

The Ocean Shipping Reform Act of 2022 – One Year Old and Growing

The bipartisan Ocean Shipping Reform Act of 2022 (OSRA) was introduced in Congress in February 2022 and was signed into law by President Biden on June 16, 2022. Although slightly over a year old, OSRA is now – and will continue – making an impact on the shipping industry. OSRA represents the most significant change in US shipping law since the Shipping Act was amended in 1998. Under OSRA, the Federal Maritime Commission (FMC) was granted new authority to regulate ocean carrier practices, and many of these changes have been implemented over the past year.

OSRA was enacted against the backdrop of the supply chain disruptions that occurred during the COVID-19 pandemic, which saw increases in demurrage and detention rates. Prior to OSRA's enactment, the FMC conducted fact findings that ultimately resulted in the final report for Fact Finding 29, dated May 31, 2022, entitled "The Effects of COVID-19 on the US International Ocean Transportation Supply Chain."¹ The initiatives identified in Fact Finding 29 include establishing a new and permanent International Ocean Shipping Supply Chain Program, reestablishing the FMC's Export Rapid Response Team, and taking steps to require carriers, marine terminal operators, and ports to employ a designated FMC compliance officer. Ultimately, the final report set forth various findings and conclusions concerning freight rates, market competition, billing practices and FMC enforcement matters, which provide insight into future rulemaking.

Against this backdrop, the FMC has taken significant regulatory action. Indeed, developments with regard to FMC rulemaking and implementation of the various provisions of OSRA are so frequent, and activity so fast and furious, that the FMC has a dedicated section of its website tracking all of the latest rulemaking activity, advisory notices relating to implementation, and new enforcement actions and charges.² The passage of OSRA has generated a sharp increase in civil penalties assessed against ocean carriers by the FMC and in private litigants filing claims before the FMC.

After a year on the books, some key OSRA developments include:

I. OSRA Provisions

The following provisions are among the more notable changes under OSRA:

- **Demurrage and Detention Charges**

OSRA adds a list of information that carriers must include in invoices for demurrage and detention 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.

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

- **Service Contracts**

The FMC has the authority to add more "essential terms" that must be included in service contracts⁴, in addition to the terms already required by law, after conducting a rulemaking process.⁵

- **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.⁶ OSRA also prohibits common carriers from unreasonably refusing cargo space when available, and from resorting to "other unfair or unjustly discriminatory methods."⁷

¹ The origin of Fact Finding 29 is an FMC investigation order issued on March 31, 2020.

² [Ocean Shipping Reform Act of 2022 Implementation](#).

³ 46 U.S.C. §§ 41104 (a); 4104(d).

⁴ Service contracts are between a shipper and an ocean common carrier, or an ocean common carrier agreement in which the shipper commits to provide a certain minimum quantity of cargo over a fixed period of time and the ocean common carrier, or the ocean common carrier agreement commits to a certain rate or rate schedule and a defined level of service.

⁵ 46 U.S.C. § 40502(c).

⁶ 46 U.S.C. § 41102(d).

⁷ 46 U.S.C.A. § 41104 (a)(3).

II. Pending OSRA Implementing Regulations

As the saying goes, the devil is in the details. The FMC has started the administrative rulemaking process to implement various OSRA provisions. FMC rulemaking concerning how the definition of “unreasonableness” will be applied under the proposed regulations is central stage. The FMC is currently focused on regulations concerning vessel space accommodation agreements and demurrage and detention billing practices. The proposed regulations have garnered industry attention. Both proposed rules are currently pending before the FMC.

• Unreasonable Refusal to Deal

OSRA prohibits ocean carriers from unreasonably refusing to deal or negotiate with shippers with respect to vessel space accommodations. The proposed rulemaking seeks to define the phrase “unreasonable refusal to deal or negotiate with respect to vessel space accommodations,” which would be used to determine whether an OSRA violation has occurred.

The original rule was proposed in September 2022.⁸ After receiving comments from various trade associations, the FMC recently issued a notice of supplemental rulemaking that seeks to refine what factors it should use to set the “unreasonableness” standard⁹, which the FMC acknowledges is inherently difficult to define.

The proposed rule also considers private party enforcement in actions before the FMC. The current elements of a prima facie claim of unreasonable refusal to deal are (1) the respondent is a [ocean] common carrier under FMC jurisdiction; (2) the respondent refuses to deal or negotiate [with respect to vessel space accommodations]; and (3) that the refusal is unreasonable.

The proposed rule would create a burden-shifting scheme in actions before the FMC. After a complainant establishes a prima facie case, the proposed rule shifts the burden to the ocean common carrier, which has the burden to justify its actions were reasonable. The ultimate burden of persuasion remains with the complainant. This shifting burden-of-proof scheme is like the so called “ping pong” burden of proof under the Carriage of Goods by Sea Act applicable to cargo damage claims, which would be familiar to both shippers and carriers.

• Demurrage and Detention Billing Practices

The FMC proposed new rules to require vessel owning common carriers (VOCC), non-vessel operating common carriers (NVOCC) and marine terminal operators (MTO) to include specific minimum information on demurrage and detention invoices.¹⁰

Significantly, the proposed rule now includes MTOs that would have to comply with the proposed demurrage and detention billing practices. New proposed definitions of “billed party,” “billing party,” “billing dispute” and “demurrage and detention invoice” clarify the types of charges that fall under the proposed rule, and which specific parties are responsible for paying those charges.

If this proposed rule is adopted, VOCCs, NVOCCs and MTOs will all be required to issue bills for demurrage or detention only to parties that they have a contractual relationship with, to be clear regarding the nature of the charges, to issue invoices within 30 days after the charges stop accruing and provide 30 days to dispute the charges with instructions about how charges should be disputed.

III. Increased FMC Enforcement

The FMC recently reorganized its investigative and prosecution functions into the newly created Bureau of Enforcement, Investigations and Compliance (BEIC). BEIC has recently announced that it intends to hire more investigators to enforce the OSRA, which implies more enforcement activity is on the horizon.

The FMC’s formation of the BEIC comes at a time where the FMC and the Department of Justice (DOJ) executed two memoranda of understanding respectively in July 2021 and February 2022 that are designed to foster closer cooperation between the agencies, with the DOJ providing the FMC with assistance from the DOJ’s Antitrust Division.

The FMC’s enforcement activity has significantly increased since the passage of OSRA with the announcement of several high-profile civil penalty settlements with large ocean carriers for alleged violations of the OSRA. These settlements include (1) a US\$2.6 million settlement with Hapag Lloyd; (2) a US\$1.7 million settlement with Ocean Network Express Ptd. Ltd. and (3) a US\$950,000.00 settlement with Wan Hai Lines, Ltd. and Wan Hai Lines (USA) Ltd.

As of May 2023, the FMC reported that it has or is pursuing 191 investigations, 204 enforcement matters, 59 compliance matters, and three formal enforcement proceedings in fiscal year 2022 alone. Going forward, increased FMC enforcement action should be expected.

⁸ See 87 FR 57674-01, 2022 WL 4356068(F.R.).

⁹ See 88 FR 38789-01, 2023 WL 3973368(F.R.).

¹⁰ See 87 FR 62341-01, 2022 WL 7540062(F.R.).

IV. Increased Litigation before the FMC

Under OSRA, shippers alleging violations of the Act may also file a charge complaint with the FMC, which is an adversarial proceeding.¹¹ Since OSRA's passage, there has been a massive spike in claims filed with the FMC. The complaint filed by Bed Bath & Beyond Inc. with the FMC against Orient Overseas Container Line Limited for US\$37.5 million in damages for alleged OSRA violations is garnering significant industry attention.

As of May 2023, the FMC reported that charge complaints filed since June 2022 have resulted in more than US\$1 million in disputed charges having been waived or refunded. It also reported that there are approximately 200 charge complaints currently pending before the FMC. The FMC recently announced the hiring of an additional administrative law judge to address the sharp increase in its caseload. It should be reasonably expected that the number of charge complaints before the FMC will only increase.

V. What Is Next?

The Shipping Act contains an antitrust exemption that applies to agreements among VOCCs in US/foreign trade or with or among marine terminal operators serving those carriers.¹² The proposed Ocean Shipping Antitrust Enforcement Act would remove the antitrust exemption.¹³ If passed, the bill would impact rate agreements, pooling agreements, and shipping route allocations.

The bill was introduced in the House of Representatives on March 23, 2023 and follows President Biden's State of the Union address where he announced a "crackdown" on ocean carriers, the alleged lack of competition in the shipping industry, specifically focusing on foreign-owned companies. The bill also reflects the Biden administration antitrust enforcement prioritization as evidenced by the DOJ's recently filed antitrust suit against Google.

VI. Conclusion

As legislation goes, OSRA is just a baby, but it has already had a significant impact on the shipping industry. As the FMC promulgates additional regulations and steps up enforcement using its new authorities, the contours of the OSRA will expand. These developments come at a time where there remains intense focus on the supply chain and concerns over inflation.

Stakeholders should closely monitor developments and submit comments as appropriate during the rulemaking process as the FMC's growing body of regulations will significantly impact the scope and reach of OSRA.

For example, the FMC's proposed rulemaking on the definition of unreasonable refusal to deal has garnered significant comments from a diverse body of stakeholders, such as the US Department of Agriculture, the International Freight Forwarders Association, American Chemistry Council and the World Shipping Council.

It should reasonably be expected that the FMC will remain very active and there will be increased private litigation before it. As evidence by Bed Bath and Beyond's damage claim of US\$37.5 million, the amount at stake in either a proceeding before the FMC or potential exposure to civil fines for OSRA violations can be significant. Parties subject to OSRA jurisdiction should seriously consider utilizing counsel to audit compliance programs given the change in controlling law.

Shipping is a global industry. The evolution of OSRA is not an isolated event but rather contains global public policy implications. It is not coincidental that the introduction of the ocean shipping enforcement bill comes at a time when the European Commission is reviewing antitrust immunity regulations.

Maritime transportation plays a critical function in the US economy and is part of a larger complex global supply chain that has been the recent focus of intense public scrutiny. OSRA will surely evolve and expand over time as new regulations are promulgated and claims litigated. Understanding, applying and potentially shaping the development of OSRA and related laws requires close coordination between stakeholders and experienced counsel.

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¹¹ The charge complaint process is one of several options available to shippers seeking relief at the FMC. Disputes can also be addressed through small claims or formal complaints processes, or by making use of dispute resolution services provided by the FMC.

¹² 46 U.S.C. §§ 40307; 40102(6), (14) 40301(a)(b).

¹³ See H.R.6864 – Ocean Shipping Antitrust Enforcement Act, 117th Congress (2021-2022).