U.S. Shipping Antitrust Regulation – The Quest to Avoid Another 95 Years of Uncertainty

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• History of U.S. Antitrust and Competition Regulation in Ocean Shipping
• Current U.S. Regulatory Scheme
• Recent Events Add Pressure for Change
• 2010 Legislative and Regulatory Developments
• 2011-12 Prospects
U.S. Ocean Shipping Antitrust and Regulatory History

- **Sherman Antitrust Act – 1890** - prohibits agreements unreasonably restraining trade and attempts to monopolize; Department of Justice jurisdiction; treble damages for violations

- **Shipping Act of 1916** - exclusive FMC jurisdiction; antitrust immunity; permits carrier conference agreements if approved by FMC; prohibits rebating, boycotts and discriminatory acts; double damages

- **Shipping Act of 1984** - preserves FMC exclusive jurisdiction and antitrust immunity; permits conference agreements if not disapproved by FMC; prohibits rebating, boycotts and discriminatory acts

- **Ocean Shipping Reform Act – 1998** - Allows ocean common carriers to enter confidential rate agreements with shippers (Service Contracts)

- **2005 Exemption** – Allows NVOCCs to enter Service Contracts (NSAs)
Current U.S. Regulatory Scheme

- FMC has exclusive jurisdiction – DOJ role limited
- Conference ratemaking or rate discussion permitted under agreements filed with FMC; approval virtually automatic
- Prohibited activities – unfiled agreements, rebating, predatory practices, boycotts, discrimination, undue prejudice or advantage – civil penalties, double damages, injunctive relief
- Regulatory restrictions – tariff publication rules, co-loading, etc.
- Confidential rate agreements - VOCC Service Contracts and NVOCC Service Arrangements, Negotiated Rate Agreements
- Numerous Exemptions – agency agreements, equipment interchange, nonexclusive transshipment, low market share agreements, terminal agreements, etc.
Recent Events Pushing U.S. toward Change

- Market changes, emergence of 3PL industry, service contract rates cover most US traffic
- Major trades now have discussion agreements rather than conference rates
- European Union elimination of antitrust block exemption in 2008
- U.S. Antitrust Modernization Commission recommends eliminating shipping antitrust immunity
- Conflict between U.S. Department of Justice and FMC
- 2009 rate instability and pressure on carriers, 2010 capacity shortfall, container availability problems and carrier-shipper service contract disputes indicate current scheme may not be effective
- Major U.S. shipper interests lobby intensely for change after 2010 events
2010 Legislative and Regulatory Efforts

• Oberstar Bill (HR 6167, Shipping Act of 2010)
  – Proposed to eliminate conference ratemaking and discussion agreements
  – Allow efficiency-enhancing agreements only if approved by FMC
  – Expand prohibitions, disallowing “unfair,” “unreasonable” acts, deceptive practices and surcharges not directly related to costs
  – Subject state-owned/controlled NVOCCs to “controlled carrier” rate restrictions
  – Avoided interaction with House Judiciary Committee

• FMC Initiatives
  – Fact-finding investigation regarding capacity shortfall
  – Study of impact of European Union antitrust changes
2010 Legislative and Regulatory Process Stalls

• Oberstar Bill introduced too late in 111th Congress for any action

• Democrats lose House of Representatives – November 2010
  – Republicans and Chairman Mica take over
  – Major House Transportation Committee staff changes
  – Democrats’ majority in Senate narrows
  – However, shipping antitrust is not a particularly partisan issue

• FMC Actions and Proposals
  – Report on capacity shortfall – brief, identifies issues and need for further oversight and procedures
  – No concrete enforcement actions or substantive regulatory changes
2011 Legislative Initiative

• Oberstar Bill will not return
• New Congressional ocean regulatory philosophy not yet fully established
• None of the causes of the 2009 instability, 2010 capacity shortfalls, or carriers’ rate and service contract actions have been addressed
• No major carrier went bankrupt and carriers have seemed to recover financially
• New calls for action now coming from U.S. shipper associations and manufacturing industries, both importers and exporters, with intense political support
2011 Legislative Initiative

• January 12, 2011 letter from 30 major U.S. manufacturing, shipper and shipping intermediary interest groups to House Transportation Committee, Senate Judiciary and Commerce Committees
  – Asserts that circumstances that led to 2009-10 problems have not been fixed
  – Asserts that carriers used antitrust immunity to restrict capacity, raise rates and engage in abusive practice under service contracts
  – Recommends that carrier antitrust immunity be repealed
  – Prefers simple approach - avoid Oberstar Bill penalization of carriers with new prohibited acts or subjecting rates and practices to “reasonableness” or “fairness” or “cost” tests
2011 Legislative Initiative

• Additional input now reaching Congress:
  – Carriers generally still maintain that antitrust immunity is useful to avoid rate instability
  – Shippers say antitrust immunity did not help stabilize rates in 2009 or prevent the 2010 rate and capacity crisis
  – Shippers argue that carriers’ 2010 rate increase (GRIIs and “Revenue Enhancement” surcharges) and practices on service contracts (slow steaming, delays in loading lower-rated cargo, forced rate increases) had strong signs of collaborative action
  – Shippers say European Union experience after removal of block exemption shows that carriers do not need immunity to prosper
• Possible features of new legislation that shipper interests are likely to advocate (no group has proposed any draft yet):
  
  – Main feature likely to be repeal of antitrust immunity, ending conference and discussion agreements; subject ocean shipping to U.S. antitrust laws
  
  – Continue other carrier agreements, such as space sharing, port rationalization, etc.
  
  – Rely on DOJ “safe harbor” guidelines, i.e., under antitrust regime, DOJ allows collaboration with modest market share, but with increasing scrutiny for higher concentrations
Antitrust and Judiciary Committee involvement is crucial; House Transportation and Senate Commerce Committees alone cannot move forward.

Already fairly late for a new initiative in 2011-12 (112th Congress); by the time a bill could reach meaningful committee or floor action the 2012 election season will be starting.

Carrier position remains unified and influential.

But:

- Shipper constituencies intensely calling for action include politically influential manufacturers, corporate interests, major U.S. employers.
- Legislation likely to be proposed by shippers appears to stimulate U.S. economic growth and jobs, with no tax increase or government spending required (no deficit issues).
- Bipartisan agreement is possible.
2012 Election Cycle – Likely Impacts on Ocean Shipping Regulations

- Shipping regulatory issues are outside the U.S. political spotlight on economic recovery, deficit reduction and national security
- Current administration has not staked out a strong position on ocean shipping issues; Congress has greater interest and is more likely to lead
- Possible Republican control of Senate after 2012 (with thin margin) could change the balance, but direction is not entirely clear; any action is likely to be bipartisan
- Trade flows and market forces in 2011-12 will have greater influence than electoral results; another capacity/rate crisis would likely guarantee major changes
- The safe bet in U.S. legislative politics is always against change
- Even dramatic electoral results would not change FMC direction quickly or radically
Thank you – enjoy the 4AMLC!

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