

## Ocean Shipping Reform Act of 2021: MYTHS vs. FACTS

On August 10, 2021, Congressmen John Garamendi (D-CA) and Dusty Johnson (R-SD) introduced the Ocean Shipping Reform Act of 2021 (H.R. 4996) (OSRA 2021) to modernize the federal shipping law to address supply chain disruptions in the United States involving ocean shipping arrangements. U.S. agricultural, dairy, retail, chemicals, paper and forest products, manufacturers, trucking and many other industries are facing unprecedented challenges securing timely deliveries and access to adequate vessel capacity and equipment, while simultaneously experiencing skyrocketing shipping rates and demurrage and detention costs. Ocean carriers are ignoring contractual commitments and forcing shippers to secure capacity on the spot market to maximize profits.

In short, U.S. importers and exporters are paying the highest ocean shipping rates ever recorded for the worst service levels ever experienced. The ongoing supply chain disruption means empty store shelves, shortages in inputs to production and finished consumer goods, and higher product prices to the detriment of consumers and the U.S. economy. Although OSRA 2021 is widely supported by thousands of importers and exporters, the dray community, and other interests, foreign ocean carriers and certain marine terminal interests oppose it. This paper addresses certain myths and falsehoods asserted by opponents of OSRA 2021.

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**MYTH: Increasing the Federal Maritime Commission's (FMC) oversight over demurrage and detention will disincentivize efficiencies by encouraging shippers to delay cargo pickup.**

**FACT:** OSRA 2021 **will promote efficiencies** in the ocean cargo delivery network by codifying the FMC's Interpretive Rule on demurrage. This rule **facilitates efficient cargo** pickup by requiring carriers to notify customers when cargo is physically available and preventing carriers and terminals from using demurrage as a revenue stream. Importers have commercial incentives to promptly pickup their cargo since raw materials or consumer goods sitting at the terminal cannot be used in manufacturing or sold.

**MYTH: Supply chain problems are caused solely by the post-pandemic market disruption.**

**FACT:** Although demand for imports and exports are high, ocean carriers are taking advantage of the crisis and seeking to maximize profits at the expense of U.S. importers, exporters and draymen, rather than implementing business changes that would improve the chokepoints exacerbated by the recent volume surge. OSRA 2021 includes **targeted reforms that are aimed at addressing ocean carrier unfair business practices** related to demurrage/detention charges, unreasonable allocations of vessel space and equipment, unreasonable contracting practices, and denials of export cargo, among others.

**MYTH: The supply chain disruption is not severe because importers/exporters/draymen are not filing formal complaints at the FMC.**

**FACT:** Importers, exporters and draymen are focused on managing supply chain disruptions rather than hiring attorneys to litigate claims at significant expense. They have serious concerns of potential retaliation by defendant carriers who may deny access to vessels due to litigation. Also, recently, **complaints have been filed at the FMC** alleging multiple violations of the current Shipping Act.

**MYTH: Ocean carriers are working collaboratively with all stakeholders on solutions.**

**FACT:** Ocean carriers continue to blame the market for the supply chain disruption and have **failed to offer any meaningful solutions** to the ocean shipping crisis. They continue to cancel contract rates and

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cargo volume commitments, deny and cancel container bookings, raise container rates, reduce export receiving windows, and force motor carriers to reposition equipment without compensation.

**MYTH: OSRA 2021 makes ocean carriers guarantors of performance by other service providers and reduces responsibilities for shippers.**

**FACT:** OSRA 2021 would require the FMC to determine the scope of the common carrier obligation of ocean carriers through the development of minimum service standards that meet the public interest. The new standards would address the serious service deficiencies that are currently occurring and place *primary* responsibility on the ocean carrier who is the entity who contracts with the shipper. The standards would be developed by FMC rulemaking ensuring broad participation by all stakeholders.

OSRA 2021 does not alter in any way the responsibilities of shippers with respect to demurrage and detention practices in terms of making timely arrangements to pick up cargo and return equipment to terminals, and to be assessed charges when they fail to do so within the allotted free time period. Shippers do not oppose demurrage and detention charges that are assessed when cargo delays are within their control; but they should not be assessed charges when cargo delays are caused by carrier and terminal actions that are beyond their control.

**MYTH: OSRA 2021 will disrupt ocean service contracting practices and revert to old discrimination-based policies.**

**FACT:** OSRA 2021 provides the FMC with discretion to adopt additional minimum service contract terms and it allows for claims against carriers for unreasonable contracting practices that are widespread in nature. It does not in any way involve the government directly in the contract negotiation process between a carrier and a shipper; nor does it guarantee a shipper the right to a contract or any specific contract price. Shippers strongly favor confidential contracts as the primary means for conducting ocean transportation arrangements.

**MYTH: OSRA 2021 simply duplicates existing authority of the U.S. Federal Maritime Commission.**

**FACT:** OSRA 2021 adds new authorities for the FMC, as well as reporting obligations by the FMC to the public and Congress.

OSRA 2021 expressly adds new prohibitions against unreasonable actions by carriers involving vessel space and equipment allocations to address concerns that ocean carriers are moving more empty containers to China to maximize profits on imports from Asia at the expense of U.S. exports; and a new prohibition against ocean carrier practices involving the interchange of equipment, such as chassis and containers, that create inefficiencies in the cargo delivery network.

OSRA 2021 also would require the FMC to establish new ocean common carrier service standards; it prohibits unreasonable denials of exports that can be loaded timely and safely; it expands the FMC's authority over demurrage and detention claims and shifts the burden of proof for such claims to ocean carriers to first prove the charges are not unreasonable; and expands FMC authority over claims against anticompetitive collective actions by ocean carrier alliances—none of which currently exist.

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