

A Look at the Shipping Act – and FMC during a Time of Change

AAPA – Port Administration and Legal Issues Seminar 2019

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Agenda

- Shipping Act of 1984 – Quick Overview
- Changes to the Shipping Act: OSRA to the Present
- Review of 2018 Amendments
- Impact on the Industry?
- Recent Activity at the FMC
 - New Members
 - Who are they?
- **Ancillary Activity**
 - FMC Enforcement Agenda
 - Recent Filings of Note
- A Bit of Conjecture
- Questions and Answers

Shipping Act (OSRA) Summary

- Congress last revised Shipping Act in 1998 – Ocean Shipping Reform Act
- OSRA introduces confidential service contracts
- Ocean common carriers offer service contracts to shippers
- In most major US trades (North-South; East-West), over 95% of all shipments now move under confidential service contract rates
- Generally, NVOCC's must adhere to published tariff rates and conditions
 - Introduction of NVOCC Service Arrangements (NSAs) and NRAs – usage is increasing and creating issues with VOCC's
- FMC still the enforcer of the Act and rules

Regulated and Semi-Regulated Entities

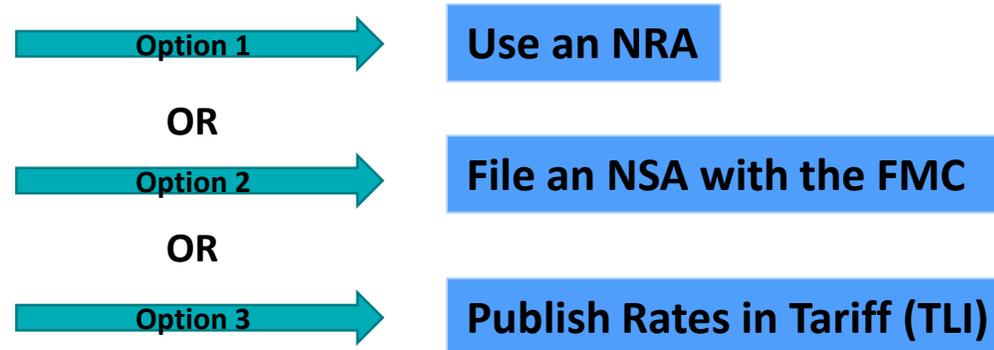
- Vessel-operating common carriers (VOCC)
 - Owns/operates vessels in the US foreign commerce
- Marine terminal operators (MTO)
- Non-vessel-operating common carriers (NVOCC)
 - Arranges for ocean transportation/issues own house bill of lading
- Ocean freight forwarders (OFF)
 - Facilitates US export shipments
- Consumers of ocean transport (BCO)*

FMC Regulatory Actions

- Year-long inquiry into carrier and MTO detention and demurrage activities
 - Result: uncertain – possible additional regulatory action but not close to what petitioners demanded
- Fine-tuning of NVOCC non-tariff authorities (NSA's and NRA's)
 - Removal of NSA filing requirements
 - Further commercial liberties for NVO's and shippers when considering and using NRA's
 - VOCC call for “parity” with NSA reform for NVO's
- Additional consideration given to further regulatory reform as directed by Trump Administration
 - Action: uncertain

Key Regulations regarding NVOCCs

- **All** rates, surcharges, accessorial and any other fees must be published in the NVOCC's tariff or contained in a non-tariff (NVOCC Service Arrangement or Negotiated Rate Agreement).



- A bill of lading should **not be issued until** the applicable rates have been published (and effective) in the tariff or put in a valid NRA or NSA.
- The rates and charges on the bill of lading and/or customer invoice **must match exactly** those in the tariff, the NRA or the NSA.
 - An NVOCC must be able to produce a rated bill of lading upon request from a customer or the FMC.
- **All shipment records** must be maintained for a period of **five (5)** years.

Review of 2018 Amendments to Shipping Act

- Section 703. Reporting on Impact of Alliances on Competition.
- Section 704. Definition of Certain Covered Services.
- Section 706. Public Participation.
- Section 707. Ocean Transportation Intermediaries.
- Section 708. Common Carriers.
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- Section 709. Negotiations.
- Section 710. Injunctive Relief Sought by the Commission.
- Section 711. Discussions.



Section 703. Reporting on Impact of Alliances on Competition. Amends 46 USC § 306

Analysis of amendments:

This modifies the FMC's annual reporting requirement to ensure that the report includes a competition analysis related to the purchase of certain covered services by VOCC alliances.



Section 704. Definition of Certain Covered Services. Amends 46 USC § 40102

Analysis of amendments:

This introduces the defined term “certain covered services,” which is relevant for amendments to § 41105 (dealing with prohibitions on concerted action among common carriers) and § 41307 (dealing with the power of the FMC to seek injunctive relief of a prohibited agreement). The covered services related to services provided to VOCCs at or near a port/terminal.



Section 705. Reports Filed with the Commission.

Amends 46 USC § 40104(a)

Analysis of amendments:

This provides more details regarding the power of the FMC to require common carriers and MTOs (previously not included) to file periodic reports.



Section 706. Public Participation.
Amends 46 USC § 40304(a) and (d)

Analysis of amendments:

This creates a requirement that the Commission may request the submission of (and, perhaps more importantly, allows any interested person to submit) relevant information and documents with respect to filed agreements.

**Section 707. Ocean Transportation Intermediaries.
Amends 46 USC §§ 40901(a) and (c), and 40902(a)**

Analysis of amendments:

This makes clear that OTIs are also prohibited from advertising or holding themselves as OTIs, in addition to actually providing services, unless they are licensed by the FMC.



Section 708. Common Carriers.

Amends 46 USC § 41104

Analysis of amendments:

This creates new prohibitions for common carriers, most significantly prohibiting simultaneous participation in a rate discussion agreement and a vessel-sharing agreement in the same trade where that is likely to produce an “unreasonable” reduction in services or increase in costs.



Section 709. Negotiations.

Amends 46 USC § 41105, creates a § 41105A, and amends § 40307

Analysis of amendments:

This prohibits common carriers from coordinating in the negotiation of tug or towing rates provided in the United States. It also newly prohibits common carriers from jointly negotiating the “covered services” described above, relating to vessel berthing or bunkering, cargo loading or unloading, buoy movement, towing services, etc.



Section 710. Injunctive Relief Sought by the Commission. Amends 46 USC § 41307

Analysis of amendments:

This broadens the Commission’s power to seek to enjoin agreements relating to the purchasing of the “certain covered services” as described. It also makes clear that the FMC can consider other agreements in addition to the agreement under review.

Presidential Signing Statement (Dec. 4, 2018)

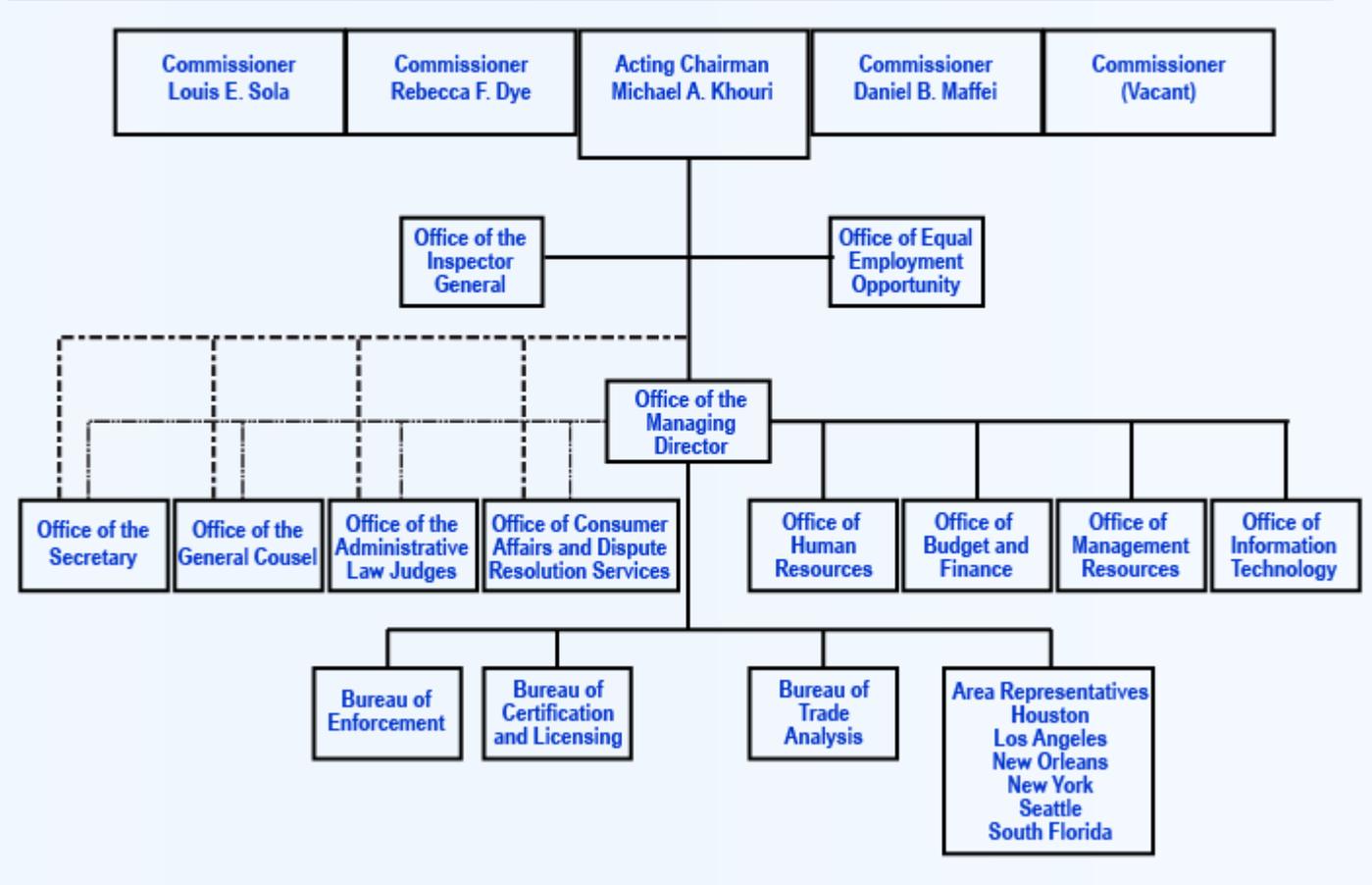
Reference in section 709(a)(2) of the Act to the “antitrust laws” should not be interpreted to give the Federal Maritime Commission (FMC) the authority to construe the antitrust laws in the first instance, which is a responsibility traditionally within the province of the Antitrust Division of the Department of Justice. Importantly, section 709 (b)(1) provides that nothing in section 709(a)(2) “shall be construed to limit the authority

of the Department of Justice regarding antitrust matters.”

I will interpret section 709(b) (1) to indicate that the FMC should defer to the Department of Justice regarding interpretations of the Federal antitrust laws, including when the FMC applies its section 709(a)(2) authority.

FMC – Current Composition (2019)

Organizational Chart



“New” FMC Members

Commissioner Daniel Maffei (D)

Daniel B. Maffei, of New York, was nominated to serve on the FMC by President Trump on November 15, 2018 and confirmed by the United States Senate on January 2, 2019.

This is a reappointment, as Maffei was also nominated by President Obama on November 19, 2015 and confirmed by the United States Senate on June 29, 2016. He served until June 30, 2018. For the last six months following the expiration of this term, he has served as professor of practice at the George

Washington University Graduate School of Political Management.



“New” FMC Members

Commissioner L.E. (Louis) Sola (R)

L.E. Sola, of Florida, was nominated to serve on the FMC by President Trump on November 15, 2018 and confirmed by the United States Senate on January 2, 2019.

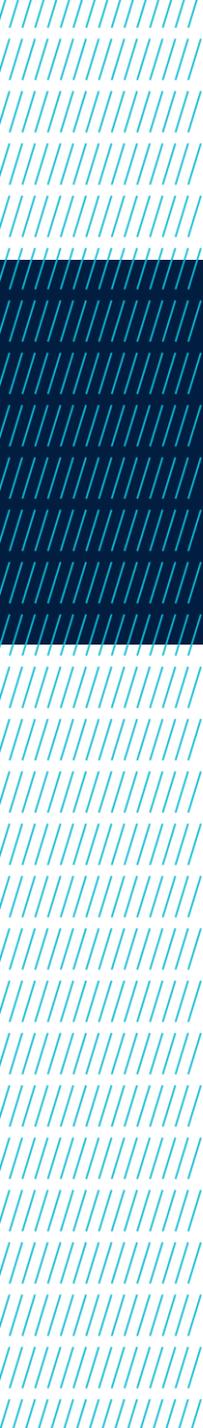
Sola is a licensed international ship broker and most recently served on the Florida Board of Pilots Commissioners, where he presided over its probable cause panel for maritime incidents. Sola is also president and founder of Evermarine, a major yacht dealer. Earlier in his career he was a senior sales executive with Campers & Nicholson

International and a consultant authoring studies for the Inter-American Development Bank during the U.S. handover of the Panama Canal.



Some Speculation . . .

- First time in years FMC is *almost* at full membership.
- New Chair or confirmation of Commissioner Khouri?
- Will new amendments have meaningful impact on MTO/carrier interactions?
- Rise of “new technology” for the sector – NYSHEX, FreightOS . . .
- Agreement filings – what will come next?
- Enforcement in a time of “regulatory reform.”
 - What’s in the box?
 - Cross-agency collaboration
- Potential for additional legislative action for the industry?
- How will global trade tensions impact the industry and the regulator?



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