

ALL ON BOARD: THE BIDEN ADMINISTRATION, FMC AND DOJ FOCUS ON OCEAN SHIPPING, PRICES AND SUPPLY CHAIN

Ocean shipping remains center stage as the Biden Administration continues to focus on the supply chain and related costs. On February 28, 2022, the Biden Administration issued a [Fact Sheet](#)¹ entitled "Lowering Prices and Levelling the Playing Field" summarizing the Administration's current view on the ocean freight transportation system.

The Fact Sheet discussed the Department of Justice (**DOJ**) and the Federal Maritime Commission's (**FMC**) joint initiative to promote competition in the ocean freight transportation system, as a mechanism to reduce consumer prices. Additionally, the Fact Sheet addressed the FMC's increased oversight of the shipping industry by: establishing an audit program that will consider and address complaints against carriers allegedly charging unfair fees. The FMC will also launch a new data initiative to identify data constraints contributing to supply chain congestion.

The Fact Sheet does not stand in isolation. It was issued shortly after the FMC announced an Advance Notice of Proposed Rulemaking (**ANPRM**) to potentially change regulations concerning detention and demurrage billing practices. Further, The FMC and DOJ have announced a joint initiative to examine antitrust and competition issues in the shipping industry.

The FMC's Proposed Detention and Demurrage Rules

The FMC recently promulgated an [ANPRM](#) seeking public comments on whether it should propose a new rule governing demurrage and detention billing practices of common carriers and marine terminal operators (**MTO**) related to ocean transportation container shipments. The ANPRM is derived from the FMC's previously issued Fact Finding 29 entitled "International Ocean Transportation Supply Chain Engagement."²

In the ANPRM, the FMC seeks public comments concerning:

- Should the FMC include both Vessel Owning Common Carriers (**VOCC**) and Non-Vessel Owning Common Carrier's (**NVOCC**) in a proposed regulation on demurrage and detention billing?
- Should the FMC include MTOs in a proposed demurrage billing regulation?
- What information or timeframes should be required for VOCC and NVOCC demurrage and detention bills? Should the FMC require different types of information or timeframes?
- Should the FMC require specific information be included on the invoice regarding how to dispute a charge? If so, what information should be required?³

The FMC further stated that terms "demurrage and detention" broadly include any charges assessed by common carriers and marine terminal operators related to the use of marine terminal space or shipping containers. It is important to note that the scope of the terms detention and demurrage is meant to encompass any charges having the purpose or effect of demurrage or detention regardless of the label attributed to those charges.

¹ <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-lowering-prices-and-leveling-the-playing-field-in-ocean-shipping/>

² FMC's Fact Finding 29 was the subject of a prior HFW update. See <https://www.hfw.com/downloads/003372-HFW-FMC-Announces-demurrage-and-detention-initiatives-Oct-21.pdf>

³ A formal list of all 16 questions can be found starting on Page 10 of the [FMC: Advance Notice of Proposed Rulemaking](#).

DOJ Antitrust Division will focus on Ocean Shipping and the Supply Chain

In concert with the FMC, the DOJ recently established an initiative to prevent anticompetitive conduct in the ocean freight shipping sector. As part of the initiative, the DOJ's Antitrust Division stated that it will take the following actions:

- Prioritize any existing investigations where competitors may be exploiting supply chain disruptions for illicit profit;
- Undertake measures to proactively investigate collusion in industries particularly affected by supply disruptions;
- Form a working group focusing on global supply chain collusion with regulators in Australia, Canada, New Zealand and the United Kingdom.

The Antitrust Division, along with the Federal Bureau of Investigation, will investigate and prosecute criminal violations of U.S. antitrust laws. Criminal antitrust offenses have been identified to include agreements between individuals and businesses to fix prices or wages, rig bids or allocate markets.

The DOJ's latest announcement follows the Biden Administration's formation of a White House task force to "address supply and demand mismatches" and a July 2021 Memorandum of Understanding entered between the FMC and DOJ that established a framework for partnership between the agencies.⁴

Conclusion

The pandemic has undeniably impacted global supply chains and the ocean shipping industry, shifting a greater focus onto industry practices. Recent actions taken by the federal government appear to be linking consumer price increases, supply chain congestion and anti-trust issues.

In the March 1, 2022, State of the Union address, President Biden stated that "when corporations have to compete, their profits go up and your prices go up — when they don't have to compete. ... See what's happening with ocean carriers moving goods in and out of America. During the pandemic, about half a dozen or less foreign-owned companies raised prices by as much as 1,000 percent and made record profits."

As evidenced by recent action taken by the FMC and DOJ, ocean shipping is facing increasing regulatory scrutiny from both a civil and criminal perspective, resulting in current efforts by Congress to enact a bill that would repeal certain antitrust exemptions for ocean common carriers.

As a result, stakeholders should closely monitor these developments and be sure to comment on the FMC's proposed rulemaking. Likewise, stakeholders should also be prepared for increased regulatory scrutiny.

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⁴ H.R.6864 - Ocean Shipping Antitrust Enforcement Act