FEDERAL MARITIME COMMISSION SEEKING COMMENT ON NEW RULEMAKING REGARDING PROHIBITION AGAINST OCEAN COMMON CARRIER REFUSAL TO NEGOTIATE ON VESSEL SPACE ACCOMMODATIONS

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U.S. Policy and Regulatory Alert

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In response to supply chain disruptions caused by the COVID-19 pandemic, on 16 June 2022, the U.S. Congress enacted the Ocean Shipping Reform Act of 2022 (OSRA) to increase the authority of the Federal Maritime Commission (FMC) to govern international ocean shipping and to promote the growth and development of U.S. exports. One of the rulemakings required in OSRA is a rulemaking to define what constitutes an unreasonable refusal to deal or negotiate with respect to vessel space accommodations.

The FMC has a longstanding prohibition in 46 U.S.C. 41104(a)(10) that prohibits common carriers from "unreasonably refusing to deal or negotiate". OSRA amended this prohibition to state that common carriers are prohibited from "unreasonably refus[ing] to deal or negotiate, including with respect to vessel space accommodations provided by an ocean common carrier". The FMC now has to do a rulemaking to define what an unreasonable refusal to deal with respect to vessel space accommodations actually means. The FMC published a Notice of Proposed Rulemaking (NPRM) this week that describes the proposed rulemaking, including the proposed elements necessary to establish a violation and the criteria the FMC will consider in assessing reasonableness. The FMC stated in the NPRM that while the new language in 41104(a)(10) is not solely focus focused on export cargoes, the FMC is focused on the imbalance between import and export cargoes in the United States, particularly when it comes to empty containers being prioritized for export over agricultural cargoes. The NPRM states that while it will be up to the shipper to bring a prima facie case that an ocean common carrier has unreasonably refused to negotiate, after that time the burden will shift to the ocean carrier to prove that their refusal was indeed reasonable. The FMC also states in the NPRM that a situation where an ocean common carrier "categorically excludes U.S. exports from its backhaul trip" will be presumed to be an unreasonable refusal to deal.

The NPRM is open for comments until approximately 14 October 2022. It will be important for any stakeholders that are interested to provide comments to the FMC on this issue, particularly since this is a new area for the FMC. The K&L Gates team is closely monitoring progress on this provision, as well as other actions stemming from the implementation of OSRA, and engaging with policy-makers to understand the impact of the new OSRA law and the way forward for the maritime industry.

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