

Biden Competition Order May Shift Ocean Carriers' Course

By **Michael Scanlon, John Longstreth and Elle Stuart** (July 20, 2021)

The Biden administration's July 9 executive order on promoting competition in the American economy directs federal agencies to strengthen oversight of several key industries that are perceived to have been adversely affected by the monopolistic control of a small number of dominant companies.

The industries addressed in the administration's latest move encompass numerous segments of the global economy, including agribusiness, freight rail, health care and international 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 is intended to mark the beginning of a potentially significant movement by the federal government to further regulate antitrust issues and unfair or unreasonable shipping practices.

In describing the executive order, 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% of the market.

The fact sheet puts market share in the year 2000 at 12%. That figure was used in a July 2019 article in *The Journal of Commerce*, but the publication later corrected its number for market share going into 2000 to 51%. The White House has not changed its number.

The order 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 order details specific and actionable directives for agencies to take to address enforcement responsibilities.

These include full and aggressive enforcement of antitrust laws across several sectors of the American economy, based on the "fundamental American idea that true capitalism depends on fair and open competition." With respect to ocean carrier practices the executive order specifically encourages the Federal Maritime Commission 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]



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'Interpretive Rule on Demurrage and Detention Under the Shipping Act,' 85 Fed. Reg. 29638, May 18, 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."

The White House is not alone in expressing concerns about rates and practices of ocean carriers. A recent congressional hearing on supply chain congestion issues focused on shipper concerns that ocean carriers have 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 the substantial fees levied on shippers through detention and demurrage charges, which are issued when chassis and containers are caught in the system.

In addition, committee members expressed their unhappiness with the steady decline of export options throughout the pandemic, as a result of American consumers shifting their spending habits from services to consumer goods. Both the executive order and the congressional inquiry followed the FMC's ongoing efforts to investigate ocean supply chain disruptions, as well as FMC interpretive rules and information demands targeting detention and demurrage practices.

Following up on the hearing, two key members of the subcommittee, Reps. John Garamendi, D-Calif., and Dusty Johnson, R-S.D., have very recently circulated for discussion a proposed "Ocean Shipping Reform Act of 2021" that would make potentially broad changes to the Shipping Act's regulation of ocean carriers in foreign commerce.

The discussion text, which is not a final agreed-to bill text, would among other things address detention and demurrage issues largely along the lines proposed in the executive order, add prohibitions on carriers unreasonably declining export cargoes or failing to provide necessary equipment, and allow private enforcement actions under the act against allegedly anti-competitive agreements. While it is too early to tell which of these provisions will be advanced, much less enacted, the proposal is further evidence that competitive issues in ocean shipping are in the spotlight.

The White House cannot mandate that independent agencies such as the FMC commit to the goals of the executive order, but newly appointed FMC Chairman Dan Maffei has stated that he will cooperate in the effort, noting that "the president is saying all hands on deck, which we appreciate."

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 result of current supply-and-demand conditions.

On July 12, the FMC and the U.S. Department of Justice's Antitrust Division signed an interagency memorandum of understanding to foster increased cooperation and communication on the types of competition issues raised by the order

The memorandum commits the agencies to meet at least annually to discuss competitive conditions in the international ocean liner industry, and to share information regularly on such conditions.

While the memorandum is largely procedural, the focus on the antitrust authority of the DOJ could be particularly consequential for the maritime industry.

The Shipping Act recognizes the FMC as the expert regulator of the industry, and exempts from antitrust liability any agreement between or among ocean common carriers and marine terminal operators that is filed with the FMC and effective under the act, or that is exempt from filing under the act.

However, the DOJ retains full authority over mergers and acquisitions and has the authority to prosecute unfiled anti-competitive agreements. The executive order 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."

A focus on cooperation between the agencies might also be intended to repair strains caused by a high-profile enforcement action by the DOJ in 2017, when it served subpoenas on carrier representatives at a meeting of the International Council of Containership Operators, familiarly known as the Box Club, which was lawfully constituted under the auspices of a filed and effective FMC agreement.

The investigation was closed on lack of evidence of any wrongdoing, and the basis and targets of the investigation were never made public, but the DOJ's actions raised concerns that it was not properly recognizing the relative spheres of the two agencies. A more cooperative approach could be intended not only to assist in identifying anti-competitive conduct, but also to provide regulatory certainty to entities operating lawfully within the statutory scheme.

Conclusion

The new executive order has the potential to reshape the structure and capabilities of several key industries across the global economy, including international shipping.

As the process moves forward, affected stakeholders will have opportunities to participate in shaping how the FMC and other federal agencies plan to implement the executive order via agency rulemakings, potential enforcement actions, and continued 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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Disclosure: K&L Gates represented the International Council of Containership Operators, which has since ceased operations, in connection with the DOJ subpoenas referenced in this article.

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