

SHIPPING | JULY 2022

CHANGES ON THE HORIZON AS THE US OCEAN SHIPPING REFORM ACT BECOMES LAW

President Biden recently signed into law the Ocean Shipping Reform Act of 2022¹ ("OSRA" or the "Act"), a package of U.S. shipping law reforms that addresses supply chain disruptions, rising ocean shipping costs, and issues related to vessel service. The legislation grants the Federal Maritime Commission ("FMC") increased authority to address the operating practices of global ocean shipping lines operating in US ports. The FMC is an independent agency of the U.S. government that oversees, among other things, competition among common carriers in US trade for the international ocean shipping supply chain.

Here is an overview of some noteworthy changes enacted in the new legislation:

- **Demurrage and Detention ("D&D") Charges**

- OSRA adds a list of information that carriers must include in invoices for D&D charges. Carriers must certify that charges are consistent with the FMC rules and that the carrier's performance did not cause or contribute to the underlying charges.² FMC must initiate a rulemaking process to consider and further define prohibited practices regarding D&D charges.

- **Complaints and Refunds**

- Shippers and others may submit to the FMC complaints about charges assessed by a carrier.³ The FMC must promptly investigate, and the Act shifts to common carriers the burden of proof regarding reasonableness of D&D charges. If a carrier's charge does not comply with OSRA, the FMC can order a refund and assess a civil penalty.

- **Service Contracts**

- The FMC may add more "essential terms" that must be included in Service Contracts, in addition to the terms already required, after conducting a rulemaking process.⁴

- **Prohibition on Retaliation and Refusing Cargo**

- OSRA prohibits common carriers, marine terminal operators, and ocean transportation intermediaries from retaliating against a shipper for filing a complaint or for patronizing another carrier.⁵ The Act also prohibits common carriers from unreasonably refusing cargo space when available, and from resorting to "other unfair or unjustly discriminatory methods."⁶

- **Shipping Exchange Registry**

- OSRA authorizes the FMC to register national shipping exchanges for ocean transportation in US foreign commerce.

The FMC is required to begin rulemaking processes in the next few months to establish new rules related to OSRA, and some of the new final rules must be issued within one year, that is by June 2023. We anticipate the FMC will be publishing proposed rules in the Federal Register in coming months.

¹ 46 U.S.C. §§ 41104(a); 41104(d).

² 46 U.S.C.A. § 41104(d).

³ 46 U.S.C. § 41104(a).

⁴ 46 U.S.C.A. § 40502(c).

⁵ 46 U.S.C.A. § 41102(d).

⁶ 46 U.S.C.A. § 41104 (a)(3).

A few weeks before Congress enacted OSRA, the FMC announced the launch of three new initiatives aimed at assisting U.S. shippers and improving performance in the ocean supply chain.

On May 31, 2022, FMC Commissioner Rebecca F. Dye released the Final Report for Fact Finding 29 (the "Final Report") titled "The Effects of COVID-19 on the U.S. International Ocean Transportation Supply Chain."⁷ The Final Report concludes a two-year investigation aimed at identifying the supply chain challenges related to the COVID-19 pandemic. The initiatives include establishing a new and permanent International Ocean Shipping Supply Chain Program, re-establishing the Export Rapid Response Team, and taking steps to require carriers, marine terminal operators, and ports to employ a designated FMC Compliance Officer. Per the Final Report, the FMC proposed:

- **International Ocean Shipping Supply Chain Program**

- The biggest issue U.S. shippers are facing is an overwhelmed capacity in the supply chain due to the Covid-19 pandemic. The International Ocean Shipping Supply Chain Program will allow the FMC to identify where issues exist in the supply chain and offer proposals for steps that can be taken to remedy impediments to the free flow of shipments.

- **Rapid Response Team**

- In the past, the FMC has used rapid response teams to resolve emergency commercial disputes. However, these programs have depended on upper-level management participation from the carriers. The FMC has recommended a revival of the rapid response team process that involves ocean carriers to assist with key commercial disputes.

- **FMC Compliance Officer**

- Throughout the fact-finding investigation, one of two main concerns related to excessive D&D fees levied by ocean carriers and rising shipping costs.
- To aid with compliance, the report recommends a new regulatory requirement that all ocean carriers and marine terminal operators designate a compliance officer who would report directly to the U.S. based CEO of the carrier and be responsible for compliance.

Given that the impact of OSRA will take time to be felt across the industry, in the near-term common carriers and marine terminal operators should familiarize themselves with these new provisions to ensure that their business activities are in full compliance. Likewise, shippers and carriers should continue closely managing their D&D charges and invoice practices, and all industry participants will want to stay on top the new reforms in OSRA. Stakeholders should therefore closely monitor and participate in FMC rulemaking.

The enactment of the OSRA does not come in isolation; rather it is the culmination of many months of FMC activity under the Biden Administration. The FMC's Bureau of Enforcement is increasingly active with the FMC announcing several recent demurrage and detention settlements with ocean carriers. The increased potential for the submission of formal complaints by stakeholders may likely be a significant OSRA by-product. Considering the increased potential for FMC administrative proceedings, stakeholders should consider retaining counsel to ensure that their internal FMC compliance procedures align with the significant changes in legislation.

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⁷ See <https://www2.fmc.gov/readingroom/docs/FFno29/Fact%20Finding%202029%20Final%20Report.pdf/>

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