Investigating the Federal Maritime Commission and Its Effects on the Shipping Industry: Simply A Paper Tiger or an Underutilized Tool

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I. INTRODUCTION AND HISTORY

Look at your phone; really look at it and think about everything that occurred to get the phone to you. Somewhere, engineers planned out every feature of your phone, created design specifications, and ordered parts. These parts were shipped to a factory where they were assembled and placed in a shipping container. An interesting specification of shipping containers is their standardized size, typically eight feet wide, eight feet tall, and forty feet long. These containers can be placed on ships, trains, and trucks that reliably transport them. The items stored in the containers are either taken to the store where you purchase them, or they are sent to a warehouse, where you order them to be delivered to you. All the exacting standards, thousands of miles of travel, and work that occurs for you to receive your Apple, Samsung, Lenovo/Motorola, or Google phone.

The ocean shipping industry is immense, accounting for more than $14 trillion in 2019.[2] Globalization that occurred due to the highly efficient methods of maritime travel have improved the quality of life of countless people. However, the illustration above is not apt only to point out how ocean-going trade is important to our lives. Looking back to the hypothetical, why were only four phone manufacturers mentioned? That choice was calculated; statistically speaking ninety-two percent of readers in the United States would have seen their phone producer listed, the majority of whom are Apple or Samsung owners.[3] Similar to the phone industry, the shipping industry is equally as stratified. There are three major sets of players in the maritime shipping industry, known as liner alliances. These three groups control most of the global maritime trade, nearing totality in some cases.[4] These alliances are multiple carriers joined together to cooperate along shipping routes.

The Federal Maritime Commission (hereinafter, "FMC") was founded in 1961 to "[e]nsure a competitive and reliable international ocean transportation supply system that supports the U.S. economy and protects the public from unfair and deceptive practices."[5] The FMC has its roots in the 1920 Merchant Marine Act which gave the United States Shipping Board the task of monitoring and responding to foreign laws, regulations, and practices that made unfavorable shipping conditions.[6] This responsibility was transferred between several departments before finally landing in the hands of the FMC in 1961.[7] The FMC had its authority overhauled by the Shipping Act of 1984 which, among other factors, allowed carriers to enter into service contracts with each other rather than have pricing rely purely on public tariffs.[8] The FMC was given the authority to analyze contracts and agreements that carriers make with each other. To balance this

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[2] *Shipping and world trade: driving prosperity*, INT'L CHAMBER OF SHIPPING, https://www.ics-shipping.org/shipping-fact/shipping-and-world-trade-driving-prosperity/ (last visited Oct. 22, 2023).

[3] *US Smartphone Market Share: Quarterly,* COUNTERPOINT RESEARCH (Feb. 21, 2023), https://www.counterpointresearch.com/insights/us-smartphone-market-share/.

[4] Other names for these organizations are Shipping Alliances, or Liner Conferences.

[5] *About the Federal Maritime Commission*, FED. MAR. COMM'N, https://www.fmc.gov/about-the-fmc/ (last visited Oct. 22, 2023) [hereinafter *About the FMC*].

[6] *FMC History*, FED. MAR. COMM'N, https://www.fmc.gov/about-the-fmc/our-history/ (last visited Oct. 22, 2023) [hereinafter F*MC History*].

[7] *Id.*

[8] *Id.*

power, the Act made all cooperative agreements automatically effective after forty-five days, unless the FMC took action to block the agreement.[9] This change was made to be less "time-consuming" in the event of outside parties protesting.[10] Later, the Ocean Shipping Reform Act of 1998 (OSRA) ended liner conferences' authority to regulate member service contracts.[11] The OSRA also encouraged confidentiality in contracted rates.[12] Finally, OSRA gave the FMC the authority to provide exemptions from statutory provisions, and allowed the FMC to address practices of foreign governments and other state-controlled carriers.[13] Today, the FMC has broad powers to maintain and review service contracts to stop the detrimental effects on shipping, ensure just and reasonable rates of government-owned or controlled carriers, and provide a forum for dispute resolution to shippers and carriers.[14]

This article investigates the FMC, beginning with its Strategic Plan. It explains the methodology, presents the results, and offers a critique regarding this plan. The second part of this article is devoted to liner alliances, the power they wield, and the benefits and burdens they confer upon the shipping industry. The final part of the article looks forward and examines how the FMC can be better utilized to safeguard public interests and foster proper competition in the international shipping industry. Notably, the FMC also affects international trade relations. A future second article will cover the FMC's power to control change when it comes to other nations, a power it has wielded to great effect.

II. PART I: STRATEGIC PLAN OF THE FMC: EXPLANATION AND CRITIQUE

In March of 2022, the FMC Released its Federal Maritime Commission Strategic Plan for the fiscal years of 2022 through 2026.[15] The FMC lays out a framework to address current and forecasted issues in the shipping industry.[16] It also stresses that the plan should be flexible and adapt to the changes the industry will have in the next five fiscal years.[17] The plan lays out two Strategic Goals, with Strategic Objectives for each, and a stewardship objective as well as appendices containing summaries of performance and an organizational chart.[18] This paper will examine the first two Strategic Goals along with their Strategic Objectives. Then it will offer a set of critiques of these goals.

A. Strategic Goals

The FMC's first Strategic Goal is to maintain a competitive and reliable international ocean transportation supply system.[19] It seeks to do this by satisfying two Strategic Objectives: (1)

[9] *Id.*
[10] *Id.*
[11] F*MC History*, *supra* note 6.
[12] *Id.*
[13] *Id.*
[14] *About the FMC*, *supra* note 5.
[15] FED. MAR. COMM'N, FEDERAL MARITIME COMMISSION STRATEGIC PLAN FY 2022-2026 (2022), https://www.fmc.gov/wp-content/uploads/2022/03/FMC-Strategic-Plan-for-FY-2022-2026.pdf [hereinafter *FMC Strategic Plan 2022*].
[16] *Id.*
[17] *Id.*
[18] *FMC Strategic Plan 2022*, *supra* note 15.
[19] *Id.*

"[ensuring] no unreasonable increases in transportation costs or decreases in transportation service are attributed to anti-competitive practices under FMC-filed agreements," and (2) "[ensuring] competition is preserved in the purchase of covered services (46 U.S.C. § 40102(5) through 46 U.S.C. § 40307 authorities.)"[20] The services covered under Section 40102(5) include berthing and bunkering of the vessel, loading/unloading cargo to or from a vessel on a point of a wharf or terminal, positioning/removal/replacement of buoys related to the movement of the vessel, and towing vessel services to a vessel (when referencing injunctive relief).[21] Section 40307 of the U.S. Code offers exemptions from antitrust laws.[22] As a result, covered services are exempt from antitrust laws.[23]

The FMC controls the shipping industry with the goal of "promot[ing] the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace."[24] Carriers file agreements with the FMC, which reviews them to ensure shippers and consumers experience no unreasonable increases in costs or unreasonable reductions in service quality.[25] The FMC also prioritizes competition among participants in the industry as it establishes competitive rates, encourages innovation, and increases service offerings to stakeholders in the industry.[26] Competition in pricing benefits shippers and (hopefully) extends to the consumers of goods as well.

Under FMC Strategic Objective 1.1, the Commission is authorized to seek injunctive relief against agreements that are anticipated to reduce competition and cause an unreasonable rise in costs or an unreasonable reduction in services offered.[27] The agreements sent to the FMC must contain the necessary forms which offer economic data, meeting minutes, and continuous updates during the agreement's effective life.[28] This information is used to determine the likelihood of "substantially anticompetitive conduct" prior to an agreement becoming effective.[29] The FMC monitors foreign government-owned carriers acting in the U.S. by reviewing their pricing, under the Foreign Shipping Practices Act of 1988, when adverse conditions disproportionately affect U.S. carriers in foreign trade.[30] The FMC measures its performance of this objective by two metrics: (1) the percentage of new vessel-sharing agreements and amendments presented to the Commission within thirty-two days, and (2) the percentage of agreement monitoring reports reviewed within thirty days of receipt (looking for actionable information, including market-distorting behavior).[31] As it pertains to these two metrics, the FMC targets an eighty-five percent

[20] *Id.* at 5; *see generally* 46 U.S.C. § 40102(5).
[21] 46 U.S.C. § 40102(5).
[22] 46 U.S.C. § 40307(a)(3).
[23] *Id.* It is notable that this protection is not offered to agreements made by air carriers, rail carriers, motor carriers, tug operators, or common carriers by water. *See* 46 U.S.C. § 40307(b)(1).
[24] *FMC Strategic Plan 2022*, *supra* note 15, at 5.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.* at 6.
[29] *FMC Strategic Plan 2022*, *supra* note 15, at 6.
[30] *Id.* at 6-7; *see generally* 46 U.S.C. §§ 42301-42307.
[31] *FMC Strategic Plan 2022*, *supra* note 15, at 7.

and eighty percent rate respectively.[32] The apparent reason for the specific nature of these deadlines is to ensure that the minority of agreements attain default effective status after the forty-five day cutoff stipulated by the Shipping Act of 1984.[33]

FMC Strategic Objective 1.2 serves as a control on the power that alliances have when purchasing necessary services for their vessels covered under the Act.[34] As previously stated, the covered services include berthing and bunkering of the vessel, loading/unloading cargo to or from a vessel on a point of a wharf or terminal, positioning/removal/replacement of buoys related to the movement of the vessel, and towing vessel services to a vessel.[35] The FMC does this by analyzing all agreements pertaining to such services, looking for anti-competitive outcomes.[36] The FMC also encourages parties to disallow jointly-negotiated purchases. . However, if the parties do keep those provisions in place, they have increased reporting requirements that allow for the FMC's evaluation of whether any potential anticompetitive effect exists.[37] When the FMC finds agreements that indicate joint contracting and procurement of covered services, it escalates those agreements to a regular monitoring status.[38] The FMC measures success according to the percentage of these agreements they can escalate within thirty days, and they target between greater than ninety-five and ninety-eight percent success within this planning period.[39]

The FMC is not gathering proper information to see if the first Strategic Objective was effective. Given the Commission's nearly forty-year tenure with powers under the Shipping Act of 1984, one would expect to see a reduction in the amount of both actionable information and joint negotiations if the FMC's message is effective. This may serve as a valuable metric to evaluate if the FMC's currently unspecified "encouragement" was effective or if changes are warranted. If there has not been a reduction in the rate of agreements with unwanted provisions, then the FMC may need to employ more authority to affect changes in the industry. More than $1 trillion worth of goods are annually exported and imported within the United States through ocean-based transportation.[40] An increase in vigilance, coupled with more aggressive means of encouragement, would unlikely result in any loss in shipping capacity, as the United States is an important shipping destination. As a result, the market would be more competitive, and providers of section 40102 services would be less likely to experience undue negotiation power against themselves. If the FMC used its authority and influence more proactively, the market's level of competition would be better maintained or, perhaps even raised.

The second Strategic Goal of the FMC is the "[protection of] the public from unlawful, unfair, and deceptive ocean transportation practices."[41] It seeks to achieve this by identifying and

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[32] *Compare FMC Strategic Plan 2022*, *supra* note 15, at 21, *with* FED. MAR. COMM'N, FEDERAL MARITIME COMMISSION STRATEGIC PLAN FY 2018-2022 26 (2018) (containing the former Strategic Plan with a target of 50-54% and 65-69% respectively).
[33] *See* Shipping Act of 1984, Pub. L. No. 98-237, § 6(c)(1), 98 Stat. 67 (1984).
[34] *FMC Strategic Plan 2022*, *supra* note 15, at 7.
[35] 46 U.S.C. § 40102(5).
[36] *FMC Strategic Plan 2022*, *supra* note 15, at 8.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 21.
[40] *Id.* at 5.
[41] *FMC Strategic Plan 2022*, *supra* note 15, at 8.

taking action to end unlawful, unfair, and deceptive practices, preventing public harm through licensing and financial responsibility, enhancing public awareness of agency resources, remedies, and regulatory requirements through education and outreach, and impartially and timely resolving international shipping disputes through alternative dispute resolution (ADR).[42] The FMC has incurred the responsibility of ensuring passenger vessel operators obtain proper licensure, as well as informing the public of its existence and the remedies available.

Strategic Objective 2.1 is the action-oriented objective to identify and take action to end unlawful, unfair, and deceptive practices.[43] Through gathering intelligence, analyzing trade data, and developing a new audit program, the FMC seeks to protect shippers from violations of the Shipping Act.[44] The FMC does this through analyzing tariffs and authorized pricing mechanisms to ensure compliance with the Shipping Act.[45] The FMC has the power to either prosecute violations formally or enter into settlement arrangements with violators to get them to comply through lesser consequences and red tape.[46]

The FMC also formed the National Shipper Advisory Committee, composed of twelve importers and twelve exporters.[47] This board is meant to advise the FMC on "policies relating to the competitiveness, reliability, integrity, and fairness of the international ocean freight delivery system."[48] The FMC is also testing a new approach to assess this objective by measuring the percentage of businesses that receive shipping licenses through the FMC's assistance power, compared to those who are forced into compliance through enforcement actions.[49] Over the Strategic Plan period, the Commission plans to monitor this percentage for changes to better tailor their activities.[50]

The FMC currently measures its performance of this objective by two metrics. The first metric involves tracking the percentage of its enforcement actions that result in a compliance audit, judgment, settlement, default judgment, or compromise agreement.[51] They currently forecast a nearly seventy-eight percent success rate in this measurement. The second metric is the percentage of unlicensed Ocean Transportation Intermediaries (OTIs) that submit a license application within one year of being contacted by the FMC.[52] The Commission seeks to grow this from ten percent to twenty-five percent by 2026.[53]

Along the same lines as the previous Strategic Objective, Strategic Objective 2.2 also pertains to licensure. Non-Vessel-Operating Common Carriers (NVOCCs), OTI's, and freight

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[42] *Id.* at 8-9.
[43] *Id.* at 9.
[44] *Id.*
[45] *Id.*
[46] *FMC Strategic Plan 2022*, *supra* note 15.
[47] *See id.*; *National Shipper Advisory Committee (NSAC)*, FED. MAR. COMM'N, https://www.fmc.gov/industry-oversight/national-shipper-advisory-committee/ (last visited Oct. 22, 2023) [hereinafter *NSAC Info Page*].
[48] *Id.*
[49] *FMC Strategic Plan 2022*, *supra* note 15, at 9.
[50] *Id.*
[51] *Id.* at 22.
[52] *Id.*
[53] *Id.*

forwarders are issued certificates by the Commission that detail their financial responsibility in the case of voyage cancellation or death/injury to passengers and bystanders.[54] These licenses can be shown to the public, giving them increased confidence. The FMC measures progress towards this Strategic Goal by determining the percentage of OTI license applications that are given a decision within sixty calendar days.[55] Additionally, the Commission tracks the number of renewal applications completed within a three-year deadline.[56] The targets for both metrics are seventy-five percent.[57] The final measure for this objective is the percentage of Passenger Vehicle Operators who have the full, required financial coverage to protect against losses resulting from nonperformance of a contract or casualty damages.[58] The Commission's target is a ninety-five percent satisfaction rate.[59]

Strategic Objective 2.3 covers public outreach. The FMC emphasizes that all industry stakeholders must be informed of their responsibilities and remedies under the Shipping Act.[60] To accomplish this goal, the Commission aims to simplify all content on its website by using ordinary language and is currently considering making public service announcements (PSAs) in online publications or on social media platforms.[61] The Commission's metric for success is the percentage of issuances, orders, and reports available through their website within five working days of receipt, and they have a ninety to ninety-two percent target.[62] This has increased from the 2018 Strategic Plan where the target was between eighty-two and ninety percent.[63]

The final Strategic Objective regards alternative dispute resolution. The FMC offers ADR services to parties that experience issues with ocean shipments.[64] The Commission also offers a formal complaint procedure, where cases are presided over by an administrative law judge.[65] Alternatively, informal complaints may be filed with the FMC if the amount of compensation

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[54] *FMC Strategic Plan 2022*, *supra* note 15, at 11.
[55] *Id.* at 22.
[56] *Id.* at 23.
[57] *Id.* at 22-23.
[58] *Id.* at 23.
[59] *FMC Strategic Plan 2022*, *supra* note 15.
[60] *Id.* at 12.
[61] *Id.* (Named outreach opportunities include National Moving Month with trade associations, peak cruising season/vacation times with AARP, AAA, and National Consumer Protection Week. They are also seeking language capabilities to better communicate in non-English speaking communities). *But see* personal communications with the Commission regarding information relevant to this article about their activities which resulted in no response despite follow-ups via telephone and e-mail.
[62] *Id.* at 23.
[63] FED. MAR. COMM'N, FEDERAL MARITIME COMMISSION STRATEGIC PLAN FY 2018-2022 26 (2018) [hereinafter *FMC Strategic Plan 2018*].
[64] *FMC Strategic Plan 2022*, *supra* note 15, at 14.
[65] *Id.*; *see generally FMC Reading Room Proceedings Search*, FED. MAR. COMM'N, https://www2.fmc.gov/readingroom/ (last visited Oct. 22, 2023) (containing documentation of all proceedings held in front of the FMC starting in 1986) [hereinafter *FMC Reading Room Proceedings Search*].

sought is less than $50,000.[66] At any time in the proceedings; however, a party may request ADR sponsored by the Commission.[67] The measures of success for this objective are 1) the percent of ADR matters resolved within six months of commencement in front of the FMC, and 2) the percent of formal complaints or commission-initiated investigations completed within two years of filing.[68] The target for the first metric is between sixty-seven and eighty percent; and seventy-two percent for the second metric.[69] Both of these targets are higher than the 2018 Strategic Plan targets.[70]

This second Strategic Goal would also benefit from changes and improvements. Strategic Goal 2.1(b) aims for unlicensed OTIs to submit their application within a year of being contacted by the Commission and has a target of between ten to twenty-five percent, which is lower than other targets in the Strategic Plan document.[71] Consider a scenario in which trucking companies could operate without a license, and only twenty-five percent of them would even apply for a license within a year from being contacted by the relevant regulatory body. In the Commission's defense, their validation requirement is based on fiscal year reporting, making it possible that on occasion, an OTI would be contacted at the end of a fiscal year without sufficient time to apply for a license.[72] However, if this is a regular occurrence, the FMC would be wise to change either its procedure on the timing of reaching out to unlicensed OTIs or by changing to a full calendar year measurement system. If a governing body is content with seventy-five percent of its advisement being neglected for over a year, then that speaks poorly of the body's use of authority. The FMC could achieve increased levels of license applications by changing their date format, as well as applying more pressure to unlicensed OTIs. Adding a small, but noticeable, civil penalty to any OTI that has not applied for a license would encourage more applications as well as build the Commission's influence.

Another, albeit more minor, critique of the goal is that of Strategic Objective 2.3. The objective pertains to outreach but has no publicized measure of the result of the outreach. The FMC would benefit from tracking data such as view count, page visits (and the percentage change during peak travel season), or improvements in public perception of the Commission. In a world filled with numerous similar metrics, this data is easily trackable and could be used to tailor advertising, optimize the production and dissemination of PSAs, and offer many other insights.

III. PART II: ALLIANCES AND ANTITRUST IMPLICATIONS

An oligopoly is a market that is dominated by a few sellers who can control prices.[73] Oligopolies have a negative reputation because they result in higher prices, increase difficulty for

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[66] *FMC Strategic Plan 2022*, *supra* note 15, at 14 (The phrase, "similar to small claims matters in local courts," gives the impression that the procedural and evidentiary requirements are lower than other proceedings in front of other FMC adjudicative bodies).
[67] *Id.*
[68] *Id.* at 24.
[69] *Id.*
[70] *FMC Strategic Plan 2018*, *supra* note 63, at 26.
[71] *FMC Strategic Plan 2022*, *supra* note 15.
[72] *Id.* at 22.
[73] *Oligopoly*, BLACK'S LAW DICTIONARY (11th ed. 2019).

newcomers to enter the market, and do not foster innovation.[74] In the absence of competitive pressure forcing businesses to develop or improve their offerings to consumers, business stagnates. Oligopolies represent a concerning concentration of power within a market, where a select few entities hold the reins and can manipulate prices to their advantage. This control over pricing dynamics almost surely results in higher costs that flow to the consumer. However, there is another consequence of oligopolies: they create barriers to entry for new businesses trying to join the market. Many governments have at least one organization or agency devoted to regulating antitrust issues,[75] and there is a large antitrust issue lurking in the marine shipping industry.

Liner alliances have started to seize more control over the marine shipping market. These alliances join with vessel-sharing agreements and operational cooperation to make business flow smoother.[76] There are three alliances: 2M, Ocean Alliance, and THE Alliance.[77] Eleven ship-owning companies are in or affiliated with an alliance.[78]

2M is made up of MSC (Mediterranean Shipping Co.) and Maersk,[79] the first and second largest shippers by TEUs (Twenty-foot equivalent units), respectively.[80] This alliance is currently under a ten-year vessel-sharing agreement that covers transatlantic, transpacific, and Asia-Europe routes, ending in 2025.[81] ZIM Integrated Shipping Services also has a strategic cooperation agreement with 2M.[82] 2M controls the plurality of trade lanes on Transatlantic routes at forty-one point seven percent, and controls twenty-seven percent and thirty-six percent of trade on the Transpacific and Asia-Europe routes, respectively.[83] On January 25, 2023, 2M announced that it would discontinue the alliance to allow both companies to "pursue their individual strategies."[84] This is likely to lead to an increase in competition between the two shipping giants in the future.

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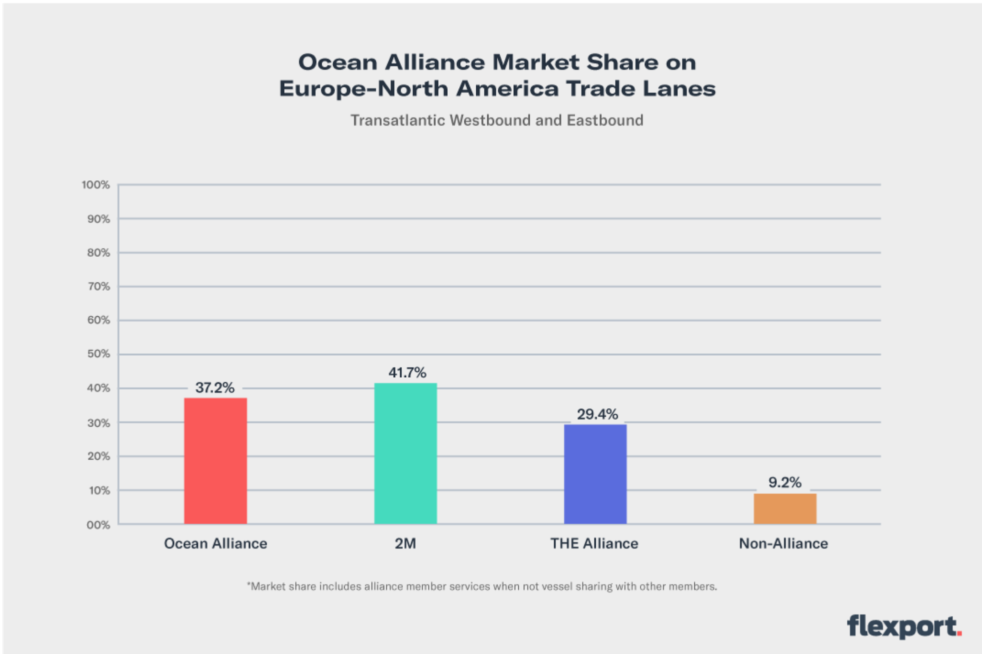
[74] Somer Anderson, *Oligopoly: Meaning and Characteristics in a Market*, INVESTOPEDIA (Mar. 28, 2023), https://www.investopedia.com/terms/o/oligopoly.asp.
[75] Department of Justice, *Antitrust Sites Worldwide*, DEPARTMENT OF JUSTICE (Feb. 27, 2024), https://www.justice.gov/atr/antitrust-sites-worldwide.
[76] Nerijus Poskus, *Ocean Alliances: Everything You Need to Know*, FLEXPORT (Dec. 7, 2022), https://www.flexport.com/blog/ocean-alliances-everything-you-need-to-know/ (Vessel sharing agreements allow space on vessels to be used by the other companies in the alliance. For instance, if MSC contracted with a seller of widgets but runs out of space on their vessel they can let the remainder of containers go on a Maersk vessel going the same direction. While not done on each trip the flexibility this allows is beneficial to shippers.) [hereinafter *Flexport Alliances Overview*].
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] ALPHALINER, https://alphaliner.axsmarine.com/PublicTop100/ (last visited Oct. 22, 2023) [hereinafter *Alphaliner Top 100*]; *see also* https://alphaliner.axsmarine.com/PublicTop100/Alphaliner-TOP100.pdf (follow "red info button" and then "How is the Top 100 Computed?") (pdf containing methodology of computation and other relevant information).
[81] *Flexport Alliances Overview*, *supra* note 76.
[82] *Id.*
[83] *Id.*
[84] *Maersk and MSC to discontinue 2M alliance in 2025*, MAERSK (Jan. 25, 2023), https://www.maersk.com/news/articles/2023/01/25/maersk-and-msc-to-discontinue-2m-alliance-in-2025.

This increased competition will hopefully benefit the whole industry. Notably, all members and partners of 2M operate Transpacific and Transatlantic services outside of the alliance already.[85]



[86]

The Ocean Alliance is comprised of COSCO, Evergreen, CMA CGM, and OOCL.[87] Ocean was formed in 2017 and their current agreement will last until 2027.[88] Ocean received approval from the FMC and went into effect on October 24, 2016.[89] The Ocean Alliance controls the plurality of trade on both the Transpacific and Asia-Europe trade routes at about thirty-six percent each.[90] Ocean also controls over thirty-seven percent of trade on Transatlantic routes as well.[91] CMA CGM, and COSCO conduct Transpacific services outside the Ocean Alliance.[92]

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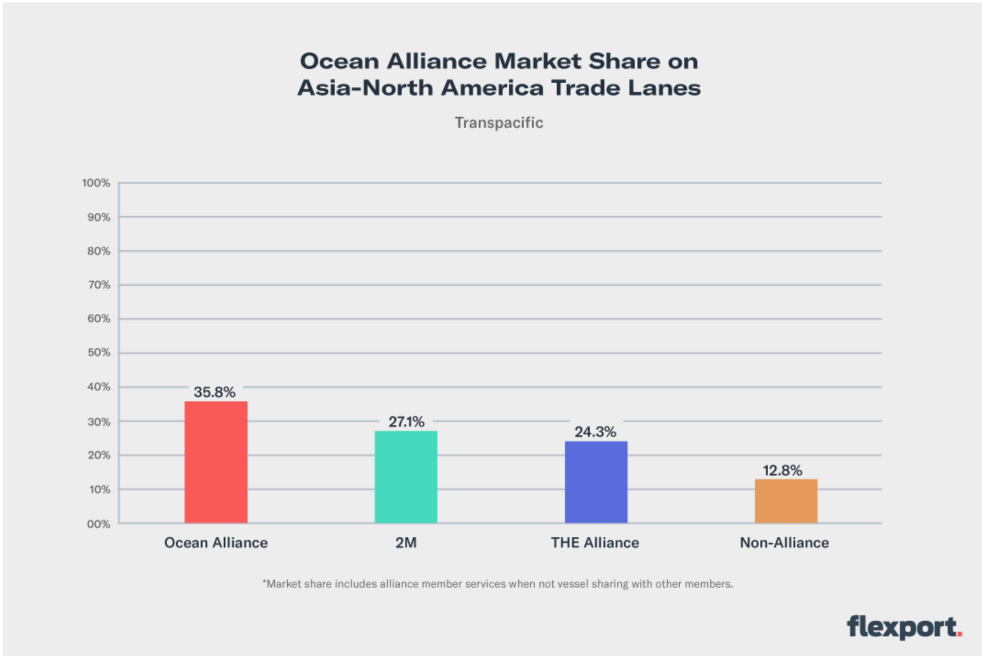
[85] *Flexport Alliances Overview*, *supra* note 76.
[86] *Id.*
[87] *Id.*
[88] Surupasree Sarmmah and Abigail Munroe, *Shipping alliances: Advantages [+Hapag Lloyd & Maersk update '24]*, CONTAINER XCHANGE (Feb. 6, 2023), https://www.container-xchange.com/blog/shipping-alliances/ [hereinafter *Container Xchange Alliances Overview*].
[89] John DeCrosta, *OCEAN Alliance Will Become Effective Monday, October 24, 2016*, FEDERAL MARITIME COMMISSION (Oct. 21, 2016), https://www.fmc.gov/ocean-alliance-will-become-effective-monday-october-24-2016/.
[90] *Flexport Alliances Overview*, *supra* note 76.
[91] *Id.*
[92] *Id.*



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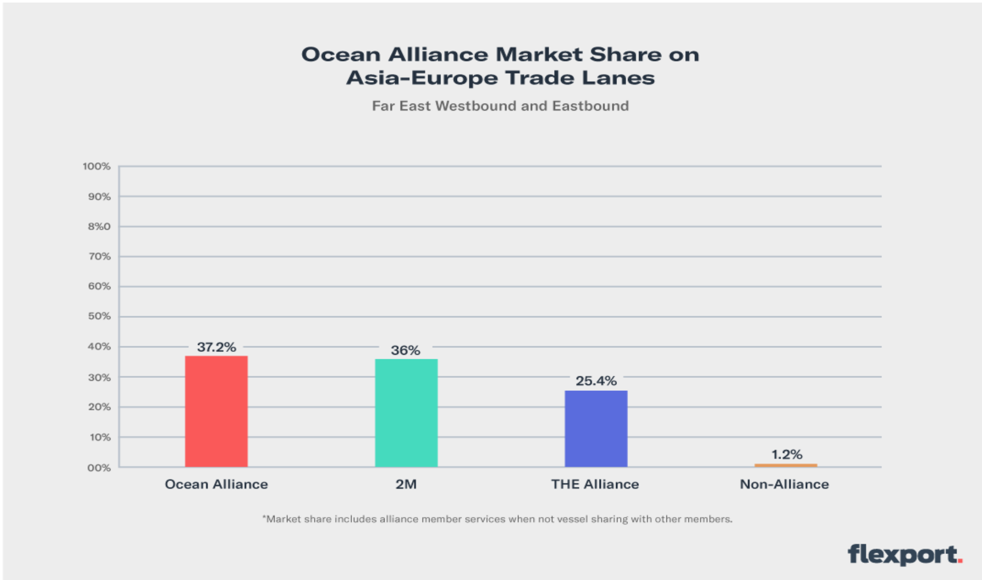
THE Alliance is composed of Hapag-Lloyd, HMM, ONE, and YML.[94] It formed in 2017, and there is no current date of discontinuation.[95] THE Alliance lacks a plurality of market share on any major trade routes, but makes up for that in consistency and unity, controlling more than twenty-four percent of trade on each of the following trade routes: the Transpacific, Asia-Europe, and the Transatlantic.[96] However, the constituent companies are restricted from contracting outside the alliance on the Asia-Europe trade route.[97]

[93] *Id.*
[94] *Id.*
[95] *Container Xchange Alliances Overview*, *supra* note 88.
[96] *Flexport Alliances Overview*, *supra* note 76.
[97] *Id.*



[98]

Combined, these three alliances control between eighty-seven and ninety-eight percent of the market share on major routes.[99] However, collaboration extends beyond internal alliance cooperation; there exists a precedent for cooperation between the alliances as well. In 2018, Hapag-Lloyd, Maersk, CMA CGM, MSC, and ONE (members of each of the major alliances[100]) established a non-profit container shipping association.[101] The goal of this association is to promote common technological standards within the shipping industry.[102] While open to new members, the organization has not commented on the cost of implementing any new procedures, leaving many to question if smaller companies can afford to participate.[103]

A. Benefits and Burdens

There are some benefits to the alliance system. Vessel-sharing agreements provide reassurance to consumers. For example, refrigeration space on one vessel is sufficiently similar to the refrigeration space on another vessel owned by an alliance member.[104] Another benefit of alliances is a general knowledge of the quality of services offered in an alliance.[105] This level of

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[98] *Id.*
[99] *See Flexport Alliances Overview*, *supra* note 76, Figures 2-4.
[100] *See Alphaliner Top 100*, *supra* note 79; *see also Flexport Alliances Overview, supra* note 76 (These shippers alone account for 60% of market share).
[101] *Hapag-Lloyd and others plan to establish a container shipping association*, HAPAG-LLOYD (Nov. 15, 2018), https://www.hapag-lloyd.com/en/company/press/releases/2018/11/new-container-shipping-association.html.
[102] *Id.*
[103] *Id.*
[104] *See Container Xchange Alliances Overview*, *supra* note 87 (For an explanation of how a vessel sharing agreement would work. Also due to the confidential nature of specific charter parties the potential premium paid for a vessel sharing agreement is unknown. It may be a fringe benefit that is given complimentary to the consumer, or they may be made to pay a premium in order to not have to contract directly with the other company).
[105] *Id.*

predictability is even more evident on the Asai-Europe route for THE alliance as it allows a contracting party to be able to predict the quality and offerings of any other THE carrier on that route. Because of this added regularity, shippers can make their decision on other distinct factors such as the demurrage and detention fees that each company offers. Another alleged benefit of alliances is the bargaining power they possess.[106] Carriers can band together against ports to negotiate lower tariff rates and better discounts based on volume.

Despite these benefits, the insidious nature of the Liner system is also clear. Wan Hai Lines, the eleventh-largest carrier, is the largest non-alliance affiliated carrier; it has less than two percent of the global TEU capacity.[107] There is a massive start-up cost in this industry, with one vessel often costing in the tens to hundreds of millions of dollars.[108] Assuming the most conservative pricing, and even after applying a thirty-five percent discount, the price to buy a fleet of vessels equivalent to Wan Hai's capacity would amount to $2.8 billion.[109] Suppose Wan Hai's capacity is the minimum threshold for alliances to acknowledge a company. Then, a new company would need to pay more than $3 billion just to start. This is one of the largest and most well-known burdens of an oligopoly–they have an almost insurmountable bar to newcomers to the industry. The balance of market share seems, barring bankruptcy and liquidation, largely concrete. Newcomers and greater competition in the industry would apply downward pricing pressure. However, words alone do not make an oligopoly.

B. Antitrust and Regulations on the Shipping Industry

The Department of Justice's Antitrust Division uses the Herfindahl-Hirschman Index (HHI) to determine the level of concentration in a market.[110] The index is on a scale of 0 to 10,000, and it determines the competition in a market by considering the number of firms in an area and the market share each of those firms have.[111] The fact that the index tracks two differing metrics means it increases in two instances: when the number of companies decreases, and when the

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[106] Ashley B. Mendoza, *What are Shipping Alliances and What are Their Importance?*, SHIP LILLY (Jan. 21, 2020), https://www.shiplilly.com/blog/what-are-shipping-alliances-and-whats-their-importance/.

[107] *Alphaliner Top 100*, *supra* note 80 (Zim is technically not in an alliance but has a strategic agreement with 2M).

[108] The most expensive cargo ship built is the Maersk Triple-E class, they carry 18,000 TEU and cost $190 Million. *See* Ship Technology, *Triple-E Class Container Ship, Denmark*, SHIP TECHNOLOGY (May 1, 2020), https://www.ship-technology.com/projects/triple-e-class-container-ship/?cf-view.

[109] *See Alphaliner Top 100*, *supra* note 80 (Wan Hai TEU capacity is 470177); William Murray, *Economies of Scale in Container Ship Costs*, US MERCHANT MARINE ACADEMY (May 3, 2016), https://www.usmma.edu/academics/%E2%80%9Ceconomies-scale-container-ship-costs%E2%80%9D-midshipman-william-murray-class-2016 (calculating the cost per TEU for large vessels to be $9,298.82) ((470177*9298.82)*.65 = 2,841,859,339.24)

[110] Department of Justice, *Herfindahl-Hirschman Index*, DEPARTMENT OF JUSTICE (July 31, 2018), https://www.justice.gov/atr/herfindahl-hirschman-index [hereinafter *DOJ HHI Information Page*].

[111] *Id.* A market with thousands of small companies with very little market share would result in a 0, a market where there is a total monopoly would result in 10,000.

market share between companies becomes less equal.[112] The department considers HHIs between 1,000 and 1,800 moderately-concentrated markets, and anything above that is a highly-concentrated market.[113] The index is a formula that squares the market share of each company and adds them together (Company A Market Share^2 + Company B Market Share^2 + Company C Market Share^2 … = HHI).[114] There is a rebuttable presumption that any transaction that increases the HHI by more than 200 points and results in a highly-concentrated market will enhance the market power of those corporations, resulting in increased scrutiny.[115]

In the shipping industry, the more TEU capacity a company owns, the larger the company. The HHI for the shipping market considering the top thirty carriers is 1,029.6.[116] This HHI is the baseline of the shipping market, a safely unconcentrated market.[117] This conclusion changes when considering that alliances exercise a great degree of control over the major shipping routes. The HHI for the Transpacific route is 2,606.54, a highly concentrated market.[118] The Asia-Europe route is even more concentrated at an HHI of 3,325, and the Transatlantic route is the least competitive at 3,987.09.[119] These numbers are higher than the cutoff and tend to show that major trade routes are inherently uncompetitive due to the influence that alliances have on the industry. With 2M's dissolution in 2025, barring any major changes, the HHI for the routes will be 2,239.34 for the Transpacific, 2,678.44 for the Asia-Europe route, and 2,248.2 for the Transatlantic route.[120] This pushes two of the routes into the moderately-concentrated range which is deemed safe by the Department of Justice. If all alliances break up, the HHI would be much closer to the baseline of 1,029.6, which represents the entire shipping industry. A world where there are no shipping alliances would mean large amounts of competition that would see developments benefiting shippers and ultimately, consumers.

So, what can the FMC do to address the uncompetitive market and unfair negotiation power that alliances possess? Strategic Goal 1 of the FMC focuses on maintaining a competitive and reliable international ocean transportation supply system.[121] While the FMC does a good job of ensuring the ocean transportation system is reliable, the industry is flatly uncompetitive. The Transatlantic and Transpacific routes are over the HHI level for highly concentrated markets. Additionally, as illustrated above, one of the alleged benefits of the alliance system is the

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[112] *Id.*
[113] *Id.*
[114] *Id.* (The example the website uses is "For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 (302 + 302 + 202 + 202 = 2,600)").
[115] U.S. Department of Justice & FTC, Horizontal Merger Guidelines § 5.3 (2010).
[116] *See Alphaliner Top 100*, *supra* note 80 (The choice to choose the top 30 carriers is because the share of TEU for smaller carriers becomes 0.2% and anything less would stop affecting the HHI. A percentage of 0.2 would result in an additional 0.04 to the HHI and even if the remaining 70 companies all had 0.2% market share they, together would only add 2.8 to the HHI, a negligible amount).
[117] *See* Horizontal Merger Guidelines § 5.3.
[118] *See Flexport Alliances Overview*, *supra* note 76 (for route percentages).
[119] *See id.*
[120] Methodology for finding the new HHI was using the current HHI formula with the market share for 2M cut in half.
[121] *FMC Strategic Plan 2022*, *supra* note 15.

negotiation power that the alliances can use to get lowered tariff rates and prices.[122] A broad reading of Strategic Goal 1.2 should disallow this behavior.[123] All vessels should pay tariffs and other fees when entering a port; these are necessary expenses, and should be addressed officially if alliances receive less for these services. The analysis of the anticompetitive nature, as is relevant to this comment, relied purely on market share. The factor of unfair pricing is another factor tending to show that the market is uncompetitive.[124]

The FMC is not using its powers effectively in addressing the issue of OTIs operating without a license.[125] The FMC fails to use its authority to the greatest effect in the majority of areas, the most relevant being alliances. Looking back to 2014, the discussion below exemplifies how government regulation has prevented the forming of an alliance.

C. P3 and China's MOFCOM

In 2013 Maersk, MSC, and CMA CGM wanted to start an alliance called the P3 alliance.[126] This alliance, if allowed, would have controlled more than forty-seven percent of today's TEU market.[127] It would have operated on all three of the major shipping routes.[128] The proposal emphasized that there would be "operational, but not commercial cooperation."[129] The aim was to leave sales, marketing, and customer service out of the agreement.[130]

To finalize the alliance's formation in 2014, P3 needed approval from the FMC, the EU Commission, China's Ministry of Commerce (MOFCOM or Ministry), and Korea's Fair-Trade Commission (KFTC).[131] The debate regarding the proposed alliance was contentious in Korea and the United States. The KFTC opened an investigation in which the Korean Shipowners' Association lodged objections, citing the Korean Free Trade Act.[132] The FMC approved of the dissent of one of its commissioners, Richard Lidinsky.[133] He stated:

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122 *Id.*
123 *Id.*
124 *See* Discussion *supra* Part I.
125 *See id.*
126 Frederic Depoortere et. al, *Navigating Chinese Merger Control: MOFCOM Prohibits P3 Shipping Alliance*, JDSUPRA (June 20, 2014), https://www.jdsupra.com/legalnews/navigating-chinese-merger-control-mofc-63495/ [hereinafter *Skadden P3 Analysis*].
127 *Alphaliner Top 100*, *supra* note 80.
128 *Skadden P3 Analysis*, *supra* note 123.
129 *Id.* (citing Maersk Line, *Maersk Line, MSC and CMA CGM to Establish an Operational Alliance*, MAERSK LINE (June 18, 2013) https://www.maersk.com/news/articles/2013/06/18/maersk-line-msc-and-cma-cgm-to-establish-an-operational-alliance (internal quotations omitted).
130 *Skadden P3 Analysis*, *supra* note 126.
131 *Id.*
132 *Id.*
133 Richard Lidinsky, *Comments of Commissioner Richard A. Lidinsky, Jr. on Proposed P3 Vessel Sharing Agreement, Federal Maritime Commission*, FEDERAL MARITIME COMMISSION (Mar. 24, 2014), https://www.fmc.gov/comments-of-commissioner-richard-a-lidinsky-jr-on-proposed-p3-vessel-sharing-agreement/.

> "The articulate and experienced comments of American parties involved in our international waterborne trade should have been given greater weight by staff in analyzing the impact of this agreement. However, since the Agency has in essence permitted over 1600 carrier agreements in the last 30 years — never stopping one — and sees nothing potentially harmful with the top three companies in an unprecedented combination, then perhaps the time is at hand for a thorough Executive and Congressional review of the 1984 Act to see how U.S. interests are being served by its current procedures."[134]

Lidinsky called the alliance a merger, despite the companies' claim that they would remain separate.[135] He warned that allowing the agreement to come into effect would create a precedent that would hamper the regulatory authority of all countries.[136] Approval would result in enriching the largest shipping corporations to the disadvantage of all the others, forcing other companies to merge in order to compete.[137] The EU opted not to investigate, effectively granting approval of the alliance.[138] However, the most impactful development was MOFCOM's decision to prohibit the formation of P3.

MOFCOM has its roots in the Ministry of Trade of the Central People's Government, established in 1949.[139] Following several name changes, it was ultimately named the Ministry of Commerce in 2003.[140] Today, the Ministry is responsible for creating policy regarding trade, import and export regulations, and maintaining market competition.[141]

MOFCOM's decision was based on five factors that it found proved the alliance would make the market uncompetitive. First, this vessel-sharing agreement extended beyond simple cooperation and became a joint operation.[142] The Ministry found the function of the businesses would only remain independent where the operations of individual vessels were concerned.[143] All the parties stood to significantly grow their market share and therefore, their negotiating power.[144]

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134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.*
138 *Skadden P3 Analysis*, *supra* note 126. The following is conjecture and out of the scope of the paper, but it is intriguing that the US, Korea, and China all had regulatory issues with P3, but the EU did not even open an investigation. Maersk, MSC, and CMA CGM, just so happen to be shipping companies originating from Denmark, Italy, and France respectively.
139 Ministry of Commerce People's Republic of China, *The History*, MINISTRY OF COMMERCE PRC, (Dec. 7, 2010), http://english.mofcom.gov.cn/history.shtml (note this website is a website run by the Chinese government and does not use the Https protocol. Web browsers have a high likelihood of giving a security warning when this site is accessed).
140 *Id.*
141 Asia Society Policy Institute, *Decoding Chinese Politics: Economy and Trade*, ASIA SOCIETY POLICY INSTITUTE, https://asiasociety.org/policy-institute/decoding-chinese-politics?policy=economy-and-trade&group=organizations&size=rank&connection=personal (last visited Oct. 22, 2023).
142 *Skadden P3 Analysis*, *supra* note 126.
143 *Id.*
144 *Id.*

Along this line, the Ministry highlighted that the proposed transaction would cause a jump of HHI from 890 to 2,240.[145] As previously detailed, such a substantial increase should spark the involvement of U.S. antitrust regulators because the increase was over 200 points and resulted in a "highly-concentrated" market.[146] The Ministry asserted that the formation of P3 would increase barriers to entry to the shipping market as well as squeeze development for competitors in the market.[147] P3's subsequent negotiations with Chinese regulators failed. Consequently, the P3 alliance did not form.[148]

Commentators state that the P3 decision was made with considerations of economic protectionism in mind.[149] The China Shipowners' Association actively lobbied against P3, as the increased market share on shipping routes would result in higher shipping costs.[150] However, those commentators acknowledge that protectionism was not the only factor, as evidenced by the KFTC and FMC's dissents towards the formation of the alliance.[151]

The P3 decision illustrates the differing factors required for successful alliance formation. The shipping industry's stakeholders include countries, consumers, and corporations. The rejection of P3 did not unduly hamper the three companies. CMA CGM would later join the Ocean Alliance and Maersk, and MSC would form 2M. Maersk and MSC also had tremendous amounts of revenue growth, from $40.3 billion to $81.5 billion and $2.9 billion to $4 billion, respectively, between the years of 2015 and 2023.[152] Clearly, some notable stakeholders should be consulted including Korea due to its large ship-building capacity, China for its substantial market share in the production of goods, and Europe and the United States for their large consumer base and export market. The FMC, as the American regulatory body, possesses considerable potential to help make the marine shipping industry more competitive. If carriers conduct business in the U.S.; as China did with the P3 alliance, the U.S. can become a bulwark against anti-competitive practice by leveraging its legislative tools.

IV. PART III: LOOKING FORWARD; HOW THE FMC CAN BE BETTER UTILIZED

So, what tools does the FMC have, and how can it wield them to achieve its stated missions? The FMC has three main categories of power: regulatory, adjudication, and public influence. The FMC exercises its powers of adjudication sufficiently, reaching timely and

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[145] *Id.*
[146] *See* discussion *supra* Part II (for information regarding HHI).
[147] *Skadden P3 Analysis*, *supra* note 126.
[148] *See id.*
[149] *Id.*
[150] *Id.* (Noting that the alliance would single handedly control between 65 and 70% of the market share on major routes. This alone represents an HHI on some routes of 4,900 without accounting for the actions other carriers would have taken in order to combat this).
[151] *Id.*
[152] *See* Macrotrends, *A.P Moller-Maersk Revenue 2015-2023*, MACROTRENDS, https://www.macrotrends.net/stocks/charts/AMKBY/ap-moller-maersk/revenue# (last visited Oct. 22, 2023); Macrotrends, *MSC Industrial Direct Revenue 2010-2023*, MACROTRENDS, https://www.macrotrends.net/stocks/charts/MSM/msc-industrial-direct/revenue# (last visited Oct. 22, 2023) (the majority of quarters both companies experienced year over year growth).

satisfactory conclusions in its ADR cases, informal cases, and formal proceedings. Alternatively, the regulatory power is not being used to its maximum potential. Congress gave the FMC broad regulatory powers, and it needs to better-utilize these important powers.

Starting with the Strategic Plan, some goals would benefit from new or tweaked objectives. There should be a new Strategic Objective 1.3 that would track the percentage of agreements that include actionable info, market-distorting behavior, and joint negotiation provisions over time. This information would ensure that its methods could be tracked for usefulness. If agreements have trended downward, then it indicates the FMC's encouragement is productive. However, if there is no change in frequency or if there is an increase in agreements filed with objectionable material, then the FMC would know to tailor their actions for better results.

This change goes hand in hand with a change to Strategic Objective 2.3. As previously stated, the FMC should use the ease of access to content impression data to improve its offerings to the public. This data has the potential to provide insight into how to craft their communications further. The U.S. Chemical Safety and Hazard Investigation Board's YouTube channel is a good example of how PSAs can reach a large viewer base, evidenced by the number of views on their incident investigation videos.[153] The channel's videos have high levels of production value of animated explanations of accidents, and instruct viewers on how to avoid industrial accidents. These videos have millions of views! Members of the public are drawn to these interesting, animated videos, and they learn about the Chemical Safety Board and its mission. While the FMC is unlikely to have animated videos with explosions, their current YouTube channel is lacking, offering only rebroadcasts of advisory committee meetings via Zoom recordings.[154] Because the FMC (as it pertains to shipping) likely affects the average member of the public, it should depict its process in an engaging way to increase the public's awareness of the Commission.

Potential changes could include publicizing the requirements for agreements in plain language across platforms frequented by carriers and OTIs. A process would entail publishing the requirements not just on the FMC website, but also on YouTube, in shipping publications, and at conferences where shippers, carriers, insurers, and attorneys in the maritime space are likely to be present. In-person promotional methods can take a variety of means like pamphlets and presentations. Handing out surveys could provide data on the quantity and quality of people's initial knowledge of the FMC and its services. Later, the FMC can track increases in FMC page visits, filings of complaints in front of the FMC, and applications for licenses. Analyzing this data can identify the most effective outreach methods to drive further iterations. The use of the adjudicative body of the FMC is sure to see an uptick in use once more clients, and their attorneys, learn about the organized procedure and relatively quick decisions the FMC offers.

The FMC lacks force in using its regulatory power for the regulation of shipping agreements and alliances. The FMC seems content in letting the majority of unlicensed OTIs go more than one year without applying for a license; that is appalling. This problem would be largely solved if the FMC becomes more aggressive in the means of ensuring compliance with regulations If it was publicized on the website, YouTube, publications, and conferences that the penalty for

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[153] USCSB, *USCSB Videos*, YOUTUBE, https://www.youtube.com/@USCSB/videos (last visited Oct. 22, 2023) (total views of 59.5 million).
[154] Federal Maritime Commission, *Federal Maritime Commission Videos*, YOUTUBE, https://www.youtube.com/@federalmaritimecommission7440/videos (last visited Oct. 22, 2023) (total views of 17,762).

operating without a license would be a $25,000-per-day civil penalty, there would surely be droves of operators sending applications in.[155]

Next, the Commission should be more assertive regarding the formation of Liner alliances. There are arguments for allowing current alliances to dissolve naturally. These current alliances could enact dissolution agreements like how 2M has announced its termination date. However, the FMC should generally forbid the creation of new alliances, as well as the addition of new members to existing alliances, particularly when such actions would lead to highly concentrated markets as determined by the HHI factors set forth by the U.S. Department of Justice. In the case of the current alliance system, the routes are severely concentrated. New members should not be allowed outside of significant showings of a compelling interest in the maritime shipping industry. This may sound heavy-handed, but public records of revenue indicate that shipping companies have grown year-over-year revenues, even when denied the opportunity to form their preferred alliance. China was able to use its power over exports to stop an impending disaster. The FMC has the influence of the United States' consumer base and can help stop the formation of mergers veiled as alliances.

The FMC should closely watch the proposed "non-profit container shipping association.". While not being formed for profit, the organization could change the industry. Given that sixty percent of the market share is represented by the current members, The FMC's utmost concern should be to exercise care to stop a secondary oligopoly controlling the technology used in the industry. The Commission should ensure that it considers the expertise and comments of all carriers and shippers, not just the largest ones. The marine shipping market should be structured to benefit all stakeholders, not just those large enough to be invited to the conference table.

Finally, the FMC should create a more robust system for port authorities, shippers, and other stakeholders to report noncompetitive actions and undue negotiation pressure from carriers. If the FMC is truly committed to holding the reins of alliance power, then these large corporations should not be able to negotiate lowered tariffs exclusively for themselves. All carriers, whether they owned a fleet of Triple-E ships or a small vessel with a capacity of 1,500 TEU, would be on a more level playing field. This added pressure of the FMC acting as a "watchdog" over carriers would ensure that negotiations are above board and contribute to developing a maritime trade system characterized by fairness and integrity.

Attorneys and their clients can, and should, utilize the FMC. The FMC's formal proceedings branch is underused—there are 509 entries in the database since 1986, averaging the filing of only 13 cases each year.[156] The FMC offers a space for not only arbitration and mediation, but also the filing of informal and formal suits outside of Federal courts. The FMC uses administrative law judges and has a clear process for arbitration, allowing clients greater flexibility. The ability to pause trials and start/resume arbitration is a notable benefit of bringing disputes before the FMC, as it would cut down on clients' litigation costs.

As it currently stands, the Federal Maritime Commission is an underutilized agency. Congress granted the FMC with broad powers to affect the marine shipping industry; yet it refuses to use these powers. The FMC plays a pivotal role as it is one of the four major regulatory bodies

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[155] This number was chosen as a mirror to the $25,000 a day penalty imposed by OPA 90; however, it is largely arbitrary and can be substituted for any number large enough to compel action of corporations.
[156] *FMC Reading Room Proceedings Search*, *supra* note 65.

concerning the marine shipping industry; it can single-handedly increase and maintain the levels of competition for all carriers. Competition is beneficial to all industries, especially those that affect the global population. Everyone would feel the lower costs that could be derived from a shipping industry with 500 fewer HHI points on some routes. As will be covered in a future comment, the FMC has shown that it can provide quick changes to foreign countries regarding trade. One can only hope that the Commission turns its attention towards carriers and Liner alliances and gives these entities the same treatment.