the FMC has numerous investigatory and enforcement tools at its disposal. The discussions and activities that take place under effective agreements are closely monitored by the FMC on an ongoing basis. Agreements are required to file quarterly monitoring reports with the FMC to provide information on market share, revenue trends, vessel utilization levels, and service changes. Under regulations that were expanded earlier this year, agreements are required to file with the FMC minutes of all meetings. See 46 C.F.R. § 535, Subpart G.

In addition, upon receipt of a complaint by the public or upon its own motion, the FMC may investigate any conduct or agreement that it believes to be in violation of the Shipping Act, including conduct constituting a prohibited act or activities that could produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost. 46 U.S.C. App. §§ 1705(g), 1710. Section 12 authorizes subpoenas and discovery in FMC investigations and adjudicatory proceedings. 46 U.S.C. App. § 1711.

In addition to seeking injunctive relief against effective agreements pursuant to Section 6(g) of the Act, the FMC may assess civil penalties for Shipping Act violations of up to \$6,000 per violation, or up to \$30,000 per violation if it is knowing and willful. Private parties may bring a complaint or reparations proceeding before the FMC to obtain damages for violations. Double damages are permitted in cases of certain predatory actions, boycotts, refusals to deal, operation under an agreement that has

not been filed or gone into effect, or operation beyond the terms of a filed agreement.  
46 U.S.C. App. §§ 1710, 1712.

In sum, the antitrust immunity granted by the Shipping Act is both limited and is overlaid with a comprehensive federal regulatory regime. Once effective, agreements are closely monitored by the FMC and are subject to numerous prohibited acts and other restrictions as part of a comprehensive regulatory system. With that introduction to Shipping Act antitrust immunity and regulation as background, we now turn to the specific questions raised by the Commission.

### **QUESTIONS – IMMUNITIES AND EXEMPTIONS**

#### ***1a. What generally applicable methodology, if any, should Congress use to assess the costs and benefits of immunities and exemptions?***

While there are common economic concepts that may be useful for analyzing antitrust exemptions, they are of limited utility in assessing the value of a specific antitrust exemption. As is evident from the list in the Commission's Notice, not only do the current immunities and exemptions relate to a wide variety of industries having little in common, but the exemptions themselves vary greatly with many unique provisions and restrictions. The costs and benefits of a particular immunity must necessarily be considered within the specific facts and circumstances of that industry and, most important, must be assessed against the purposes and goals the exemption is intended to achieve. Thus, even a common methodology will quickly lead to divergent analyses and results.

In the case of the Shipping Act, Congress's review of the industry has found that liner shipping is affected by a confluence of internal and external forces that are



different from any other industry, regulated or unregulated.<sup>3</sup> Congress has recognized this fact numerous times in its various reviews of the Shipping Act. For example, in 1997 the Senate Committee on Commerce, Science, and Transportation stated:

Ocean liner shipping is an international industry involving trade between sovereign nations, and the industry is subject to multinational regulation. The international nature of the industry has been characterized by chronic conditions of carrier overcapacity. The primary cause of liner shipping overcapacity is the presence of international policies designed to promote national-flag carriers and also to ensure strong shipbuilding capacity in the interests of national security and employment. These policies include subsidies to purchase ships and operate ships, tax advantages to lower costs, cargo reservation schemes, and national control of shipyards and shipping companies and have resulted in an industry which is not completely driven by economic objectives.

S. Rep. 105-61, at 2 (1997). Liner shipping is far from the classic, unfettered free market that is the underpinning of the antitrust laws.

Thus, any grant of antitrust immunity, and its accompanying regulatory scheme if any, must necessarily reflect the characteristics of the industry involved and be based on the particular policies that Congress seeks to promote. That has been done painstakingly by Congress in the case of the Shipping Act, whose policies can therefore only be measured against Congress's specific policy objectives, not some general methodology for review of antitrust exemptions.

***b. Should Congress analyze different types of immunities and exemptions differently?***

Yes. For similar reasons cited above, different immunities and exemptions have been constructed differently, for different purposes, presumably with different results, and must be analyzed differently. At a minimum, the analysis must take into account

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<sup>3</sup> There are some similarities with the international airline industry; however there are also major differences between aviation and shipping, including in the maritime field the absence of bilateral government-to-government agreements that restrict entry. There are no regulatory barriers to entry in international liner shipping.

the unique circumstances of the industry involved. The nature and extent of regulatory oversight of the immunity must be considered. Related questions include whether consumer protections are built into the exemption, whether the immunity and any accompanying regulatory regime has achieved its goals, and whether there is evidence that consumers have been harmed. Each of these questions must be answered separately for each exemption if the analysis is to be meaningful.

***c. Should Congress subject immunities and exemptions to a “sunset” provision, thereby requiring congressional review and action at regular intervals as a condition of renewal?***

No. The purpose of statutes enacted by Congress is to establish the law of the land and the government’s policy on a particular subject. Once considered, debated and enacted into law, it is important for that policy to be something affected parties can understand and rely on in making their investment and business decisions. When there is sufficient reason to change the law, Congress can do so, and it has done so on many occasions. Sunset clauses, however, create an unproductive and unnecessary level of uncertainty in the law.

Furthermore, there is already regular Congressional oversight of the Shipping Act, periodic legislation reauthorizing appropriations for the FMC by Congressional authorizing committees, and annual review of the agency by the Congressional appropriations committees, as well as the FMC’s ongoing regulatory actions. The FMC is required by law to report annually to Congress on the Shipping Act, including the FMC’s activities and any recommendations it has for Congress, when it presents its budget. See, 46 U.S.C. App. § 1118. The annual report is publicly available on the FMC’s web site. Given this regular scrutiny, and given the fact that the Shipping Act, as amended by OSRA, has been quite successful for shippers and carriers alike, there would be no basis for a sunset provision.

A sunset provision in the Shipping Act would also create unnecessary uncertainty in international shipping. Ocean shipping is a capital intensive industry. Equipment and assets such as ships and port facilities take years to design and build and require long term financing and asset sharing commitments to bring to fruition. The ability to rely on a known regulatory system greatly facilitates these investments. An arbitrarily established sunset provision, aside from creating redundant analyses, would result in unnecessary uncertainty in the international shipping community and could deter the investments necessary to carry the nation's expanding foreign trade.

This type of stability was one of Congress's main purposes in crafting the Shipping Act.

In this bill we have tried to provide predictability and certainty to both the enforcing agency and those who operate under the law's provisions. Under this bill the ocean common carriers will have more precise standards to measure their conduct against and also more severe penalties for violating those standards.

Statement of Congressman Biaggi during House debate of the Conference Report on S. 47, Shipping Act of 1984, 130 Cong. Rec. H 1292 (1984). This was a consistent theme throughout Shipping Act debate as demonstrated in the Senate Report on S. 504, an earlier version of the 1984 Act, which stated its intent to provide "a predictable legal regime and streamlined regulatory process administered and enforced by a single independent Federal agency (the Federal Maritime Commission (FMC))". S. Rep. 98-3, at 1 (1983).

Thus, Congress has established a comprehensive and stable regulatory system that already receives significant review.

***d. Should proponents of an immunity or exemption bear the burden of proving that the benefits exceed the costs?***

The burden of proof should be on those who wish to change established law. Thus, the proponents of a new immunity or exemption should bear the burden to

prove its benefits over its costs. Where the immunity or exemption has already been considered and established in existing U.S. law, those seeking to change the law should bear the burden of proof.

## QUESTIONS - REGULATED INDUSTRIES

**1. What role, if any, should antitrust enforcement play in regulated industries, particularly industries in transition to deregulation? How should authority be allocated between antitrust enforcers and regulatory agencies to best promote consumer welfare in regulated industries?**

In the shipping context, Congress has determined that one agency, the FMC, should have primary responsibility for regulating ocean shipping. As stated by the Senate Committee on Commerce, Science, and Transportation during the Shipping Act debate:

Once the requirements of sections 5 and 6 [filing and acceptance of agreements] have been met, activities pursuant to such agreements or reasonably believed to be pursuant to such agreements, are subject solely to the Shipping Act. Only the standards, remedies and penalties of this legislation will apply. Carriers operating in the U.S. foreign commerce will no longer face a dual risk of being regulated under both the Shipping Act and the antitrust laws for their conference activities. This is intended to be a broad exemption from the antitrust laws for the activities outlined herein.

S. Rep. 98-3, at 29 (1983).

Moreover, the legislative record makes clear that Congress was concerned with the unfairness and regulatory uncertainty that arose out of parallel jurisdiction over Shipping Act violations by the FMC, the expert agency established by Congress to administer the Act, and by the Department of Justice under the antitrust laws. This resulted in Congress's stated intent that, with respect to violations of the Shipping Act, the Shipping Act was to govern in place of, not alongside, the antitrust laws:

. . . the Committee intends that violations of this Act not result in the creation of parallel jurisdiction over persons or matters which are subject to the [Shipping Act of 1984]; the remedies and sanctions

provided in the [Shipping Act of 1984] will be the exclusive remedies and sanctions for violation of the Act.

H.R. Rep. 98-53, Part 1, at 12 (1983).

This is not to say, however, that there is no role for antitrust enforcement agencies. With respect to the interplay between regulatory authorities and antitrust enforcement authorities, the Shipping Act provides a comprehensive system in which Congress specifically addresses the relationship of the regulatory obligations and antitrust laws. See Section 7, and in particular, Section 7(c) of the Act (46 U.S.C. App. § 1706, describing antitrust immunities exceptions and limitations). The FMC regulates ocean carrier agreements and anti-competitive conduct, but the antitrust authorities and criminal antitrust penalties apply to agreements and activities that go beyond the Shipping Act's reach. When the limited antitrust immunity provided by the Shipping Act is exceeded, there is a role for other enforcement agencies. The interrelation of the two systems has been carefully crafted and has worked as Congress intended. This is demonstrated in *United States v. Gosselin Worldwide Moving, N.V.*, \_\_\_ F.3d \_\_\_, 2005 WL 1389531 (4<sup>th</sup> Cir. June 14, 2005), in which a claim of antitrust immunity under the Act was rejected by the court faced with defendants that were not operating under an effective agreement and had no reasonable basis to believe they were immune under the Shipping Act.

**2. How, if at all, should antitrust enforcement take into account regulatory systems affecting important competitive aspects of an industry? How, if at all, should regulatory agencies take into account the availability of antitrust remedies?**

Where Congress has provided for specific antitrust exemptions and mandated a comprehensive regulatory system to oversee and enforce those exemptions, antitrust enforcement agencies should, absent compelling reasons, defer to the designated agency having regulatory oversight. In the case of the Shipping Act, where there are

clearly articulated antitrust immunities, exemptions from those immunities, identification of procedures and prohibited acts, and federal regulatory oversight with investigative, adjudicative and punitive powers, there is little reason or public policy grounds for antitrust enforcement authorities to become involved in issues that fall within the scope of the Act. Moreover, it is clear from the legislative history that this was precisely Congress's intent with respect to oversight of the Shipping Act immunities, where the FMC was granted exclusive authority for Shipping Act enforcement.

This bill puts new and important responsibilities on the Federal Maritime Commission. That agency is charged with insuring that consumers are protected from any abuse of the antitrust immunity granted by the bill.

Statement of Congressman Biaggi, 130 Cong. Rec. H 1292 (1984).

**3. What is the appropriate standard for determining the extent to which the antitrust laws apply to regulated industries where the regulatory structure contains no specific antitrust exemption?**

This question is not applicable to the Shipping Act, where there is a specific and circumscribed antitrust exemption and a well articulated regulatory scheme implementing the exemption. WSC has no comments with respect to other industries in which a different situation may exist.

**4. How should courts treat antitrust claims where the relevant conduct is subject to regulation, but the regulatory legislation contains a "savings clause" providing that the antitrust laws continue to apply to the conduct?**

The Shipping Act does not have a "savings clause" per se. However, historically, the courts have not hesitated to apply the antitrust laws in cases where the reach of antitrust immunity has been exceeded. See, e.g., *Gosselin, supra.*; *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 932 (1966); *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973). The standards established by Congress for application of the Shipping Act versus the antitrust laws are discussed in detail above.

**5. Should Congress and regulatory agencies set industry-specific standards for particular antitrust violations that may conflict with general standards for the same violations?**

This is effectively what Congress has done with respect to the Shipping Act. As noted above, the Shipping Act system is the result of Congress's specific review and consideration of the most appropriate way to regulate the ocean shipping industry and to address its domestic and foreign policy implications. Accordingly, it is appropriate for Congress, after analyzing the peculiarities of a given industry, to determine industry-specific standards for anti-competitive violations when, as with the Shipping Act, doing so will advance national policies.

This was well articulated by Congressman Biaggi, the primary author of the 1984 Act, in summing up the Act's development during debate of the conference report.

. . . the controversies [over the Shipping Act] have been over the proper extent of the Government's role in this industry, how the industry should be regulated, and the proper balance between the industry, its customers, and the consumers in general. These basic considerations were debated in terms of tariff filing, independent action, service contracts, a general, or public interest, standard, closed versus open conferences, the need for further study of the industry, and the nature and extent of antitrust immunity for the liner shipping industry. These issues have now been resolved. . .

130 Cong. Rec. H 1292 (1984).

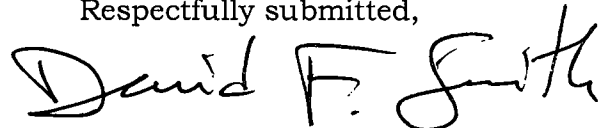
**CONCLUSION**

Through the Shipping Act, Congress has established an effective and comprehensive regulatory system, administered by an expert independent regulatory agency. Limited antitrust immunity is part of that system. It is accompanied by numerous statutory and regulatory constraints and extensive regulatory agency oversight. This system was created after due consideration of the unique

characteristics of the international liner shipping industry. The system has worked well and has been periodically reviewed, revised and reaffirmed by Congress.

Parties proposing to amend the Act's limited antitrust immunity or regulatory system as established by Congress should bear the burden of proof.

Respectfully submitted,

A handwritten signature in black ink that reads "David F. Smith". The signature is written in a cursive style with a large, prominent "D" and "S".

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