

# FEDERAL MARITIME COMMISSION

## 60TH ANNUAL REPORT

FOR

FISCAL YEAR  
2021



# TABLE OF CONTENTS

Letter of Transmittal.....	1
Members of the Commission.....	3
List of Acronyms.....	5
FMC Mission, Strategic Goals, and Functions.....	7
Strategic Goal 1.....	7
Strategic Goal 2.....	8
Statutory Authority.....	8
Year in Review.....	11
Efficiency and Competition.....	17
Strategic Goal 1.....	17
Agreement Filings and Review.....	17
Monitoring Regulated Entities.....	19
Carrier Alliance Agreements.....	19
Market Shares of Alliances.....	21
Alliance Carrier Capacity.....	22
Tariffs/NRAs/NSAs and Service Contracts.....	24
International Cooperation.....	25
Competitive Impact of Ocean Carrier Alliance Joint Purchases of Certain Covered Services.....	25
Protecting the Public.....	29
Strategic Goal 2.....	29
Fact Finding Investigations.....	29
Licensing.....	31
Passenger Vessel Program.....	32
Consumer Affairs and Dispute Resolution.....	33
Enforcement and Compliance.....	34
Developments in Major U.S. Foreign Trades.....	37

Containerized Capacity.....	38
Containerized U.S. Imports and Exports.....	39
Commodities Imported and Exported.....	41
Top Twenty U.S. Liner Cargo Trading Partners.....	45
Foreign Shipping Practices Act.....	47
Controlled Carriers.....	49
Formal Investigations, Private Complaints, and Litigation.....	51
Formal Proceedings.....	51
Rulemakings and Exemptions.....	54
FMC Information Technology.....	59
Glossary.....	61
Appendices.....	65
A – FMC Organization Chart.....	65
B – FMC Senior Officials.....	66
C – Statement of Appropriations, Statement of Custodial Activity, and Financial Operations.....	67
D – Agreement Types.....	68
E – Agreement Review Standard.....	70
F – Standard for Practices in Handling Property.....	72

# LETTER OF TRANSMITTAL



FEDERAL MARITIME COMMISSION  
800 North Capitol Street, N.W.  
Washington, DC 20573-0001

March 31, 2022

To the United States Senate and House of Representatives:

On behalf of my fellow Commissioners, and pursuant to section 103(e) of Reorganization Plan No. 7 of 1961, and section 208 of the Merchant Marine Act, 1936, as amended, at 46 U.S.C. § 46106(a), I am pleased to share with you the 60th Annual Report of the Federal Maritime Commission, Fiscal Year 2021.

Sincerely,

Daniel B. Maffei  
Chairman



# MEMBERS OF THE COMMISSION

Fiscal Year 2021



Rebecca F. Dye  
Commissioner  
Appointed 2002  
Term Expired 2020



Daniel B. Maffei  
Chairman  
Appointed 2016  
Term Expires 2022



Michael A. Khouri  
Commissioner  
Appointed 2009  
Term Expired 2021



Louis E. Sola  
Commissioner  
Appointed 2019  
Term Expires 2023



Carl W. Bentzel  
Commissioner  
Appointed 2019  
Term Expires 2024



# LIST OF ACRONYMS

<b>ALJ</b>	Administrative Law Judge
<b>ANPRM</b>	Advance Notice of Proposed Rulemaking
<b>AR</b>	Area Representative
<b>BOE</b>	Bureau of Enforcement
<b>CADRS</b>	Office of Consumer Affairs and Dispute Resolution Services
<b>CBP</b>	U.S. Customs and Border Protection
<b>DOJ</b>	Department of Justice
<b>FMC</b>	Federal Maritime Commission
<b>EPA</b>	Environmental Protection Agency
<b>FSPA</b>	Foreign Shipping Practices Act
<b>FTC</b>	Federal Trade Commission
<b>IT</b>	Information Technology
<b>MOU</b>	Memorandum of Understanding
<b>MTO</b>	Marine Terminal Operators
<b>NESOI</b>	Not Elsewhere Specified or Indicated
<b>NPRM</b>	Notice of Proposed Rulemaking
<b>NRA</b>	Negotiated Rate Arrangement
<b>NSA</b>	NVOCC Service Arrangement
<b>NVOCC</b>	Non-Vessel-Operating Common Carrier
<b>OFF</b>	Ocean Freight Forwarder
<b>OTI</b>	Ocean Transportation Intermediary
<b>PIERS</b>	Port Import Export Reporting Service
<b>PVO</b>	Passenger Vessel Operator
<b>TEU</b>	Twenty-Foot Equivalent Unit
<b>TSA</b>	Terminal Services Agreement
<b>VOCC</b>	Vessel-Operating Common Carrier



# FMC MISSION, STRATEGIC GOALS, AND FUNCTIONS

The Federal Maritime Commission (FMC or Commission) is an independent agency responsible for the regulation of oceanborne transportation in the foreign commerce of the United States for the benefit of U.S. exporters, importers, and the U.S. consumer.

The FMC's Mission is:

- Ensure a competitive and reliable international ocean transportation supply system that supports the U.S. economy and protects the public from unfair and deceptive practices.

The Commission achieves its mission by ensuring that the fundamental dynamics of a free, open, and competitive ocean transportation market drive economic outcomes. To that end, the Commission is committed to faithfully administering the Shipping Act, employing a minimum of government intervention and regulatory costs and by placing a greater reliance on the marketplace.

## STRATEGIC GOAL 1

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**Maintain an efficient and competitive international ocean transportation system.**

The FMC ensures efficient and competitive ocean transportation services for the shipping public by:

- Reviewing and monitoring agreements among ocean common carriers and marine terminal operators serving the U.S. foreign oceanborne trades to ensure that any joint or collective activities do not cause substantial increases in transportation costs or decreases in transportation services;
- Maintaining and reviewing confidentially-filed service contracts and Non-Vessel-Operating Common Carrier Service Arrangements to guard against detrimental effects to shipping;
- Providing a forum for exporters, importers, and other members of the shipping public to obtain relief from ocean shipping practices or disputes that impede the flow of commerce;
- Ensuring common carriers' tariff rates and charges are published in private, automated tariff systems and electronically available;
- Monitoring rates, charges, and rules of government-owned or controlled carriers to ensure they are just and reasonable; and
- Taking action to address unfavorable conditions caused by foreign governments or business practices in U.S. foreign shipping trades.

## STRATEGIC GOAL 2

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Protect the shipping public from unlawful, unfair, and deceptive ocean transportation practices and resolve shipping disputes.

The FMC protects the public from financial harm and contributes to the integrity and security of the U.S. supply chain and transportation system by:

- Investigating and ruling on complaints regarding rates, charges, classifications, and practices of common carriers, Marine Terminal Operators (MTOs), and Ocean Transportation Intermediaries (OTIs) that violate the Shipping Act;
- Licensing OTIs with appropriate character and adequate financial responsibility;
- Helping resolve disputes involving shipments of cargo, personal or household goods, and between cruise vessel operators and passengers;
- Identifying and holding regulated entities accountable for mislabeling cargo shipped to or from the United States; and
- Ensuring that cruise lines maintain financial responsibility to pay claims for personal injury or death, and to reimburse passengers when their cruise fails to sail.

## STATUTORY AUTHORITY

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The principal statutes administered by the Commission, now codified in Title 46 of the U.S. Code at sections 40101 through 44106, are:

- The Shipping Act of 1984 (Shipping Act), 46 U.S.C. chapters 401-413;
- The Foreign Shipping Practices Act of 1988 (FSPA), 46 U.S.C. chapter 423;
- Section 19 of the Merchant Marine Act, 1920 (1920 Act), 46 U.S.C. chapter 421; and
- Sections 2 and 3 of Pub. L. No. 89-777, 80 Stat. 1350, 46 U.S.C. chapter 441.

In addition, section 834 of the Frank LoBiondo Coast Guard Authorization Act of 2018 (LoBiondo Act) is codified at 46 U.S.C. § 3503(b)(1)(C).





# YEAR IN REVIEW

The challenges resulting largely from COVID-related supply and demand swings continued to dominate the agenda of the Federal Maritime Commission in 2021.

In Fiscal Year 2021, nearly 28 million Twenty-Foot Equivalent Units (TEUs) were imported through U.S. ports, an increase of 21% from Fiscal Year 2020 totals. If including volumes entering the United States through Canadian ports, that total grows to more than 29 million TEUs of cargo, also a 21% increase from the preceding year.

While conditions at Los Angeles and Long Beach have drawn the attention of the public, media, and government officials, container ports around the United States handled significant and often record-breaking volumes of international trade. Ports in the states of Washington, New York, New Jersey, South Carolina, Georgia, Texas, and Florida all reported historic years in terms of cargo moving over their gateways. The frequency of vessel calls and magnitude of containers arriving in the United States has far outpaced the capabilities of inland networks. Personnel, equipment, domestic surface transportation, warehouse space and infrastructure constraints have all contributed to degraded efficiency and reliability of the system which are reflected in vessels waiting to berth.

Pandemic-related impacts to the supply chain are global in scope—neither limited to the United States nor to ocean shipping—and create interrelated consequences that exacerbate the obstacles that transportation companies and workers face in moving each container from origin to destination. For

example, a factory or marine terminal closure in Asia will impact U.S. surface transportation networks and retail operations. Similarly, a weather event or lack of warehousing space in the United States causes backups at U.S. ports, on the seas, and even ports in Asia. Problems in Asia and the United States have impacts in Europe, and in turn, European problems cause complications in Asia. Shippers around the world are working through the same challenges as those in the United States. The interconnected networks that move international commerce are usually beneficial, but for the past year, those linkages have meant that any problem in one area has a ripple effect on the whole system.

It should be noted, however, that America's ocean transportation system, though strained by unprecedented demand, did in fact continue to function and processed and delivered record amounts of cargo even while dealing with COVID-related constraints. Despite wide-spread predictions of empty shelves and shortages of essential goods during the holiday shopping season, most Americans experienced no major disruptions thanks in large measure to shippers that altered their supply chain expectations, transportation and logistics companies that came up with innovative solutions, and tens of thousands of workers who refused to let the system fail.

The Commission's work has focused on improving the circumstances of American shippers—and the U.S. consumers who depend on them—in these extraordinarily challenging circumstances. The Commission has sought to use its existing statutory

authorities, found at 46 U.S.C. §§ 40101 through 44106, as creatively and effectively as possible to address head-on issues related to the cost, availability, and reliability of ocean transportation services that pose unprecedented challenges to American importers and exporters. These efforts include focused activities related to compliance, monitoring, enforcement, outreach, and consumer assistance. They complement actions being taken by other Executive Branch agencies under the Biden-Harris Administration’s whole of government response to supply chain challenges American shippers and consumers are facing.

Fact Finding 29, “International Ocean Transportation Supply Chain Engagement,” remained active and focused throughout 2021 on identifying both COVID-related impacts to the supply chain and industry actions that can be taken to address them. Established in March of 2020 with an original focus on the consequences of falling freight volumes following the outbreak of the pandemic, the work of Fact Finding Officer Commissioner Rebecca F. Dye has shifted to what can be done to mitigate effects of the cargo surge. In November 2020, the Commission approved a Supplemental Order for Fact Finding 29, adding a formal investigatory function to the undertaking. This led to the issuance of demand orders served on ocean carriers and MTOs to determine if their legal obligations related to detention and demurrage practices were being met. Information gathered from this effort was provided to the Commission’s Bureau of Enforcement for review and potential action.

In July 2021, Commissioner Dye provided the Commission with eight Interim Recommendations she identified that would

minimize barriers to private party enforcement of the Shipping Act; clarify Commission and industry processes; encourage shippers, truckers, and other stakeholders to assist Commission enforcement actions; and support the ability of the Office of Consumer Affairs and Dispute Resolution Services (CADRS) to facilitate prompt and fair dispute resolution and assist shippers in emergency situations. The Commission is moving forward with her five recommendations—including an additional rulemaking—that do not require legislative changes. Further recommendations could be issued by Commissioner Dye as she continues her work on Fact Finding 29.

At the direction of Chairman Daniel B. Maffei, the Commission established the Vessel-Operating Common Carrier Audit Program, along with a dedicated audit team, in July 2021. The focus of the program and team is to assess carrier compliance with the Commission’s interpretive rule on detention and demurrage, as well as to provide additional information beneficial to the regular monitoring of the marketplace for ocean cargo services. The Audit Program began its work by analyzing the top nine carriers by market share for compliance with the Commission rule interpreting 46 U.S.C. § 41102(c) as it applies to detention and demurrage practices in the United States. The Commission is working with companies to address their application of the rule and clarify any questions or ambiguities. Information developed by this engagement led to the Commission issuing in October three best practices related to detention and demurrage that promote clarity and certainty about how and when fees will be assessed as well as how to challenge disputed charges. These recommendations

were issued to 25 vessel-operating common carriers serving the U.S. and the trade association representing the industry and were accompanied by a call for their voluntary adoption.

In August 2021, the Commission's Bureau of Enforcement launched an expedited inquiry into the timing and legal sufficiency of the practices of eight ocean carriers with respect to certain detention or congestion-related surcharges. Ocean carriers are subject to specific requirements related to tariff changes or rate increases, including providing a 30-day notice to shippers and ensuring that published tariffs are clear and definite. This action was taken in response to communications received by the Commission from multiple parties reporting that ocean carriers were improperly implementing surcharges.

In addition to an enhanced emphasis on enforcement, the Commission's Consumer Affairs and Dispute Resolution Services bureau handled hundreds of cases involving COVID-related supply chain disruptions. Since it is clear that exporters face even greater and more complex logistical challenges than importers associated with the COVID-related import demand surge, Chairman Maffei ordered that CADRS have an employee dedicated specifically to assisting exporters.

The Commission was active in rulemaking during FY 2021. Work continued on a rule to amend regulations governing Passenger Vessel Operators (PVOs or cruise lines) in order to create a uniform standard for non-performance of transportation and to make clear how passengers may obtain refunds. Also, a rulemaking was instituted to allow ocean carriers to file service contracts and service contract amendments up to 30 days

after going into effect, making FMC regulatory requirements more consistent with contemporary business practices.

The Commission signed a Memorandum of Understanding (MOU) with the Department of Justice (DOJ) in July 2021 to foster increased cooperation and communication in each agency's respective oversight and enforcement responsibilities of the ocean liner shipping industry. The MOU establishes a framework for the FMC and the DOJ's Anti-trust Division to continue regular discussions and review law enforcement and regulatory matters affecting competition in the shipping industry. The MOU also provides for information and expertise exchanges between the agencies that may be relevant and useful in meeting their oversight and enforcement responsibilities. Such exchanges would be conducted in a manner appropriate and consistent with applicable legal and confidentiality restrictions.

Given the global nature of the ocean transportation system, communication and coordination with foreign government counterparts is essential. In September 2021, Commissioners met with their regulatory counterparts from the European Union and the People's Republic of China for the fifth biennial Global Regulatory Summit. Three broad agenda items were discussed during the meeting. First, the parties discussed sectoral developments since the start of the COVID-19 pandemic including an analysis of supply and demand, an identification of bottlenecks in the ocean-linked supply chain, and the causes of service disruptions. Second, the Summit examined actions undertaken so far by relevant jurisdictions and authorities in response and their results. Finally, the

parties discussed the way forward and possible actions to increase resilience and smooth operations in the sector.

In September, Chairman Maffei, along with Acting Administrator of the Maritime Administration Lucinda Lessley, met with Parliamentary Undersecretary of State at the Department of Transport Robert Courts MP and other United Kingdom officials to ensure continued cooperation and coordination on maritime issues now that the UK has departed the European Union.

An important new channel for industry engagement opened this year with the Commission's launch of the National Shipper Advisory Committee, created by Congress as a part of the *Elijah E. Cummings Coast Guard Authorization Act of 2020* (Pub. L. No. 116-283, div. G). The Commission announced in September the 24 inaugural members of the Committee, which are evenly divided between those who represent entities that import or export cargo. The Committee will advise the Commission on policies relating to the competitiveness, reliability, integrity, and fairness of the international ocean freight delivery system. As of the end of Calendar Year 2021, the Committee had already held two meetings and its member leaders were planning an active schedule for 2022. Other

segments of the ocean transportation industry have expressed interest in the possibility of additional advisory committees that would allow them to share information with the Commission through such a forum.

In addition to formal agency actions, Commissioners have engaged in informal outreach to senior executives at leading container shipping lines and MTOs to address and improve operational and business challenges affecting shippers and the supply chain. Beyond ensuring the Commissioners are aware of the most current information available, these conversations have allowed for progress in addressing some business and operational challenges.

In the coming year, it is likely that shippers in the United States and around the world will continue to see high demand on the system with associated high costs compared to pre-pandemic levels. Some are predicting that rates will remain high through 2023 and perhaps into 2024. While new vessels ordered in 2020 and 2021 will begin being deployed in 2022, final delivery of these ships will stretch into the out years. Additionally, it must be recognized that until landside constraints are better addressed, adding more container-carrying capacity on the sea will do little to reduce the costs or improve reliability in moving cargo.





# EFFICIENCY AND COMPETITION

## STRATEGIC GOAL 1

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A primary function of the Commission is to maintain a competitive and reliable international ocean transportation system and regularly scheduled liner trade by evaluating and monitoring the use of various types of agreement authority for anticompetitive effects. Competition among participants in U.S. liner trades fosters competitive rates and encourages a variety of service offerings for the benefit of U.S. exporters and importers, and ultimately consumers.

The Shipping Act allows ocean carrier and marine terminal competitors to meet, discuss, and in some cases, cooperate on certain business issues, but first they must file a written agreement with the Commission. The Shipping Act is a federal competition law applicable to the industry of international liner shipping. It contains provisions similar to those found in the Sherman Act of 1890, the Clayton Act of 1914, and the Robinson-Patman Act of 1936, and it concerns various prohibitions of discriminatory or unfair business practices and standards regarding business combinations. The Shipping Act creates a regulatory regime separate from the U.S. Department of Justice's enforcement of the antitrust law, under which collective ocean carrier or MTO

activity is evaluated when an agreement is initially filed and closely monitored thereafter for any adverse impact on competition in the trade.

The Commission reviews agreements using traditional antitrust law principles and economic models to evaluate the potential competitive impact of a proposed agreement before it may go into effect. The initial review and analysis of a proposed agreement and subsequent monitoring of the members' activities under the agreement, should it become effective, are designed to identify and guard against possible anticompetitive abuse of the filed authority, avoid unreasonable increases in transportation costs or decreases in transportation services, and address other activities prohibited by the Shipping Act.

So long as an agreement complies with the relevant Shipping Act and regulatory requirements, other federal antitrust statutes generally do not apply. Conversely, if a regulated entity violates the Shipping Act, it would be subject to penalties, and may, under certain circumstances, also be subject to investigation and prosecution under the full array of federal antitrust statutes.

## AGREEMENT FILINGS AND REVIEW

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Under Sections 4 and 5 of the Shipping Act, 46 U.S.C. §§ 40301–40303, all agreements by or among ocean common carriers and/or MTOs

to undertake any of the following are required to be filed with the Commission:

- fix rates or conditions of service,
- pool cargo revenue,

- allot ports or regulate sailings,
- limit or regulate the volume or character of cargo or passengers to be carried,
- control or prevent competition, or
- engage in exclusive or preferential arrangements.

In FY 2021, the Commission received 159 agreement filings, including new agreements and amendments to, or terminations of, existing agreements. This activity represents an increase in filings from the 123 received in FY 2020, due primarily to the FMC’s efforts to bring agreements into compliance with the Frank LoBiondo Coast Guard Authorization Act of 2018 (Pub. L. No. 115-282), as discussed further below. Those agreements that were identified as having joint negotiation authority for covered services were required to either provide quarterly monitoring reports on their joint negotiation activities or to amend their agreement to remove that authority. Many chose to amend their agreements, thereby reducing competitive concerns.

At the end of the fiscal year, a total of 357 agreements were on file and in effect with the Commission, categorized categorized in Table 1 as follows:

**Table 1: Agreements in Effect at End of FY 2021**

Agreement Type	Number in Effect
VOCC Agreements	258
MTO Agreements	90
Assessment Agreements	9
TOTAL	357

### Agreement Review Process

Agreements become effective 45 days after filing unless the Commission has requested additional information to evaluate the competitive impact of the agreement. All agreements are reviewed pursuant to the standard set forth in section 6(g) of the Shipping Act, 46 U.S.C. § 41307(b)(1).

The Commission has the authority to reject a pending agreement filing if it determines the filing fails to meet the Shipping Act and the Commission’s regulations requiring filed agreements to be clear and definite, or if the filing is outside the Commission’s jurisdiction.

The Commission may seek to enjoin the operations of an agreement under 46 U.S.C. § 41307(b), where it determines that the agreement could reduce competition to the point of unreasonably impacting the market, or substantially lessen competition in the purchasing of certain covered services as defined in the LoBiondo Act.

Effective agreements are exempt from U.S. antitrust laws, and instead, are subject to Shipping Act restrictions and Commission oversight.

## MONITORING REGULATED ENTITIES

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Agreements filed with the FMC that present competitive concerns are monitored regularly for actions that might result in unreasonable increases in transportation cost or decreases in transportation services, as well as indicators of prohibited acts under the Shipping Act. In FY 2021, 53 agreements were subject to monitoring, including requirements to file meeting minutes and monitoring data with the FMC.

While a great deal of attention is placed on the ocean carrier alliances (described below),

they comprise only 3 of the 53 agreements that are actively monitored. MTO rate discussion agreements, chassis pools, and carrier discussions of data and digital information technology are also actively monitored. Additionally, while carrier rate discussions declined in favor of capacity discussions, these agreements still exist in some trades, particularly the north-south, Caribbean, and Bermuda trades, and are actively monitored.

## CARRIER ALLIANCE AGREEMENTS

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A core function of the FMC is monitoring agreements filed by Vessel-Operating Common Carriers (VOCCs). This includes the three global shipping alliances: 2M, OCEAN Alliance, and THE Alliance. The FMC receives information from the members of these alliances to assist in the agency's monitoring process, including revenue, total capacity operated and volumes moved, and notices of blank sailings. That information is carefully analyzed by the FMC staff to determine trends in the marketplace and to identify potential anticompetitive or prohibited practices.

The 2M Alliance consists of Maersk Line (HQ: Denmark) and Mediterranean Shipping Company (MSC; HQ: Switzerland), the largest and second-largest ocean carriers by global capacity, measured in twenty-foot equivalent units (TEUs). The three ocean carriers that make up the OCEAN Alliance are CMA CGM (including its affiliate APL; HQ: France), COSCO (including its majority-owned affiliate OOCL; HQ: China), and Evergreen (HQ:

Taiwan). THE Alliance (THEA) is comprised of four members: Hapag-Lloyd (HQ: Germany), Hyundai Merchant Marine (HMM; HQ: South Korea), Ocean Network Express (ONE; HQ: Japan), and Yang Ming (HQ: Taiwan). Among filed ocean carrier agreements, the three alliance agreements have the greatest potential to

### Agreement Monitoring Process

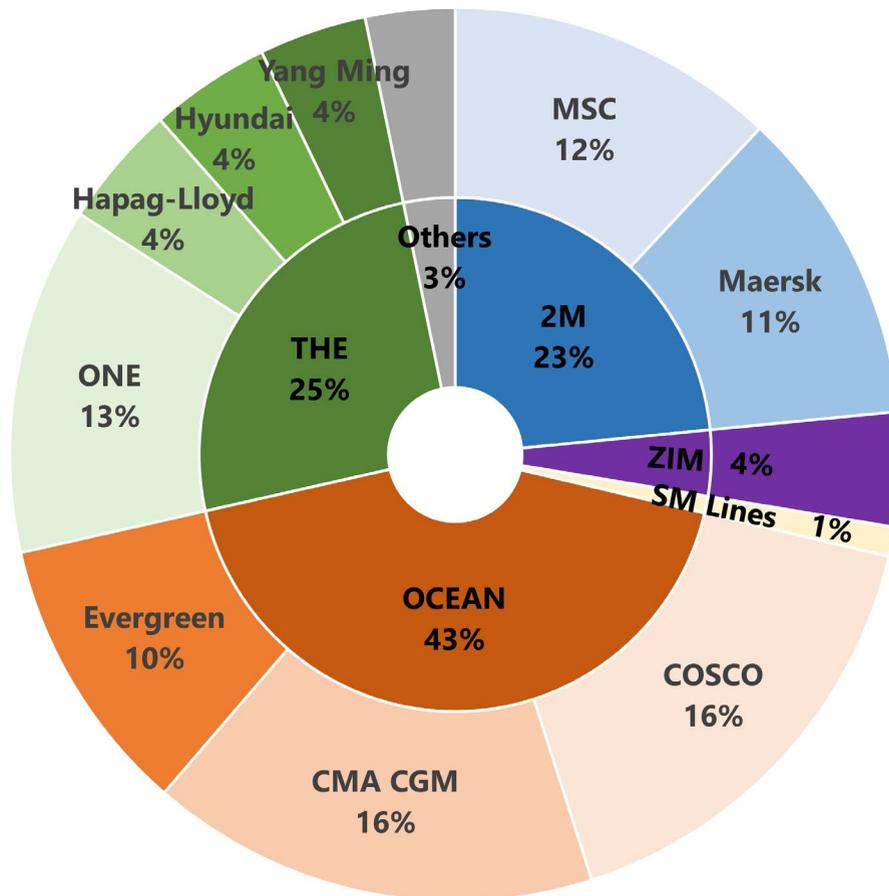
The FMC receives information from the members of these alliances to assist in the agency's monitoring process, including revenue, total capacity operated and volumes moved, and notices of blank sailings. That information is carefully analyzed by FMC staff to determine trends in the marketplace and to identify potential anticompetitive or prohibited practices.

cause or facilitate adverse market effects based on the agreements' authority and geographic scope in combination with underlying market conditions.

The Commission's Bureau of Trade Analysis (BTA) relies on a combination of individual vessel operator confidentially-provided data and information from commercially-available industry data to monitor and analyze container

carrier freight rates and service market trends. Pursuant to 46 C.F.R. § 535.702(d), in November 2020, the FMC revised alternative periodic reporting requirements for alliances moving away from quarterly monitoring reports to monthly monitoring with information to be submitted no later than 30 days from the end of each calendar month.

**Chart 1: Transpacific Market Shares of Carriers and Alliances, First Half of 2021**



*\*Due to rounding, some totals may not correspond with the sum of the separate figures*

## MARKET SHARES OF ALLIANCES

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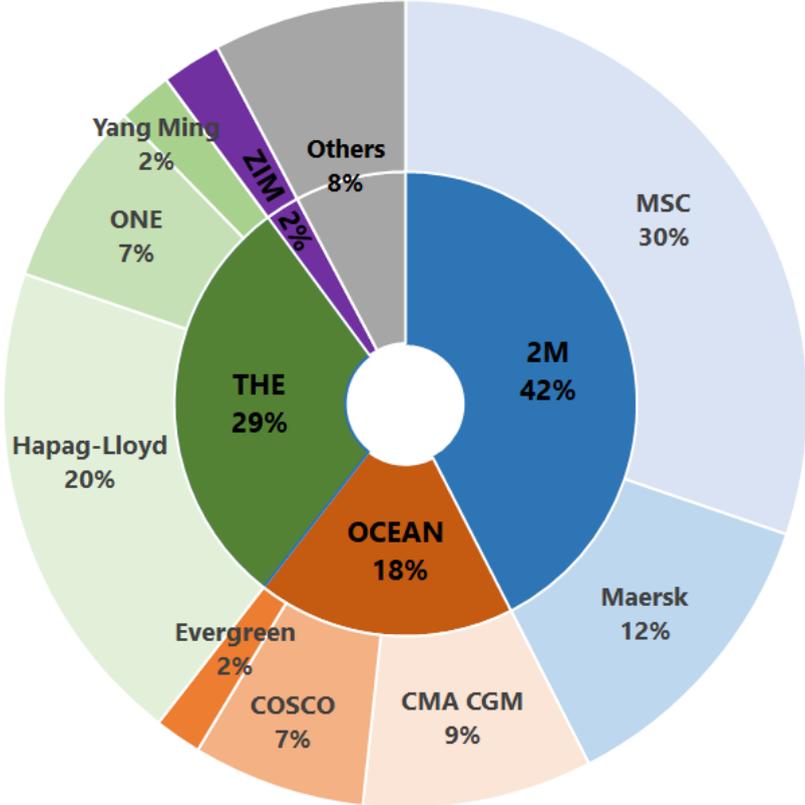
Collectively, the three global alliances had market shares of 91 percent in the transpacific and 89 percent in the transatlantic trades in the first half of 2021, according to Port Import Export Reporting Service (PIERS), a commercial provider of U.S. waterborne trade data. Given these considerable market shares, the Commission closely monitors the alliance parties' activities through its prescribed periodic reporting requirements, which not only include submitting data, but also filing meeting minutes and semi-annual meetings between the FMC staff and alliance representatives.

As shown in Chart 1, OCEAN Alliance is the largest carrier alliance in the transpacific, moving 43 percent of cargo in the first half of 2021. They are followed by THE Alliance with 25 percent, and the 2M Alliance with 23 percent. Compared to the first half of 2020, 2M has increased its market share from 19 percent to 23 percent due to the reestablishment of the services suspended in early 2020 and both Maersk and MSC adding vessels to

existing service strings. In comparison, THE Alliance's market share dropped from 31 percent in the first half of 2021 to 25 percent in the first half of 2020. OCEAN Alliance's market share remained relatively stable in 2021 at 43 percent versus 44 percent in 2020.

As shown in Chart 2, in the transatlantic trade, the 2M carriers lead the market, moving 42 percent of all cargo between the U.S. and Europe in the first half of 2021. This represents an increase in share from 38 percent in the first half of 2020. THE Alliance is the second-largest alliance in this trade, moving 29 percent in the first half of the year. However, their share dropped 3 percentage points compared to the first half of 2020. OCEAN Alliance is the smallest of the alliances in this market, moving 18 percent of cargo in the first half of 2021, a small decline from 20 percent in the same period of the prior year. Of note, the OCEAN Alliance stopped servicing the Mediterranean trade in February 2021, so their market share in this trade will decrease.

**Chart 2: Transatlantic Market Shares of Carriers and Alliances, First Half of 2021**



## ALLIANCE CARRIER CAPACITY

Together the carriers in these global alliances operate several services that encompass the major east-west trade lanes, including the transpacific, transatlantic, and Asia-Europe trades. At the end of FY 2021, the 2M Alliance accounted for approximately 33 percent of all global container capacity, including 19 percent of the transpacific U.S. import trade, and 19 percent of the transpacific U.S. export trade.

In the transatlantic, 2M has 41 percent of the U.S. import trade and 33 percent of the U.S. export trade.

THE Alliance members accounted for 19 percent of the global container capacity in FY 2021. THEA accounted for 25 percent of the transpacific U.S. import trade and 30 percent of the transpacific U.S. export trade. In the transatlantic, THEA has 28 percent of the U.S.

import trade and 35 percent of the U.S. export trade. The OCEAN Alliance accounted for approximately 29 percent of all global container capacity, including 43 percent of the transpacific U.S. import trade and 43 percent of the transpacific U.S. export trade. In the transatlantic, the Ocean Alliance has 19 percent of the U.S. import trade and 21 percent of the U.S. export trade.

Over the fiscal year, supply chain challenges, including severe congestion at U.S. ports, resulted in a surge of cancelled sailings and inhibited the ability of the global alliances to expand capacity. While rapidly increasing demand in 2020 and 2021 incentivized carriers to substantially increase seaside capacity across the globe, the effectiveness of this seaside capacity was limited due to supply constraints at ports, terminals, and inland rail hubs across the United States.

Compared across the trade lanes in 6-month increments, there are two significant surges of blank sailings—in the first half of 2020 and the first half of 2021. For the transpacific inbound trade, alliances removed 18 percent of adjusted capacity in both the first half of 2020 and the first half of 2021. For the transatlantic inbound trade, the alliances increased their blank sailings in 2021, removing 12 percent of adjusted capacity in the first half of the year, compared with 7 percent in the first half of 2020. Unlike in 2020 when cancelled sailings were caused by the onset of the COVID-19 pandemic resulting in factory and port closures, cancelled sailings in 2021 were almost entirely driven by port congestion. This includes reasons such as vessel sliding due to severe schedule delays, schedule recovery, vessel repositioning, fleet rearrangement, and service restructuring. During the fiscal

year, THE Alliance collectively cancelled 238 sailings across their transpacific and transatlantic services, followed by 124 sailings by the OCEAN Alliance, and 82 sailings by 2M.

As a result of increased demand, coupled with capacity constraints, freight rates have hit record-setting highs in the fiscal year. These significant increases in freight rates are reflected in carriers' average revenues.

For the transpacific inbound trade,

since July 2020 and continuing through the entire fiscal year, the average revenue per TEU has continuously

increased. Compared to the transpacific trade, the increase in average revenue in the transatlantic inbound trade has occurred more recently, beginning its ascent in October 2020 and rising throughout the fiscal year.

In FY 2021, 2M did not suspend any additional services or introduce any additional services, but the transatlantic service that was suspended in 2020 continued to be inactive through the end of FY 2021. While 2M did not independently announce any new services within the alliance, it did expand cooperation with ZIM Line during FY 2021. THEA launched a service connecting Asia with the U.S. Gulf Coast in May 2021. This service operates in conjunction with Evergreen Line. They removed one of their transatlantic services in August, and now operate four services between North Europe and the U.S., including one that is a U.S. flag service. The

As a result of increased demand, coupled with capacity constraints, freight rates have hit record-setting highs in the fiscal year.

OCEAN Alliance ceased its service between the U.S. and the Mediterranean in February

2021 but did not make any other major service changes in FY 2021.

## TARIFFS/NRAS/NSAs AND SERVICE CONTRACTS

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### Tariffs

The Shipping Act requires common carriers and conferences to publish their tariffs containing rates, charges, rules, and practices electronically in private systems. For ease of public access, the Commission publishes the web addresses of those tariffs on its website. At the close of FY 2021, 7,077 tariff location addresses were posted. Of that number, 6,932 tariff location addresses were for Non-Vessel-Operating Common Carriers (NVOCCs).

### Tariff Exemptions — NRAs and NSAs

The Commission provides regulatory relief from its NVOCC rate tariff requirements by exempting licensed and foreign registered NVOCCs when using NVOCC Negotiated Rate Arrangements (NRAs) or NVOCC Service Arrangements (NSAs) rather than a published tariff. At the end of the fiscal year, there were a total of 4,244 licensed and 2,688 foreign registered NVOCCs. Of this total, 2,349 (34%) had filed a prominent notice or rule in their respective tariff indicating that they had invoked the NRA exemption as an alternative to rate tariff publication. The majority of NVOCCs that have implemented NRAs continue to use a combination of NRAs and tariff rate filings; 183 NVOCCs have opted to use the NRA exemption exclusively and do not publish tariff rates. A total of 1,624 NVOCCs have opted to publish a tariff rule in

their respective tariff indicating they reserve the right to use the NSA option as an alternative to rate tariff publication.

### Service Contracts

Service contracts enable carriers and shippers to tailor transportation services and rates to their commercial and operational needs and to keep these arrangements confidential. While the majority of cargo volumes transported in the major U.S. liner trades move under service contracts as an alternative to tariffs, ocean carrier use of tariffs versus service contracts varies by carrier and trade lane.

The COVID-19 pandemic had a significant impact on the global supply chain, including service contract negotiation and implementation. To allow contracting parties time to adapt to the increased pressures from COVID-19 and minimize disruptions to the contracting process, the Commission issued a temporary blanket exemption in FY 2020, extending the filing flexibilities for service contract amendments to original service contracts, and later extended that relief to June 1, 2021. In FY 2021, the FMC amended its service contract filing requirements to permit ocean carriers to file original service contracts up to 30 days after the contract goes into effect. This final rule became effective on June 2, 2021.

Of the 145 active ocean carriers in the U.S. trades at the end of FY 2021, 85 filed service contracts with the Commission during the fiscal year. The remaining 60 ocean carriers

solely used tariffs in rating their cargo. During the fiscal year, the Commission received 113,068 new service contracts and 645,014

contract amendments, compared to 45,164 and 779,884, respectively, in FY 2020.

## INTERNATIONAL COOPERATION

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In-person international events and opportunities for cooperation continued to be delayed or postponed due to the COVID-19 pandemic. However, Commissioners and Commission staff attended several virtual meetings with international counterparts during FY 2021. Specifically, in September 2021, Chairman Maffei, Commissioner Dye, and Commissioner Khouri participated in the 5th Global Regulatory Summit with regulators from the European Union and the People's Republic of China. During this virtual summit, they discussed the effects of the COVID-19 pandemic

on the international ocean freight industry and actions taken to address these effects.

Later in September 2021, Chairman Maffei attended the London International Shipping Week, which brought together various industry stakeholders and regulators from around the world. While in London, Chairman Maffei also met with senior representatives from the UK Department for Transport and the Competition and Markets Authority, the International Maritime Organization, and the International Chamber of Shipping.

## COMPETITIVE IMPACT OF OCEAN CARRIER ALLIANCE JOINT PURCHASES OF CERTAIN COVERED SERVICES

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On December 4, 2018, the LoBiondo Act was enacted as Public Law No. 115-282. Among other changes, the LoBiondo Act placed restrictions on cooperation between or among ocean carriers and MTOs, including removing antitrust immunity for certain activities, prohibiting certain joint procurement activities, restricting overlapping agreement participation, and modifying the legal standard for enjoining agreements to jointly procure certain covered services, including:

- the berthing or bunkering of a vessel;
- the loading or unloading of cargo to/from a vessel, or to/from a point on a wharf or terminal;

- the positioning, removal, or replacement of buoys related to the movement of the vessel; or
- towing vessel services provided to a vessel.

The LoBiondo Act also amended 46 U.S.C § 46106 to require that the Commission annually provide to Congress: (1) an analysis of the competitive impact of ocean carrier alliance joint purchases of the covered services mentioned above; and (2) a summary of actions, including corrective actions, taken by the Commission to promote competition.

## Review of Agreements Under the LoBiondo Act/Promotion of Competition

Since the passage of the LoBiondo Act, Commission staff have identified 176 agreements containing language that could be considered a potential threat to competition under the LoBiondo Act. The FMC contacted the parties to these agreements and informed them that they would be subject to special reporting requirements pursuant to 46 C.F.R. § 535.702(d) requiring them to submit quarterly reports on usage of joint negotiation authority by carrier parties for the purchase of covered services. In response to this request, 49 agreements were amended by the parties to remove this authority. These agreement revisions reduce the likelihood of anti-competitive activities in contracting for terminal services.<sup>1</sup>

Forty-eight agreements retain their joint negotiation authority for terminal services as of the end of FY 2021. Forty-three of these agreements report that they have not used this authority in their negotiations for terminal services agreements and are now required to update the Commission on a quarterly basis on use of this authority. Two agreements have requested and been granted a waiver from reporting requirements on the grounds that the parties share common ownership and/or control. There are three agreements on file with the Commission that have active, jointly negotiated terminal services agreements (TSA) in effect. TSAs from two of these agreements were reviewed in past years, posed no competitive concerns, and did not undergo any

changes in FY 2021, so were not reanalyzed. TSAs from THE Alliance agreement (FMC No. 012439), however, were analyzed for potential anticompetitive impacts.

## Analysis of Joint Purchasing Agreements

There are two primary competition concerns with respect to joint purchasing arrangements. First, if the parties have a significant degree of purchasing power in the relevant market, the parties may drive the price of the purchased services below competitive levels. Second, if access to service providers is limited, competing purchasers may be excluded from the market. This is most likely where there are barriers to entry that prevent new service providers from entering the purchasing market or that prevent expansion by existing providers.

The U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) have jointly issued guidance on the key metrics that should be analyzed when market participants engage in joint purchasing, a case of collaboration among competitors. If joint purchases account for less than 35 percent of the total sales (or output) of the purchased services in the relevant upstream market, and the cost of the jointly purchased services account for less than 20 percent of the buying group's sales revenue in each relevant downstream market, the DOJ/FTC generally would consider any such arrangement to fall with the safety zone. These two thresholds are general boundaries that if crossed would likely subject the group to increased antitrust scrutiny.

<sup>1</sup> A significant number of agreements containing joint negotiation authority for terminal services were terminated during this period. Terminations of agreements occur for a variety of reasons and may not be directly linked to the passage of the LoBiondo Act or increased oversight of joint negotiation authority.

In the case of joint purchasing agreements between ocean carriers and terminal operators and/or stevedoring companies, the relevant upstream market is the market in which terminal and stevedoring services are sold by providers and purchased by ocean carriers. The relevant downstream market is the ocean transportation services market in which the buying groups compete to sell those services to shippers.

The above referenced terminal and stevedoring services jointly negotiated by the THE Alliance were reviewed to ensure conformity with the DOJ/FTC guidelines for joint purchasing arrangements. Safety zone threshold tests were conducted using data from the first three quarters of FY 2021 (October 2020-June 2021). In upstream markets, combined purchases of covered services by the members of

the agreement were less than 35 percent for the relevant markets.

Turning to the second threshold test, members within THE Alliance compete on the basis of price with other agreement members in downstream ocean transportation services in four markets: Asia to/from the U.S. West Coast; Asia to/from the U.S. East and Gulf coasts; North Europe to/from the United States; and the Mediterranean to/from the United States.<sup>2</sup> In these markets, the value of joint purchases was below the threshold of 20 percent of the parties' total sales in the relevant markets.

In summary, THE Alliance agreement operates within the safe harbor guidelines for joint purchasing arrangements promulgated by the DOJ and FTC.<sup>3</sup> FMC will continue to monitor and assess joint purchasing of covered services.

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2 Elevated rates for container shipping have led to higher revenues for shipping lines in FY 2021. However, throughput rates have remained steady, leading to these port charges reflecting a lower share of total sales revenue than in prior years.

3 Federal Trade Commission and Department of Justice. (April 2000). *Antitrust Guidelines for Collaborations Among Competitors*.



# PROTECTING THE PUBLIC

## STRATEGIC GOAL 2

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The FMC engages in a variety of activities that protect the public from unlawful, unfair, and deceptive practices that lead to financial harm. The Commission issues licenses for U.S. Ocean Transportation Intermediaries (OTIs) and registers foreign-based OTIs; ensures financial responsibility of all OTIs through bonding requirements; helps resolve disputes about the shipment of goods or the

carriage of passengers; investigates and prosecutes unreasonable or unjust practices; and issues rulings on private party complaints that allege Shipping Act violations. In addition, the FMC ensures that passenger vessel operators maintain proper financial coverage to reimburse cruise passengers in the event their cruise is cancelled or to cover liability in the event of death or injury at sea.

## FACT FINDING INVESTIGATIONS

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During FY 2020, the FMC authorized two Fact Findings, each tasked with exploring COVID-19 related impacts to the maritime industry. Fact Finding 29 focused on international ocean transportation supply chain dislocations and Fact Finding 30 examined the passenger cruise industry. These investigations both continued in FY 2021.

### International Ocean Transportation Supply Chain Engagement (Fact Finding 29)

In March 2020, the Commission voted to establish Fact Finding 29: International Ocean Transportation Supply Chain Engagement, designating Commissioner Rebecca F. Dye as the Fact Finding Officer, and authorizing her to identify operational solutions to cargo delivery system challenges related to COVID-19.

The initial focus of Fact Finding 29 was addressing conditions at American ports from

the spread of COVID to the United States in early 2020. Widespread closures and quarantines in China shuttered factories, which had an associated impact on freight flows, port operations, and ocean carrier service offerings. Import cargo volumes dropped precipitously and ocean carriers cut service offerings accordingly. The consequence was that domestic ports, particularly on the West Coast, became congested with import loads that were not being picked up for final delivery and empty containers waiting to be repositioned to Asia. Commissioner Dye used Supply Chain Innovation Teams to identify what steps could be taken to clear cargo that was accumulating at ports, especially at the Southern California gateways. It was determined that simple steps would make meaningful contributions to reducing cargo congestion on terminals, including shippers providing information to terminal operators about which shipments contained Personal Protective Equipment, which containers shippers wanted to accept

and were willing to pick-up, and identifying what containers shippers were not able to accept. Finally, Commissioner Dye was engaged in working with ports and shippers to find available cargo storage locations for U.S. companies whose businesses were shutdown.

With the surge of cargo that commenced in July 2020, the focus of Fact Finding 29 shifted to addressing operational impacts to the freight delivery system from those record setting volumes.

During FY 2021, the Commission issued a Supplemental Order in November 2020 expanding Fact Finding 29 and authorized Commissioner Rebecca Dye to investigate ocean carriers operating in alliances and calling the Port of Long Beach, the Port of Los Angeles, or the Port of New York and New Jersey to determine if the policies and practices of those companies related to detention and demurrage, container return, and container availability for U.S. export cargoes violated 46 U.S.C. § 41102(c). In February 2021, Commissioner Dye issued information demand orders to ocean carriers and MTOs to determine if legal obligations related to detention and demurrage practices were being met. The demand orders required carriers and MTOs to provide information on their policies and practices related to container returns and container availability for exporters. Responses were reviewed to inform the Commission of possible next steps.

Over the course of FY 2021, Commissioner Dye met repeatedly with senior executives from ocean carriers, MTOs, shippers, truckers, and other parties as part of her work on Fact Finding 29, holding more than 100 different meetings. These conversations yielded a set of

eight Interim Recommendations she provided to the Commission in July 2021. The recommendations are aimed at minimizing barriers to private party enforcement of the Shipping Act, clarifying Commission and industry processes, encouraging shippers, truckers, and other stakeholders to assist Commission enforcement efforts, and bolstering the ability of the Office of Consumer Affairs and Dispute Resolution Services to facilitate fair and fast dispute resolution. They address many of the most common problems she identified through her work, and the Commission is moving forward with implementing the recommendations that do not require legislative action.

Commissioner Dye's work on Fact Finding 29 continues in FY 2022, and it is possible she will have additional recommendations for agency action, including providing further details about the benefits of establishing a permanent supply chain program at the Federal Maritime Commission.

## COVID-19 Impact on Cruise Industry (Fact Finding 30)

On April 30, 2020, the Commission voted to initiate Fact Finding 30: COVID-19 Impact on Cruise Industry. Commissioner Louis E. Sola was designated Fact Finding Officer, charged to investigate and report on the challenges that impacted the cruise industry and the ports that rely on the cruise business. Throughout the investigation, Commissioner Sola has interviewed executives with ports, cruise lines, and labor organizations; public officials at the local, state, and federal level; and cruise passengers.

Commissioner Sola's efforts have examined the consequences of the cessation of cruising on U.S. ports, as well as on related industries. During the fiscal year, Commissioner Sola visited PortMiami, Port Everglades, and the Port of Galveston, and he issued an interim report, *Economic Impact of COVID-19 on the Cruise Industry in the Gulf Coast*. The report noted that the loss of income to the ports and port communities was significant. In the Port of Galveston, for example, he reported that more than half of the port revenue is tied to cruising.

By the close of the fiscal year, he published three other reports on the cruise industry in California, Hawaii, and the Pacific; U.S. Territories in the Caribbean; and the East Coast.

In addition to published reports, Commissioner Sola has provided in-person briefings to interested parties in the legislative and executive branches of government. He has spoken with Senators, Representatives, and Congressional staff serving on committees

and in personal offices. Furthermore, he has provided briefings on his work to officials at the Secretary and Under Secretary levels of the U.S. Departments of Homeland Security and Transportation.

In July 2020, the Commission issued a Policy Statement on Passenger Vessel Financial Responsibility that provided limited and temporary relief to small passenger vessel operators whose operations and business have been disrupted by the response to COVID-19. That relief was in effect until April 1, 2021.

In August of 2021, the Commission issued a proposed rule seeking public comment on its proposal to amend regulations on passenger vessel financial responsibility, including new requirements for when cruise passengers should be provided refunds for cancelled or delayed voyages. This followed an Advanced Notice of Proposed Rulemaking issued in October 2020 seeking public comment. The Commission anticipates taking final action in FY 2022.

## LICENSING

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There are two types of OTIs that serve as transportation middlemen for cargo moving in the U.S.-foreign oceanborne trades: Non-Vessel-Operating Common Carriers (NVOCCs) and Ocean Freight Forwarders (OFFs).

An NVOCC is a common carrier that holds itself out to the public to provide ocean transportation and issues its own house bill of lading or equivalent document but does not operate the vessel by which ocean transportation is provided.

A U.S.-based OFF arranges for transportation of cargo with a common carrier (NVOCC or Vessel Operator) on behalf of shippers and

processes documents related to U.S. export shipments. However, an OFF does not hold itself out to the public to provide ocean transportation and does not issue a house bill of lading or equivalent shipping documents.

All NVOCCs and OFFs located in the U.S. must be licensed by the Commission and must establish financial responsibility. To be issued a license, an OTI must provide the Commission evidence of experience in OTI activities in the U.S., the necessary character to render services, and proof of financial responsibility. In FY 2021, there were 4,927 licensed NVOCCs and OFFs that maintained

financial responsibility in the form of surety bonds on file with the FMC, collectively in excess of \$466 million. These funds are held to pay any damages arising out of a licensee's ocean transportation-related activities.

Foreign-based NVOCCs that do business in the U.S. foreign trades are required to register with the Commission and to have financial responsibility in the form of surety bonds. Registrants provide basic corporate contact information for the company. A foreign NVOCC may choose to become licensed if they wish. In FY 2021, there was a dramatic increase in the number of foreign registered NVOCCs, with a total of 971 new registrations accepted by the end of the fiscal year. Several possibilities which may have led to the increase are changes in the Commission's regulations, fluctuations in the market, and enhanced efforts by surety companies to increase market portfolios.

There are 2,688 foreign registered NVOCCs and 82 foreign licensed NVOCCs that maintained approximately \$409 million in surety bonds on file with the FMC in FY 2021.

The Commission's triennial renewal program ensures accurate industry information for FMC-licensed OTIs with an online user-friendly renewal process. In FY 2021, the FMC processed approximately 1,694 renewals.

The Commission has received inquiries from the industry regarding the People's Republic

of China's continued requirement for the Optional Rider for Additional NVOCC Financial Responsibility, and various articles have been published in the press indicating that China may be loosening its financial responsibility requirements for NVOCCs. The optional China bond rider originated from bilateral discussions between the United States and China and a 2003 agreement, which the Commission implemented through regulations in 2004. It is not, and never has been, required by the Commission. From the Commission's perspective, the bond is optional and at the discretion of individual NVOCCs. As of the end of the fiscal year, the Commission had 386 Optional Riders on file with an approximate aggregated value of over \$19 million.

### Licensing Activity in FY 2021

- New OTI applications accepted: 391
- Amended applications accepted: 279
- New OTI licenses issued: 286
- Amended licenses issued: 94
- Licenses revoked or surrendered: 218
- New registrations accepted: 971
- Licenses renewed: 1,446
- Foreign NVO registrations renewed: 248

## PASSENGER VESSEL PROGRAM

The Passenger Vessel Operator (PVO) program administered by the Commission (46 U.S.C. §§ 44102-44103), requires evidence of financial responsibility for vessels which have berth or stateroom accommodations for 50 or

more passengers and embark passengers at U.S. ports and territories. Certificates of performance cover financial responsibility used to reimburse passengers in the event their cruise is cancelled. Certificates of casualty are

required to cover liability that may occur for death or injury to passengers or other persons on voyages to or from U.S. ports.

The PVO industry continues to be impacted by COVID-19, and as a result of the Commission's Fact Finding 30 Investigation, the Commission issued an Advance Notice of Proposed Rulemaking (ANPRM) on October 29, 2020, to obtain comments on potential regulatory changes recommended in the Fact Finding 30 Interim Report on PVO refund policies. In response to the comments received from the ANPRM, the Commission prepared and published a Notice of Proposed Rulemaking (NPRM) on August 25, 2021, to seek comment on defining when nonperformance of transportation has occurred and to establish uniform procedures regarding how and when passengers may make claims for refunds under a passenger vessel operator's financial responsibility instrument when nonperformance occurs. The Commission will review and consider public comments in early FY 2022.

At the close of FY 2021, 243 vessels owned by 49 passenger vessel operators were certified under the PVO program. The combined evidence of financial responsibility for nonperformance of transportation for all cruise vessels in the program is \$801 million. Under the Commission's program, there is \$710 million in aggregate financial responsibility for casualty coverage. During the fiscal year, 4 new performance certificates and 7 casualty certificates were issued.

### PVO Financial Coverage in FY 2021

- Aggregate evidence of financial responsibility for nonperformance: \$801 million
- Aggregate evidence of financial responsibility for casualty: \$710 million
- New Performance Certificates issued: 4 in FY 2021
- New Casualty Certificates issued: 7

## CONSUMER AFFAIRS AND DISPUTE RESOLUTION

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The Commission, through its Office of Consumer Affairs and Dispute Resolution Services (CADRS), provides informal dispute resolution and mediation services to industry stakeholders to assist parties in resolving international ocean shipping and passenger cruise disputes. CADRS also gives informational assistance concerning the Commission's jurisdiction and regulatory processes, as well as complex ocean shipping commercial matters. Overall, CADRS seeks to assist parties to avoid delays, risks, and additional costs that

may result from litigation and facilitate the flow of U.S. foreign commerce.

The FMC was contacted by individuals with shipping and cruise-related complaints referred by the Cybersecurity and Infrastructure Security Agency, Surface Transportation Board, as well as other state and local consumer protection agencies such as the New Jersey State Attorney General, the Florida Department of Agriculture and Consumer Services, and the Miami-Dade Office of Consumer Affairs. Where appropriate, Commission staff also referred individuals to the

Surface Transportation Board's Rail Customer and Public Assistance Program for concerns related to railway delays and charges.

This fiscal year, the Commission closed a total of 239 ombuds matters: 126 relating to commercial cargo; 27 involving household goods; and 86 cruise matters. Also, two mediation matters were concluded. FMC staff

responded to approximately 2,041 inquiries from the public during the fiscal year. Notably, COVID-19 pandemic continued to have a significant impact on the inquiries received by the FMC, as approximately 956 inquiries were a result of cruise cancellations and refund policies related to COVID-19.

## ENFORCEMENT AND COMPLIANCE

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### VOCC Audit Program

Congestion and bottlenecks at U.S. ports across the country continued to disrupt the U.S. supply chain during FY 2021. Accordingly, the FMC established the Vessel-Operating Common Carrier Audit Program to assess carrier compliance with the agency's rule on detention and demurrage as well as to provide additional information beneficial to the regular monitoring of the marketplace for ocean cargo services. The audit program's team analyzed the top nine carriers by market share for compliance with the Commission rule interpreting 46 U.S.C. § 41102(c) as it applies to detention and demurrage practices in the United States. Based on the initial information collected in FY 2021, and subsequent quarterly data collections, the Commission will work with companies to address their application of the rule and clarify any questions or ambiguities. Quarterly quantitative and qualitative information supplied by carriers have been, and will continue to, be used to establish industry best practices.

### Enforcement Program

The Commission's Bureau of Enforcement (BOE) is comprised of attorneys, investigative analysts, and the Commission's Area Representatives (ARs). BOE strives to achieve industry compliance with the Shipping Act, as well as with other shipping statutes administered by the Commission, through investigation and prosecution of Shipping Act violations.

Given the U.S. supply chain issues, the Commission focused enforcement efforts primarily to address VOCC and MTO practices resulting in the assessment of possibly unjust or unreasonable demurrage and detention charges against import and export shippers which may have contributed to U.S. port congestion. ARs initiated 17 investigations in collaboration with BOE to identify potential violations of 46 U.S.C. § 41102(c) for VOCC failures to establish, observe, and enforce reasonable regulations and practices.

Commission staff are investigating allegations of actions, or inactions, by VOCCs calling at the Nation's ports. These investigations may identify: (1) unreasonable demurrage and detention charges or terminal practices; (2) inability to return empty containers; (3)

container imports clogging container yards; and (4) the scale of chassis shortages.

The Commission also authorized BOE to launch an inquiry into VOCC congestion surcharges to assess the possible adverse impacts these additional fees have on U.S. port congestion and upon cargo interests. BOE also investigated illegal practices in the transpacific, North Atlantic, Middle East, South American and Caribbean trades. These practices include VOCCs' reliance on the definition of "merchant" in their bills of lading to assess demurrage and detention charges to entities that have no ownership interests in the relevant cargo nor privity of contract with the VOCCs. Other areas of illegal practices investigated were cargo misdescription and misdeclaration.

As of the end of FY 2021, 48 total enforcement cases were pending final resolution. In addition, 11 new investigative matters were referred to BOE for enforcement action or informal compromise, and 3 matters were administratively closed or referred for formal proceedings during FY 2021. The Formal Investigations section of this report includes information on formal proceedings, including one formal case litigated by BOE this year.

The Commission cooperates with other federal, state, and local transportation and law enforcement agencies, both through an established MOU which allows the FMC to share information and access confidential trade information for law enforcement purposes, and other enforcement activities. The FMC also collaborates and partners with other agencies on specific transportation-related policies, issues, or incidents involving U.S. domestic and international liner shipping.

In FY 2021, joint law enforcement activities included criminal and civil investigations of entities licensed or regulated by the FMC. Several ARs participated with the U.S. Customs and Border Protection (CBP), U.S. Coast Guard, and other federal agencies in annual Multi-Agency Strike Force Operations conducted at marine terminals at ports in New York and New Jersey; Oakland, CA; and Seattle, WA. The ARs aided these investigations by providing expert knowledge on ocean carrier and OTI practices, procedures, and documentation related to shipping transactions. The Commission and CBP also exchanged investigative information to enhance and safeguard the global economic competitiveness of the U.S., through the Department of Justice's Trade Fraud Task Force.

During FY 2021, the FMC participated in a federal information sharing initiative regarding misdeclared cargo and received two leads for investigations of possible violations of the Shipping Act through the collaboration.

## OTI Audit Program

The Commission's compliance audit program reviews the operations of NVOCCs and OFFs, identifies aspects of their practices that are noncompliant with statutory or regulatory requirements, and provides guidance to bring such regulated entities into compliance. The audit program also reviews companies that hold themselves out to be ocean carriers but who do not appear to conduct vessel operations. During the fiscal year, BOE opened 137 audits and completed 131, with 6 audits pending as of September 30, 2021.

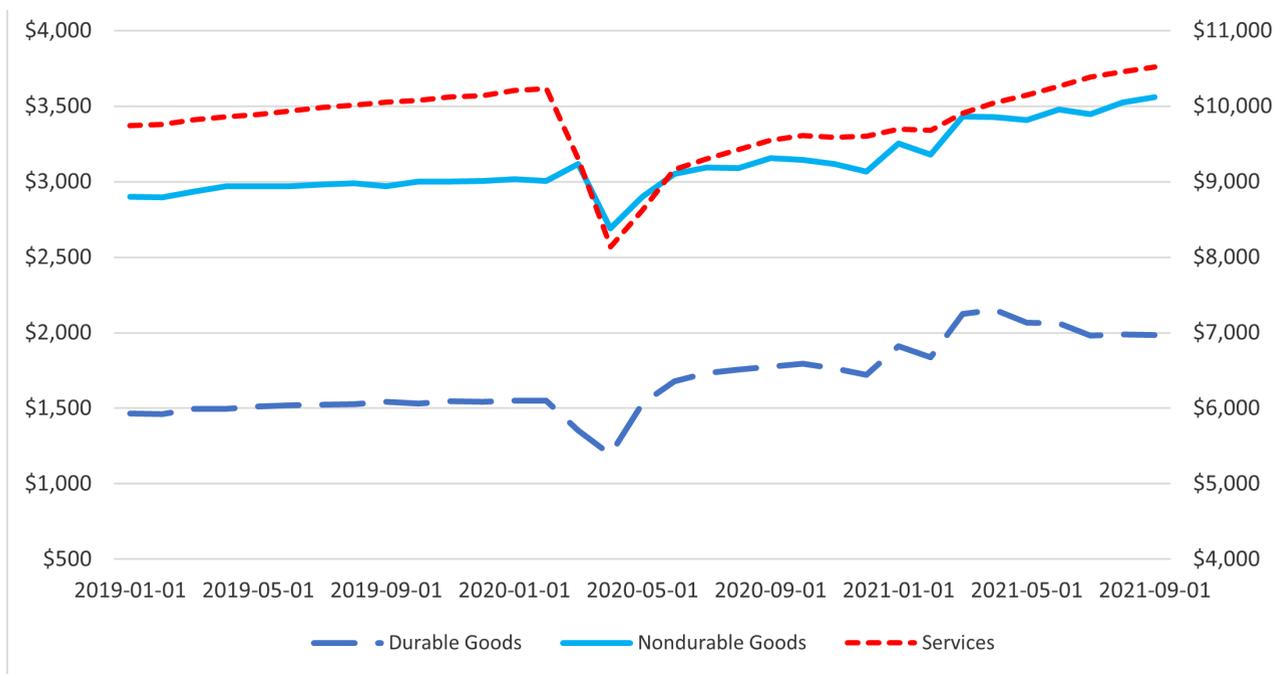


# DEVELOPMENTS IN MAJOR U.S. FOREIGN TRADES

After initial declines in production and consumption worldwide at the outset of the COVID-19 pandemic in March 2020, U.S. consumer demand rebounded quickly. As shown in Chart 3, consumer spending shifted markedly from service to goods, with consumer spending on goods, particularly durable goods,

returning to their pre-pandemic nominal level in June 2020. Nominal consumer spending on nondurable goods increased from \$3 trillion in February 2020 to \$3.1 trillion in March 2020, dropped to \$2.7 trillion in February 2021, and has increased steadily for all but one month since that time.

**Chart 3: U.S. Personal Consumption Expenditures (in billions of nominal dollars)**



Source: U.S. Bureau of Economic Analysis

Spending on services finally returned to its pre-pandemic nominal levels in June 2021 and remains below pre-pandemic levels in real terms.

This shift to consumer spending on goods led to demands on the supply chain, as items

such as apparel, furniture, and other durables rely on international sources and accompanying ocean transportation. The unprecedented demand for imports, coupled with intermittent supply chain disruptions in 2021 due to continued COVID-19 outbreaks at the factories

and ports in China, Vietnam, and other major trading partners, led to severe port congestion that many expect to last into calendar year 2022.

While the U.S. Bureau of Economic Analysis data (Chart 3) shows more recent tempering in consumer spending on durable goods in

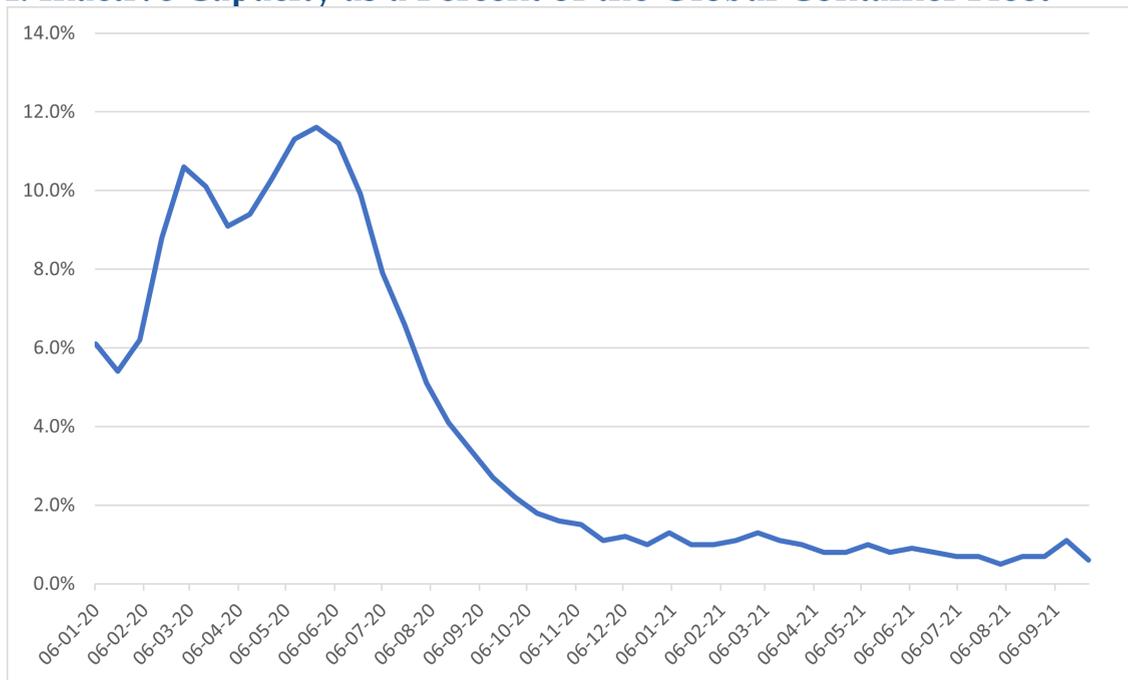
late Summer and Fall 2021, the flattening is likely caused by constraints on the supply chain making it harder for consumers to spend money on certain types of goods, such as furniture and vehicles, as opposed to a shift away from consumer spending on goods.

## CONTAINERIZED CAPACITY

Carriers responded to the increased demand for ocean transportation services by expanding capacity to the extent feasible. Given the time lag between ship orders and delivery and the fact that the substantial shift in consumer buying had not been anticipated, the increased capacity has taken the form of additional ship charters, deferring ship repairs/dry docks, and realigning capacity across trade lanes.

As seen in Chart 4, roughly 6 percent of containership capacity was inactive pre-pandemic. This nearly doubled after the onset of the pandemic as factories and ports closed, leading to an increase in blank sailings. Since the reopening of factories and ports in late Spring 2020, the idle capacity has declined substantially, and has been below 2 percent from November 2020 through the end of September 2021.

**Chart 4: Inactive Capacity as a Percent of the Global Container Fleet**



Source: Alphaliner

Additionally, although capacity on the Europe-North America trade lane remained relatively stable from January 2020 through September 2021, total capacity on the Far East-North America trade lane increased

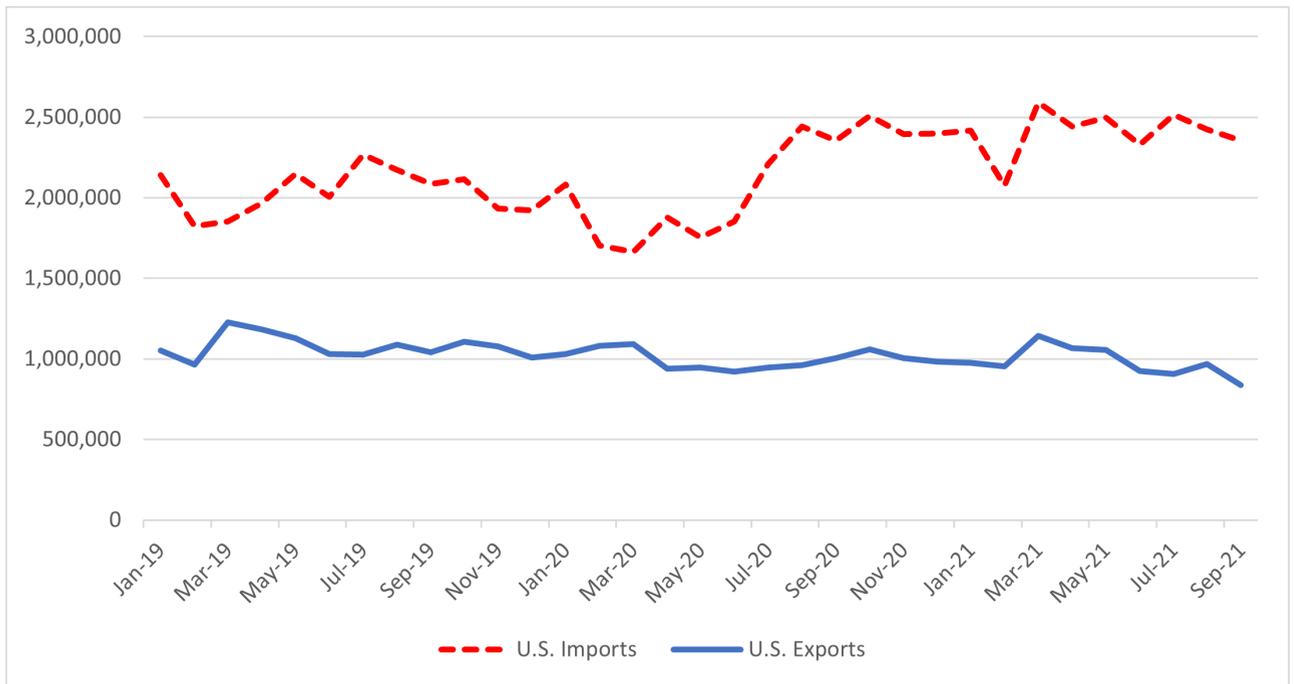
approximately 38 percent, from roughly 450,000 TEU weekly capacity in January 2020 to 620,000 TEU weekly capacity in September 2021.

## CONTAINERIZED U.S. IMPORTS AND EXPORTS

Turning from container capacity to actual trade numbers, it is important to note that the major East-West trades remain imbalanced. As shown in Chart 5, in the transpacific trade, more imports enter the U.S. from Asia than are exported from the U.S. to Asia. The U.S.

also imports more goods from Europe than it exports to that region, although the imbalance in this transatlantic trade is not as strong as in the transpacific trade. Imports in these trades are also more highly valued than exports and move at higher rates than exports.

**Chart 5: Total Monthly U.S. Containerized Imports and Exports (in TEUs)**



Source: PIERS (note that September 2021 export data are preliminary)

U.S. containerized imports (across all trades and ports) averaged roughly 2 million TEUs per month pre-pandemic and has been roughly 2.4 million TEUs per month since July 2020, a sustained 20 percent increase.

Exports, on the contrary, increased slightly in late 2020, showed a surge in winter and spring 2021, and have fallen substantially through the summer, as congestion at major ports and

lack of equipment availability has led to substantial obstacles for exporters.

The increase in imports and decrease in exports differs substantially by port location, presented in Table 2 as total TEUs from January-September for 2019, 2020, and 2021. While exports began strong in 2021, the eventual decline due to supply chain congestion

and carrier prioritization of imports led to declines over the first three quarters of 2021 for West Coast and Gulf Coast ports, while exports through East Coast ports were higher through September of 2021 compared to the same point in 2020, though slightly below 2019 levels.

**Table 2: U.S. Containerized Imports and Exports by Coast, January-September**

	2019	2020	2021
<b>Total Exports</b>	9,738,442	8,920,783	8,833,881
<b>East Coast</b>	4,881,812	4,439,426	4,802,061
<b>Gulf Coast</b>	1,343,434	1,309,299	1,120,509
<b>West Coast</b>	3,513,128	3,172,022	2,911,265
<b>Total Imports</b>	18,459,492	17,948,268	21,645,458
<b>East Coast</b>	8,346,629	7,976,060	9,540,617
<b>Gulf Coast</b>	1,383,465	1,374,957	1,707,650
<b>West Coast</b>	8,725,995	8,593,785	10,392,298

Source: PIERs

Note: totals include Great Lakes and other ports not present in subtotals.

While a large portion of media coverage on port congestion focused on import surges being handled by West Coast ports, the increase in West Coast ports U.S. imports for January through September of 2021 was 21 percent higher than the first nine months of

2020, which is comparable to the 20 percent increase in containerized imports moving through East Coast ports and lower than the 24 percent increase at Gulf ports.

## COMMODITIES IMPORTED AND EXPORTED

Tables 3 and 4 present the top 10 commodities that the U.S. exported and imported through East Coast and West Coast ports from January through September 2021. The commodity groups listed in these tables are drawn from PIERS which bases their description of goods data field on the Harmonized System code used by shippers.

**Table 3: Top 10 U.S. Import and Export Commodities by Coast – West Coast**

Exports		Imports		
Rank	Commodity	TEUs	Commodity	TEUs
1	Forage Products NESOI* (Hay, Clover, Vetches, Etc)	269,950	Furniture NESOI And Parts Thereof	698,131
2	Waste, Scrap Paper, Paperbd, NESOI	216,260	Toys Dolls	239,561
3	Waste, Scrap Unbleach Kraft, Corrugatd Paper/Pprbd	121,192	Wooden Furniture, NESOI	221,261
4	Brewing Or Distilling Dregs And Waste, W/Nt Pellet	113,281	Articles Of Plastics, NESOI	135,804
5	Soybean, Other Than Seed	109,849	Footwear, Gaiters Etc. And Parts Thereof	132,646
6	Cotton, Not Carded Or Combed	101,458	Metal Furniture NESOI	130,915
7	Ferrous Waste & Scrap NESOI	60,059	New Pneumatic Tires Of Rubber, For Motor Cars	117,300
8	Animal Feed Prep Except Dog Or Cat Food, Retail Pk	48,036	Art Of Beddng Ex Mattrss Etc, Inc Quilts, Cushions	112,952
9	Almonds, Fresh Or Dried, Shelled	42,751	Other Plantains	97,672
10	Copper Waste And Scrap	36,586	Tableware And Kitchenware Of Plastics	94,280

\*Not Elsewhere Specified or Indicated (NESOI)

**Table 4: Top 10 U.S. Import and Export Commodities by Coast – East Coast**

Import		Export		
Rank	Commodity	TEUs	Commodity	TEUs
1	Waste, Scrap, Incl Unsorted, Paper, Paperbd, NESOI*	177,101	Furniture NESOI And Parts Thereof	522,226
2	Chem Wdpulp Sulfate Ex Disslvg Gr Conif, Unbleach	153,859	Other Plantains	186,954
3	Pass Veh Spk-Ig Int Com Rcpr P Eng >1500 Nov 3m Cc	107,425	Wooden Furniture, NESOI	172,794
4	Soybean, Other Than Seed	103,006	Toys Dolls	125,745
5	Furniture NESOI And Parts Thereof	102,634	New Pneumatic Tires Of Rubber, For Motor Cars	105,468
6	Chemical Woodpulp, Soda Etc. N Dis S Bl & Bl Conif	101,787	Articles Of Plastics, NESOI	98,098
7	Cotton, Not Carded Or Combed	101,033	Wooden Bedroom Furniture, Except Seats	91,226
8	Parts & Access For Motor Vehicles (Head 8701-8705)	99,287	Metal Furniture NESOI	81,077
9	Motor Cars & Vehicles For Transporting Persons	98,834	New Pneumatic Tires, Of Rubber	78,883
10	Coniferous Wood In The Rough, Not Treated	96,542	Art Of Beddng Ex Mattrss Etc, Inc Quilts, Cushions	71,253

\*Not Elsewhere Specified or Indicated (NESOI)

The commodities in Table 3 and 4 represent those imported and exported through all trades, which includes the major North-South trades (*e.g.*, other plantains) rather than just the East-West trades with Asia which are characterized by more apparel. As previously noted and made clear by the types of commodities in these tables, exports tend to be heavier and lower value than imports. In particular, note that the West Coast's top exports are commodities such as wastepaper and scrap metal. The weight and value imbalance drives a great deal of the obstacles to U.S. exporters, particularly those attempting to access the

East-West trades. High value imports, some of which are critical to U.S. manufacturing, and the higher rates commanded by imports put pressure on ocean carriers to move empty containers back to Asia as quickly as possible to fill with imports.

Even absent the higher rates and values for U.S. imports, the higher weights of exports mean that ships traveling from the U.S. back to Asia have limits on the number of full export containers, as the weight capacity of the ship is exceeded before all TEUs slots are full.



**Table 5: Top 20 U.S Liner Cargo Trading Partners, Calendar Year 2020 and First Half of 2021**

Calendar Year 2020			First Half of 2021		
Rank	Country	TEUs (000)	Rank	Country	TEUs (000)
1	China (PRC)	12,295	1	China (PRC)	6,602
2	Vietnam	2,400	2	Vietnam	1,484
3	South Korea	1,596	3	South Korea	840
4	Taiwan (ROC)	1,344	4	India	786
5	India	1,208	5	Taiwan (ROC)	709
6	Japan	1,193	6	Japan	634
7	Germany	1,045	7	Thailand	590
8	Thailand	969	8	Germany	541
9	Malaysia	752	9	Malaysia	419
10	Brazil	724	10	Indonesia	412
11	Indonesia	718	11	Brazil	388
12	Belgium & Luxembourg	698	12	Belgium & Luxembourg	374
13	Italy	686	13	Italy	374
14	Netherlands	556	14	Guatemala	266
15	Guatemala	501	15	Netherlands	261
16	Turkey	426	16	Turkey	236
17	Chile	419	17	Spain	214
18	United Kingdom	408	18	Chile	208
19	Spain	385	19	United Kingdom	197
20	Hong Kong*	345	20	Costa Rica	184

Source: PIERS

\*PIERS continues to report data separately for Hong Kong due to its status as a major transshipment center.

# TOP TWENTY U.S. LINER CARGO TRADING PARTNERS

The Foreign Shipping Practices Act, 46 U.S.C. § 306 (b)(1), requires the FMC to include in its annual report to Congress “a list of the twenty foreign countries which generated the largest volume of oceanborne liner cargo for the most recent calendar year in bilateral trade with the United States.”

The Commission derives its list of top-twenty trading partners from the PIERS database. The most recent complete calendar year of available data is 2020. Table 5 lists the twenty foreign countries that generated the largest volume of oceanborne liner cargo in the bilateral trade with the United States in calendar year 2020 and the first half of 2021. The figures in the table represent each country’s U.S. liner imports and exports combined in thousands of loaded TEUs.

Bilateral trade with the United States’ top-twenty liner trading partners represented

approximately 80 percent of the Nation’s total liner trade over the past few years. The total volume of trade with our top-twenty liner trading partners was about the same as in the preceding calendar year with a slight two percent increase.

The top-twenty list has been comprised of nearly the same trading partners since 2009. However, in 2020, there were some changes in the ranking order of the countries compared to the preceding period. China remained the U.S.’s top trading partner in 2020, accounting for about 12.3 million TEUs of the total volume of trade and is on pace to exceed this in 2021. Malaysia jumped in rank from 12 to 9. Trade with Vietnam increased 18 percent between 2019 and 2020 and trade with South Korea, Taiwan, and India edged down slightly year over year, but are expected to increase in 2021.



# FOREIGN SHIPPING PRACTICES ACT

The Commission has the authority to address restrictive foreign shipping practices under section 19 of the Merchant Marine Act of 1920 (46 U.S.C. ch. 421) and the Foreign Shipping Practices Act (FSPA)(46 U.S.C. ch. 423). Section 19 empowers the Commission to make rules and regulations to adjust or meet conditions unfavorable to shipping in the foreign trade of the United States. The FSPA directs the Commission to address adverse conditions that affect U.S. carriers in the foreign trade and that do not exist for foreign carriers in the United States.

On March 6, 2020, the Commission received a petition from the Lake Carriers' Association, a trade association made up of owners and operators of vessels on the Great Lakes, alleging that conditions created by Transport Canada, an agency of the government of Canada, are unfavorable to shipping in the United States-Canada trade under section 19. In particular, the Lake Carriers' Association asserted that Transport Canada's proposed regulations requiring the installation of ballast water management systems on vessels loading or discharging ballast water in Canadian waters would drive U.S.-flag vessels from the cross-lakes U.S. export trade with Canada. On June 16, 2020, the Commission issued a Notice of Investigation and Request for Comments.

The comment period closed on July 22, 2020, and the Commission received 21 comments, mostly in support of the petition.

On October 26, 2020, the Environmental Protection Agency (EPA), published a Notice of Proposed Rulemaking titled, Vessel Incidental Discharge National Standards of Performance. Like the proposed Canadian rule, the EPA's proposed rule intends to reduce the environmental impact of vessel discharges, such as ballast water. Though similar in intent, the EPA's proposed approach to Great Lakes ballast water does not align with the Canadian approach and will not have an effect on the U.S. Great Lakes fleet. The Notice of Proposed Rulemaking required that comments be received on or before November 25, 2020. The EPA is currently reviewing comments, and the final rule is not expected until 2022.

On June 4, 2021, Transport Canada issued its final rule. The general approach to the regulation of Great Lakes ballast water did not change. However, while the effective date of the final rule remains 2024, the rule delayed implementation until 2030 for vessels built prior to 2009.

The Commission continues to monitor the situation and remains in contact with other federal agencies as it proceeds with its investigation.



# CONTROLLED CARRIERS

A controlled carrier is an ocean common carrier that is, or whose operating assets are, owned or controlled directly or indirectly by a foreign government. The Shipping Act provides that no controlled carrier may maintain rates or charges in its tariffs or service contracts that are below a level that is just and reasonable, nor may any such carrier establish, maintain, or enforce unjust or unreasonable classifications, rules, or regulations in those tariffs or service contracts.

In addition, tariff rates, charges, classifications, rules, or regulations of a controlled carrier may not, without special permission of the Commission, become effective sooner than the 30th day after the date of publication. The Commission's staff monitors U.S. and foreign trade press and other information sources to identify controlled carriers and any unjust or unreasonable controlled carrier activity that might require Commission action.

As of the end of FY 2021, four controlled carriers operated in the U.S. trades. All four controlled carriers are subsidiaries of COSCO SHIPPING Holdings Co., Ltd.:

1. COSCO SHIPPING Lines Co., Ltd. – People's Republic of China
2. Orient Overseas Container Line Limited – People's Republic of China
3. OOCL (Europe) Limited – People's Republic of China
4. COSCO Shipping Lines (Europe) GmbH – People's Republic of China



# FORMAL INVESTIGATIONS, PRIVATE COMPLAINTS, AND LITIGATION

Adjudicative proceedings before the Commission are commenced by the filing of a complaint, or by order of the Commission upon petition, or upon its own motion. Types of docketed proceedings include:

- **Private complaints:** Any person may file a formal complaint alleging violations of specific sections of the Shipping Act found at 46 U.S.C. Chapter 411. Formal complaints are generally assigned to an Administrative Law Judge (ALJ) who issues an initial decision which is reviewed by the Commission.
- **Small claims complaints:** For claims of \$50,000 or less, an informal complaint may be filed. The complaint is handled by a settlement officer for

resolution using informal procedures that do not tend to include discovery or motions practice.

- **Investigative proceedings:** The Commission may investigate the activities of ocean common carriers, OTIs, MTOs, and other persons to ensure effective compliance with the statutes and regulations administered by the Commission. Formal orders of investigation and hearing are assigned to an ALJ for an initial decision and may be reviewed by the Commission.

The following summarizes the results of docketed proceedings concluded during FY 2021 by the Office of the Administrative Law Judges and the Commission.

## FORMAL PROCEEDINGS

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### **Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves [Docket No. 14-06]**

Complainants (parking lot operators who operate shuttle busses) allege that Respondents violated 46 U.S.C. § 41106(2) by imposing fees on Complainants while exempting taxis and limousines from the fees. The ALJ dismissed these claims, and the Commission affirmed the dismissal. Two of the complainants petitioned the United States Court of Appeals of the District of Columbia Circuit (D.C. Circuit) for review of the Commission order. The D.C. Circuit granted the petition, vacated the order,

and remanded for further proceedings. The Commission in turn remanded the proceeding to the ALJ. The ALJ dismissed the claims on remand, and, in April 2021, the Commission reversed in part, vacated in part, and affirmed in part the Initial Decision on Remand. In particular, the Commission found that The Board of Trustees of the Galveston Wharves violated 46 U.S.C. § 41106(2) with respect to two of the complainants. The Commission then remanded the proceeding to the ALJ for further proceedings on reparations. Respondents petitioned for reconsideration of the Commission order, and while the petition

was pending, two of the complainants and Respondents jointly moved for approval of a partial settlement. The Commission approved the partial settlement in September 2021. As of September 30, 2021, the petition for reconsideration for the remaining Complainant was pending before the Commission.

### **Crocus Investments, LLC v. Marine Transport Logistics, Inc. [Docket No. 15-04]**

Complainants allege that Respondents, one of whom is a non-vessel-operating common carrier, violated 46 U.S.C. §§ 40901(a) and 41102(c) in handling three boats. Complainants specifically alleged that Respondents charged excessive fees to store the boats prior to export and negligently failed to provide promised services. The ALJ dismissed all claims, and the Commission affirmed the dismissal except for the claim regarding the storing or handling of one boat for a six-month period. On remand, the ALJ dismissed the remaining claim because Complainants failed to prove that Respondent engaged in unreasonable conduct on a normal, customary, and continuous basis. In August 2021, the Commission affirmed the ALJ's decision.

### **MAVL Capital v. Marine Transport Logistics, Inc. [Docket No. 16-16]**

Complainants allege that Respondents violated several provisions of Chapter 411 of Title 46 by: (1) converting two automobiles and shipping them overseas without Complainants' consent; and (2) interfering with Complainants' arrangements to have a third-party ship three motorcycles overseas. The ALJ dismissed the claims regarding the motorcycles and one of the automobiles and

stayed the claims regarding the other automobile pending appeal to the Commission. In October 2020, the Commission reversed the dismissal of the 46 U.S.C. § 41102(c) claim regarding the automobile and remanded that claim for further proceedings. The Commission affirmed the ALJ's decision in all other respects. On September 29, 2021, the ALJ found that Respondent Marine Transport Logistics violated 46 U.S.C. § 41102(c) but declined to award reparations. As of September 30, 2021, the deadlines for the parties to file exceptions to the ALJ decision, or for the Commission to review the ALJ decision sua sponte, had not yet expired.

### **CMI Distribution, Inc. v. Service by Air, Inc. [Docket No. 17-05]**

Complainant alleges that Respondents violated 46 U.S.C. §§ 40501(a), 40901(a), 41102(c), and 41104(a)(2)(A) by failing to maintain tariffs showing their rates, acting as ocean transportation intermediaries without a license, engaging in unreasonable conduct related to pass-through charges, and charging rates that were not contained in a published tariff. The ALJ found in Complainant's favor and awarded reparations of \$126,185 for the violation of § 41104(a)(2)(A). Both parties filed exceptions to the ALJ's Initial Decision. Respondent argued that it was not an entity subject to the provisions at issue and that the ALJ erred in calculating reparations. Complainant also challenged the reparations award, asserting that the ALJ should have awarded additional amounts. In July 2021, the Commission affirmed in part and reversed in part the ALJ decision. The Commission affirmed the finding that Respondent violated §§ 40501, 40901, and 41104, but reduced the reparations

award. The Commission ultimately awarded Complainant reparations of \$112,902, plus interest of \$7,181. Complainant subsequently petitioned for attorney fees, and that petition was pending before the Commission as of September 30, 2021.

### **Toyota de Puerto Rico, Corp. v. Puerto Rico Ports Authority [Docket No. 19-02]**

Complainant alleged that Respondents violated 46 U.S.C. §§ 41102(c), 41104, and 41106 in the collection of enhanced security fees on vehicles shipped to Puerto Rico from 2011 to 2017 which were not subject to scanning under Respondent Puerto Rico Ports Authority's cargo scanning program. After two of the respondents were dismissed by stipulation, the ALJ found that Respondent Puerto Rico Ports Authority was entitled to sovereign immunity for the cargo scanning program and dismissed the claims against it. The Commission affirmed the ALJ's decision in July 2021.

### **TCW, Inc. v. Evergreen Shipping Agency [Docket No. 1966(I)]**

Complainant filed a small claims complaint alleging that Respondents violated 46 U.S.C. § 41102(c) by charging Complainant per diem fees on unreturned containers and chassis on a weekend and holiday when the Port of Savannah (the return location) was closed. The Small Claims Officer rejected Respondent's jurisdictional arguments, found that Respondents violated § 41102(c), awarded Complainant reparations, and ordered Respondents to cease and desist charging per diem fees under certain circumstances. In February 2021, the Commission determined to review the Small Claims Officer's decision, and the Commission

subsequently gave the parties and any amici the opportunity to file supplemental briefs on specified issues. As of September 30, 2021, the matter was pending before the Commission.

### **Moses Damisa v. Trans Atlantic Shipping LLC [Docket No. 1967(F)]**

Complainant filed a small claims complaint alleging violations of the Shipping Act in connection with an arrangement between the parties to ship Complainant's property from the United States to Nigeria. Respondent denied the allegations and did not consent to the small claims procedures, so the claim was adjudicated as a formal proceeding under Subpart T of the Commission's Rules of Practice and Procedure. The parties engaged in mediation through the Commission's Office of Consumer Affairs and Dispute Resolution Services. Complainant moved to dismiss the complaint without prejudice. Respondent opposed dismissal of the action without prejudice and sought an award of attorney fees and costs incurred in the proceeding. Complainant opposed Respondent's request for attorney fees and costs. An Initial Decision granted the motion for voluntary dismissal without prejudice and denied Respondent's request for attorney fees and costs. At the end of FY 2021, the Commission had not determined whether to review the decision.

### **Astra Supply Chain, LLC and TDS Management, LLC v. Orient Star Transport Int'l Ltd. [Docket No. 20-19]**

Complainants filed a complaint alleging that Respondent violated the Shipping Act. The Complainants filed a request for voluntary dismissal of the complaint prior to an

answer being filed. The Secretary issued a notice of discontinuance of proceeding.

### **Astra Supply Chain, LLC and TDS Management, LLC v. B&Q Freight China Limited [Docket No. 20-20]**

Complainants filed a complaint alleging that Respondent violated the Shipping Act. The Complainants filed a request for voluntary dismissal of the complaint prior to an answer being filed. The Secretary issued a notice of discontinuance of proceeding.

### **Astra Supply Chain, LLC and TDS Management, LLC v. Qingdao Perimeter Global Logistics Co. Ltd. and Premier Global Logistics LLC [Docket No. 20-21]**

Complainants filed a complaint alleging that Respondents violated the Shipping Act. The Complainants filed a request for voluntary dismissal of the complaint prior to an answer being filed. The Secretary issued a notice of discontinuance of proceeding.

## **RULEMAKINGS AND EXEMPTIONS**

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The Commission initiated several rulemakings to update its regulations and address pressing issues for the shipping industry. The Commission also took action on three requests for regulatory exemptions.

### **Passenger Vessel Financial Responsibility [Docket No. 20-15]**

On April 30, 2020, the Commission initiated Fact Finding No. 30 to investigate COVID-19's impact on the cruise industry. As part of the investigation, the Fact Finding Officer issued an interim report on passenger vessel operator refund policies on July 27, 2020. The Fact Finding Officer concluded that clearer guidance is needed in determining whether a passenger is entitled to obtain a refund if a PVO cancels a voyage, makes a significant schedule change, or significantly delays a voyage. The Fact Finding Officer proposed that the Commission provide a clear interpretation of when non-performance of transportation has occurred and modify the appropriate provisions of the

Commission's PVO regulations to make clear how passengers may obtain refunds under a PVOs' financial responsibility instrument filed with the Commission. The Commission subsequently approved the recommendation on August 10, 2020, and voted to initiate a rulemaking to implement the proposed regulatory changes. On August 25, 2021, the Commission issued the proposed rule with the comment period closing on October 25, 2021. FMC received approximately 70 comments and staff is currently analyzing the comments and drafting a final rule for consideration by the Commission.

### **Update of Existing User Fees [Docket No. 20-18]**

On November 13, 2020, the Commission updated its current user fees and amended the relevant regulations to reflect these updates. In this direct final rule, the Commission also corrected an internal citation and clarified the applicability of a fee in an existing regulation.

## **Service Contracts [Docket No. 20-22]**

On January 19, 2021, the Commission proposed to amend its service contract filing requirements to permit ocean common carriers to file original service contracts up to 30 days after the contract goes into effect. The Commission received 8 comments and published a final rule on April 23, 2021.

## **Inflation Adjustment of Civil Monetary Penalties [Docket No. 21-01]**

On January 13, 2021, the Commission published this final rule to adjust for inflation the civil monetary penalties assessed or enforced by the Commission pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act). The 2015 Act requires that agencies adjust and publish their civil penalties by January 15 each year.

## **Carrier Automated Tariffs [Docket No. 21-03]**

On April 8, 2021, the Commission published an Advance Notice of Proposed Rulemaking (ANPRM) that identified inconsistencies in the manner in which different carriers are interpreting and applying certain aspects of the Commission's rules. The ANPRM was issued to facilitate a fuller understanding of these issues prior to the Commission potentially proposing changes to its tariff regulations. The Commission observed that carriers are charging widely varying fees and imposing varying minimum requirements for access to common carrier tariffs. The Commission sought information regarding the impact of such fees and minimum requirements on public access to common carrier rules, rates, practices, and charges in published tariffs and whether existing fees or requirements

are unreasonable. The Commission received three public comments and is considering the next action in this rulemaking project.

## **Marine Terminal Operator Schedules [Docket No. 21-06]**

In a Notice of Proposed Rulemaking issued on September 22, 2021, the Commission proposed to modernize outdated requirements and clarify existing requirements associated with the filing of MTO schedules. The public comment period closed on November 22, 2021. FMC staff is currently working on a final rule for Commission consideration.

## **Internal Commission Organization and Delegations of Authority [Docket No. 21-07]**

On September 10, 2021, the Commission issued a final rule amending its regulations governing the Commission's organization and the delegation and redelegation of authorities. These regulatory changes also reflect the implementation of the Commission's Agency Reform and Long-Term Workforce Plan.

## **Temporary Exemption from Certain Service Contract Requirements [Docket No. 20-06]**

Responding to the impact of COVID-19 on commercial shipping operations, the Commission issued an order on April 27, 2020, that temporarily exempted carriers from the requirement that service contracts be filed with the Commission before becoming effective. Instead, carriers were required to file service contracts within 30 days of the effective date. The Order made the relief effective immediately and lasting through December 31, 2020. The Commission noted in its Order that

it might consider extending this exemption, as necessary, to address the continuing effects of the COVID-19 pandemic. In the interest of providing certainty and stability to supply chain stakeholders, the Commission extended this exemption until June 1, 2021, at which time the exemption was made permanent via the service contract rulemaking noted above.

### **Petition of K Line for a Temporary Exemption from Standard Tariff and Service Contract Filing Requirements [Petition No. P1-21]**

K Line filed a petition with the Commission seeking an exemption from certain service contract filing and tariff publishing requirements because of a cyberattack on its systems. On April 9, 2021, the Commission granted the request for exemption from the relevant service contract filing requirements and an exemption from the relevant tariff publishing requirement, subject to certain conditions. Because the Commission's exemption authority is limited to prospective relief, the Commission denied the request for exemption from the relevant tariff publishing requirements for cargo received prior to the date of the order. Instead, K Line may use other procedures provided by the Shipping

Act that allows it to refund or waive collection of freight charges for these shipments due to failure to publish a tariff.

### **Petition of CMA for a Temporary Exemption from Standard Tariff and Service Contract Filing Requirements [Petition No. P2-20]**

The CMA Group filed a petition with the Commission seeking an exemption from certain service contract filing and tariff publishing requirements because of a cyberattack on its systems. On October 20, 2020, the Commission granted the request for exemption from the relevant service contract filing requirements subject to certain conditions. The Commission also granted the request for exemption from the relevant tariff publishing requirements, subject to certain conditions. Because the Commission's exemption authority is limited to prospective relief, the Commission denied the request for exemption from the relevant tariff publishing requirements for cargo received prior to the date of this order. Instead, the CMA Group may use other procedures provided by the Shipping Act that allows it to refund or waive collection of freight charges for these shipments due to failure to publish a tariff.





# FMC INFORMATION TECHNOLOGY

Technology remains an integral part of enabling the Federal Maritime Commission to fulfill its mission. Information technology (IT) infrastructure allows streamlined workflow and business functions to enhance productivity and have access to data and provides improved public access to FMC information. The FMC provides automated IT systems for use by the shipping public to file license applications, carrier and MTO agreements, and commercially sensitive operational data reviewed and used by the Commission to conduct mission-critical functions.

The FMC's Information Technology Strategic Plan for FY 2018-2022 (IT Strategic Plan), aligned to the Commission's agency-wide Strategic Plan, guides the FMC's efforts to support and manage its information technology assets. The plan guides IT activities by setting performance goals, objectives, and timelines. The plan, being updated for alignment with the Commission's 2022-2026 Strategic Plan, outlines how technology will be used to meet the Commission's mid-term and long-term mission goals and objectives.

The FMC is continuing its multiyear application modernization effort. This initiative

is transforming line-of-business applications into cloud-based enterprise applications. Through this initiative, FMC has successfully transitioned nine of the Commission's 13 applications. In FY 2021, the FMC completed development of two cloud-based applications (E-bonds and Form 1), with deployment expected to occur in FY 2022. The FMC remains committed to the overall modernization effort and establishing new requirements that will identify opportunities to leverage the gains to date.

Because of prior strategic IT infrastructure and cybersecurity investments, the FMC user community successfully transitioned to maximum telework and remote status at the beginning of the COVID-19 pandemic. The FMC's mission was unimpeded by the shift. The continued reliance on distributed work necessitated additional investments in technology resources to ensure sustained capabilities and security of our IT infrastructure. The FMC is completing the installation of new network switches and routers to stay abreast of technology and enhance our security posture.



# GLOSSARY

**Agreement** means an understanding, arrangement, or association, written or oral (including any modification, cancellation, or appendix) entered into by or among ocean common carriers and/or marine terminal operators, but does not include a maritime labor agreement. Various types of agreements are described in Appendix D to this report.

**Blank sailing** refers to a sailing that has been cancelled by the ocean carrier, which may mean one port is being skipped, or the entire string is cancelled.

**Bulk cargo** means cargo that is loaded and carried in bulk without mark or count in a loose unpackaged form, having homogeneous characteristics.

**Common carrier** means a person holding itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation that:

1. assumes responsibility for the transportation from port or point of receipt to the port or point of destination; and
2. utilizes, for all or part of that transportation, a vessel-operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel tanker or by a vessel when primarily engaged in the carriage of perishable agricultural commodities:
  - i. if the common carrier and the owner of those commodities are

wholly-owned, directly or indirectly, by a person primarily engaged in the marketing and distribution of those commodities; and

- ii. only with respect to the carriage of those commodities.

**Consignee** means the recipient of cargo from a shipper; the person to whom a transported commodity is to be delivered.

**Container** means a demountable and reusable freight-carrying unit designed to be transported by different modes of transportation and having construction, fittings, and fastenings able to withstand, without permanent distortion or additional exterior packaging or containment, the normal stresses that apply on continuous all-water and intermodal transportation. The term includes dry cargo, ventilated, insulated, refrigerated, flat rack, vehicle rack, liquid tank, and open-top containers without chassis, but does not include crates, boxes, or pallets.

**Controlled carrier** means a vessel-operating common carrier that is, or whose operating assets are, directly or indirectly owned or controlled by a government; ownership or control by a government shall be deemed to exist with respect to such common carrier if:

1. a majority portion of the interest in the common carrier is owned or controlled in any manner by that government, by an agency thereof, or by any public or private person controlled in any manner by that government, by any agency thereof, or by any public or private person controlled by that government; or

2. that government has the right to appoint or disapprove the appointment of a majority of the directors, the chief operating officer or the chief executive officer of the common carrier.

**Demurrage** is the charge per container for the use of ground space at the marine terminal.

**Detention** is the charge by the ocean carrier for use of the container equipment. Per diem relates to assessorial charges beyond demurrage and detention.

**Intermodal transportation** means continuous through transportation involving more than one mode of service (*e.g.*, ship, rail, motor, air), for pickup and/or delivery at a point beyond the area of the port at which the vessel calls. The term “intermodal transportation” can apply to through transportation (at through rates) or transportation on through routes using combination rates.

**Marine terminal operator** means a person engaged in the United States or a commonwealth, territory, or possession thereof, in the business of furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to Subchapter II of Chapter 135 of Title 49, United States Code. A marine terminal operator includes, but is not limited to: terminals owned or operated by states and their political subdivisions; railroads who perform port terminal services not covered by their line haul rates; common carriers who perform port terminal services; and warehousemen who operate port terminal facilities.

**Non-vessel-operating common carrier** means a common carrier that does not operate the vessels by which the ocean transportation

is provided and is a shipper in its relationship with an ocean common carrier.

**Ocean carrier alliance agreement** means two or more shipping lines authorized to discuss and agree on the supply of vessel capacity across multiple trades. Alliance agreements may contain other authorities such as information exchange, joint procurement of goods or services necessary to operate their services, etc. While there are currently seven global alliance agreements on file with the Commission, only three are jointly/collectively operating container services in the U.S. trades.

**Ocean transportation intermediary** means an ocean freight forwarder or a non-vessel-operating common carrier.

**Ocean freight forwarder** means a person that:

1. in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and
2. processes the documentation or performs related activities incident to those shipments.

**Port** means a place at which a common carrier originates or terminates (by transshipment or otherwise) its actual ocean carriage of cargo or passengers as to any particular transportation movement.

**Service Contract** means a written contract, other than a bill of lading or receipt, between one or more shippers and an individual ocean common carrier or an agreement between or among ocean common carriers in which the shipper makes a commitment to provide a certain minimum quantity or portion of its cargo or freight revenue over a fixed time period, and the individual ocean common carrier or

the agreement commits to a certain rate or rate schedule and a defined service level, such as assured space, transit time, port rotation, or similar service features.

**Shipper** means a cargo owner; the person for whose account the ocean transportation is provided; the person to whom delivery is to be made; a shipper's association; or an NVOCC that accepts responsibility for payment of all charges applicable under the tariff or service contract.

**Tariff** means a publication containing the actual rates, charges, classifications, rules, regulations, and practices of a common carrier or a conference of common carriers. The term "practices" refers to those usages, customs or modes of operation which in any way affect, determine, or change the transportation rates, charges, or services provided by a

common carrier or conference and, in the case of conferences, must be restricted to activities authorized by the basic conference agreement.

**Transshipment** means the physical transfer of cargo from a vessel of one carrier to a vessel of another in the course of all-water or through transportation, where at least one of the exchanging carriers is an ocean common carrier subject to the Commission's jurisdiction.

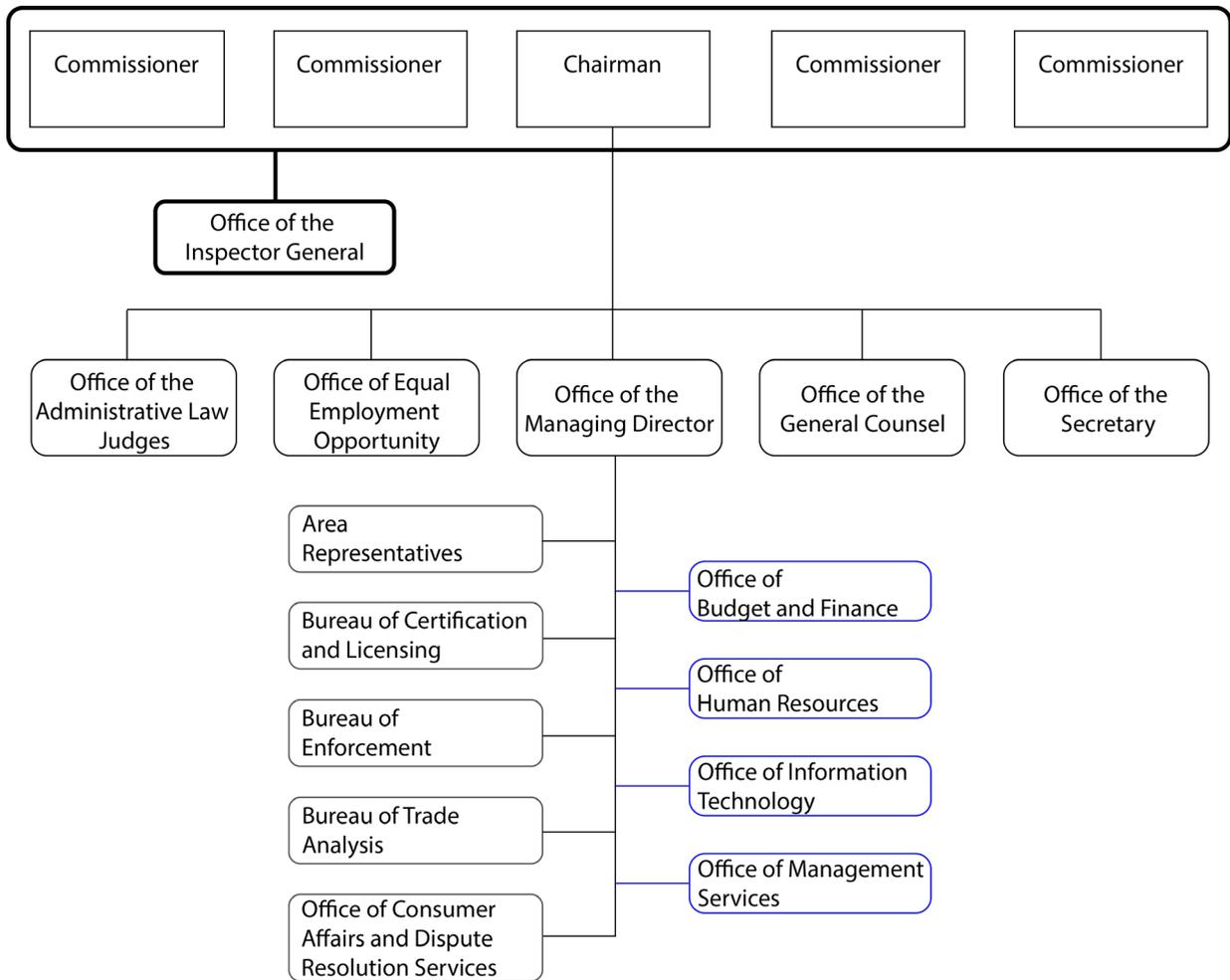
**Vessel-operating common carrier** means a common carrier that operates, for all or part of its common carrier service, a vessel on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker.



# APPENDICES

## A – FMC ORGANIZATION CHART

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## B – FMC SENIOR OFFICIALS

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Chief of Staff.....	Mary T. Hoang
Counsel to Chairman Maffei.....	Katharine Primosch
Counsel to Commissioner Dye.....	Robert Blair*
Counsel to Commissioner Khouri.....	John A. Moran
Counsel to Commissioner Sola.....	Clark Jennings
Counsel to Commissioner Bentzel.....	John Young
General Counsel.....	Steven Andersen
Secretary.....	Rachel E. Dickon
Chief Administrative Law Judge.....	Erin Wirth
Director, Office of EEO.....	Ebony Jarrett*, Camella M. Woodham
Inspector General.....	Jon Hatfield
Managing Director.....	Karen V. Gregory*, Lucille Marvin
Deputy Managing Director.....	Peter King*
CFO, Director of Enterprise Services.....	Patrick Moore
Director, Bureau of Trade Analysis.....	Florence A. Carr*, Kristen Monaco
Director, Bureau of Certification and Licensing.....	Cindy Hennigan
Director, Bureau of Enforcement.....	Benjamin K. Trogdon
Director, Office of CADRS.....	Zoraya de la Cruz

\*Departed; \*\*Acting

## C – STATEMENT OF APPROPRIATIONS, STATEMENT OF CUSTODIAL ACTIVITY, AND FINANCIAL OPERATIONS

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### Statement of Appropriations – Public Law 116-260:

For necessary expenses of the Federal Maritime Commission as authorized by section 201(d) of the Merchant Marine Act, 1936 (46 U.S.C. 307), including services as authorized by section 3109 of title 5, United States Code; hire of passenger motor vehicles as authorized by section 1343(b) of title 31, United States Code; and uniforms or allowances therefore, as authorized by sections 5901 and 5902 of title 5, United States Code, \$30,300,000: Provided, That not to exceed \$3,500 shall be for official reception and representation expenses.

### Statement of Custodial Activity:

	2021 (\$)	2020 (\$)
Fines, Penalties, and Forfeitures	—	103
General Fund Proprietary Receipts (User fees)	216,490	190,950
Refunds of Proprietary Receipts (User fees)	(250)	(2,375)
Interest	—	15
<b>Total Custodial Collections</b>	<b>216,240</b>	<b>188,693</b>

**Financial Operations:** For a detailed review of the FMC’s financial operations, including expenditures, please refer to the FMC’s Congressional Budget Reports and its Performance and Accountability Reports found at <https://www.fmc.gov/about-the-fmc/strategies-budgets-and-performance/>.

## D – AGREEMENT TYPES

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The Commission categorizes ocean common carrier agreements by the types of agreements currently utilized by the ocean transportation industry, recognizing trends among types of agreement filings, and provides more refined information to users. The current categories are summarized below.

**Space charter agreements** authorize an ocean common carrier(s) to sell or exchange vessel space for use by another shipping line. Space charter agreements do not include the authority to discuss the provision of space in a trade, only the chartering of space already deployed.

**Vessel sharing agreements** authorize two or more shipping lines to discuss and agree on the supply of vessel capacity in a defined U.S. trade through the deployment of a specific service string or strings.

**Global vessel sharing agreements/alliances** authorize two or more shipping lines to discuss and agree on the supply of vessel capacity across multiple trades. Alliance agreements may contain other authorities such as information exchange, joint procurement of goods or services necessary to operate their services, etc. While there are currently seven global alliance agreements on file with the Commission, only three are jointly/collectively operating container services in the U.S. trades.

**Vessel-operating common carrier conference agreements** are distinguished from all other types of agreements because they authorize two or more shipping lines to collectively discuss, agree, and fix uniform freight rates, charges, practices, and conditions of service relating to the receipt, carriage, handling and/or delivery of passengers or cargo. There are currently no conference agreements on file that cover the movement of general commercial cargo. The conference agreements currently on file with the Commission only involve the transport of government impelled cargo.

**Joint service agreements** authorize two or more shipping lines to establish and operate a combined vessel service or joint venture that uses a distinct operating name and generally acts as a single shipping line independent of the shipping lines that are parties to the joint service agreement.

**Equipment discussion agreements** are agreements between shipping lines that primarily focus on the discussion, exchange, and transportation of containers, chassis, LASH/ SEABEE barges, and related equipment.

**VOCC rate discussion agreements** focus on any type of rate matter or charges, but unlike conferences, any consensus on rates among the shipping line members is non-binding on the members.

**VOCC cooperative working agreements** authorize shipping lines to establish exclusive, preferential, or cooperative working relationships that are subject to the Shipping Act, but that do not fall precisely within the parameters of any other specifically defined agreement category.

**Assessment agreements**, whether part of a collective bargaining agreement or negotiated separately, authorize the parties to collectively bargain for fringe benefit obligations on other than a uniform man-hour basis regardless of the cargo handled or type of vessel or equipment utilized. These agreements can be between common carriers and labor organizations, or MTOs and labor organizations, and are effective upon filing with the Commission.

**Marine terminal rate discussion agreements** authorize MTOs to discuss rates and/or charges related to marine terminal operations.

**Marine terminal facilities agreements** generally refer to lease agreements between a MTO and the owner of the land or warehouse/facility at a port.

**Marine terminal services agreements** are agreements between a MTO and a shipping line concerning marine terminal services provided to and paid for by a shipping line. These services include: dockage, free time, handling, heavy lift, loading and unloading, terminal storage, usage, wharfage, wharf demurrage, and checking (the service of counting and checking cargo against the shipping documentation), and include any marine terminal facilities that may be provided incidentally to such marine terminal services.

**Marine terminal joint venture agreements** are agreements between or among two or more MTOs, or between one or more MTOs and one or more shipping lines, operating as a joint venture whereby a separate MTO is established.

**MTO cooperative working agreements** authorize MTOs to establish exclusive, preferential, or cooperative working relationships subject to the Shipping Act, but do not fall precisely within the parameters of any of the above specifically defined agreement categories.

## E – AGREEMENT REVIEW STANDARD

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### Statutory Standard and Process for Commission Review of Agreements Between or Among Ocean Common Carriers or Marine Terminal Operators

Review of agreements is governed by 46 U.S.C. § 41307(b), also commonly referred to as Section 6(g) of the Shipping Act.

#### **46 U.S.C. § 41307 – Injunctive relief sought by the Commission**

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(b) REDUCTION IN COMPETITION. —

(1) ACTION BY COMMISSION. —

If, at any time after the filing or effective date of an agreement under chapter 403 of this title, the Commission determines that the agreement is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost or to substantially lessen competition in the purchasing of certain covered services, the Commission, after notice to the person filing the agreement, may bring a civil action in the United States District Court for the District of Columbia to enjoin the operation of the agreement. The Commission's sole remedy with respect to an agreement likely to have such an effect is an action under this subsection.

(2) REMEDIES BY COURT. — In an action under this subsection, the court may issue—

(A) a temporary restraining order or a preliminary injunction; and

(B) a permanent injunction after a showing that the agreement is likely to have the effect described in paragraph (1).

(3) BURDEN OF PROOF AND THIRD PARTIES. —

In an action under this subsection, the burden of proof is on the Commission. The court may not allow a third party to intervene.

(4) COMPETITION FACTORS. —

In making a determination under this subsection regarding whether an agreement is likely to substantially lessen competition in the purchasing of certain covered services, the Commission may consider any relevant competition factors in affected markets, including, without limitation, the competitive effect of agreements other than the agreement under review.

## **The Commission's process for review of agreements is established in 46 U.S.C. §§ 40301 – 40303:**

- Agreements become effective 45 days after filing unless the Commission has requested additional information to evaluate the competitive impact of the agreement. All agreements are reviewed pursuant to the standard set forth in section 6(g) of the Shipping Act, 46 U.S.C. § 41307(b)(1).
- The Commission has the authority to reject a pending agreement filing if it determines the filing fails to meet the Shipping Act and Commission regulations requiring filed agreements to be clear and definite, or if the filing is outside the Commission's jurisdiction.
- The Commission may seek to enjoin the operations of an agreement under 46 U.S.C. § 41307(b), where it determines that the agreement could reduce competition resulting in unreasonable impacts to the market, or substantially lessen competition in the purchasing of certain covered services as defined in the Frank LoBiondo Coast Guard Authorization Act of 2018 (Pub. L. No. 115-282).
- Effective agreements are exempt from U.S. antitrust laws, and instead, are subject to Shipping Act restrictions and Commission oversight.

## F – STANDARD FOR PRACTICES IN HANDLING PROPERTY

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### **46 U.S.C. § 41102(c), commonly referred to as Section 10(d)(1) of the Shipping Act**

(c) PRACTICES IN HANDLING PROPERTY.—

A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

The Commission has published interpretive rules regarding 46 U.S.C. 41102(c) to clarify the scope of the prohibition and provide guidance about its interpretation in the context of detention and demurrage charges.

### **46 C.F.R. § 545.4 Interpretation of Shipping Act of 1984—Unjust and unreasonable practices.**

46 U.S.C. 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations:

- (a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;
- (b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;
- (c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;
- (d) The practice or regulation is unjust or unreasonable; and
- (e) The practice or regulation is the proximate cause of the claimed loss.

### **46 C.F.R. § 545.5 Interpretation of Shipping Act of 1984—Unjust and unreasonable practices with respect to demurrage and detention.**

(a) Purpose. The purpose of this rule is to provide guidance about how the Commission will interpret 46 U.S.C. 41102(c) and § 545.4(d) in the context of demurrage and detention.

(b) Applicability and scope. This rule applies to practices and regulations relating to demurrage and detention for containerized cargo. For purposes of this rule, the terms demurrage and detention encompass any charges, including “per diem,” assessed by ocean common carriers, marine terminal operators, or ocean transportation intermediaries (“regulated entities”) related to the use of marine terminal space (e.g., land) or shipping containers, not including freight charges.

(c) Incentive principle—(1) General. In assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider the extent to which demurrage

and detention are serving their intended primary purposes as financial incentives to promote freight fluidity.

(2) Particular applications of incentive principle—(i) Cargo availability. The Commission may consider in the reasonableness analysis the extent to which demurrage practices and regulations relate demurrage or free time to cargo availability for retrieval.

(ii) Empty container return. Absent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable.

(iii) Notice of cargo availability. In assessing the reasonableness of demurrage practices and regulations, the Commission may consider whether and how regulated entities provide notice to cargo interests that cargo is available for retrieval. The Commission may consider the type of notice, to whom notice is provided, the format of notice, method of distribution of notice, the timing of notice, and the effect of the notice.

(iv) Government inspections. In assessing the reasonableness of demurrage and detention practices in the context of government inspections, the Commission may consider the extent to which demurrage and detention are serving their intended purposes and may also consider any extenuating circumstances.

(d) Demurrage and detention policies. The Commission may consider in the reasonableness analysis the existence, accessibility, content, and clarity of policies implementing demurrage and detention practices and regulations, including dispute resolution policies and practices and regulations regarding demurrage and detention billing. In assessing dispute resolution policies, the Commission may further consider the extent to which they contain information about points of contact, timeframes, and corroboration requirements.

(e) Transparent terminology. The Commission may consider in the reasonableness analysis the extent to which regulated entities have clearly defined the terms used in demurrage and detention practices and regulations, the accessibility of definitions, and the extent to which the definitions differ from how the terms are used in other contexts.

(f) Non-Preclusion. Nothing in this rule precludes the Commission from considering factors, arguments, and evidence in addition to those specifically listed in this rule.



