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CIAA Bulletin

An Exclusive CIAA Member
Update

Ocean Shipping Reform Act of 2021 Introduced in Congress

On August 10, 2021, Congressmen John Garamendi (D-CA) and Dusty Johnson (R-SD) introduced the "[Ocean Shipping Reform Act of 2021](#)." If passed, this would mark the first major update to federal laws for the global ocean shipping industry since 1998 ([Public Law 105-258](#)). Reps. Garamendi and Johnson proposed this legislation following complaints by agricultural exporters reporting that ocean carriers refused to accept bookings for U.S. exports. Instead, ocean carriers chose to send empty containers back to Asia as quickly as possible to refill with foreign exports during the COVID-19 pandemic. The legislation, which focuses heavily on exports, intends to provide oversight and transparency into maritime shipping practices, including those that impact importers.

The Ocean Shipping Reform Act of 2021 would specifically:

- Promote reciprocal trade of U.S. exports in the foreign commerce of the U.S. as part of the Federal Maritime Commission (FMC) mission.
- Require ocean carriers to adhere to minimum service standards meeting the public interest.
- Revise the "Service Contracts" section of the Shipping Act (46 U.S.C. § 40502) to:
 - afford flexibility to the FMC in determining minimum contract requirements for terms of service contracts;
 - allow the FMC to be a venue for remedy of breaches of service contracts, expanding the venue beyond "an appropriate court"; and
 - stipulate that a "carrier may not fail to establish, observe and enforce just and reasonable regulations relating to service contracts."
- Establish new FMC authority to register and issue operations licenses for shipping exchanges (broker/services that connect shippers with various carrier

services) and directs the FMC to propose rules for minimum requirements of service contracts by such exchanges.

- Expand FMC regulations to prohibit retaliation by a common carrier, terminal operator or intermediary against a shipper, their agent or motor carrier by refusing or threatening to refuse cargo accommodations or other unfair or unjust practices.
- Add a new provision to the “Disclosure of Public Information” section of the Shipping Act (46 U.S.C. §41103) directing the FMC to publish and update annually 1) all findings by the FMC of false certifications by common carriers or marine terminal operators of detention and demurrage charges under 46 U.S.C. §41104(a)(17), and 2) all penalties imposed or assessed against common carriers or marine terminal operators for violations of the Shipping Act.
- Require ocean carriers or marine terminal operators to certify that any late fees—known as “detention and demurrage” charges—comply with federal regulations or face penalties.
- Shift the burden of proof regarding the reasonableness of “detention or demurrage” charges from the invoiced party to the ocean carrier or marine terminal operator.
- Prohibit ocean carriers from declining opportunities for U.S. exports unreasonably, as determined by the FMC in new required rulemaking.
- Require common carriers to submit to the FMC on a quarterly basis a report that describes total import and export tonnage, as well as total loaded and empty containers, for any vessel making port in the United States.
- Authorize the FMC to order refund relief to shippers or other injured parties, in addition to civil penalties, for violations of the Shipping Act.
- Authorize the FMC to self-initiate investigations of ocean common carriers’ business practices and apply enforcement measures, as appropriate, where the FMC believes there is a violation of the Shipping Act.
- Authorize the FMC to order double reparations for violations of existing prohibitions on unjust or unreasonable practices in handling property by ocean carriers, marine terminal operators or intermediaries, and extend double reparations where false certification of detention or demurrage charges are provided “knowingly and willfully” (“with intent”).

The introduction of the Ocean Shipping Reform Act of 2021 was lauded by many exporter and importer groups but faces an uphill battle for passage due to competing issues of importance pending before Congress (such as infrastructure and budget reconciliation). The bill has been criticized as it tasks FMC with certain aspects of trade promotion, a duty and expertise that the agency does not currently have. However, the additional oversight of detention and demurrage fees, which many importers and exporters have raised significant complaints about over the last few years, would be a welcome addition to the Shipping Act.

FMC Investigation of Supply Chain Issues

Even prior to the introduction of the Ocean Shipping Report Act of 2021, the FMC was investigating recent supply chain issues. In March 2020, the FMC voted to establish Fact Finding 29, authorizing Commissioner Rebecca Dye to identify

operational solutions to cargo delivery system challenges related to COVID-19. According to Commissioner Dye:

In the earliest days of COVID-19 related impacts to the supply chain in the United States, import cargo volumes dropped precipitously and ocean carriers cut services. And those imports that were delivered contributed to congestion at U.S. ports, particularly on the West Coast, because the import loads that were not being picked up for final delivery due to business shutdowns. The congestion was exacerbated by empty containers waiting to be repositioned.

The preliminary findings of Fact Finding 29 included a list of complaints shared by companies, listed in order of most-frequently to least-frequently cited, regarding: (a.) appointments, (b.) empty container returns, (c.) customs, (d.) chassis, (e.) earliest return dates (ERDs), (f.) congestion/long lines, (g.) availability of containers for export, (h.) dispute resolution, (i.) terminal closure, (j.) new fees, and (k.) shut out/locked out. Few carriers have made significant changes to demurrage or detention tariffs, practices, or policies since the effective date of the Commission's [interpretive rule on demurrage and detention](#) (issued in April 2020), and many carriers indicated that their past practices were compliant with the Commission's guidance. Some carriers have, however: (a.) made information about their demurrage and detention practices more easily accessible and understandable, (b.) clarified that demurrage will not accrue while a container is at an off-terminal customs examination site, (c.) preemptively cancelled demurrage or detention charges incurred because there is a change in ERD caused by vessel delays or blank sailings after an empty container has left a terminal for loading, and/or (d.) invoiced demurrage and detention charges to their customers directly rather than to truckers, for customers using merchant haulage.

Several carriers assert that they provide notice of return location by at least 1:00 pm the day before, but this deadline does not appear to be firm. Most carriers, but not all, require shippers or truckers to request a free time extension and provide documentation if there are problems with empty container return. In some instances, carriers have provided off-dock or off-terminal space to facilitate empty container returns.

Carriers shipped empty containers back to Asia for a number of reasons, including to balance heavy agriculture commodity shipments with lighter empty containers for vessel safety and to enable carriers to fulfill contractual obligations to U.S. importers. Liner services are designed to meet the demand of high-volume head haul trade. Whereas in "normal" years peak season for imports and exports do not coincide, the unusually long import peak in 2020 and early 2021 resulted in an overlap that resulted in competing demands for the same containers. The report outlined various proposals to alleviate challenges to export container availability include container depots, collapsible containers, digitized two-way committed contract practices or products, and increasing container supply.

The FMC continues to solicit public feedback. As recently as July 28, 2021, the FMC received information regarding supply chain and cruise issues. On July 16, 2021 U.S. Department of Transportation Secretary Pete Buttigieg hosted a virtual roundtable on congestion at the Ports of Los Angeles and Long Beach, which included the FMC

and key stakeholders at the ports and throughout our Nation's supply chain. They discussed the many consequences of increased congestion and examined opportunities to ease the movement of cargo and improve information sharing at the ports.

Given the above legislative and regulatory efforts to address U.S. exporter concerns, importers should expect additional impediments to imports, including time, cost, and generally, "red tape."

The CIAA will continue to monitor developments related to the Ocean Shipping Reform Act and Fact Finding 29 and keep members updated as additional changes or announcements are made that may impact dairy imports. Members with questions regarding these developments should contact the Husch Blackwell LLP team at CIAAGeneralCounsel@huschblackwell.com.

Cheese Importers Association of America

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INDUSTRY DATES TO REMEMBER

AUGUST 31, 2021

Last day to enter dairy products into U.S. Customs territory that may be used to qualify and establish eligibility for a calendar year 2021 license.

SEPTEMBER 1, 2021

First day of license eligibility period for next quota year-plus one. Example: entries made on or after September 1, 2021 can be used to establish eligibility for a license for calendar year 2022.

SEPTEMBER 1, 2021

Last date to request globalization of a calendar year 2021 license. First transmission date for applications for reallocated license amounts for calendar year 2021. First transmission date for all applications for calendar year 2022 licenses.

SEPTEMBER 15, 2021

(no exceptions!) Last transmission date for licensees applying for reallocated license amounts for calendar year 2021.

OCTOBER 1, 2021

(no exceptions!) Last transmission date for licensees to surrender all or the unused portion of their calendar year 2021 licenses.

OCTOBER 15, 2021

(no exceptions!) Last transmission date for all applications for calendar year 2022 licenses.

OCTOBER 31, 2021

Exporting countries that are designating U.S. importers for calendar year 2022 must submit their designations to FAS by this date.

NOVEMBER 5, 2021

Member Meeting

8:45 am - 9:30 am Continental Breakfast

9:30 am - 11:30 am Meeting

Saddle Brook Marriott

Saddle Brook, NJ

DECEMBER 20, 2021

(approximately) FAS issues first notice of calendar year 2022 licenses to licensees.

DECEMBER 31, 2021

Last day for licensees to make entries to fulfill the requirement to use 85% of their calendar year 2021 license amount. Last day for which calendar year 2021 licenses are valid

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