



**U.S. House of Representatives**  
**Committee on Transportation and Infrastructure**

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**Washington, DC 20515**

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June 18, 2008

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**SUMMARY OF SUBJECT MATTER**

**TO:** Members of the Subcommittee on Coast Guard and Maritime Transportation

**FROM:** Subcommittee on Coast Guard and Maritime Transportation Staff

**SUBJECT:** Hearing on "Federal Maritime Commission Management and Regulation of International Shipping"

**PURPOSE OF THE HEARING**

The Subcommittee on Coast Guard and Maritime Transportation will convene at 2:00 p.m., on Thursday, June 19, 2008, in Room 2167 of the Rayburn House Office Building to receive testimony regarding the management of the Federal Maritime Commission ("FMC") on the FMC's regulation of international shipping. The Subcommittee will also receive testimony from a management consultant who reviewed the performance of the agency as well as testimony from industry associations representing vessel owners, shippers, and transportation intermediaries regarding the current regulation of international shipping and its impact on U.S. imports and exports.

**BACKGROUND**

History

The FMC was established August 12, 1961, as an independent regulatory agency by Reorganization Plan No. 7. Prior to that date, the Federal Maritime Board had responsibility for the regulation of ocean commerce and the promotion of the United States Merchant Marine. Under Reorganization Plan No. 7, U.S. shipping laws were separated into two categories: regulatory and promotional. Responsibility for promoting an adequate and efficient U.S. Merchant Marine was assigned to the United States Maritime Administration ("MARAD"), now located within the

Department of Transportation. The newly formed FMC was charged with the administration of the regulatory provisions of U.S. shipping laws.

When the Shipping Act was enacted in 1984, major deregulatory changes were made in the regulatory regime for shipping companies operating between the United States and foreign countries. One of the most significant changes was allowing for "service contracts" between carriers and shippers. However, carriers that were members of a conference needed the approval of a conference to enter these contracts. In 1998, Congress passed the Ocean Shipping Reform Act, which contained additional deregulatory amendments to the Shipping Act of 1984. This Act was a significant pro-market shift in shipping regulations and allowed for "confidential service contracts" by prohibiting conferences from interfering with contracts between vessel-owning carriers and shippers. As a result, almost all containerized cargo is moved under service contracts rather than under publicly available tariffs.

### Functions

The principal statutes or statutory provisions administered by the Commission are contained in subtitle IV of title 46, United States Code. These FMC functions include overseeing the filing of tariffs and service contracts under chapter 405; regulation of controlled carriers under chapter 407; regulation of ocean transportation intermediaries such as freight forwarders under chapter 409; and actions to address unfair foreign shipping practices under chapters 421 and 423. The principal responsibility of the FMC is to ensure that ocean common carriers, marine terminal operators, conferences, ports, and ocean transportation intermediaries ("OTIs") which operate in the U.S. foreign commerce maintain just and reasonable practices related to shippers who import and export goods from the United States.

The Federal Maritime Commission's specific regulatory responsibilities include:

1. Regulating certain activities of international shipping lines (called "ocean common carriers"), marine terminal operators, and ocean transportation intermediaries that operate in the U.S. foreign commerce or the trade between individuals or legal entities in U.S. and different countries. (An Ocean Transportation Intermediary is either an ocean freight forwarder or a non-vessel operating common carrier. An ocean freight forwarder is an individual or company that dispatches shipments from the United States via common carriers and arranges or books space for those shipments on behalf of shippers. They also prepare and process the documentation and perform related activities pertaining to those shipments. A non-vessel operating common carrier is a common carrier that purchases a block of space on a containership and resells that space to shippers.)
2. Overseeing the financial responsibility of cruise ship lines and other passenger ship operators to ensure they have the resources to pay compensation for personal injuries or non-performance of contracted duties.
3. Monitoring the laws and practices of foreign governments that could have a discriminatory or otherwise adverse impact on the U.S. maritime trade and U.S. shipping industry and administering bilateral trade sanctions to persuade foreign governments to remove adverse conditions.

4. Enforcing special regulatory requirements applicable to shipping lines controlled or owned by foreign governments (so-called "controlled carriers").
5. Reviewing and regulating agreements between marine terminals and/or shipping lines (which enjoy statutory immunity from antitrust laws) as well as service contracts between shipping lines and their customers.
6. Licensing and regulating ocean transportation intermediaries in the U.S., and ensuring they maintain evidence of financial responsibility. These intermediaries include freight forwarders, who make bookings and process paperwork for shipper customers (roughly analogous to a travel agent for freight), and "non-vessel-operating common carriers", who act as resellers of space on shipping lines' vessels.
7. Reviewing common carriers' privately published tariff systems for accessibility and accuracy.

The Commission is authorized by chapters 421 and 423 of title 46, United States Code, to take action to ensure that the foreign commerce of the U.S. is not burdened by non-market barriers to ocean shipping. The Commission may take countervailing action to correct unfavorable shipping conditions in U.S. foreign commerce and may impose penalties to address actions by carriers or foreign governments that adversely affect shipping in the U.S. foreign oceanborne trades or that impair the access of U.S. flag vessels to ocean trade between foreign ports.

The Commission conducts informal and formal investigations as a part of its regulatory responsibility. If a person or company is unable to settle a dispute that involves a possible violation of the Shipping Act, that person or company may file a complaint with the Commission. The complaint will be referred to the Commission's Office of Administrative Law Judges ("ALJs"). If an ALJ is unable to decide the case merely by reading written evidence, a hearing may be conducted in which witnesses appear and give testimony under oath. The ALJ's initial decision may be appealed to the Commission if either party files an exception within 22 days, or may be reviewed by the Commission on its own motion. If there are no exceptions to the initial decision, it becomes administratively final 30 days after the date of issuance.

Among the regulatory issues that the Subcommittee Members may explore are:

- The purpose and use of antitrust immunity for carriers and conferences when 95 percent of goods are transported under contracts rather than by traditional tariffs.
- The impact that a decrease in antitrust immunity by the European Union (in effect in October 2008) will have on U.S.- Europe trade as well as on global trade.
- The purpose and use of tariff filing when most goods are not shipped by tariffs.
- The growing use by ports and marine terminal operators of filing agreements with the Commission to obtain antitrust immunity for their collective actions.
- The extent to which the limited availability of containers and ship capacity is constraining the ability of U.S. exporters to get their goods to foreign markets.

## Organization

The Commission is typically composed of five Commissioners appointed to five-year terms by the President with the advice and consent of the Senate. Not more than three members of the Commission may belong to the same political party. The Chairman of the Commissioners is designated by the President. The Commission currently does not have a Chairman and one of the other Commissioners (Mr. Paul Anderson) has resigned since the last Subcommittee hearing on the Commission in April 2008.

The Chairman is the administrative officer and chief executive of the agency. In the absence of a Chairman, all the remaining Commissioners are responsible for the day-to-day management of the Commission including hiring and establishment of Senior Executive Service ("SES") positions, oversight of renovations to the Commission's offices, and other personnel and administrative matters.

The Commission's organizational units consist of: Office of the Secretary; Office of the General Counsel; Office of Administrative Law Judges; Office of the Inspector General; Office of the Executive Director; Office of Equal Employment Opportunity; Bureau of Consumer Complaints and Licensing; Bureau of Enforcement; and Bureau of Trade Analysis. The Executive Director assists the Chairman in providing executive and administrative direction to the bureaus in the Commission. The offices and bureaus are responsible for conducting the Commission's regulatory programs or for providing administrative support.

In fiscal year 2007, the Commission was authorized a total of 119 full-time equivalent positions and had a total appropriation of \$20 million. In the President's FY 2009 budget, 131 full-time equivalent positions have been requested. The majority of the Commission's personnel are located in Washington, D.C., with area representatives in Los Angeles, New York, Miami, New Orleans, and Seattle.

## Management of the Commission

In 2004, the then Chairman of the FMC hired a management consultant, Mr. Donald A. Cole, to help him identify management problems at the Commission. Some of the issues identified by Mr. Cole were raised at the April 2008 hearing and the Members indicated that they would like to receive testimony from Mr. Cole regarding his finding. The current Commissioners testified that they had not seen the report. The findings are as follows:

1. "Lack of Trust—at all levels in the organization but especially in the leadership, women and minorities feel disenfranchised, conflict abounds between people, managers, SES and even the bureaus.
2. "No leadership team exists, managers do not know how to give or receive feedback to employees or customers, people do not know where they fit in.
3. "Communication—people are starved for information-no staff meetings are being held, there is little interaction with industry, there are no vision or operational values exhibited.

4. "The agency appears to be adverse to change—people are fearful to suggest improvements, empowerment is not in their vocabulary.
5. "Relationships with customers, clients, stakeholders and the Hill are poor.
6. "The organization operates in a command and control manner. The Executive Director has ruled with an iron hand. The Bureau of Enforcement operates with a hammer mindset rather than how the agency can work in partnership with industry and individuals. The organizational structure supports this top down power with only two direct reports to the Chairman—the Executive Director and the General Counsel. There is little support, training or development for the workers and no socialization.
7. "The budget is controlled by a few. No bureau has its own budget allowance thus no budget responsibility or accountability exists.
8. "IT-Automation of processes both inside the agency and the industry you serve are outdated and no plan exists to improve. Computer security is questionable at best and no disaster recovery plan exists.
9. "There is little interaction between the Commissioners and the staff. They are a rich resource and should be used/included in the products/services you deliver.
10. "There is no concept of "Stewardship of the Whole"—that all the leaders/managers are responsible for managing efficiently and effectively the resources of the agency. It is not OK for one part of the agency to do just fine at the expense of another. The leadership/management team will succeed together or fail together."

#### April 2008 Hearing

The Subcommittee was concerned during the April 2008 hearing that the then-four Members of the Commission did not collectively make decisions and were not effectively overseeing the administration of the Commission. Further, Subcommittee heard testimony indicating that the Commission rarely met in public sessions to consider either administrative or regulatory issues -- and often held votes that entailed the use of blank vote forms that had been pre-signed by a Commissioner and were then subsequently filled in when a vote was called. Additionally, Federal employee responses to the Federal Human Capital Survey conducted by the Office of Personnel Management tended to be negative, particularly regarding the lack of trust and leadership issues.

As a result of the April 2008 Subcommittee hearing, the FMC has held several publicly open meetings of the Commissioners to discuss and approve both management issues and regulatory issues -- rather than the "notational voting" that they had been using that allowed Commissioners to vote while not present.

#### **PREVIOUS COMMITTEE ACTION**

The Subcommittee held a hearing on April 15, 2008, on the FMC budget request.

WITNESSES

**Commissioner Joseph E. Brennan**  
Commissioner  
Federal Maritime Commission

**Commissioner Harold J. Creel Jr.**  
Commissioner  
Federal Maritime Commission

**Commissioner Rebecca F. Dye**  
Commissioner  
Federal Maritime Commission

**Mr. Donald A. Cole**  
Management Consultant

**Mr. Peter Freidmann**  
Executive Director  
Agriculture Transportation Coalition

**Mr. Michael Berzon**  
President  
Mar-Log Inc.  
Chairman, Ocean Transportation Committee  
The National Industrial Transportation League

**Mr. Win Froelich**  
General Counsel  
National Association of Waterfront Employers

**Ms. Mary Jo Muoio**  
President  
National Customs Brokers and Forwarders Association of America, Inc.

**Mr. Stanley O. Sher**  
Acting President  
World Shipping Council