

COVID-19: SUPPLY CHAIN IMPACTS

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By: Darrell L. Conner, Michael F. Scanlon, James A. Sartucci, John Longstreth, Elle M. Stuart, Brody Garland

Despite manufacturing and port activity in China ramping back up toward pre-crisis levels, the global supply chain continues to feel the devastating effects of the COVID-19 pandemic. In response, the Federal Maritime Commission (“FMC”) is now looking into supply chain dynamics and is seeking feedback from stakeholders on the situation to provide guidance on potential solutions. K&L Gates lawyers and government relations professionals have been closely monitoring government activity related to these issues and advising clients and policymakers regarding the implications of COVID-19 impacts on supply chains.

During February and March, there were serious concerns that a lack of capacity for returning empty containers to China would result in excess containers occupying space in U.S. container yards and port facilities. Recent increases in trade flows between China and the United States are providing some relief, but blanked sailings continue to disrupt the ocean supply chain. Responding to market conditions, ocean carrier alliances continue to announce proportionate capacity reductions in the Asia-Europe, Trans-Pacific, and Trans-Atlantic trades.

Capacity and cargo space are also feeling the impacts of decreasing demand for imported cargoes. Reports of manufacturers and retailers failing to pick up cargo from ports are becoming more common; the result is an additional downstream strain on offsite warehouse capacity. A sustained drop in demand also leads to container congestion in terminal complexes at U.S. ports.

Pursuant to the [Shipping Act of 1984, 46 U.S.C. § 40101 et seq.](#), the FMC is charged with regulating the common carriage of goods by water in the foreign commerce of the United States. The FMC has used this authority to investigate marine terminal demurrage and detention practices, as described below.

The FMC is also entrusted with the statutory authority to both mitigate the effects of unfair and discriminatory shipping practices that harm the U.S. trades and ensure an efficient and economic transportation system for ocean commerce. Specifically, Section 19 of the [Merchant Marine Act of 1920, 46 U.S.C. § 42101 et seq.](#), empowers the FMC to prescribe regulations to address “conditions unfavorable to shipping” in the U.S. foreign trade that “arise out of or result from laws or regulations of a foreign country or competitive methods, pricing practices, or other practices employed by owners, operators, agents, or masters of vessels of a foreign country.” These include practices that impose charges or restrictions on vessels in the U.S. trades different from those imposed on other vessels competing in the trade; reserve substantial cargoes to national flag or other vessels; are discriminatory or unfair as between U.S. carriers, shippers, exporters, importers, or ports and their foreign competitors; and which are unjustified under generally accepted international agreements or practices.

The FMC has [broad powers](#) to meet these unfavorable conditions, including limitation of sailings, suspension of carriers' tariffs, suspension of carriers' rights to operate under FMC-filed terminal and other agreements, and any other action deemed necessary and appropriate to adjust or meet the unfavorable condition. The [Foreign](#)

[Shipping Practices Act](#), gives the FMC [additional tools](#) to combat unfair foreign maritime practices and restrictions that adversely affect the operations of U.S. common carriers.

The FMC published an [order](#) on March 31, 2020, authorizing Commissioner Rebecca Dye to identify operational solutions to cargo delivery system challenges related to COVID-19 and to form Supply Chain Innovation Teams to address specific industry concerns. In issuing the order under the authority of the Shipping Act of 1984, the FMC noted that “congestion and bottlenecks at ports and other points in the Nation's supply chain have become a serious risk to the growth of the U.S. economy, job growth, and to our Nation's competitive position in the world.”

The order permits Commissioner Dye to “engage supply chain stakeholders in public or non-public discussions to identify commercial solutions to certain unresolved supply chain issues.” Commissioner Dye had recently served as the FMC's Fact Finding Officer for International Ocean Transportation Supply Chain Engagement, studying the application of detention and demurrage charges. The [final recommendations](#) on the Fact Finding Investigation (No. 28) were issued on August 27, 2019.

In the coming weeks, Commissioner Dye will engage key executives from all corners of the ocean cargo supply chain, soliciting solutions from a diverse spectrum of the industry that will include port authorities, marine terminal operators, beneficial cargo owners, ocean transportation intermediaries, liner shipping companies, drayage trucking companies, longshore labor representatives, rail officials, and chassis providers.

Interested stakeholders are advised to make their priorities known, as Commissioner Dye commences her initial work of seeking input from the industry. K&L Gates remains uniquely situated to help clients assess their issues and priorities and manage stakeholder outreach as these supply chain issues garner more attention by government officials and Congress.

KEY CONTACTS



DARRELL L. CONNER
GOVERNMENT AFFAIRS COUNSELOR

WASHINGTON DC
+1.202.661.6220
DARRELL.CONNER@KLGATES.COM



MICHAEL F. SCANLON
PARTNER

WASHINGTON DC
+1.202.661.3764
MICHAEL.SCANLON@KLGATES.COM



JAMES A. SARTUCCI
GOVERNMENT AFFAIRS COUNSELOR

WASHINGTON DC
+1.202.778.9374
JIM.SARTUCCI@KLGATES.COM



JOHN LONGSTRETH
PARTNER

WASHINGTON DC
+1.202.661.6271
JOHN.LONGSTRETH@KLGATES.COM



ELLE M. STUART
ASSOCIATE

WASHINGTON DC
+1.202.778.9081
ELLE.STUART@KLGATES.COM



BRODY GARLAND
GOVERNMENT AFFAIRS ANALYST

WASHINGTON DC
+1.202.778.9189
BRODY.GARLAND@KLGATES.COM

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