

# The Journal of Commerce

## In the crosshairs

US regulators are training their sights on container shipping



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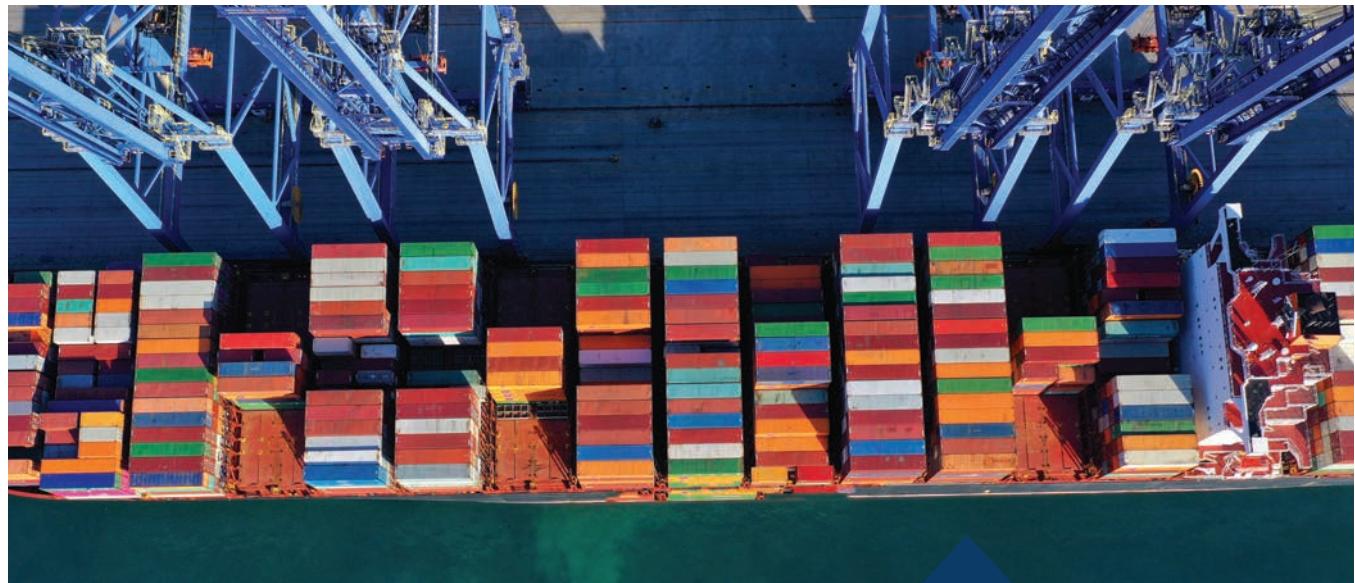
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An aerial photograph of a large cargo ship sailing on the ocean. The ship is heavily loaded with numerous shipping containers stacked high on its deck. The containers are of various colors, including red, blue, white, and green. The ship's hull is a vibrant red, and its wake is visible in the water behind it. The ocean surface has some small waves and reflections of sunlight.

US regulators train sights  
on container shipping

By Mark Szakonyi and Peter Tirschwell

**ROUGHLY 12 MONTHS** after the COVID-19 pandemic sparked the largest bullwhip effect on US containerized supply chains in history, the Biden administration is wading into ocean regulatory waters via an executive order, upping pressure on maritime regulators to crack down on illegal behavior and work more closely with the Department of Justice (DOJ). And for the first time in more than 20 years, Congress is on track to rewrite the shipping law that gives the Federal Maritime Commission (FMC) its direction, powers, and purview.

# In the crosshairs

The escalation of federal and Congressional attention on container shipping speaks to how supply chain disruptions have moved out of the world of logistics managers and onto the front pages of general news — and to top of mind of retailer and manufacturing CEOs. Increasingly, shippers such as Taylor Group, a heavy equipment manufacturer, are getting the ear of politicians, and legislators don't like what they hear.

"This situation is causing inflation to run rampant throughout the supply chain. So far, we have kept our lines running but are facing 30 percent to 75 percent price increases from our vendors and transportation companies," William Taylor, CEO of Taylor Group, told the Senate Commerce Committee on July 15. "The worst part is that we have orders, but we don't have confidence in our supply chains to meet the demand. The same story is playing out in thousands of manufacturers across America."

The inclusion of ocean shipping in Biden's executive order, part of a larger effort to inject more competition in the rail carload market along with the agriculture, banking, and other industries, does add urgency to the FMC's pursuit of unfair carrier practices, particularly in the area of detention and demurrage fees. There's been a flurry of activity since the July 9 executive order rocked the industry.

The FMC and the Justice Department on July 12 agreed to increase cooperation between the agencies on antitrust issues through a first-of-its-kind memorandum of understanding. That raised eyebrows in the shipping community, considering the DOJ has made plain its aversion to the antitrust immunity enjoyed by carriers, and the White House made similar noises in announcing the executive order.

During a July 11 press briefing, White House Press Secretary Jen Psaki said container shipping has become more concentrated in recent years, resulting in carriers monopolizing many trades and "three foreign-owned shipping alliances controlling more than 80 percent of the market." Psaki said that's led to higher shipping costs through record container rates and higher storage fees, known as detention and demurrage in the industry.



The MOU could enable the FMC to get the DOJ's perspective on whether it has enough of a case showing an existing agreement violates the Shipping Act of 1984 to seek a federal injunction from a judge, and potentially how such a case could be strengthened, according to a maritime attorney who asked not to be identified. The FMC has only sought an injunction once; in 2008, it pursued a preliminary injunction against the ports of Los Angeles and Long Beach Clean Truck Program. A federal court denied the injunction the following year.

A week after signing the agreement with DOJ, the FMC told the top nine container lines operating on US trades that the agency will immediately begin auditing how they bill customers for detention and demurrage. The newly formed Vessel-Operating Common Carrier Audit program will gauge whether additional storage fees that stem from an inability to pick up or return containers heed the agency's interpretive ruling: that the fairness of detention and demurrage fees should be viewed through a lens of whether they encourage cargo flow.

**Congress is set to re-examine and possibly reform US shipping law for the first time in more than 20 years.**  
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In the audit, the FMC is targeting the container lines with the largest share of US cargoes: Cosco Shipping Group, CMA CGM, Evergreen, Hapag-Lloyd, HMM, Maersk, Mediterranean Shipping Co., Ocean Network Express, and Yang Ming. Each carrier must tap a managing director to respond to the audit and provide monthly updates to regulators.

## Rethinking regulation

So-called unreasonable detention and demurrage bills are a longstanding grievance of shippers, to the point that the National Industrial Transportation League (NITL) and the Agricultural Transportation Coalition (AgTC) have proposed legislative changes to shift the legal burden of proof in detention and demurrage billing from shippers to carriers. Language shifting that burden is part of a draft bill that envisions an upending of the current regulatory system and could be introduced before the August recess of Congress.

Although there is no guarantee the bill will pass in its current draft form, the initial salvo by Rep. John

Garamendi, D-Calif., dubbed the Ocean Shipping Reform Act of 2021, would take US shipping law in a starkly different direction, reversing the deregulatory trajectory of the most recent shipping law rewrites in 1984 and 1998 by placing a heavy burden on ocean carriers and strengthening the oversight role of the FMC.

According to a draft of the bipartisan bill obtained by *The Journal of Commerce*, the new regulations would make it much more difficult for container lines to refuse to carry export cargo or prioritize repositioning of empties at the expense of ports. If passed into law, the bill would also prohibit carriers from collecting detention and demurrage fees in cases when “obstacles to cargo retrieval or return of equipment are... beyond the control of the invoiced or contracting party.”

In addition, it would go further than current law in barring unreasonable denial of service by a shipping line, saying a carrier “may not... fail to furnish or cause a contractor to fail to furnish the facilities and instrumentalities needed to

perform the transportation services, including containers.”

“We have a problem in which the shipping industry is able to discriminate against American exporters,” Garamendi said during a June 15 meeting of the House Coast Guard and Maritime Transportation subcommittee.

The bill, when introduced, will be bitterly opposed by container

“We have orders, but we don’t have confidence in our supply chains to meet the demand.”

lines, which have been arguing that the issues shippers are facing in obtaining space and equipment have arisen from once-in-a-lifetime circumstances. In other words, end-to-end freight capacity has been overwhelmed by the pandemic and its impact on consumer goods purchasing and productivity across the global shipping network.

“Normalized demand, not regulation, will solve supply chain delays,” the World Shipping Council (WSC), which represents container lines, said July 6.

FMC Chairman Daniel Maffei gave a similar diagnosis during a June 15 House hearing, saying, “The primary reason for the congestion, high prices, and lack of reliability is that demand for cargo shipping has outstripped the supply.”

Some will point out the bill’s implicit prioritizing of exports over imports. Ocean carriers’ refusal to carry certain export cargoes over the past year can be seen both as an effort to free up capacity for import cargoes moving at several times the freight rate of export cargoes — helping carriers achieve record profits in the process — and an effort to ensure capacity for the consumer products, including many retail staples, that dominate import volumes.

And to the broader criticism of the carrier’s power through alliances, container lines stress that members of the highly integrated vessel-sharing agreements compete with alliance and non-alliance

carriers alike. Abolishing the alliances would reduce competition, particularly on smaller trades, because without the ability to pool cargo into larger ships, carriers would either merge or simply exit trade lanes, ultimately resulting in a reduction of service for shippers, carrier executives tell *The Journal of Commerce*.

The WSC pointed to record volumes as the culprit for port congestion, noting that container lines are adding as much capacity as they can into the trans-Pacific trade. US imports from Asia in the first half of 2021 jumped 38 percent

November supplemental order to its investigation of carrier practices at the ports of Los Angeles, Long Beach, and New York and New Jersey, FMC representatives at ports are now looking into unofficial complaints from shippers and truckers of unfair practices.

“Normalized demand, not regulation, will solve supply chain delays.”

as well,” Maffei told the House subcommittee.

Even so, there’s mounting skepticism of container lines’ ability to manage capacity via alliances, paralleling DOJ’s own skepticism that it publicly raises each time the FMC allows an alliance to take effect. That skepticism and frustration with service levels — on-time vessel performance from Asia to the US was still below 30 percent in May, according to Sea-Intelligence — and record rates will only intensify as space gets tighter and carriers push higher surcharges during peak season.

In the longer term, carriers have



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compared to the same period a year ago, according to PIERS, a sister company of *The Journal of Commerce* within IHS Markit. Container lines are boosting capacity by between 32 percent and 34 percent in the third quarter compared to the same period a year ago, according to Sea-Intelligence Maritime Analysis. But port congestion at US and Asian ports limits carriers’ ability to fully use this new capacity.

## A stronger hand

Still, the container lines agree with the White House that the FMC has the power to investigate and respond to complaints from shippers, Butler said, telling the House subcommittee that he rejects the idea that shippers have failed to file formal complaints.

The FMC no longer needs to wait for formal complaints, but it often struggles to get enough details for a proper investigation. Through a

With ocean shipping having been largely deregulated through laws passed in 1984 and 2008, rates fluctuate based on free market forces. When the market experienced overcapacity, as it did for most of the decade following the financial crisis, rates fell to historic lows and many shippers came to expect year-over-year reductions in contract rates; cargo owners never complained about issues like access to vessel capacity outside periodic spikes in demand when cargo rolling would temporarily increase. But when demand has outstripped capacity across the system of ships, ports, trucking, and rail — as painful as it is for shippers — rates have moved sharply in the other direction.

“For years, the increasing supply of cargo space and bigger and bigger ships kept ocean freight rates on the low side, but now COVID and its effects have created record demand for shipping and record freight rates

been able to better manage capacity over the last two to three years, largely thanks to discipline brought through the number of east-west carriers halving to 10 in roughly five years. The balance of power has shifted from the shipper to the carrier.

“Carrier consolidations (and mega-alliances) have undeniably led to a power imbalance between carriers and the shipping public, who are left with limited choice and limited ability to reach reasonable terms through normal commercial negotiations. And I am being generous using the word ‘limited,’” said Lori Fellmer, vice president of logistics and carrier management at BassTech International. She also serves as NITL’s ocean committee chair.

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