

SPOTLIGHT ON THE INTERNATIONAL MARITIME SECTOR AS THE BIDEN ADMINISTRATION LOOKS TO ADDRESS COMPETITION ACTIVITIES

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On 9 July 2021 the Biden Administration released an Executive Order (EO) on [promoting competition in the American economy](#). The latest White House effort directs federal agencies to strengthen oversight of several key industries that are perceived to be impacted by the monopolistic control of a small number of dominant companies. The industries addressed in the EO include agribusiness, freight rail, health care, and shipping. The order reflects a “whole-of-government effort to promote competition in the American economy,” providing 72 individual recommendations to foster competition, including multiple provisions related to the global shipping industry. The order could mark the beginning of a potentially significant movement by the federal government to further regulate unfair or unreasonable shipping practices.

In describing the EO, White House Press Secretary Jen Psaki stated that “a lot of American companies rely on...ocean carriers to ship their goods internationally,” and noted that the industry has “grown more concentrated over time” and that the “concentration has contributed to a spike in shipping costs and fees during the pandemic.” The fact sheet accompanying the order states that the largest 10 shipping companies now control more than 80 percent of the market. The EO thus expressly highlights that “the global container shipping industry has consolidated into a small number of dominant foreign-owned lines and alliances, which can disadvantage American exporters.”

The White House is not alone in expressing concerns about ocean carrier rates and practices. A congressional hearing in June on supply chain congestion issues focused on concerns that ocean carriers had been declining to carry U.S. agriculture exports, choosing instead to return empty containers to Asia to be filled with high-value consumer goods. The [hearing](#) before the House Subcommittee on Coast Guard and Maritime Transportation also heard criticism of significant fees levied on shippers through detention and demurrage charges—which are often levied on shippers when chassis and containers are caught in the system—and the lack of export options throughout the pandemic as American consumers shifted spending habits from services to consumer goods. The EO and the congressional inquiry followed the Federal Maritime Commission's (FMC) ongoing efforts to investigate ocean supply-chain disruptions and FMC interpretive rules and information demands targeting detention and demurrage practices.

Ultimately, the EO appears to respond to expressed concerns from domestic shippers. The EO expressly highlights that “the global container shipping industry has consolidated into a small number of dominant foreign-owned lines and alliances, which can disadvantage American exporters.” Unlike a broader-based policy initiative

by the Obama Administration to enhance the global competitiveness of U.S. markets, the Biden EO details specific and actionable directives for agencies to take.

While there is no mandate in the order for independent agencies such as the FMC to commit to these goals, new FMC Chairman Dan Maffei has stated that he will cooperate in the effort, saying, “The President is saying all hands on deck, which we appreciate.” Chairman Maffei also commented that “by having a consolidated industry, you set the stage for some of the price increases that we’ve seen.” Ocean carriers have, by contrast, painted the rate increases as a normal incident of current supply-and-demand conditions.

With respect to shipping provisions, the EO specifically encourages the FMC to:

- Vigorously enforce the prohibition of unjust and unreasonable practices in the context of detention and demurrage pursuant to the Shipping Act, as clarified in [its] “Interpretive Rule on Demurrage and Detention Under the Shipping Act,” 85 Fed. Reg. 29638 (18 May 2020);
- Request from the National Shipper Advisory Committee recommendations for improving detention and demurrage practices and enforcement of related Shipping Act prohibitions; and
- Consider further rulemaking to improve detention and demurrage practices and enforcement of related Shipping Act prohibitions.

On 12 July 2021, the FMC and Department of Justice's (DOJ) antitrust division signed an [interagency memorandum](#) of understanding to foster increased cooperation and communication on competition issues raised by the EO. The focus on the antitrust authority of the DOJ could be particularly consequential for the maritime industry. The Shipping Act of 1984 (Act) recognizes the FMC as the expert regulator of the industry, and exempts from antitrust liability any agreement between ocean common carriers and marine terminal operators filed with the FMC and effective under the act or exempt from filing under the act. However, the DOJ retains full authority over mergers and acquisitions and the authority to prosecute unfiled anticompetitive agreements. The EO states that “when agencies have overlapping jurisdiction, they should endeavor to cooperate fully in the exercise of their oversight authority, to benefit from the respective expertise of the agencies and to improve Government efficiency.”

LOOKING FORWARD

The latest EO from the Biden White House has the potential to reshape the structure and capabilities of several key sectors of the global economy, including the maritime industry. Affected stakeholders will have a voice in shaping how the FMC and other agencies plan to implement the EO via rulemakings, potential enforcement actions, and continuing oversight from the congressional committees of jurisdiction. The complex and intersecting nature of the governing regulatory systems will require careful navigation on all sides.

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