AMERICAN SHIPPING COMPANY

AMERICAN SHIPPING COMPANY
Supply Chain Gazette

content by INTERNATIONAL TRADE TODAY

January 2022

New FMC Policy Statements Address Carrier Retaliation, Shipper Complaint Process

The Federal Maritime Commission issued three new policy statements this week to provide the shipping industry more guidance on its complaint process and clarify how it will address cases of carrier retaliation. The shipper-friendly policy statements, originally recommended by Commissioner Rebecca Dye in July (see ITT 07/29/2021), describe how the FMC defines who can allege complaints, how the commission approaches reparations for attorney fees and a broad outline of who can bring forward a retaliation complaint.

The policies, issued Dec. 28, are part of an FMC effort to address issues in the international freight delivery system that have been exacerbated during the COVID-19 pandemic, including litigation between carriers and shippers over unfair shipping practices. The three statements are specifically meant to reduce barriers faced by shippers that may serve as "disincentives to filing actions at the agency," the FMC said.

In one statement, a nine-page document on carrier retaliation, the FMC describes what constitutes retaliation by common carriers and outlines a range of factors it will consider during the complaint process. The commission specifically emphasized that it "broadly" defines which parties qualify as a shipper, which includes cargo owners, "the person for whose account the ocean transportation of cargo is provided, the person to whom delivery is to be made," a shipping association or a non-vessel operating common carrier that "accepts responsibility for payment of all charges applicable under the tariff or service contract."

Despite laws against retaliation, some shippers have specifically said they haven't followed through with their complaints because they're worried about carrier backlash (see ITT 06/17/2021). In the policy statement, the FMC describes shipper activity that is "specifically protected" under federal regulations, which includes, but also extends beyond, filing a complaint with the FMC. The commission said carriers can't retaliate against shippers for commenting on FMC rulemakings or participating in the agency's investigative efforts.

The FMC also stressed that shippers that file retaliation-related complaints don't need to prove the retaliation resulted from a carrier competition issue. "It is not hard to envision situations where a carrier might engage in retaliatory conduct that has nothing to do with competition with other carriers," the FMC said. "It is enough that a complainant can show that a carrier engaged in unfair or unjustly discriminatory conduct because a shipper filed a complaint-related activity."

In another policy statement, the FMC clarified that "any person" can file a complaint with the commission, including shipping associations or other trade groups. The agency said individual shippers sometimes decide not to follow through with a complaint because they don't have the time, attention, money or relationships, so the "cost-benefit analysis weighs against bringing an otherwise valid, or potentially valid, claim."

"The Commission emphasizes that individuals and companies are not the only persons who may file complaints," the FMC said, adding that it has "consistently interpreted the term broadly to include not only natural persons but also corporations, partnerships, associations, and public or private organizations."

The third policy statement is meant to address the "lack of clarity" among shippers about reparations for attorney fees stemming from successful complaints. The statement describes how soon following a successful complaint shippers must file for fee reimbursement, who is eligible and other procedures.

The agency also stressed that successful respondents as well as successful complainants are eligible for reparations, meaning the commission can reimburse parties wrongfully

accused of violating shipping laws. But the FMC said it has only once required an unsuccessful complainant to pay for the respondent's attorney fees, and that was because the complainant "abandoned its claim, forced multiple [r] espondents to expend significant resources of both time and money in their defense and, perhaps most egregiously, failed to terminate the claim when it could have limited the expense of the Respondents."

Complainants "who raise non-frivolous claims in good faith, who litigate zealously but within the rules and for proper purposes, and who comply with Commission orders are at little risk of attorney fee liability if they are unsuccessful, absent unusual circumstances," the FMC said.

CBP Suspends Liquidation of Solar Cells, Bifacial Panels Subject to Safeguard Duties

CBP will suspend liquidation for entries of solar cells subject to Section 201 safeguard duties over the past 10-15 months, following to a Court of International Trade decision that invalidated a Trump-era increase in safeguard duty rates on solar cells and the withdrawal of an exemption for bifacial cells (see ITT 11/17/2021), CBP said in a CSMS message Dec. 28.

Suspension of liquidation will apply to all entries of solar cells under subheadings 9903.45.22 and 9903.45.25 for goods subject to Section 201 safeguard duties entered Feb. 7, 2021, through Feb. 6, 2022. It will also apply to any entries of bifacial solar cells entered Oct. 25, 2020, through Feb. 6, 2022, CBP said. That includes any entries for which a post-summary correction (PSC) has been submitted, CBP said.

Importers entering bifacial solar panels should still "provide documentation to CBP that demonstrates the nature of the merchandise via the Document Imaging Service (DIS), using entry number as the reference," the agency said.

CIT ordered the suspension of liquidation on Dec. 7, at the request of the Justice Department. The government says it needs time to decide whether to appeal CIT's decision, and runs the risk of having entries liquidate pursuant to the CIT decision prior to any potentially successful appeal to the U.S. Court of Appeals for the Federal Circuit to overturn the CIT decision. — ***Brian Feito***

2022 Tariff Schedule Update to Take Effect Jan. 27; ITC Releases Details on Changes

Changes to the U.S. tariff schedule that implement an update to the World Customs Organization's Harmonized System tariff nomenclature (see ITT 12/23/2021) are set to take effect Jan. 27, according to the presidential proclamation set for publication in the *Federal Register* Dec. 28. The full list of coming changes, along with descriptions, is in a newly released report from the International Trade Commission on modifications to the Harmonized Tariff Schedule of the U.S.

The HS governs classification for most countries at the six-digit level, and each Harmonized System Convention member must then also set eight-digit and 10-digit changes to its own tariff schedule. Similarly widespread changes were adopted by the WCO and implemented in the HTSUS in 2017. — ***Tim Warren***

FDA Sets Lab Requirements for Testing to Show Admissibility of Imports, Removal From Import Alert

FDA is finalizing its Laboratory Accreditation for Analyses of Foods (LAAF) framework for accreditation of laboratories for testing of food in certain circumstances, including tests to demonstrate admissibility of food detained by FDA at the border and tests used as evidence by importers seeking removal from import alert, it said in a final rule Dec. 3.

The final rule, which takes effect Feb. 1, sets standards that laboratories must meet to conduct food testing covered by the new regulations. That includes testing to address an identified or suspected food safety problem, both in response to a specific testing requirement under FDA's laws and regulations or as required by the secretary of health and human services. It also applies to testing used as evidence that an imported food detained at the border is not adulterated and misbranded and is admissible, as well as testing to support removal from an import alert through successful consecutive testing.

Testing required under FDA's Foreign Supplier Verification Program is not covered by the new food testing accreditation scheme, FDA said.

The final rule establishes a publicly available registry listing LAAF accreditation bodies and laboratories that have

been recognized or accredited by FDA under the new food testing program, and requires that results of food testing by these labs be sent directly to the agency. It also specifies the analytical reports LAAF labs must send under the final rule, and sets eligibility requirements for LAAF accreditation bodies to qualify for FDA recognition and requirements they must meet once recognized.

While the importer of record is responsible for compliance with FDA laws and regulations, including testing requirements set by FDA's final rule, the agency said it will allow the importer of record to contract with other parties so that the other party agrees to engage an accredited LAAF laboratory to test the product. "Such arrangements are purely between the parties to the shipment; at the end of the day the importer of record remains the party ultimately responsible for the compliance of that entry and therefore is ultimately responsible for amassing any testimonial evidence (e.g., test results and associated analytical documentation) in support of admission of the food," FDA said.

Foreign laboratories may seek LAAF accreditation as well, and there is no requirement that testing of imports subject to LAAF testing must be conducted in the U.S. However, FDA will generally require sampling after arrival in the U.S., unless it grants a written, case-by-case exception based on the specific circumstances of the shipment, such as product characteristics and the specifics of packaging and transportation. **— *Brian Feito***

Uyghur Forced Labor Act Becomes Law

President Joe Biden signed the Uyghur Forced Labor Act Dec. 23. Under the act, the rebuttable presumption that goods with a nexus to China's Xinjiang province are made with forced labor will begin June 21.

That is also the day CBP is required to produce guidance for importers on what sort of evidence is sufficient to prove that goods were not made with forced labor, and to identify which companies outside the province are either using inputs from Xinjiang or accepting transferred Muslim workers from there.

Sen. Marco Rubio, R-Fla., whose push to append this bill to the National Defense Authorization Act apparently spurred the House to arrive at a compromise between the two chambers' versions, welcomed the news that the bill had become law. "This is the most important and impactful action taken thus far by the United States to hold the Chinese Communist Party accountable for their use of slave labor," he said. "It will fundamentally change our relationship with Beijing. This law should also ensure that Americans no longer unknowingly buy goods made by slaves in China. I look forward to working with the Biden Administration and my colleagues to ensure the new law is implemented correctly and enforced properly."

With the act now signed into law, "we can finally ensure that American consumers and businesses can buy goods without inadvertent complicity in China's horrific human rights abuses," co-sponsor Sen. Jeff Merkley, D-Ore., said. "As the Chinese government tries to whitewash their genocide and claim a propaganda victory with the upcoming Olympics, this legislation sends a powerful, bipartisan message that the United States will not turn a blind eye." **— *Mara Lee***

NCBFAA Tells Congress SIMP Expansion Unworkable

The Seafood Import Monitoring Program Expansion that was going to be in the bipartisan infrastructure bill did not become law, but H.R. 3075 passed out of the House Natural Resources Committee in October, and the National Customs Brokers & Forwarders Association of America is warning the majority leader that he should not schedule a vote in the chamber for the bill.

NCBFAA President Jan Fields said that SIMP is aiming to combat forced labor on fishing boats and illegal or unregulated fishing, but even the current law is not well tailored to that aim.

"The current SIMP program shows a poor understanding of real world supply chain operations and does not reflect the fact that a vast amount of seafood imports originate from aquaculture sources, not the ocean," she wrote Dec 14. "For example, for shrimp imports, the current structure of data input requires a significant amount of repetitive data to be entered into the automated commercial environment (ACE) again and again from each aquaculture source based on the various sizes of the shrimp. With anywhere from 1 to 100+ aquaculture sources for one shipment of shrimp entering the U.S., it is a massive quantity of data. An NCBFAA

member noted that one shipment was estimated to require 18,000 data elements to be manually entered!"

For the species of fish covered by SIMP, brokers report the ship's name and country flag, where the fish was caught and with what gear, and where the fish was processed. "A single fishing vessel may be out at sea for six to eight weeks at a time catching up to 350 tons of fish from 20 to 30 different locations. A typical imported shipment of canned seafood may easily have originated from 10 or 12 different vessels catching fish from over a hundred different locations," she said, which means thousands of data points.

The expansion would be worse, she said, since it would require complete chain of custody data with names and addresses of each party that handled the fish, as well as the beneficial owner of each one of those companies. This would cover foreign truckers, warehouses, distributors and so on. All this would be required 72 hours before the shipment arrives.

"[I]n some cases, fresh seafood is caught, shipped by air and consumed within a 72-hour period! Finally, the legislation also requires a certificate from a competent authority to be provided for every transfer point in the supply chain. These requirements at the point of entry are wildly unrealistic... ." — ***Mara Lee***

Blumenauer Considering Major Changes to de Minimis

House Ways and Means Trade Subcommittee Chairman Earl Blumenauer, D-Ore., said the $800 de minimis threshold amounts to a huge loophole, and he's going to propose major changes to the law. He said that millions of packages a day enter the U.S. under de minimis, and "nobody's monitoring it. We don't know what's forced labor, what has circumvented intellectual property, counterfeit goods, drugs. CBP's getting better, but who can monitor millions of packages a day?"

Blumenauer, who discussed his thoughts at the Capitol in a Dec. 2 hallway interview, said he thinks countries on the Office of the U.S. Trade Representative's watch lists for intellectual property abuses should be denied access to de minimis. He said that currently, 83% of the de minimis packages come from China.

He said there could be another way to address the lack of scrutiny of Chinese packages other than an outright ban on de minimis for the country, which would be to say that exporters have to use a customs broker. During a later roundtable with reporters, Blumenauer said he thinks changes to de minimis could get bipartisan support. — ***Mara Lee***

APHIS to Continue to Accept Copies of Phyto Certs Until March 31

The Animal and Plant Health Inspection Service will allow importers a few more months before it begins rejecting copies of phytosanitary certificates for plant commodities, it said Dec. 29. The agency had previously said it would end the policy of accepting copies Jan. 1 (see ITT 12/10/2021), but now says it will begin accepting only originals on March 31. The policy is in place to mitigate challenges from the COVID-19 pandemic.

FDA Set to Open Up VQIP Application Period for FY 2023

FDA will open its Voluntary Qualified Importer Program application portal for FY 2023 on Jan. 1, 2022, it said. The voluntary, fee-based program provides expedited review benefits to food importers that meet certain requirements, including third-party audits of their suppliers. The fee for FY 2023 hasn't been set yet, but it was $15,938 for FY 2022. The FY 2023 application portal will close May 31, 2022, FDA said. There were four program participants in FY 2022: Costco, Pacific Seafood, Palmex and Sovena USA.

OFFICE LOCATIONS
Moonachie, NJ (201-478-4600) * Long Beach, CA (562-435-2327) * Schaumburg, IL (630-860-0782)
Hong Kong • Shenzhen • Guangzhou • Shanghai • Ningbo • Nanjing • Dalian • Tianjin • Qingdao • Xiamen

DOMESTIC CARGO OPERATIONS
Moonachie, NJ (201) 941-4990

www.shipamerican.com

4PL LOCATIONS
New Jersey * California * Joliet, IL

INTERNATIONAL TRADE TODAY
The source for trade compliance news

(ISSN 1932-6289)
PUBLISHED BY WARREN COMMUNICATIONS NEWS, INC.

Warren Communications News, Inc. is publisher of International Trade Today, Export Compliance Daily, Trade Law Daily, Communications Daily, Consumer Electronics Daily and other specialized publications.

EDITORIAL & BUSINESS HEADQUARTERS
2115 Ward Court, N.W., Washington, DC 20037

Albert Warren
Editor & Publisher 1961–2006

Paul Warren ..... Chairman and Publisher
Daniel Warren ..... President and Editor
Timothy Warren ..... Executive Managing Editor
Brian Feito ..... Managing Editor
Mara Lee ..... Associate Editor
Ian Cohen ..... Associate Editor
Jacob Kopnick ..... Associate Editor

Sales

William R. Benton ..... Sales Director
Bruce Ryan ..... Account Manager
Jim Sharp ..... Account Manager
Lisa Price ..... Account Manager
Matt Long ..... Account Manager
Matt Peterson ..... Account Manager

Send news materials to ittnews@warren-news.com
Phone: 202-872-9200 Fax: 202-318-8984
https://internationaltradetoday.com
Email: info@warren-news.com