

**FEDERAL MARITIME COMMISSION**

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**SPECIAL REPORTING REQUIREMENTS FOR THE TRANSPACIFIC  
STABILIZATION AGREEMENT AND THE WESTBOUND TRANSPACIFIC  
STABILIZATION AGREEMENT**

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**ORDER**

**I. Background**

*a. The Transpacific Stabilization Agreement and Westbound Transpacific Stabilization Agreement (the "Agreements").*

The Transpacific Stabilization Agreement (TSA), Agreement No. 205-011223, is an agreement among international ocean common carriers filed with the Federal Maritime Commission (FMC or Commission) under Sections 4 and 5 of the Shipping Act of 1984, 46 U.S.C. §§ 40301 to 40302. Membership of the TSA is currently comprised of:

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| 1. American President Lines Ltd. & APL Co. Pte. Ltd.   | 8. Hapag-Lloyd A.G.                        |
| 2. A.P. Moller-Maersk A/S  | 9. Hyundai Merchant Marine Co., Ltd.       |
| 3. China Shipping Container Lines (Hong Kong) Company Limited & China Shipping Container Lines Company Limited | 10. Kawasaki Kisen Kaisha, Ltd.            |
| 4. CMA CGM S.A.  | 11. Mediterranean Shipping Company S.A.    |
| 5. COSCO Container Lines Company Ltd.  | 12. Nippon Yusen Kaisha                    |
| 6. Evergreen Line Joint Service Agreement  | 13. Orient Overseas Container Line Limited |
| 7. Hanjin Shipping Co., Ltd.   | 14. Yangming Marine Transport Corp.        |
|  | 15. Zim Integrated Shipping Services, Ltd. |

On December 18, 2008, TSA filed an amendment to increase its authority to include discussion and agreement on capacity deployed by the membership. See TSA Amendment No. 43. The TSA members withdrew Amendment No. 43 on February 10, 2009, in the face of numerous public comments opposing it.

On November 9, 2009, members of TSA filed a proposed amendment to add A.P. Moller-Maersk (Maersk), and the amendment became effective on December 24, 2009. See TSA Amendment No. 44. With addition of Maersk, TSA members now control approximately 94% of the Transpacific trade. Pursuant to the filed Agreement, TSA members have the authority to discuss the rates they charge their customers and agree on “voluntary” guidelines for service contracts and service contract rates. The members can also discuss general trade conditions. Two Commissioners, in their respective votes to take no action to prevent or delay Maersk joining TSA, noted the need to monitor the Agreement closely.<sup>1</sup>

The members of TSA then filed yet another amendment to the Agreement, authorizing the parties to discuss and agree on practices, terms, and conditions relating to environmental impact programs, including, among other things: “slow steaming;” “cold ironing;” use of alternative fuel types; the design of vessels, engines and propulsion systems; route planning; ballast water; navigational practices; and noise reduction. See TSA Amendment No. 45. When the Commission determined it would take no action to prevent or delay the effectiveness of Amendment No. 45, several

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<sup>1</sup> “Monitor very closely and I want to see each new monitoring report.” (Chairman Lidinsky) (emphasis in original); Commissioner Dye expressly agreed with the Chairman’s comments. Commissioner Brennan voted to take action to prevent or delay the amendment. Notation No. 09-112.

Commissioners noted the need to monitor the Agreement's activities closely.<sup>2</sup>

The Westbound Transpacific Stabilization Agreement (WTSA), is Agreement No. 205-011325. Membership of the WTSA is currently comprised of:

1. American President Lines Ltd. & APL Co. Pte. Ltd.
2. COSCO Container Lines Company Ltd.
3. Evergreen Line Joint Service Agreement
4. Hanjin Shipping Co., Ltd.
5. Hapag-Lloyd A.G.
6. Hyundai Merchant Marine Co., Ltd.
7. Kawasaki Kisen Kaisha, Ltd.
8. Nippon Yusen Kaisha
9. Orient Overseas Container Line Limited
10. Yangming Marine Transport Corp.

Each member of the WTSA is also a member of the TSA. WTSA members thus comprise two thirds of the membership of the TSA. WTSA members control between 60 and 65% of the Westbound trade.

*b. Recent capacity shortages and carrier practices.*

In 2009, the ocean shipping industry experienced its worst year since the first containership embarked in 1956. In response, ocean common carriers took out of service more than 575 vessels worldwide, or roughly 12 percent of the world's containership fleet. Utilization rates dropped from 95% to approximately 75%.

In the late fourth quarter of 2009, and continuing into 2010, cargo volumes shipped to the United States from Asia began to recover quickly and demand for U.S. exports to Asia surged. Yet ocean common carriers did not begin to redeploy vessels to the U.S.-Asia trade lanes until April 2010. Demand thus far outstripped supply, and as

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<sup>2</sup> "While I am voting to approve this amendment, the Commission will closely monitor the trans-Pacific trade to ensure that discussions permitted under the amendment will not result in capacity management and thus reduce transportation service." (Commissioner Khouri); "I encourage staff to closely monitor the capacity situation in the trans-Pacific trade to ensure that any coordinated slow steaming program discussed under this amendment does not function as a capacity management plan or adversely affect the international competitiveness of U.S. exporters." (Commissioner Dye); "Keep close watch..." (Chairman Lidinsky). Notation No. 10-03.

a result created serious supply chain disruptions for American importers and exporters. Shippers experienced cargo bookings under annual service contracts in the U.S.-Asia trades that were abruptly cancelled, denied, or rolled to a later voyage. Since December 2009, American importers and exporters have complained of serious shortages in vessel space for their shipments. Carriers who are members of the Transpacific Stabilization Agreement and Westbound Transpacific Stabilization Agreement each imposed similar or identical successions of incremental price increases. U.S. exporters experienced severe problems with the availability of shipping containers for their goods.

*c. Facts from FMC Fact-Finding No. 26*

In order to investigate the problems reported by shippers, the Commission instituted Fact-Finding 26, and charged the Fact Finding Officer (FFO) with conducting a “non-adjudicatory investigation into current conditions and practices in the U.S. liner trades, and into potential impediments to the flow of ocean-borne import and export trades.” Vessel Capacity and Equipment Availability in the United States Export and Import Liner Trades; Order of Investigation, 75 Fed. Reg. 13,761, 13,762 (March 17, 2010). The Commission further indicated that it would “use the information obtained in this investigation and recommendations of the [FFO] to determine its policies with respect to vessel and equipment capacity-related issues.” *Id.* Specifically, the Order identified as worthy of review the “[c]urrent practices and plans of VOCCs regarding the deployment of vessel capacity in the U.S. trades.” *Id.*

The FFO has publicly reported that shippers expressed the opinion that the ocean carriers continued to withhold vessel capacity from the market in a collective

effort to raise prices by leveraging access to scarce capacity and equipment. They believed that carrier practices involving rolled cargo, cancelled bookings, and successive price increases were in conflict with protections in their existing service contracts.

The FFO has also reported that carriers responded that they were reluctant to bring vessel capacity back into the U.S. trades quickly, given the precariousness of their financial positions and the lack of certainty that recent, unanticipated increases in import and export demand would be sustainable. They explained their capacity decisions as sound business decisions made by individual lines, and said they believed that problems with rolled cargo and cancelled bookings have been exacerbated as a result of multiple bookings by shippers.

In order to increase the Commission's monitoring requirements on carriers in the transpacific trades, the FFO recommended to the Commission, among other things, that it require the transcription of certain TSA and WTSA meetings, and the Commission does so pursuant to 46 C.F.R. 535, Subpart G and underlying statutory authority.

## **II. Application**

Requiring verbatim records of certain meetings conducted by TSA and WTSA will provide the Commission with critical information relating to whether member carriers are improperly discussing capacity, or otherwise acting in a manner that is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost.

*a. Transcript Requirements*

Transcripts required to be produced pursuant to this Order shall consist of verbatim reproductions of the conversations between TSA or WTSA members or their agents participating in the meetings specified below. Transcripts need not be under oath, but must be a full accounting of the entirety of meetings and any discussions conducted therein. Transcripts may be produced by stenographic, audio, or video records that are later transcribed to paper. At least one member of the agreement shall certify that each respective transcript is a full account of the meeting in its entirety. Transcripts shall be filed with the Commission in electronic form (text searchable), and shall be filed no later than 21 days following a meeting.

*b. Confidentiality and Privilege*

The transcripts provided by the TSA and WTSA may be redacted to preserve the confidentiality of the identity of the speaker. At the option of the members of the respective agreements, carriers may be identified by pseudonym (such as Carrier A, Carrier B, and so forth), and pseudonyms shall be constant throughout all transcripts recorded and provided to the Commission. Pursuant to 46 U.S.C. § 40104(b), these transcripts shall be filed confidentially with the Commission and will not be released to third parties or published. Counsel for the TSA or WTSA may redact those portions of the transcripts that are subject to protections for attorney work product or attorney client privilege, only if the advice or attorney work product that appears in the transcript is by counsel to the respective Agreement and to the Agreement as an entity. If any redactions are made, each redaction shall be listed in a redaction log that provides an

individual description adequate to allow the Commission to determine whether the redaction is legitimate.

THEREFORE, IT IS HEREBY **ORDERED** THAT, the members of the Transpacific Stabilization Agreement, Agreement No. 205-011223 file, in electronic format (text searchable) in the same manner as minutes and monitoring reports are currently filed with the Federal Maritime Commission, transcripts of the following meetings,<sup>3</sup> whether conducted by telephone, electronic or personal presence:

- Chief Executive Officer Committee Meetings;
- Revenue Policy Committee Meetings;
- Chief Executive Officer Executive Committee Meetings;
- Revenue Policy Executive Committee Meetings; and
- Any other meeting at which voluntary service contract guidelines, general rates increases, or surcharges are discussed or agreed upon, or where capacity information might be shared.

IT IS FURTHER **ORDERED** THAT, the members of the Westbound Transpacific Stabilization Agreement, Agreement No. 205-011325 file, in electronic format (text searchable) in the same manner as minutes and monitoring reports are currently filed with the Federal Maritime Commission, transcripts of the following meetings, whether conducted by telephone, electronic or personal presence:

- Chief Executive Officer Committee Meetings;
- Revenue Policy Committee Meetings;
- Any other meeting at which voluntary service contract guidelines, general rates increases, or surcharges are discussed or agreed upon or where capacity information might be shared.

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<sup>3</sup> The term "meeting" when used in this Order shall have the same definition as it does in 46 C.F.R. § 535.704.

FINALLY, IT IS **ORDERED** THAT, this special reporting requirement shall take effect for all meetings conducted on or after September 13, 2010, and shall terminate one calendar year from the date of service of this Order, unless the Commission determines to continue this Order further or discontinue it earlier. The members of TSA and WTSA need not produce minutes for meetings where transcripts will be produced and filed with the Commission. The members of TSA or WTSA may request that Commission staff members attend any meeting in lieu of TSA or WTSA preparing and filing a transcript for that meeting. If the Director of the Commission's Bureau of Trade Analysis, in consultation with the Commission's General Counsel, determines that Commission staff members will attend a meeting, TSA or WTSA may produce minutes instead of transcripts for those meetings or portions of meetings where Commission staff members are in attendance. All other requirements, regulations, and rules are unaffected by this Order.

By the Commission.

Karen V. Gregory  
Secretary