



The Bottom Line

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FMC ACTIONS ON OCEAN CHARGES

Summary

The Federal Maritime Commission (FMC) has established a new audit program and dedicated audit team 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.

Background

Initially adopted to incentivize cargo owners in the efficient collection and return of containers, demurrage and detention fees have been the target of significant displeasure in recent years. The FMC began an investigation into port demurrage and detention practices in December of 2016, responding to a petition following significant port disruption in 2015. The FMC received more than 110 comments to the petition and held public hearings. On March 5, 2018, the FMC voted to commence a fact-finding regarding demurrage and detention practices, selecting Commissioner Rebecca Dye to lead the study. Fact Finding #29 issued rules in 2020 that adopt, as the primary principle, the point that when assessing the reasonableness of demurrage and detention practices, the Commission will look to whether they are meeting their intended purpose as financial incentives to facilitate the prompt and efficient movement of freight.

Current Status

In an executive order issued July 9, President Biden said "United States policy that the answer to the rising power of foreign monopolies and cartels is not the tolerance of domestic monopolization, but rather the promotion of competition and innovation by firms small and large, at

home and worldwide." His stated aim is to protect conditions of fair competition in one or more ways including by:

- policing unfair, deceptive, and abusive business practices;
- resisting consolidation and promoting competition within industries through the independent oversight of mergers, acquisitions, and joint ventures;
- promulgating rules that promote competition, including the market entry of new competitors;
- promoting market transparency through compelled disclosure of information.

"In recent months, we have increased our scrutiny of the ocean carrier alliances to identify evidence of anticompetitive behavior regarding rates and capacity, and we will continue to do so as the COVID-19 and import surge crisis continues. We welcome the assistance and cooperation from other agencies, including the Department of Justice," FMC Chairman Daniel B. Maffei also said in an emailed statement. To emphasize its growing interest in ocean carriers' pricing policies, the U.S. Federal Maritime Commission is highlighting its partnership with the U.S. Department of Justice's Antitrust Division, which enforces America's competition laws. On Monday, the two agencies signed their first-ever memorandum of understanding on enforcement responsibilities, and they announced that they are strengthening their cooperation. Monday's MOU builds on the executive order by establishing a process for the FMC and the DOJ Antitrust Division to review "law enforcement and regulatory matters" affecting competition in the shipping industry, the agencies said. Beyond matters of bureaucratic process, the announcement sends a clear signal to ocean



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carriers that American regulators will subject shipping to heightened scrutiny. The FMC already believes that certain carrier actions such as a blanket refusal to carry exports violates the Shipping Act of 1984, and separately as of last fall began proactively investigating unfair detention and demurrage practices without requiring a formal complaint from a shipper, which it had required in the past, signaling a more aggressive approach to an issue that for years has defied easy solutions.

Impact

The inclusion of ocean shipping in President Joe Biden's executive order encouraging competition across several sectors will add urgency to the Federal Maritime Commission's pursuit of unfair carrier practices, particularly in the area of detention and demurrage. The Audit Program will begin with an information request establishing a database of quarterly reports allowing the Commission to assess how detention and demurrage is administered. Responses will be followed by individual interviews with the carriers. Each of the nine largest carriers by market share will be audited irrespective of whether a formal or informal complaint has been filed at the Commission. "The Federal Maritime Commission is committed to making certain the law is followed and that shippers do not suffer from unfair disadvantages. The work of the audit team will enable the Commission to monitor trends in demurrage and detention practices and revenue, as well as to establish ongoing dialog between staff and carriers on challenges facing the supply chain. Of course, if the audit team uncovers prohibited activities, the Commission will take appropriate action. Furthermore, the information gathered by the audit process might lead to changes in FMC regulations and industry guidance if warranted," said FMC Chairman Daniel B. Maffei.

RESOURCES

- [Interpretive Rule on Demurrage and Detention under the Shipping Act](#) (Federal Maritime Commission)
- [Biden executive order adds urgency to FMC review of ocean shipping](#) (JOC)
- [FMC Gets Serious on Carrier Competition, Bringing in Dept. of Justice](#) (The Maritime Executive)
- [FMC Establishes Ocean Carriers Audit Program](#) (Federal Maritime Commission)
- [FMC commissioners back audits of ocean carrier detention and demurrage](#) (Supply Chain Dive)
- [Rising Container Costs Draw Industry Concern, Government Action](#) (Sandler, Travis & Rosenberg)
- [Executive Order on Promoting Competition in the American Economy](#) (The White House)
- [Fact Finding Investigation No.29 Interim Recommendations](#) (Federal Maritime Commission)
- [US Company sues 'collusive' ocean carriers, alleging price manipulation](#) (Freightwaves)