• Setting up canopies or similar opaque barriers at a CBTS to provide some privacy to individuals during the collection of samples.
• Controlling foot and car traffic to create adequate distancing at the point of service to minimize the ability of persons to see or overhear screening interactions at a CBTS. (A six foot distance would serve this purpose as well as supporting recommended social distancing measures to minimize the risk of spreading COVID–19.)
• Establishing a “buffer zone” to prevent members of the media or public from observing or filming individuals who approach a CBTS, and posting signs prohibiting filming.
• Using secure technology at a CBTS to record and transmit electronic PHI.
• Posting a Notice of Privacy Practices (NPP), or information about how to find the NPP online, if applicable, in a place that is readily viewable by individuals who approach a CBTS.

Although covered health care providers and business associates are encouraged to implement these reasonable safeguards at a CBTS, OCR will not impose penalties for violations of the HIPAA Privacy, Security, and Breach Notification Rules that occur in connection with the good faith operation of a CBTS.

IV. Who/what is not covered by this notification?

This notification does not apply to health plans or health care clearinghouses when they are performing health plan and clearinghouse functions. To the extent that an entity performs both plan and provider functions, the Notification applies to the entity only in its role as a covered health care provider and only to the extent that it participates in a CBTS.

This notification also does not apply to covered health care providers or their business associates when such entities are performing non-CBTS related activities, including the handling of PHI outside of the operation of a CBTS. Potential HIPAA penalties still apply to all other HIPAA-covered operations of the covered health care provider or business associate, unless otherwise stated by OCR.

For example:
• A pharmacy that participates in the operation of a CBTS in the parking lot of its retail facility could be subject to a civil money penalty for HIPAA violations that occur inside its retail facility at that location that are unrelated to the CBTS.
• A covered clinical laboratory that has workforce members working on site at a CBTS could be subject to a civil money penalty for HIPAA violations that occur at the laboratory itself.
• A covered health care provider that experiences a breach of PHI in its existing electronic health record system, which includes PHI gathered from the operation of a CBTS, could be subject to a civil money penalty for violations of the HIPAA Breach Notification Rule if it fails to notify all individuals affected by the breach (including individuals whose PHI was created or received from the operation of a CBTS).

V. Collection of Information Requirements

This notification of enforcement discretion creates no legal obligations and no legal rights. Because this document imposes no information collection requirements, it need not be reviewed by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

Roger T. Severino
Director, Office for Civil Rights Department of Health and Human Services.

BILLING CODE 4153–01–P

FEDERAL MARITIME COMMISSION
46 CFR Part 545
[Docket No. 19–05]
RIN 3072–AC76
Interpretive Rule on Demurrage and Detention Under the Shipping Act

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission is clarifying its interpretation of the Shipping Act prohibition against failing to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property with respect to demurrage and detention. Specifically, the Commission is providing guidance as to what it may consider in assessing whether a demurrage or detention practice is unjust or unreasonable.

DATES: This final rule is effective May 18, 2020.

FOR FURTHER INFORMATION CONTACT: Rachel E. Dickon, Secretary; Phone: (202) 523–5725; Email: secretary@fmc.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

On September 17, 2019, the Commission published proposed guidance, in the form of an interpretive rule, about factors it may consider when assessing the reasonableness of demurrage and detention practices and regulations under 46 U.S.C. 41102(c) and 46 CFR 545.4(d). The rule followed years of complaints from U.S. importers, exporters, transportation intermediaries, and drayage truckers that ocean carrier and marine terminal operator demurrage and detention practices unfairly penalized shippers, intermediaries, and truckers for circumstances outside their control. These complaints led the Commission to open a Fact Finding Investigation that substantiated many of these concerns. Based on the investigation and previous experience with demurrage and detention issues, the Commission developed guidance and sought comment in a Notice of Proposed Rulemaking (NPRM). The interpretive rule was intended to reflect three general principles:

1. Importers, exporters, intermediaries, and truckers should not be penalized by demurrage and detention practices when circumstances are such that they cannot retrieve containers from, or return containers to, marine terminals because under those circumstances the charges cannot serve their incentive function.

2. Importers should be notified when their cargo is actually available for retrieval.

3. Demurrage and detention policies should be accessible, clear, and, to the extent possible, use consistent terminology.

3. Demurrage and detention practices unfairly penalized shippers, intermediaries, and truckers for circumstances outside their control. These complaints led the Commission to open a Fact Finding Investigation that substantiated many of these concerns. Based on the investigation and previous experience with demurrage and detention issues, the Commission developed guidance and sought comment in a Notice of Proposed Rulemaking (NPRM).

The NPRM attempted to provide guidance on these principles while making sure that the proposed interpretive rule was flexible enough to account for the variety of marine terminal operations nationwide and to allow for innovative commercial solutions to commercial problems.

Consequently, instead of prescribing practices that ocean carriers and marine terminal operators must adopt or avoid, the Commission’s proposed rule was a non-exclusive list of factors that the Commission may consider when assessing the reasonableness of demurrage and detention practices under 46 U.S.C. 41102(c) and 46 CFR 545.4(d). Each section 41102(c) case would continue to be decided on its particular facts, and the rule would not foreclose parties from raising, or the Commission from considering, factors beyond those listed in the rule.

The Commission received just over one hundred comments to the NPRM, the vast majority of which supported the Commission’s proposed rule. In particular, American importers, exporters, intermediaries, and truckers urged that the Commission adopt it, and, in many instances, implored the Commission to do more. Ocean carriers and their marine terminal operator partners opposed the proposed guidance on legal and policy grounds.

Having considered the comments, the Commission adopts the rule as set forth in the NPRM, with a few minor changes. In particular, the Commission is revising the regulatory text to: (1) Adopt a policy regarding demurrage and detention practices and government inspections; and (2) to make clear that the rule does not preclude the Commission from considering additional factors outside those specifically listed. Importantly, the rule is not intended to, and cannot, solve every demurrage and detention problem or quell all disputes. Rather, it reflects the Commission's finding that all segments of the industry will benefit from advance notice of how the Commission will approach the “reasonableness” inquiry under section 41102(c). The Commission continues to believe that such guidance will promote fluidity in the U.S. freight delivery system by ensuring that demurrage and detention serve their purpose of incentivizing cargo and equipment velocity, and that the interpretive rule will also mitigate confusion, reduce and streamline disputes, and enhance competition and innovation in business operations and policies.

II. NPRM and Summary of Comments

A. Background

Although the rule is derived from Commission’s Fact Finding Investigation No. 28, that investigation itself was just the Commission’s latest attempt to reconcile shipper and trucker complaints about ocean carrier and marine terminal operator demurrage and detention practices with the latter groups’ insistence that the transportation system was working well and that Commission action was unnecessary.

The Commission’s recent focus on demurrage and detention began in 2014, when the Commission hosted four regional port forums regarding congestion in the international ocean supply system. These forums were catalyzed in part by severe winter weather and the expiration of the labor agreement covering most West Coast port workers. Although demurrage and detention were not the focus of the forums, shipper and trucker discontent with free time, demurrage, and detention practices was “palpable.”

In response, Commission staff issued a report, subsequently published by the Commission in 2015, that compiled shipper concerns about demurrage and detention, examined potential private-sector approaches to addressing those concerns, and surveyed possible ways the Commission could serve as a catalyst for those efforts. Among other things, the report noted that: (1) It appeared that ocean carriers, rather than marine terminal operators, generally control demurrage and detention practices; and (2) there was little uniformity in demurrage and detention terminology or the circumstances under which ocean carriers would waive, refund, or otherwise mitigate demurrage and detention, making comparisons across the industry difficult. The report also noted “shippers’ perceptions that demurrage charges are not serving to speed the movement of cargo, the purpose for which those charges had originally been intended.”

Aggrieved shippers, intermediaries, and truckers took action in 2016 by petitioning the Commission to adopt a rule specifying certain circumstances under which it would be unreasonable for ocean carriers or marine terminal operators to collect demurrage or detention. The petitioners were chiefly concerned that although demurrage and detention are intended to incentivize efficient cargo retrieval and container return, “these charges did not abate consistently even though shippers, consignees, and drayage providers had no control over the events that cause[d] the ports to be inaccessible and prevented them from retrieving their cargo or returning equipment.”

Petitioners argued that not only were current ocean carrier and marine terminal demurrage and detention practices unjust and unreasonable, but permitting ocean carriers and marine terminal operators to levy these charges even when cargo and equipment could not be retrieved or returned weakened any incentive for them to address port congestion and their own operational inefficiencies. The Commission received numerous comments on the petition and held two days of public hearings.

In light of the petition, comments, and testimony, on March 5, 2018, the Commission launched a non-adjudicatory fact finding investigation into “current conditions and practices of vessel operating common carriers and marine terminal operators, and U.S. demurrage, detention, and per diem charges.” In so doing, the Commission acknowledged the petitioners’ concerns. The petition highlighted the nationwide scope of the Commission’s jurisdiction and the variety of demurrage and detention practices across the country, and recognized that


FMC Demurrage Report at 1.

FMC Demurrage Report at 2, 4, 32.

11FMC Demurrage Report at 44.


14Pet. P4–16 at 4–5 (“But the incentive placed upon ocean common carriers and marine terminal operators to address port congestion is weakened if they can levy demurrage, detention, and per diem charges against parties who have no influence over the operations and conditions that prevent shippers, consignees, and drayage providers from promptly picking up cargo and returning equipment.”).


The Commission is also making minor changes in the final rule, described in more detail below. The Commission has also made technical formatting changes to the paragraph levels in the final regulatory text.
“[t]he international ocean liner trade has changed dramatically over the last fifty years, driven in large part by the advent of containerization.” The Commission named Commissioner Rebecca F. Dye the Fact Finding Officer and charged her with developing a record on five subjects related to demurrage and detention: (a) Comparative commercial conditions and practices in the United States vis-à-vis other maritime nations; (b) tender of cargo; (c) billing practices; (d) practices regarding delays caused by intervening events; and (e) dispute resolution practices. The Commission stated it would use the resulting record and Fact Finding Officer’s recommendation to determine its policies with respect to demurrage and detention. The Fact Finding Investigation lasted 17 months and involved written discovery, field interviews, and group discussions with industry leaders. The investigation revealed a situation marked by: (1) Increasing demurrage and detention charges even after controlling for weather and labor events; (2) complexity; and (3) a lack of clarity and consistency regarding demurrage and detention practices, policies, and terminology. On December 3, 2018, the Fact Finding Officer found that:

- Demurrage and detention are valuable charges when applied in ways that incentivize cargo interests to move cargo promptly from ports and marine terminals;
- All international supply chain actors could benefit from transparent, consistent, and reasonable demurrage and detention practices, which would improve throughput velocity at U.S. ports, allow for more efficient use of business assets, and result in administrative savings; and
- Focusing port and marine terminal operations on notice of actual cargo availability would achieve the goals of demurrage and detention practices and improve the performance of the international commercial supply chain.

The Fact Finding Officer further found that the U.S. international ocean freight delivery system, and American economy, would benefit from:

- Transparent, standardized language for demurrage and detention practices;
- Clear, simplified, and accessible demurrage and detention billing practices and dispute resolution processes;
- Explicit guidance regarding the types of evidence relevant to resolving demurrage and detention disputes;
- Consistent notice to cargo interests of container availability; and
- An FMC Shipper Advisory Board.

The Fact Finding Officer ultimately recommended that the Commission: (a) Implement the guidance from the investigation’s Final Report in an interpretive rule; (b) establish a Shipper Advisory Board; and (c) continue to support the FFO’s work with stakeholders in Memphis.

As to the first recommendation, the Fact Finding Officer emphasized the “longstanding principle that practices imposed by tariffs, which are implied contracts by law, must be tailored to meet their intended purpose.” Accordingly, the Fact Finding Officer explained, “when incentives such as demurrage and detention no longer function because shippers are prevented from picking up cargo or returning containers within time allotted,” “extenuating circumstances, ‘charges should be suspended.’” The Fact Finding Officer also recommended that the Commission make clear in its proposed guidance that it may consider other factors in the “reasonableness inquiry” under section 41102(c), including the “existence, accessibility, and transparency of demurrage and detention policies, including dispute resolution policies (and related concepts such as clear bills and evidence guidelines), and clarified language.”

B. Notice of Proposed Rulemaking and Comments

The Commission adopted the Fact Finding Officer’s recommendation on September 6, 2019, and on September 13, 2019, issued its proposed guidance in an NPRM. The proposed rule took the form of a non-exclusive list of factors that the Commission may consider when assessing the reasonableness of demurrage and detention regulations and practices under 46 U.S.C. 41102(c). Consistent with Commission caselaw on section 41102(c), the chief consideration was whether ocean carrier and marine terminal operator practices are tailored to meet their intended purposes. In the case of demurrage and detention, the rule stated, this means considering the extent to which demurrage and detention serve their purposes as financial incentives to promote freight fluidity. The rule also set forth illustrations of how the Commission might apply this principle, and additional considerations the Commission might weigh, in various contexts, e.g., empty container return. The Commission discussed government inspections in the NPRM but deferred issuing guidance with respect to that issue until it received industry comment.

The industry responded to the NPRM with over one hundred comments. Most commenters supported the proposed guidance. This support came primarily from importers, exporters, transportation intermediaries, and truckers, large and small, and their trade associations, from across the United States. To the extent their comments departed from the rule, it was to ask the Commission to do more: To be more prescriptive and require ocean carriers to take certain actions and refrain from others, to apply the proposed guidance to more situations and contexts than described expressly in the NPRM, and to consider more
circumstances as justifying mitigation of demurrage and detention.

In contrast, ocean carriers, marine terminal operators, chassis lessors, and cooperative working agreements of ocean carriers and marine terminal operators opposed the rule. Also opposing the rule were trade associations such as the World Shipping Council (WSC), a trade group representing the interests of approximately 90 percent of the global liner vessel capacity, whose members include companies such as China COSCO Shipping Corporation, Mediterranean Shipping Company, and A.P. Møller-Maersk. They argued that the Commission lacks the authority to issue the rule, and that the rule is unnecessary, costly, burdensome, and unfair to ocean carriers and marine terminal operators.

III. Discussion of Particular Issues
A. General Legal Challenges to Rule
Ocean carrier and marine terminal operators raise a number of legal objections to the rule, many of which are based on misinterpretations of the guidance. WSC describes the rule as "prescribing sweeping new standards that would make ocean carriers financially responsible for circumstances beyond their control" and "impose significant regulatory costs on carriers in order to comply with those standards." Similarly, the National Association of Waterfront Employers (NAWE) contends that the rule "would require wholesale changes in the way ocean carriers and marine terminal operators do business." And the Pacific Merchant Shipping Association (PMSA) insists that the NPRM's "rigid standards of reasonableness" seek to mandate a "perfect world." These characterizations bear little resemblance to the proposed rule. The rule consists of a non-exclusive list of factors for the Commission to consider when determining whether demurrage and detention practices are "just and reasonable" under 46 U.S.C. 41102(c). And aside from the general incentive principle, which the proposed rule indicated the Commission will consider, the particular applications of that principle and other factors listed are things the Commission may consider. The Commission also sought in the preamble of the NPRM to give a sense of how those factors might weigh in particular contexts and gave some examples of the attributes of demurrage and detention practices that might, in the abstract, weigh favorably or unfavorably in the analysis.

The Commission emphasized that although the factors in the proposed rule would guide its analysis, "each section 41102(c) case would continue to be decided on the particular facts of the case." The application of the "incentive principle," the Commission reiterated, "would vary depending on the facts of a given case." Moreover, the Commission specified that the illustrations of how the factors might apply in the NPRM were subject to "extenuating circumstances." In other words, the Commission would consider any additional or countervailing arguments or evidence raised by the parties in a particular case.

It appears from ocean carrier and marine terminal operator comments, however, that some may have misunderstood the nature of the proposed rule. Consequently, the final rule includes a new paragraph confirming that nothing in the rule precludes the Commission from considering other factors, arguments, and evidence in addition to the ones specified.

1. APA Considerations

Turning to the ocean carriers and marine terminal operators' specific legal objections, these commenters first argue that despite the Commission characterizing the proposed rule as guidance and interpretive, it is actually a legislative rule subject to the Administrative Procedure Act's (APA) rulemaking requirements. Because the Commission did not comply with these requirements, they argue, the rule violates the APA.

The APA's notice-and-comment requirements apply to legislative rules, not "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." A legislative rule is "an agency action that purports to impose legally binding obligations or prohibitions on regulated parties—and that would be the basis for an enforcement action for violations of those obligations or requirements." Interpretive rules and policy statements, in contrast, are explanatory in nature; they do not impose new obligations. The key consideration is whether the rule has "legal effect," which courts assess by asking:

(1) Whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of
duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.54

None of the factors support treating the Commission’s non-exclusive list of considerations as a legislative rule. WSC argues that the rule meets the first prong because it “without question proposes new, enforceable obligations on carriers with respect to detention practices.” 53 According to WSC, the rule and NPRM would require substantial changes in how carriers operate, and “the proposed rule would create new grounds for reparation actions.” 54

The rule does not, however, have “legal effect” within the meaning of the American Mining test. The rule could not be the basis for a Commission enforcement action or a private party reparation action. There are no “requirements” or mandates or dictates in the rule for an ocean carrier to violate. In other words, one cannot bring an action based on the rule alone—the basis for any legal action would be section 41102(c). Similarly, the rule does not subject regulated entities to any new legal authority. They were already subject to section 41102(c)’s requirement that their practices be “just and reasonable.” Further, the NPRM makes clear that each demurrage and detention case under section 41102(c) would be decided on its own facts, and the Commission is adding a provision to the final rule to expressly reflect that the Commission may consider additional factors, arguments, and evidence presented in individual cases. A set of factors issued as guidance does not constitute a legislative rule.55

Moreover, that the industry might rely on the guidance in the Commission’s rule, and that ocean carriers and marine terminal operators might feel “pressure to voluntarily conform” does not make the rule legislative.56 The Commission is issuing guidance in part to mitigate confusion about how the Commission may apply section 41102(c) with respect to demurrage and detention.57 Providing advance notice “facilitates long range planning within the regulated industry, and allows the public a chance to contemplate an agency’s views before those views are applied to particular factual circumstances.” 58 Commission guidance will not only help ocean carriers and marine terminal operators avoid section 41102(c) liability, but it will also raise awareness of shipper, intermediary, and trucker obligations. The “merit fact” that an interpretive rule could have a “substantial impact does not transform it into a legislative rule.” 59

Additionally, the rule is not legislative because the Commission published the NPRM in the Federal Register and because the final rule will be codified in the Code of Federal Regulations (CFR). While publication in the CFR is a factor courts look at, it is based on a presumption, 60 and publication or its absence is nothing more than a “snippet of evidence of agency intent”; it is not determinative.61 The Commission customarily publishes non-legislative rules in the CFR in a part titled “Interpretations and Statements of Policy.” 62 For instance, the Commission published an interpretive rule regarding section 41102(c) in the CFR as recently as December 2018.63 Here, the Commission reasoned that publication in the Federal Register and CFR was not only consistent with its normal practice, but would promote public notice of the guidance.64

The Commission’s guidance also does not qualify as a legislative rule under the final two American Mining criteria. The Commission did not invoke its general legislative authority to issue its interpretive rule. The Commission’s authority to issue interpretive rules and policy statements derives from the APA.65 The only reference to the Commission’s general rulemaking authority under 46 U.S.C. 305 in the NPRM copies the preexisting authority citation for part 545 of the Commission’s regulations.66 And the Commission’s rule does not amend any prior legislative rule.

Because the Commission’s guidance is not a legislative rule, APA requirements applicable solely to legislative rules are inapplicable here. That said, commenters’ APA-related arguments are unpersuasive. The primary distinction under the APA between legislative rules on one hand and interpretive rules and statements of policy on the other is that the former require notice and comment while the latter do not.67 While not required to engage in notice-and-comment rulemaking, the Commission nonetheless provided notice and requested comment on the proposed rule in this case, and ocean carriers, marine terminal operators, importers, exporters, intermediaries, and truckers also had the opportunity to weigh in on possible Commission action during the Fact Finding No. 28 investigation. WSC argues that the Commission failed in the NPRM to discuss the record in detail or link the evidentiary record to the “reasonableness” standard under section 41102(c).68 But the principles in the interpretive rule flow directly from information the Commission received during the Fact Finding No. 28 investigation and described in the Fact Finding reports, which the Commission cited in the NPRM. The Commission focused on the “incentive principle” because section 41102(c) requires that regulations and practices be tailored to meet their intended purpose,69 and because fact finding participants repeatedly told the Commission that demurrage and detention were incentive

53 WSC at 4.
55 Cf. Inv. Co. Inst. v. CFTC, 720 F.3d 370, 381 (D.C. Cir. 2013) (noting that guidance in form of a seven-factor test was not subject to the APA’s notice-and-comment provision).
56 Sec. Indus. & Fin. Mkt. Ass’n v. CFTC, 67 F. Supp. 3d 373, 422 (D.D.C. 2014). In determining that the agency issuance was a policy statement as opposed to a legislative rule, the court reasoned that “[t]he practical consequences, such as the threat of having to defend itself in an administrative hearing should the agency actually decide to pursue enforcement pursuant to the policies within the Cross-Border Action are insufficient to bring an agency’s conduct under [the Court’s] purview.” Id. (internal quotation marks omitted).
57 84 FR at 48851.
58 Sec. Indus., 67 F. Supp. 3d at 422 (internal quotation marks and citations omitted).
59 See Splane v. W., 216 F.3d 1058, 1066 (Fed. Cir. 2000) (“An agency’s statutory authority to issue interpretive rules is implicit in sections 552(a)(1) and 553 of title 5.”). Because the source of the Commission’s authority to issue guidance is the APA and 46 U.S.C. 41102(c), the National Federation of Independent Business’s argument that 46 U.S.C. 305 does not grant the Commission power to prescribe regulations to implement section 41102(c) is unpersuasive. Nat’l Fed. Ind. Bus. at 2-3. Moreover, as described in further detail in Part III.A.2, infra, the Commission has the authority to prescribe regulations under section 41102(c). The commenter also incorrectly points out that the Commission could achieve results similar to the rule via adjudication. Id. at 3. The choice whether to proceed via adjudication or rulemaking, however, “lies primarily in the informed discretion of the administrative agency.” SBC v. Cheney Corp., 332 U.S. 194, 203 (1947).
60 84 FR at 48851.
61 73 S. U.S. 553.
62 WSC at 5.
charges.\textsuperscript{70} The Commission’s guidance emphasizes cargo availability and notice thereof because ocean carrier and marine terminal operators generally agreed that their carrier obligations were related to the concepts of reasonable notice of cargo availability and reasonable opportunity to retrieve cargo, and because the “issue most frequently discussed during Phase Two was notice of container availability and the relationship between container availability and demurrage free time.\textsuperscript{71} The Commission’s guidance focused on the existence, clarity, content, and accessibility of demurrage and detention dispute resolution and billing practices, and demurrage and detention terminology, because the Commission’s review of ocean carrier and marine terminal operator records (some of which are public, e.g., tariffs) and discovery responses showed that the practices were rife with complexity, inconsistency, lack of transparency, and variability.\textsuperscript{72} WSC’s objection appears to be that the Commission did not cite or discuss the specific documents it reviewed during the Fact Finding Investigation. The Commission does not, however, typically make public its investigatory records in such proceedings.\textsuperscript{73} Additionally, most ocean carriers and marine terminal operators requested confidentiality for the responses and documents they submitted to the Commission during Phase One of the investigation. The Commission assumes that WSC is not suggesting that the Commission should ignore those requests for confidentiality. Several ocean carrier and marine terminal operator commenters also argue that the Commission’s rule would depart from Commission precedent without adequate explanation.\textsuperscript{74} The rule, however, with a few exceptions explained in more detail below, is consistent with the Commission’s approach to applying section 41102(c) and its predecessors (i.e., section 17 of the Shipping Act of 1916). Further, the commenters provide no support for their suggestion that the Commission cannot change agency precedent via an interpretive rule.\textsuperscript{75} Commission precedent is not “binding” on the Commission—the Commission can change course in a subsequent case.\textsuperscript{76} NAWE has not explained why Commission could not also change course via an interpretive rule,\textsuperscript{77} especially when the Commission recently did so in a 2018 interpretive rule that ocean carriers and MTOs supported.\textsuperscript{78} Many of these same commenters further contend that the interpretive rule would shift the burden of proof in section 41102(c) cases in violation of the APA.\textsuperscript{79} But nothing in the rule changes the burden of proof. Under the APA and Commission regulations, “the proponent of a rule or order has the burden of proof.”\textsuperscript{80} This burden of persuasion does not shift, even if the burden of producing evidence does in some cases.\textsuperscript{81} In the section 41102(c) case, the complainant bears the burden of persuading the Commission that a practice or regulation is unjust or unreasonable, and if that burden is met, the burden of refuting that conclusion is on the respondent.\textsuperscript{82} In all instances, the complainant bears the ultimate burden of proving unreasonableness.\textsuperscript{83} The rule does not change that framework. A complainant would still have the burden of proving all the elements of a section 41102(c) claim under 46 CFR 545.4, including proving by a preponderance of the evidence that the demurrage or detention practice or regulation at issue is “unjust or unreasonable.” It is true that the rule might help a complainant prove that element by giving guidance about what sort of arguments and evidence the Commission is likely to find relevant. Setting forth factors that the Commission might consider in a case, however, does not shift the burden of proof.\textsuperscript{84} 2. Statutory Authority Another objection raised by commenters is that the Commission lacks authority under the Shipping Act to issue the interpretive rule.\textsuperscript{85} Commenters point out that section 17 of the Shipping Act of 1916, the predecessor of section 41102(c), stated that not only must regulated entities establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property, but also the Commission, upon finding that any such regulation or practice is unjust or unreasonable, may determine, prescribe, and order enforced a just and reasonable regulation or practice.\textsuperscript{86} The Shipping Act of 1984, however, replaced this language with: “No common carrier, ocean freight forwarder, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering property.”\textsuperscript{87} According to commenters, by removing the second sentence of section 17 of the 1916 Act” from its 1984 equivalent, Congress “eliminated the Commission’s

\textsuperscript{70} Final Report at 12 (“Importantly, almost every Phase Two respondent characterized demurrage as an incentive, to get containers out of the terminal.”); Interim Report at 2–3.

\textsuperscript{71} Interim Report at 9; Final Report at 18.

\textsuperscript{72} Interim Report at 5–6, 10–11, 12, 14; see also Final Report at 11–18.

\textsuperscript{73} See, e.g., Order of Investigation (authorizing the fact finding officer to hold public or nonpublic sessions); 46 CFR 502.291.

\textsuperscript{74} Am. Ass’n of Port Authorities at 2; NAWE at 5–6; OCEMA at 5; PMSA at 8–9; WCMTOA at 7, 8, 12; WSC at 8, 13.

\textsuperscript{75} See Gen. Am. Transp. Corp. v. ICC, 872 F.2d 1948, 1060 (D.C. Cir. 1989) (“It seems to us presumptively reasonable that a controlling principle announced in one adjudication may be modified in a subsequent adjudication . . . .”); id. (“As we have said before, ‘adjudicatory decisions do not harden into ‘rules’ which cannot be altered or reversed except by rulemaking simply because they are longstanding.”) (quoting Chihoonol v. FCC, 538 F.2d 349, 365 (D.C. Cir. 1976)).

\textsuperscript{76} Cf. Health Ins. Ass’n, 23 F.3d at 424–25 (noting that discriminatory issuance of interpretative rules would lead to the “ironic result” that “the entities affected by the agency’s interpretations would be left more in the dark than before, for clues to the agency’s reading of the relevant texts would emerge only on an ad hoc basis.”).


\textsuperscript{78} NAWE at 6 n.2 (asserting that “the NPRM raises additional legal issues in that it seeks to change binding precedent through a non-binding, interpretative rule.75 Commission regulations, ‘the

\textsuperscript{79} 29 S.R.R. 1199, 1222 (ALJ 2003).

\textsuperscript{80} See A. Ass’n of Port Authorities at 2; NAWE at 6 n.2 (asserting that “the NPRM raises additional legal issues in that it seeks to change binding precedent through a non-binding, interpretative rule.\textsuperscript{75} Commission regulations, ‘the

\textsuperscript{81} See also NPRM and demonstrate the reasonableness of the

\textsuperscript{82} The rule does not change that framework. A complainant would still have the burden of proving all the elements of a section 41102(c) claim under 46 CFR 545.4, including proving by a preponderance of the evidence that the demurrage or detention practice or regulation at issue is “unjust or unreasonable.” It is true that the rule might help a complainant prove that element by giving guidance about what sort of arguments and evidence the Commission is likely to find relevant. Setting forth factors that the Commission might consider in a case, however, does not shift the burden of proof.

\textsuperscript{83} The Shipping Act of 1984, however, replaced this language with: “No common carrier, ocean freight forwarder, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering property.”

\textsuperscript{84} According to commenters, by removing the second sentence of section 17 of the 1916 Act” from its 1984 equivalent, Congress “eliminated the Commission’s
This argument misses the mark, however, because the rule does not determine, prescribe, or order enforcement of a reasonable practice; that is, it does not prescribe specific practices that regulated entities must adopt. The Commission avoided doing so because it did not want to inhibit stakeholders from developing new and better practices. Consequently, even if the differences between section 17 of the 1916 Act and section 41102(c) removed some Commission authority, the present rule is not implicated.

In addition, although the Commission has not elected to issue a legislative rule in this case, the Commission disagrees with the contention that it lacks the authority to issue rules prohibiting practices or regulations determined to be unjust or unreasonable. The Commission has broad general rulemaking authority under 46 U.S.C. 305, which provides that the Commission "may prescribe regulations to carry out its duties and powers." The Commission has relied on this authority and section 41102(c) to issue regulations prohibiting certain practices determined to be unjust and unreasonable, and the D.C. Circuit has affirmed this authority.

The Commission avoided doing so because it did not want to inhibit stakeholders from developing new and better practices. Consequently, even if the differences between section 17 of the 1916 Act and section 41102(c) removed some Commission authority, the present rule is not implicated.

3. Shipping Act Purposes

A few marine terminal operator and ocean carrier commenters further claim that the rule is inconsistent with the purposes of the Shipping Act because it represents "extreme government intrusion into the market" and discriminates against ocean carriers and marine terminal operators by placing all risk on them. The purposes of the Shipping Act are to:

- Establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs;
- Provide an efficient and economic transportation system in the ocean commerce of the United States that is, as far as possible, in harmony with, and responsive to, international shipping practices;
- Encourage the development of an economically sound and efficient liner fleet of vessels of the United States capable of meeting national security needs; and
- Promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.

The Commission fails to see how issuing an interpretive rule while declining calls for more prescriptive regulation represents "extreme government intrusion." It is unclear based on the comments whether there is anything the Commission could do regarding demurrage and detention that ocean carriers and marine terminal operations would not object to as overly intrusive regulation. That one purpose of the Shipping Act is to minimize government intervention does not mean that the Commission may abandon its duty to prevent unreasonable practices under section 41102(c).

Nor is the interpretive rule discriminatory within the meaning of the Shipping Act. There is nothing discriminatory about the Commission describing factors that would help ensure that ocean carriers and marine terminal operators comply with their preexisting duty under section 41102(c) to ensure their practices are reasonably tailored to match their purposes. Further, the "discrimination" the Shipping Act is concerned with is discrimination by ocean carriers and marine terminal operators against shippers and others in the industry, not so-called discrimination by the Commission against the entities it oversees. This general purpose aligns with the more specific mandate in section 41102(c) that the Commission determine the reasonableness of certain carrier and marine terminal operator practices. In sum, it is consistent with the purposes of the Shipping Act for the Commission to address the concerns of American importers, exporters, intermediaries, and truckers.

4. Executive Orders

Two commenters assert that the Commission’s interpretive rule violates various executive orders. First, NAWE argues that "[b]y specifying the behavior or manner of compliance that regulated entities should adopt rather than performance objectives, the NPRM violates Executive Order 12866." Executive Order 12866, titled "Regulatory Planning and Review," was issued in 1993. It sets forth several "principles of regulation," one of which is that "[e]ach agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt." According to NAWE, the "effect of the NPRM is to require regulated entities to engage in specific behavior," contrary to the executive order.

The Commission’s guidance is not inconsistent with Executive Order 12866. As in initial matter, the order does not apply to the Commission. It expressly excludes from its scope
“independent regulatory agencies” such as the Commission.101 Further, as explained above, the rule is not specifying behavior that regulated entities must adopt; it is describing a non-exclusive list of factors the Commission will consider in evaluating the reasonableness of demurrage and detention practices.

Additionally, in light of NAWE’s arguments that the proposed rule is too prescriptive, the Commission is perplexed by NAWE’s assertion that the Commission should instead specify “performance objectives,” a much more intrusive undertaking. That is, rather than its traditional approach to section 41102(c), NAWE would apparently prefer the Commission set, and assess compliance with, performance metrics. Examples of such metrics commonly used to assess cargo fluidity include container dwell time, truck turn time, and gate moves. Some commenters would welcome that approach.102 But others have approached performance objectives with caution.103

The other executive order mentioned by commenters is Executive Order 13777, titled “Enforcing the Regulatory Reform Agenda.” 104 Issued in 2017, this Executive Order’s purpose was to “lower regulatory burdens on the American people by implementing and enforcing regulatory reform.” 105 WSC asserts that the “NPRM’s imposition of additional regulatory costs and burdens is in direct contrast with the Executive Order.”

Executive Order 13777, like Executive Order 12866, is not binding on the Commission.106 The Commission has, however, voluntarily undertaken regulatory reform efforts consistent with the spirit of the order.107 There is no evidence that the rule on demurrage and detention is outdated, unnecessary, or otherwise interferes with regulatory reform initiatives and policies. The Commission’s interpretive rule is consistent with the goals of regulatory reform and Congress’s mandate that the Commission protect U.S. shippers and their agents from unreasonable practices.

5. Filed Rate Doctrine

A few commenters question whether statements in the NPRM that the Commission may consider whether demurrage or detention practices provide for mitigation of charges when cargo cannot be retrieved, or containers returned, can be reconciled with the “filed rate doctrine.” The “filed rate doctrine” “provides that any entity required to file tariffs governing the rates, terms, and conditions of service must adhere strictly to those terms.” 109 Commenters argue that the rule might require ocean carriers to deviate from their tariffs in contravention of this doctrine.110

This issue involves reconciling two different prohibitions in the Shipping Act. The Shipping Act incorporates the filed rate doctrine by prohibiting common carriers from providing service in the liner trade that is “not in accordance with the rates, charges, classifications, rules, and practices contained in” a published tariff.111 The Shipping Act also, however, prohibits common carriers from failing “to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.”112 If a practice (or the absence of a practice) in a tariff is “unreasonable” under the latter prohibition, it is no defense to rely on the former. “The [filed rate] doctrine is meant to preserve the integrity of filed tariff laws, not to provide carriers with an irrefutable excuse for alleged violations of the Act.”113

Nor does the Shipping Act necessarily require common carriers to apply all tariffed charges without exception. Section 41104 requires that ocean carriers provide service in accordance with their rules and practices. Those rules and practices can provide ocean carriers with the flexibility to mitigate charges (by waiver, refund, or free time extension) in appropriate cases. During the Fact Finding Investigation, “[m]ost VOCCs and MTOS stated that they have a policy for extending free time or waiving or otherwise mitigating demurrage and detention caused by circumstances outside of the control of cargo interests or truckers,” and several provided tariffs reflecting such policies.114 Similarly, the Commission has permitted deviations from tariff rates when parties settle bona fide disputes.115 While there is some tension between the filed rate doctrine and encouraging regulated entities to mitigate demurrage and detention under certain circumstances, the Commission is equipped to distinguish legitimate resolution of demurrage and detention disputes from sham settlements and illegal rebates.

B. General Policy Comments to Rule

The commenters also raised several policy issues relating to the rule in general rather than specific sections. These comments fall into several general categories: (a) The desirability of

visited Apr. 5, 2020) (noting that “as an independent regulatory agency the FMC is not required to comply with the recent regulatory reform executive orders”).

108 Id.; Notice of Inquiry: Regulatory Reform Initiative, 85 FR 25221 (June 1, 2017).


110 IICL at 9–10 (“Failure of a carrier to collect its tariff charges can be viewed as a violation of the Shipping Act . . . . What circumstances would allow a carrier to waive some or all of the charges required to be paid under applicable rules? Int’l Logistics at 1 (“I do not think it is fair to say the ocean lines are responsible for the problems associated with billing port storage and container per diem when they are required by your tariff requirements to bill everyone according to their published tariff.”): cf. National Customs Brokers and Forwarders Association of America (NCBFAA) at 15 (“Carriers often decline mitigation citing FMC regulations that allow them to apply all tariffed charges without exception, which is of course not a reasonable construction of the Shipping Act’s requirements.”).

guidance, (b) the specificity of guidance, (c) the consequences of guidance, and (d) the Uniform Intermodal Interchange and Facilities Access Agreement.

1. Desirability of Guidance

The Commission issued the rule after a hearing on a petition and a Fact Finding Investigation. It did so after determining that guidance in the form of a non-exclusive list of factors will promote fluidity in the U.S. freight delivery system, mitigate confusion, reduce and streamline disputes, and enhance competition and innovation in business operations and policies. As noted by the petitioners in Docket No. P4–16, guidance will help regulated entities avoid incurring liability under section 41102(c) and will encourage shippers, intermediaries, and truckers to examine their practices as well.116

A few commenters, however, assert that Commission guidance is not necessary because the current freight delivery system is working,117 commercial solutions to demurrage and detention issues are adequate,118 and complaints by shippers, intermediaries, and truckers are subject to cross examination and could contain hyperbole.119

The majority of the commenters, however, advocate for the proposed rule’s prompt adoption.120 Although the freight delivery system works in the sense that cargo gets delivered, the notion that there are no problems is belied by the consistent complaints of shippers, intermediaries, and carriers.121 In light of these complaints, the Commission cannot assume that the lack of Shipping Act proceedings about demurrage and detention means these complaints are illusory or hyperbolic.122 There are a number of reasons why a particular shipper, trucker, or intermediary might not file a formal complaint with the Commission, including relatively low amounts in dispute as compared to litigation costs, fear of retaliation from ocean carriers, or the absence of Commission guidance on section 41102(c).123

As for commercial solutions, to the extent that they adequately resolve demurrage and detention issues, then the Commission’s guidance will arguably have little effect. Commenters correctly note that the Fact Finding Investigation revealed that most ocean carriers have policies for extending free time or mitigating demurrage and detention charges caused by circumstances outside the control of cargo interests or truckers.124 But not all did, and a shipper’s right under the Shipping Act to be free from unreasonable practices under section 41102(c) does not turn on the identity of the regulated entity at issue. Further, several ocean carriers noted that their policies give them the discretion to waive demurrage under certain circumstances.125 But if application of demurrage in those circumstances would be unreasonable, a shipper, intermediary, or trucker should not have to rely on an ocean carrier or marine terminal operator’s discretion for a remedy. In other words, while the Commission prefers commercial solutions to demurrage and detention problems, the Fact Finding record showed that commercial solutions are only adequate from the perspective of ocean carriers and marine terminal operators.126

See Part II, supra.

Shippers, intermediaries, and trucker comments are no more self–interested than comments from ocean carriers, marine terminal operators, or chassis providers.

121 See Part II, supra.

122 Shippers, intermediaries, and trucker comments are no more self–interested than comments from ocean carriers, marine terminal operators, or chassis providers.


124 E.g., Ports Am. at 4 (“There is no showing in the Commission’s fact–finding or rationale expressed for the proposed rule that suggests this is a material problem in the industry. This is demonstrated conclusively by the virtually total absence of Commission complaint proceedings for many decades.”).

125 E.g., Ports Am. at 3 (“As the Commission found, when major disruptions occur, such as storms or labor disputes, the terminals work out waivers or other suitable accommodations in individual cases. Terminals are already highly disincentivized from the marketplace from having disputes with their customer vessel operators and their shippers.”); PONYNSSA at 3 (“The PONYNSSA has long made available at their own cost commercial solutions to provide enhanced cargo and vessel transparency.”); PMSA at 4–5 (“[i]t appears from the Commission’s report that the free market has voluntarily addressed the conditions raised in its NPRM.”).

126 WCMTOA at 5 n. 2 (“If each case depends on an analysis of the facts of each case, as has historically been the case under Section 10(d)(1) cases, it is unnecessary, and in fact counter–productive, to have a national standard such as in the NPRM.”); Nat’l Fed. of Indep. Business at 3; PMSA at 5 (“while the FMC

127 IICL at 10 (noting that “while the FMC is well–intentioned”, “in IICL Providers’ view the Interpretive Rule presents more problems than it attempts to resolve because the problems at issue exist at many levels and across multiple jurisdictions”); PMSA at 5 (“The NPRM is a broad–brush approach to a very complex subject.”).

128 PMSA at 3; see also WCMTOA at 5 (“The NPRM seeks to mandate the same practices nationwide, without regard to geography, individual configuration (including operating ports vs. landlord ports), cargo volumes, and other local conditions.”).

129 WCMTOA at 5 n. 2 (“If each case depends on an analysis of the facts of each case, as has historically been the case under Section 10(d)(1) cases, it is unnecessary, and in fact counter–productive, to have a national standard such as in the NPRM.”).

130 WSC at 15–16.

131 WSC at 16; see also id. at 18–19 (asserting that references to “extenuating circumstances” in the NPRM are so vague as to be useless in shielding any light on what particular circumstances would counterbalance those situations that the NPRM would deem likely unreasonable); NAWE at 13–14 (describing hypothetical questions that NPRM does not address); Ocean Network Express at 1–2 (listing hypotheticals); SSA Marine (asserting that because the list of factors is non–exclusive, “there could be
several shipper, intermediary, and trucker commenters want the Commission to do more—to declare certain practices unreasonable or to require various practices. For example, these commenters would have the rule:

- Require that regulated entities extend free time when an ocean carrier requires an empty container to be returned to a location other than where it was retrieved; 132
- Specify what information ocean carriers or marine terminal operators must provide to shippers and their agents regarding cargo availability; 133
- Mandate specific requirements for ocean carrier and marine terminal operator dispute resolution and billing processes, such as timeframes and internal appeals processes; 134
- Prescribe reasonable free time periods; 135
- Define uniform demurrage and detention terminology; 136
- Specify that all cargo on a bill of lading be available before demurrage accrues on any container; 137
- Set caps on the levels of, or total amount of, demurrage or detention that may be charged. 138

These comments do not justify withdrawing or substantially altering the rule. The Commission proposed general guidance in the form of factors because the operations of industry stakeholders are too varied nationwide, and the risk of inhibiting commercial innovation is too great, for the Commission to prescribe or prohibit specific practices, at least in this

\[\text{any number of circumstances brought to the FMC depending on which it views as “unreasonable”}.
\]

132 See Part III.C, infra. Moreover, one commenter suggests that street turns should be cheaper than returning a container to the terminal. Transways Motor Express at 1.

133 See Part III.K and Part III.L, infra.

134 E.g., Int’l Fed. of Freight Forwarders Ass’ns at 10 (“FIATA would appreciate guidance on fair and reasonable free periods that are in line with market developments of higher peaks.”) of John S. Connors, Global Logistics at 3 (“Further to this understanding of availability, there must be a clear and consistent method for calculating Free Time” and “[a]ll parties [carriers, MTOs, etc.] that provide Free Time should be utilizing the same method of calculation”); New Direx, Inc. (“‘Free time would not count on days when the terminal or rail yards are not open.”)

135 John S. Connors Global Logistics at 6.

136 CV Int’l, Inc. at 1; Shapiro at 1.

137 E.g., Int’l Fed. of Freight Forwarders Ass’ns at 7; Int’l Motor Freight at 2 (“Finally, the rates we are charged for per diem and demurrage need to be looked at. Every year, per diem charges increase, regardless of the economic climate, for the same container that sits out year after year.”); Nat’l Retail Sys. at 1 (“The presence of ocean carriers using detention charges as a profit center. There should be a formula for detention charges that can be applied across the board by all carriers at all ports.”).

\[\text{rulemaking.}^{139}\] Nor is issuing guidance inconsistent with case-by-case adjudication, especially when the Commission expressly states that it will continue to consider all arguments raised in an individual case. 140

It was because the Commission was issuing guidance applicable to all regulated entities within its purview that the Commission declined to issue a legislative rule or the rule proposed by the petitioners in Docket No. P4–16. 141 It is also why the Commission’s rule is not as granular as some commenters would want the rule to be; the proposals suggested by shippers, truckers, and intermediaries appear to have merit.

The Commission understands that there may be questions about how the rule would apply in practice. Regarding “extenuating circumstances” specifically, 142 the Commission used that phrase as a way of indicating that it would consider all arguments raised by the parties, including those involving considerations not listed in the rule. As to what these “extenuating circumstances” could be, the NPRM specified one: “An example of an extenuating circumstance is whether a cargo interest has complied with its customary responsibilities, especially regarding cargo retrieval (e.g., making appointments, paying freight, submitting paperwork, retaining a trucker). If it has not, this could be factored into the analysis.” 143 Many of

\[\text{the arguments raised by ocean carriers and regulated entities about things such as cost, technical feasibility, and the conduct of shippers, intermediaries, and truckers are issues that could be raised as “extenuating circumstances” in a particular case.}^{144}\]

The guidance was drafted with the complexity and variety of the U.S. freight delivery system in mind. Further refinement of the Commission’s approach would be accomplished by adjudication. Comments by ocean carriers and marine terminal operators suggesting that the rule is fatally flawed because it does not address every fact pattern that could possibly arise set a standard that no Commission guidance could possibly meet. But, as the Commission noted at the outset, the inability of the Commission to solve every problem does not justify doing nothing. 145

3. Consequences of Guidance

Ocean carrier and marine terminal operator commenters also contend that the rule would have a number of deleterious consequences. They argue that the rule is impracticable, 146 that it ignores the costly burden it would impose on ocean carriers and marine terminal operators and others, 147 that it limits contract flexibility and risk allocation. 148 Additionally, these commenters contend that the rule could lead to an “explosion of time-consuming and expensive litigation.” 149 Increased container dwell time; 150 and chassis shortages. 151

Some of these comments, particularly those about the practicability and costliness of the rule, are based on

144 WSC at 16 (discussing technical feasibility of practices); WCMTOA at 11–12.

145 For instance, SSA Marine Inc. points out that “[r]equiring that demurrage be waived when a terminal fails to provide appointments is not a panacea to solve congestion.” The Commission is not attempting, however, to provide a panacea; rather it is providing guidance in an effort to ensure that marine terminal operator and ocean carrier practices involving demurrage and detention are reasonable.

146 AACE at 12; OCEA at 4; Ocean Network Express at 1–2; SSA Marine at 2; Ports Am. at 2–3; WCMTOA at 5, 10–11.

147 IICL at 3; AACE at 8; OCEA at 4; Ocean Network Express at 3; WSC at 12; WCMTOA at 5; Am. Ass’n Port Auth. at 2.

148 OCEA at 3; Ports Am. at 2–3; WSC at 11, 12; Am. Ass’n Port Auth. at 2.

149 SSA Marine at 2; WCMTOA at 5 n.2 (asserting that rule “will encourage an explosion of litigation by shippers and truckers who do not want to pay demurrage or detention”); see also AACE at 13.

150 Ocean Network Express at 2; WO at 1, 3.

151 IICL at 3. This commenter argues that if a carrier waives or deviates from the provisions in its bill of lading, “it would theoretically” void its protection and indemnity insurance. This concern is on its face speculative and was not raised by ocean carrier commenters themselves.
unwarranted assumptions about what the rule does. These arguments are belied by the text of the rule. For instance, commenters insist that the practical difficulties of starting demurrage free time based on cargo availability instead of vessel discharge of a container are insurmountable.\footnote{NAWE at 13; Ports Am. at 3; WSC at 15–16.} Even assuming that this is true, the rule does not go so far as to require this change.\footnote{84 FR at 48855 (stating that the Commission may consider “the extent to which demurrage practices or regulations relate demurrage or free time to cargo availability”).} Statements in the NPRM that certain practices might weigh favorably in the analysis do not mandate their adoption, and the rule cannot reasonably be read as doing so.\footnote{84 FR at 48852.} The same goes for commenters’ assumptions that the rule requires things like starting and stopping the free time clock each time a container becomes unavailable on a minute-by-minute basis\footnote{NAWE at 13; OCEMA at 4.} or waiving a full day of demurrage due to a container being unavailable for less than an entire day\footnote{84 FR at 48856} or implementing new information technology systems\footnote{84 FR at 48857} or creating new dispute resolution teams.\footnote{The rule, in its final form, makes clear that parties will have ample opportunity to argue the merits of any such practices should their absence be challenged as section 41102(c) violations. And, to reiterate, the standard under section 41102(c) is reasonableness, not exacting precision.} Additionally, fears of an explosion of litigation due to the rule are speculative. If, as ocean carriers and marine terminal operators claim, commercial solutions have been adequate to address demurrage and detention problems, then the Commission’s guidance will not lead to lawsuits. There have historically been very few formal

**Shipping Act complaints filed regarding demurrage and detention.** If the issuance of guidance results in more disputes because shippers are better able to challenge unreasonable practices, that is a feature, not a bug, of the rule. An increase in valid claims is not a negative result, and guidance is just as likely to reduce disputes because it allows parties to better assess the merits of a dispute before resorting to litigation. At present, there is little to no guidance on demurrage and detention and section 41102(c) in the containerization context.\footnote{Similarly speculative are concerns about increased container dwell time and chassis shortages. The rule might result in an increase in free time extensions, but extending free time is just one way to mitigate demurrage and detention charges. Additionally, the rule’s primary focus is situations where detention charges. As for inhibiting the freedom to allocate risk by contract, this is discussed in more detail below. That said, commenters appear to object to the rule because it would “interfere with private and lawful commercial arrangements” wherein ocean carriers and shippers have negotiated free time.\footnote{But whether commercial arrangements are lawful is the point. Ocean carriers and marine terminal operators (and ocean transportation intermediaries) do not have an unbounded right to contract for whatever they want. They are limited by the prohibitions of the Shipping Act, one of which is section 41102(c). Although the general trend in the industry has been deregulatory, Congress retained section 41102(c) when it enacted the Ocean Shipping Reform Act in 1998.\footnote{In this sense, ocean carriers and marine terminal operators are no different from participants in other regulated industries.}}

Occasionally, fears of an explosion of litigation due to the rule are speculative. If, as ocean carriers and marine terminal operators claim, commercial solutions have been adequate to address demurrage and detention problems, then the Commission’s guidance will not lead to lawsuits. There have historically been very few formal

See infra note 365.

See infra note 162.


See infra note 165.

\textit{See Huffman v. \textit{Sticky Fingers}, Case No. 2:05–2108–DCN–GCK, 2005 U.S. Dist. LEXIS 55481, at *26–*27 (D.S.C. at Dec. 20, 2005) [defining a contract of adhesion as “a standard form contract offered on a take-it-or-leave-it basis” where the terms are “not negotiable”—“an offeree faced with such a contract has two choices: Complete adherence or outright rejection”].}

\textit{See AgTC at 3 (“The opportunity to negotiate is a myth. . . .”)}

1 Corbin on Contracts § 1.4 (2020).

See Pet. of the World Shipping Council for an Exemption From Certain Provisions of the Shipping Act of 1984, As Amended, For a Rulemaking Proceeding, 1 F.M.C.2d 504, 514 (FMC 2019) (“NVOCs hold market power through the antitrust immunity secured pursuant to their filed agreements as well as their ability to discuss and coordinate freight rates and/or vessel capacity and services. . . . Because VOCCs have stronger negotiating positions, they are able to set service contract terms and conditions with NVOCs; indeed, the majority of service contracts on file with the Commission use boilerplate terms and conditions written by the VOCC.”).
Suffice it to say, ocean carriers and marine terminal operators do not have an inoviate right to contract with their customers free from government scrutiny, and there is reason to question whether demurrage and detention practices are normally the subject of arms-length negotiation between parties with remotely equal bargaining power. Consequently, that the guidance in the rule, when applied in a case, might put some limits on the ability of ocean carriers or marine terminal operators to impose, or negotiate, demurrage and detention practices vis-à-vis shippers, intermediaries, and truckers, is not itself a reason not to issue guidance. For the same reasons, ocean carrier and marine terminal operator arguments that they are being treated unfairly by the rule are taken with a grain of salt, though the Commission agrees that shippers, intermediaries, and truckers have an equally important role to play in enhancing the efficiency of the transportation system.

The Uniform Intermodal Interchange and Facilities Access Agreement

The final general category of policy comments involved the Uniform Intermodal Interchange and Facilities Access Agreement (UIIA). The UIIA “is a multimodal negotiated interchange agreement that serves as the standard interchange agreement for most intermodal equipment interchanges except chassis.” Generally, it governs relationships between signatory ocean carriers and truckers. Some commenters pointed out that the UIIA has provisions related to empty container return, billing, and billing disputes, and expressed concern that the rule could potentially conflict with this. Others noted problems with the UIIA or the extent to which other parties adhere to it.

A few points about the UIIA. First, not all ocean carriers or truckers participate in the UIIA, and because ocean carrier practices may be contained in their addenda as opposed to the standard UIIA itself, the Commission cannot simply assume that the processes outlined in the UIIA sufficiently address concerns about ocean carrier detention practices vis-à-vis truckers. This is especially true given complaints that participants do not always abide by the terms of the UIIA or the addenda. The UIIA has been in effect for decades and was negotiated with the participation of carriers, truckers, and railroads. Ocean carrier practices, whether incorporated in the UIIA or not, are within the Commission’s purview under section 41102(c). To the extent UIIA terms or conditions are relevant to the only standard industry contract that governs the interchange of equipment between intermodal trucking companies and equipment providers such as ocean carriers (and railroads), the Commission cannot simply assume that the UIIA sufficiently address concerns about ocean carrier detention practices vis-à-vis truckers.

Commenters did not object to limiting the rule to containerized cargo, to defining demurrage and detention broadly, or to including reefer cargo within the rule’s ambit. And while some commenters believe that the Commission’s guidance should account
for chassis availability or the interests of chassis lessors, none argued that the scope of the rule should be enlarged to include charges imposed by chassis owners.

Commenters did, however, raise questions about the scope of the rule. Several commenters urged that the rule apply to export shipments as well as imports, and they raised issues unique to exports, such as rolled bookings due to vessel and schedule changes and ocean carrier changes to container return cutoff dates and insufficient notice of such changes. To be clear, the rule is not limited to import shipments and applies to export shipments as well. In particular, the guidance on the incentive principle, demurrage and detention policies, and transparent terminology would apply in situations involving exports. The NPRM preamble focused on import issues because imports were the focus of the Fact-Finding Investigation and most of the complaints.

Another scope-related comment involved the application of the rule outside of marine terminals. The American Cotton Shippers Association noted that ocean carriers, “responding to the demands of consumers, have crafted service contracts that incorporate inland movements and services” and “[t]hus the reasonableness of detention and demurrage practices and regulations, as they apply to inland movements in point-to-point service contracts, have an equally significant impact on the fluidity of all ocean-borne trade.” It urges that the rule account for the inland components of ocean-borne shipping transactions and apply to point-to-point service contracts.

Similarly, IMC Companies believes there is a “gray area of jurisdiction” in intermodal shipping, and requests “greater clarity directed to ocean carriers’ intermodal shipments moving on a through bill of lading with regard to application of the incentive principle the FMC has outlined.” Nothing in the rule limits its scope to shipping activities occurring at ports or marine terminals. Rather, section 41102(c) concerns ocean carrier, marine operator, and ocean transportation intermediary service contracts that “relating to or connected with receiving, handling, storing, or delivering property.” Ocean carrier demurrage and detention practices are subject to section 41102(c) and Commission oversight, regardless of whether the practices relate to conduct at ports or inland, with some caveats. First, not everything an ocean carrier or marine terminal operator does is within the Commission’s purview—an ocean carrier or marine terminal operator must be acting as a common carrier or marine terminal operator as defined by the Shipping Act with respect to the conduct at issue. This is often not a difficult question, but the further one gets away from the terminal, the more complicated the inquiry may become, and it is not a question that can always be answered in the abstract.

Second, the Commission must be careful not to encroach into the jurisdiction of other agencies, such as the Surface Transportation Board, which is itself considering issuing guidance to railroads similar to that in the Commission’s rule.

Commenters were also concerned about railroads and railyards. To be clear, section 41102(c) of the Shipping Act applies to common carriers, marine terminal operators, and ocean transportation intermediaries. The Commission is without authority to address practices of railroads or rail facilities unless they fall within one of those statutory definitions. That said, if the practice at issue relates to rail but is nonetheless an ocean carrier practice, e.g., is contained in an ocean carrier tariff or service contact, then the guidance in the rule would likely apply. In sum, the rule is not limited, in its language or intent, to import shipments, nor is it limited solely to ocean carrier practices related to conduct at marine terminals. The precise outer bounds of the Commission’s authority, however, is a subject better resolved in the context of a particular factual scenario. Consequently, the Commission will adopt paragraph (b) of the proposed rule in the final rule with only grammatical changes that do not affect its substance. It is important to emphasize, however, the Commission’s focus here is on practices related to charges imposed by regulated entities on shippers, intermediaries, and truckers and not the contractual relationships between ocean carriers and marine terminal operators. Ocean carriers must provide adequate terminal facilities. It appears that most carriers accomplish this by “contract[ing] for the facilities of another person such as a terminal operator, in which case the terminal operator is in effect the agent of the carrier.” This relationship—how marine terminal operators are compensated by ocean carriers for use of their terminal facilities—is not the primary concern of the guidance in the rule, even if marine terminal operators are compensated by carriers via charges called “wharf demurrage” or “terminal demurrage.” The rule might be relevant to that compensation if marine carriers are compensated by shippers for any reason.
terminal charges to ocean carriers are passed on to shippers and their agents via demurrage. In those instances, however, the Commission would be assessing the reasonableness of ocean carrier demurrage practices vis-à-vis shippers, intermediaries, and truckers, not marine terminal operator practices with respect to ocean carriers.

E. Incentive Principle

The main thrust of the rule is that although demurrage and detention are valid charges when they work, when they do not, there is cause to question their reasonableness. This derives from the well-established principle that to pass muster under section 41102(c), a regulation or practice must be tailored to meet its intended purpose, that is, “fit and appropriate for the end in view.” The Commission determined that because the purpose of demurrage and detention are to incentivize cargo movement, it will consider in the reasonableness analysis under section 41102(c) whether demurrage and detention are serving their intended purposes as financial incentives to promote freight fluidity. The Commission explained in the NPRM that practices imposing demurrage and detention when such charges are incapable of incentivizing cargo movement, such as when a trucker arrives at a marine terminal to retrieve a container but cannot do so because it is in a closed area or the port is shut down, might not be reasonable. Similarly, the Commission stated, “absent extenuating circumstances, demurrage and detention practices and regulations that do not provide for a suspension of charges when circumstances are such that demurrage and detention are not serving their purpose would likely be found unreasonable.”

The commenters did not dispute that demurrage and detention practices must be tailored to meet their purpose. But several commenters objected to the rule because: (1) Demurrage and detention serve purposes other than acting as financial incentives for cargo movement, (2) the rule will disincentivize cargo movement, (3) the rule might conflict with the principle of once-in-demurrage-always-in-demurrage, and (4) the rule unfairly allocates risks better allocated by contract.

1. Purposes of Demurrage and Detention

The Commission stated in the NPRM that the “intended purposes of demurrage and detention charges are to incentivize cargo movement and the productive use of assets (containers and port or terminal land).” This understanding was based on what shippers, ocean carriers, and marine terminal operators told the Commission. Many commenters agreed that the “incentive principle” is “supported by law and Shipping Act policies” and assert that charges should be mitigated when efficiency incentives cannot be achieved. Commenters also recognized that “the primary purpose of detention and demurrage is to provide an incentive for cargo interests to remove their cargo from the terminal promptly or to return equipment in a timely manner.”

Several commenters asserted, however, that demurrage and detention serve other legitimate purposes. Ocean carriers argued that demurrage and detention function to compensate them for costs associated with their equipment. Marine terminal operators asserted that these charges are appropriate to compensate terminal operators for the use of terminal space. Shippers and intermediaries, too, indicated that demurrage and detention have a compensatory element. As a few commenters pointed out, the Final Report in Fact Finding Investigation No. 28 noted that “some cases refer to demurrage also as serving a compensatory purpose.” Additionally, some commenters asserted that demurrage and detention actually serve an illegitimate purpose:

204 84 FR at 12 (citing Interim Report at 2–3; Final Report at 12, 13).
205 E.g., Wal Mart at 1 ("Wal Mart has also experienced abuse of such charges in ways that do not incentivize efficient movement and therefore applauds FMC’s identification of efficient cargo movement as the key consideration in assessing reasonableness of demurrage and detention practices under 46 U.S.C. 41102(c)"); Cal. Cartage Co. at 1; Dressbach Enter. at 1.
206 SSA Marine at 1; Nat’l Indus. Transp. League at 5 ("Demurrage and detention practices should be supported by law and Shipping Act policies and promptly or to return equipment in a timely manner."); Cal. Cartage Co. at 1; Dressbach Enter. at 1.
207 OCEMA at 2; WCMTOA at 8–9.
208 Am. Ass’n for Port Auth. at 1; NAWE at 10–11; WCMTOA at 2.
209 E.g., Am. Coffee Corp. at 2; Int’l Fed. of Freight Forwarders Ass’ns at 1–2; Nat’l Indus. Transp. League at 13; Sea Shipping Line at 2; see also ICL at 2.
210 Final Report at 28 n.36.

Historically, the Commission recognized that demurrage has “penal elements which are designed to encourage the prompt movement of cargoes off the pier” and includes a compensatory element which accounts for “the use of the pier facilities, for watchmen, fire protection, etc., on the cargo not picked up during free time.” It is important to specify, however, what this compensatory aspect of demurrage traditionally meant. To the extent demurrage had a compensatory aspect, it was to reimburse ocean carriers for costs incurred after free time expired—“costs” in this context meant additional costs associated with cargo remaining on a pier after free time. In other words, demurrage and detention are not the mechanism by which ocean carriers recover all costs related to their equipment, and the Commission cannot assume that these charges are the primary method by which ocean carriers recover their capital investment and container costs, as some commenters suggest.

A second point is that Commission in Free Time and Demurrage Charges at New York assumed that the minimum demurrage charge in that case—the first period demurrage—represented a compensatory charge for that period. This assumption was based on Commission caselaw requiring ocean carriers to charge at least compensatory

201 AgTC at 3 ("It is also clear that the penalties have now become a significant revenue source for the carriers."); Mohawk Global Logistics at 5; NCBFAA at 7; Lee Hardeman Customs Broker, Inc. at 1 (arguing that demurrage and detention are “CLEARLY revenue streams from frequently unreasonable application of them”); Bunzl Int’l Serv. Inc. at 1; Int’l Motor Freight at 2; The Judge Org. at 1; Mondelez Int’l at 2; Mundelholt Global Logistics at 2; Transp. Intermediaries Ass’n at 4; Retail Indus. Leaders Ass’n at 2; see also Free Time and Demurrage Charges at New York, 3 U.S.M.C. 86, 107 (FMC 1948) (NYI) (“We hold, however, that demurrage charges at penal levels are not justifiable by reference to a carrier’s need for revenue.").
213 NYI, 9 S.R.R. at 864.
214 For example, in the “ideal” situation, where a container is retrieved and returned with free time, an ocean carrier would collect no demurrage or detention. The Commission cannot assume that in this preferred scenario that ocean carriers would have to absorb their equipment costs. Rather, they presumably recover those equipment costs in other ways, such as in their freight rate.
215 WSC at 9 ("From the carrier’s perspective, detention charges are structured to serve as a recovery mechanism for the capital investment and cost of the container, including repair, maintenance, and leasing, as well as opportunity costs associated with not having the equipment available for revenue-producing cargo transport.").
demurrage.\textsuperscript{217} Given that that this
caselaw pre-dated containerization, its
precedential value is an open question,
and in the absence of evidence
establishing the extent to which ocean
carrier demurrage or detention are
compensatory, the Commission cannot
assume that demurrage and detention
have compensatory aspects in every
case. As noted above, however, the rule
does not preclude ocean carriers and
marine terminal operators from arguing
and producing evidence regarding the
compensatory aspects of demurrage and
detention in individual cases.

Accordingly, because the participants
in Fact Finding Investigation No. 28 and the
commenters consistently
emphasized the utility of demurrage and
detention in incentivizing cargo
movement and productive asset use, the
Commission continues to understand
demurrage and detention as primarily
being financial incentives to promote
freight fluidity. That said, the
Commission is amending the final rule
to recognize that the demurrage and
detention might have other purposes.
First, the Commission is adding the word
“primary” to the “Incentive
Principle” paragraph of the rule.
Second, the Commission is adding a new
“Non-Preclusion” paragraph of the
interpretive rule, which confirms that
the Commission may consider
additional factors, arguments, and
evidence in addition to the factors
specifically listed in the rule. This
would include arguments and evidence
that demurrage and detention have
purposes other than as financial
incentives.\textsuperscript{218}

2. Incentives

Ocean carrier and marine terminal
operators also object to the “incentive principle”
on the grounds that it will
effectively disincentivize cargo
movement and equipment return.

According to NAWE: “If the cargo
interest knows that its free time will be
extended because of terminal closure
due to a force-majeure-type situation,
the cargo interest is not incentivized to
retrieve its cargo before the event.”\textsuperscript{219} Some
commenters also suggest that the
rule would permit shippers to get extra
free time by withholding the payment of
freight or by being careless with
paperwork.\textsuperscript{220}

As to the former concern, the
Commission does not believe that
shippers will be disincentivized from
retrieving their cargo in a timely
fashion. This assumes that shippers are
willing to run the risk of paying
demurrage charges on the off chance a
“force majeure” event occurs. Moreover,
shippers have commercial incentives to
get their cargo off terminal, including
“contractual delivery deadlines and
perishable condition limits.”\textsuperscript{221} In
addition, one could easily argue the flip
side of the commenters’ position,
namely that the ability of ocean carriers
and marine terminal operators to collect
demurrage even if it is impossible for a
shipper to retrieve cargo or a truck to
return equipment might disincentivize
ocean carriers and marine terminal
operators from acting efficiently.\textsuperscript{222}

As for concerns that shippers will
game the system to get more free time,
the rule presupposes that shippers,
intermediaries, and truckers have
complied with their customary
obligations, including those involving
cargo retrieval.\textsuperscript{223} Any evidence
that these obligations were not met can be
raised in the context of a case.

Relatedly, the National Industrial
Transportation League requests that the
Commission “clarify that not making an
advance payment of freight charges,
where the parties have a credit
arrangement in place, should not be
viewed as failure to comply with
customary cargo interest
responsibilities.”\textsuperscript{224} The Commission
agrees that as a general matter, paying
freight in advance may not necessarily
be a “customary cargo interest
responsibility” if a shipper or
intermediary has a credit arrangement
with an ocean carrier, but such
determinations will depend on the facts
of each case and the specific
arrangements between the shipper and
carrier.

3. Once-in-Demurrage, Always-in-
Demurrage

Ocean carriers and marine terminal
operators further urge the Commission
to reaffirm that notwithstanding the
rule, the principle of “once-in-
demurrage, always-in-demurrage” still
governs.\textsuperscript{225} According to these
commenters, under this principle
shippers “bear the risk of any disability
that arises after free time has ended.”\textsuperscript{226}

In other words, once free time ends, it
would not be unreasonable to impose
demurrage on a shipper even if the
shipper is unable to retrieve the
container due to circumstances outside
the shipper’s, or anyone’s, control.

Conversely, other commenters request
that the Commission expressly overrule
the once-in-demurrage, always-in-
demurrage principle.\textsuperscript{227}

As an initial matter, it is useful to
describe the legal context before and
after the expiration of free time.\textsuperscript{228}
Prior to the expiration of free time, there are
two relevant legal principles in play
relevant to demurrage. First, as part of its
transportation obligations, an ocean
carrier must allow a shipper a
“reasonable opportunity to retrieve its
cargo,” i.e., free time.\textsuperscript{229} Free time is
“free” because during this time period,
an ocean carrier cannot assess any
demurrage.\textsuperscript{230}

Nor can marine terminal

\textsuperscript{217} NYI, 9 U.S.M.C. at 93, 109.

\textsuperscript{218} Shippers, intermediaries, and truckers do not
necessarily oppose ocean carriers and marine
terminal operators recovering, in certain
circumstances, legitimate costs. Mohawk Global
Logistics at 6 (noting that in government hold
situations, “[i]f there should be compensation to both
the terminals and the carriers in these cases.”);
Agregar Consultoria at 1. Nor do most of them deny
that demurrage and detention have a necessary
place in ocean commerce. E.g., Mohawk Global
Logistics at 2. Their primary concern is avoiding
“punitive” demurrage and detention. John S.
Connor Global Logistics at 1; AgTC at 1; ContainerPort Group at 1; Mohawk Global Logistics
at 6–7.

\textsuperscript{219} E.g., NAWE at 11; see also OCEMA at 4;
WCMTOA at 1, 10. A “force majeure” clause is a
contract provision that excuses a party’s
performance of contractual obligations when certain
circumstances arise outside the party’s control,
making performance inadvisable, impracticable, or
impossible. 14 Corbin on Contract § 74.19. These
clauses usually list circumstances that trigger the
clause, such as acts of God, fires, floods, labor
disputes, etc. Id. Presumably, commenters use the
phrase “force majeure” as shorthand for events
outside their control.

\textsuperscript{220} WCMTOA at 12; PMSA at 6.

\textsuperscript{221} AgTC at 4. Truckers likely have commercial
and other incentives to return equipment in a
timely fashion. It may be true that some “importer-
consignees operate on small margins of profit, and,
because public warehouse charges are generally
higher than demurrage charges, some consignees
tend to use the piers as warehouses.” NYII, 9 S.R.R.
at 864. But this possibility is insufficient reason to
ignore the incentive principle.

\textsuperscript{222} Cf. EMO Trans Atlanta, GA USA at 1 (“To ask
the forwarding community to pay the price for
operational issues of ports and carriers must stop.”)
F.O.X. Intermodal Corp. at 1 (arguing that
“terminals directly benefit from their inability to
service the truckers in a timely fashion”); The Judge
Organization at 1 (same).

\textsuperscript{223} 84 FR at 48852.

\textsuperscript{224} Nat’l Indus. Transp. League at 6.

\textsuperscript{225} J. Peter Hinge at 3; NAWE at 14 n.5; OCEMA
at 5; PMSA at 7–8.

\textsuperscript{226} WCMTOA at 9 (“If any final rule is adopted,
its should make clear that it is reasonable for a
terminal operator to charge demurrage if a container
becomes unavailable for any reason, after free time
has expired.”); NAWE at 14 n.5.

\textsuperscript{227} Green Coffee Ass’n at 2 (“We also contend that
the demurrage clock should be suspended during
“non-accessible” periods when the container may
already be incurring demurrage charges thus
eliminating the practice of “once in demurrage, always
in demurrage.”); Commodity Supplies, Inc. at 2
(same, but for detention).

\textsuperscript{228} The caselaw involves demurrage, but similar
cases would apply in detention context.

\textsuperscript{229} Final Report at 27 (citing Port of San Diego,
9 F.M.C. at 539).

\textsuperscript{230} NYI, 9 S.R.R. at 874 (noting obligation to
“tender for delivery free of assessments of any
demurrage”); NYI, 9 U.S.M.C. at 101 (“This is an
obligation which the carrier is bound to discharge
as a part of its transportation service, and
consignees must be afforded fair opportunity to
be responsible, the ocean carrier or the consignee, for paying the terminals’ cost: “Thus, where the terminal is the intermediate link between the carrier and the shipper or consignee, one of these two persons must pay the terminal’s cost of providing the services rendered.” The Commission held that during free time, this burden was on the ocean carrier; once free time expired, it was on the shipper. The Commission in Boston Shipping Association said nothing about the penalty aspect of demurrage. At most, it stands for the proposition that once free time ends—shipper may be responsible for any compensatory aspect of demurrage.

This interpretation of Boston Shipping Association is consistent with the New York cases. In Free Time and Demurrage Charges at New York, the Commission held that even after free time expired, levying penal demurrage charges when a consignee, for reasons beyond its control, could not remove cargo from a pier was unjust and unreasonable:

> When property lies at rest on a pier after free time has expired, and consignees, through reasons beyond their control, are unable to remove it, the penal element of demurrage charges assessed against such property has no effect in accelerating clearance of the pier. To the extent that such charges are—i.e., in excess of a compensatory level—they are a useless and consequently unjust burden upon consignees, and a source of unearned revenue to carriers.

The Commission further held, however, that in such circumstances, the ocean carrier is entitled to fair compensation for sheltering and protecting the cargo. The Commission reached a similar conclusion almost 20 years later in In re Free Time and Detention Practices on Inbound Cargo at New York Harbor, explaining that “[d]uring longshoremen’s strikes affecting even a single pier, the penalty element of demurrage affords no incentive to remove cargo from the pier because the consignee cannot do so for reasons entirely beyond his control.”

But this quotation must be read in context. The question in Boston Shipping Association was who should accept delivery of cargo without incurring liability for penalties. It is therefore just and reasonable to require the vessel to pay the cost of the supervening strike which renders the discharge of that responsibility impossible.”

This is a corollary to the argument that the rule disincentivizes shippers from retrieving containers during free time. As noted above, shippers and truckers have commercial reasons for wanting to get containers off-terminal or returned in a timely fashion. Moreover, the prospect of having to pay demurrage or detention alone is an incentive. And, as noted above, once-in-demurrage, always-in-demurrage may also lessen the incentive for ocean carriers and marine terminal operators to perform efficiently.

The Commission therefore does not agree with some commenters’ arguments that it is always a reasonable practice to charge detention and demurrage after free time regardless of cargo availability or the ability to return equipment. The rule and the principles therein apply to demurrage and detention practices regardless of whether containers at issue are “in demurrage” or “in detention.” That is, in assessing the reasonableness of demurrage and detention practices, the Commission will consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity, including how demurrage and detention are applied after free time has expired.
4. Risk Allocation

Finally, ocean carriers and marine terminal operators argue that the rule unfairly allocates all risks in force majeure situations to ocean carriers and marine terminal operators and prevents allocation of those risks by contract. Commenters refer to “risk related to fluctuations in terminal fluidity,” “risk and all of the attendant costs related to events beyond their control,” and “the entire financial responsibility for no-fault situations.” Similarly, NAWE states that “the NPRM would legally mandate that all risk of demurrage/detention costs in force majeure-type situations be placed on terminals and carriers.”

The Commission interprets these comments as saying that in a “force majeure” situation, e.g., a port is completely closed due to weather, commenters incur costs related to containers and terminal property, and if they cannot charge demurrage or detention, they have to absorb those costs. Again, part of the problem is that the commenters treat a factor in the reasonableness analysis—the incentive principle—as creating bright line rule, and they further assume the Commission would be incapable of exercising common sense when applying the factors. As explained above, nothing precludes the Commission from considering whether demurrage and detention have some compensatory aspect when determining the reasonableness of specific practices in individual cases.

F. Cargo Availability

In addition to describing how section 41102(c) may apply in the demurrage and detention context—the incentive principle—the Commission in the NPRM also sought to explain how that principle might work in particular contexts. First, the Commission clarified that it may consider in the reasonableness analysis the extent to which demurrage practices and regulations relate demurrage or free time to cargo availability for retrieval. If, the Commission stated, shippers or truckers cannot pick up cargo within free time, then demurrage cannot serve its incentive purpose. Put slightly differently, if a free time practice is not tailored so as to provide a shipper a reasonable opportunity to retrieve its cargo, it is not likely to be reasonable.

The Commission emphasized that concepts such as cargo availability or accessibility refer to the actual availability of cargo for retrieval by a shipper or trucker. The Commission did not go so far as to define what availability means, but it said that certain practices would weigh favorably in the reasonableness analysis, including starting free time upon container availability and stopping a demurrage or free time clock when a container is rendered unavailable, such as when a trucker cannot get an appointment within free time.

There was significant support for the Commission’s guidance from shippers, truckers, and intermediaries, and the Commission will include the language on container availability from the proposed rule in the final rule. A number of commenters request bright line rules. For instance, several commenters argue that free time should not start until a container is available, and that starting free time before availability should be deemed an unreasonable practice. Others assert that free time and demurrage and detention clocks should stop when containers become non-accessible due to situations beyond the control of shipper or trucker. Still others request that the Commission define “container availability,” that the Commission expressly address things like terminal hours of operation vis-à-vis free time, appointment

243 Am. Ass’n of Port Auth. at 2 (“However, the proposed rule would effectively prohibit private parties from negotiating over how the risk of events beyond either’s control (such as weather event or actions of a third party) are to be allocated, putting all the burden completely on the terminal operator and/or carrier.”); see also NAWE at 11; OCEMA at 2–3; PMSA at 6; Ports Am. at 5;
244 OCEMA at 2–3.
245 PMSA at 6.
246 NAWE at 11.
247 84 FR at 48852, 488555.
248 E.g., Retail Indus. Leaders Ass’n at 2 (“A terminal’s volume of appointment times and appointment availability are a critical component of cargo owners’ ability to collect cargo. It is essential to consider the details of a terminal’s appointment system, including availability and time frames of appointments, when assessing if fees are justified.”); Harbor Trucking Ass’n at 2 (“Important to consider the workings of terminal appointment systems in evaluating reasonableness—should be some minimum period of appointment availability.”)
249 E.g., Am. Cotton Shippers Ass’n at 5; CV Int’l, Inc. at 1; John Steer Co. at 1; John S. Connor Global Logistics, Inc. at 2–3; Yusen Logistics (Americas) Inc. at 1. But see Thunderbolt Global Logistics at 1 (“The lack of an available chassis appointment should not be considered a requirement of availability unless the steamship line is supplying the chassis as part of their contract of carriage.”)
251 Accordingly, many ocean shipper and marine terminal operator concerns about the “unworkability” of the rule are unfounded. See NAWE at 12–13; WMCTOA at 10–11.
252 E.g., MO Trans Atlanta, GA USA at 1; FedEx Trade Networks, Inc. at 1; Int’l Motor Freight at 1.
253 E.g., Mondelez Int’l at 1 (“All free time should be defined as business days as not all ports allow pick up/return on weekends.”); Rio Tinto at 1.
Depending on the facts of the case, the Commission may consider things such as appointment systems and appointment availability and trucker access to the terminal, i.e., congestion.\(^259\)

The chassis situation is more complicated. It is undeniable that chassis availability impacts the ability of a shipper or a trucker to remove a container from a port.\(^260\) But the Commission has held that “[t]he persons importing merchandise may reasonably be assumed to have, or be able promptly to obtain, the equipment needed to receive it,” and, therefore, “[i]t is not necessary, in fixing free time, to allow for delays that may be encountered in the procurement of equipment.”\(^261\) Additionally, chassis supply models vary. Sometimes a trucker provides his or her own chassis. Sometimes chassis are provided via third-party chassis providers, over whom the Commission does not have authority under section 41102(c). And, although ocean carriers in many cases sold their chassis fleets, sometimes they substantially affect chassis availability via chassis pools owned by ocean carrier agreements such as OCEMA.\(^262\) Ocean carriers also exert control over chassis via “box rules,” under which ocean carriers determine which chassis a trucker must use in a carrier haulage situation.\(^263\)

According to the Agriculture Transportation Coalition (AgTC), “carriers’ ‘box rules’ limit availability of chassis, forcing trucker to ‘hunt’ for a container brand designated by the carrier, and cannot use other containers more conveniently located.”\(^264\)

Suffice it to say, the assumption in Free Time and Demurrage Charges at New York that a shipper is able promptly to obtain equipment might, in the case of a trucker and chassis, in some circumstances, no longer be valid.\(^265\) Accordingly, the Commission may, in an appropriate case, consider chassis availability in the analysis. In doing so the Commission would be especially careful to analyze how the chassis supply model at issue relates to the primary incentive purpose of demurrage and detention.

G. Empty Container Return

The second application of the incentive principle discussed in the rule is empty container return.\(^266\) The rule states that absent extinguating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable.\(^267\) The Commission explained that such practices, absent extinguating circumstances, weigh heavily in favor of a finding of unreasonable, because if an ocean carrier directs a trucker to return a container to a particular terminal, and that terminal refuses to accept the container, “the amount of detention can incentivize its return.”\(^268\) In addition to refusal to accept empty containers, the Commission listed additional situations where imposition of detention might weigh toward unreasonable, such as uncommunicated or untimely communicated changes in container return, or uncommunicated or untimely communicated notice of terminal closures for empty containers.\(^269\)

Most of the comments about this aspect of the rule were supportive.\(^270\) Several commenters suggest additional ideas. Some argue that an ocean carrier should grant more detention free time when the carrier requires an empty to be returned to a location other than where it was retrieved, or when a marine terminal operator requires an appointment to return an empty container.\(^271\)

Commenters also raised issues with marine terminal “dual move” requirements.\(^272\) In the import context, a “dual move” is where a trucker drops off an empty container and picks up a loaded container on the same trip to a terminal. Mohawk Global Logistics described some of the issues that arise when a marine terminal operator requires a dual move to return an empty container:

When winding down peak season, there are typically more empty containers being returned than full containers available to pick up, so single empty returns are more commonly needed, and without inbound loads, dual moves are hard to effect. When terminals go for days without accepting single moves, the trucker is stuck holding the container, usually on a chassis that is being charged for daily, and in a storage yard that is also charging daily. When a few single slots open up, everyone scrambles to get there with empties, quickly closing the yard down again.\(^273\)

Changes in return location, and requiring dual moves, are certainly practices that the Commission could review under section 41102(c) in light of the guidance in rule.\(^274\) While the rule does not discuss the extension of free time when containers must be returned to a different terminal than that from which they were retrieved, the approach may have merit. The NPRM referred to the similar situation when container return location changes and the change is not communicated in a timely fashion.\(^275\) The Commission is particularly concerned about the reasonableness of dual move requirements, or more specifically, an ocean carrier imposing detention when a trucker’s inability to return a container within free time is due to it not being able to satisfy a dual move requirement.\(^276\) Although the

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\(^{259}\) 84 FR at 48852–53; id. at 48852 n.16; Final Report at 20. That the Commission in an appropriate case could consider appointment systems and appointment availability is by no means a requirement that all terminals must adopt appointment systems. Contra WCMTA at 11; SSA Marine, Inc. at 2.

\(^{260}\) 84 FR at 48851 at n.7 (“Current variations in chassis supply models have frequently contributed to serious inefficiencies in the freight delivery system.”); id. (“Timely and reliable access to roadworthy chassis is a source of ongoing and systemic stress to the system.”).

\(^{261}\) NYI, 3 U.S.M.C. at 100.

\(^{262}\) Inst. of Int’l Container Lessors at 7.

\(^{263}\) See Bill Mongelluzzo, Box rules hold back interoperable chassis pools: truckers, JOC.com (Dec. 12, 2019) (defining “box rules”).

\(^{264}\) AgTC at 5.

\(^{265}\) NYI, 3 U.S.M.C. at 100. To be clear, the Commission agrees in general with the assumption that a shipper or its agent has or can obtain the equipment necessary to retrieve cargo.

\(^{266}\) 84 FR at 48853–55; id. at 48852 n.16; Final Report at 20. That the Commission in an appropriate case could consider appointment systems and appointment availability is by no means a requirement that all terminals must adopt appointment systems. Contra WCMTA at 11; SSA Marine, Inc. at 2.

\(^{267}\) 84 FR at 48851 at n.7 (“Current variations in chassis supply models have frequently contributed to serious inefficiencies in the freight delivery system.”); id. (“Timely and reliable access to roadworthy chassis is a source of ongoing and systemic stress to the system.”).

\(^{268}\) 84 FR at 48853, 48855.

\(^{269}\) 84 FR at 48855.

\(^{270}\) 84 FR at 48853; see also id. (“Absent extinguating circumstances, assessing detention in such situations, or declining to pause the free time or detention clock, would likely be unreasonable.”).

\(^{271}\) 84 FR at 48853.

\(^{272}\) E.g., A.N. Deringer, Inc. at 1 (“If we cannot return a container because the terminal will not take it, detention should not accrue.”); Int’l Fed. of Freight Forwarders Ass’n at 2; Mohawk Global Logistics at 7; NYI, 3 U.S.M.C. at 1; Transp. Intermediaries Ass’n at 4; Transways Motor Express at 1; Yupi at 1; NGBA at 7.

\(^{273}\) E.g., Best Transp. at 2; F.O.X. Intermodal Corp. at 1; Int’l Motor Freight at 1 (“All empty equipment

\(^{274}\) As between ocean carriers and marine terminal operators, in this context the focus would

\(^{275}\) 84 FR at 48853.

\(^{276}\) 84 FR at 48853.

\(^{277}\) 84 FR at 48853.
The rule also states that in assessing the reasonableness of demurrage practices and regulations, the Commission may consider whether and how water carriers and terminals provide notice to cargo interests that cargo is available for retrieval. The rule further states that the Commission may consider whether and how notices are communicated to the Parties involved. The rule further states that the Commission may consider whether and how notices are communicated to the Parties involved.

The substantial supportive comments bolster the Commission’s belief that consistent notice that cargo is actually available for retrieval would provide significant benefits to ocean freight delivery system, especially if that notice is tied to free time. As pointed out by a commenter, notice of availability “would serve the important function of clearly identifying when the cargo is truly available for pick up and thus when the free time clock should start and end.” The Commission remains concerned that legacy forms of notice might not be providing shippers with a reasonable opportunity to retrieve cargo. Those concerns mitigate in favor of the Commission keeping “notice” as a factor in its guidance.

That said, the Commission is not requiring specific types of notice. The Commission’s guidance is intended to apply to a wide variety of terminal conditions. What constitutes appropriate notice in one situation might not be in another. Ocean carrier and marine terminal operator customers have varied needs, and the Commission is wary of asking regulated entities to develop tools that their customers are unwilling to use. Consequently, while the Commission may consider the factors listed in the NPRM in the analysis, it is not requiring any specific form of notice.

Marine terminal operators argue that by noting the merits of things like “push notifications” and updates regarding container status, the Commission is requiring marine terminal operators to do these things. This is based on a misreading of the NPRM. The marine terminal operators also make a number of claims about the costliness and technical feasibility and necessity of some of the suggestions. These are

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279 NCBFAA at 7.
279 NCBFAA at 7.
280 Final Report at 18–20, 27–28; Interim Report at 9, 18; 84 FR at 98553 ("The more these factors align with the facts, the less likely demurrage practices would be found unreasonable.").
281 84 FR at 98553.
282 84 FR at 98553 ("[n]otice that cargo is discharged in an open area, “notice that cargo is discharged, in an open area, free of holds, and proper paperwork has been submitted,” and “notice of all of the above and that an appointment is available.").
283 84 FR at 98553.
284 E.g., Mohawk Global Logistics at 2; NCBFAA at 13; Airforwarders Ass’n at 1; ContainerPort Group at 1; CV Int’l, Inc. at 2; FedEx Trade Networks, Inc. at 1–2; Florida Customs Brokers & Freight Forwarders Ass’n at 1; Int’l Fed. of Freight Forwarders Ass’n at 2; John S. Connor Global Logistics at 3; Thunderbolt Global Logistics at 2; cf. Int’l Logistics; ContainerPort Group.
285 PMSA at 5–6; WCMTOA at 10–11. In contrast, WSC argues that the rule is too vague in this regard because the Commission did not specify what it considers to be the proper format, method, or timing” of notice.” WSC at 16.
286 In NYI, the Commission declined to require that free time start upon issuance of a notice of availability. NYI, 3 U.S.M.C. at 105–06. The

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NCBFAA at 7.
NCBFAA at 7.

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likely be on ocean carrier practices. See FMC Demurrage Report at 7 (“For the return of their empty containers, VOCCs instruct the consignees and terminal operators who serve them when, where, and how this equipment can be returned.”). Additionally, the NPRM states that “[t]erminal operators are being asked to do these things. This is based on an

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NCBFAA at 7.
arguments that the commenters would be free to make if relevant in a particular case.

Further, in describing things likely to be found reasonable, the Commission was reacting to what it heard from shippers, intermediaries, and truckers during the Fact Finding Investigation, and pointing out their potential advantages. The Commission mentioned the “type” of notice because notice related to cargo availability was, in some circumstances, more aligned with the ability to retrieve the cargo than notice of vessel arrival. But that is not necessarily the case at all ports or at all terminals for all shippers. The Commission referred “to whom” notice would be provided as a consideration because truckers and others said that efficient retrieval of cargo could be enhanced if they were directly notified. As for the notice format and distribution method, the Commission commented on push notifications because truckers explained that even when marine terminal operators provide container status information on websites, truckers would have to continuously monitor or “scrape” the websites to know when a container would be ready. And as for appointment availability and notice, the Commission was noting the potential advantages of an idea proposed during the Fact Finding Investigation wherein once an appointment is made, a marine terminal operator would guarantee that the container would be available at the appointed time. If for some reason the marine terminal could not honor the appointment, it would accommodate the trucker in some other way, such as restarting free time, giving priority to a new appointment, or waiving the need for an appointment. The Commission, based on the Fact Finding Officer’s reports, noted in the NPRM that these were potentially valuable ideas, but they were not intended to be the only idea.

WCMTOA claims that the Commission “would seem to impose a requirement for a terminal operator to update cargo interests on a minute-by-minute basis as to the availability status of individual containers.” But nothing in the rule requires “minute-by-minute updates” of changes in container status. Rather, the Commission may consider whether and how notice of changes in cargo availability is provided, with the focus being how well ocean carrier and marine terminal operator practices are reasonably tailored to the shipper’s or trucker’s convenience.”

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The Commission acknowledged in the NPRM that significant demurrage and detention issues involve government inspections of cargo. Such inspections not only involve shippers, intermediaries, truckers, and marine terminal operators, but also government agencies, third-parties, and off-terminal facilities, such as centralized examination stations.

I. Government Inspections

The Commission sought comment on three proposals, and any other suggestions for “handling demurrage and detention in the context of government inspections, consistent with the incentive principle.” The Commission’s proposals were:

(a) In the absence of extenuating circumstances, demurrage and detention practices and regulations that provide for the escalation of demurrage or detention while cargo is undergoing government inspection are likely to be found unreasonable;

(b) In the absence of extenuating circumstances, demurrage and detention practices and regulations that do not provide for mitigation of demurrage or detention while cargo is undergoing government inspections, such as by waiver or extension of free time, are likely to be found unreasonable; or

(c) In the absence of extenuating circumstances, demurrage and detention practices and regulations that lack a cap on the amount of demurrage or detention that may be imposed while cargo is undergoing government inspection are likely to be found unreasonable.

Option B is the most popular option among the shipper, intermediary, and trucker commenters. This option is essentially a restatement of the general incentive principle. Under the incentive principle, “absent extenuating circumstances, demurrage and detention practices and regulations that do not provide for a suspension of charges when circumstances are such that demurrage and detention are incapable of serving their purpose would likely be found unreasonable.”

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related to the inspections.\textsuperscript{305} As explained by one commenter, the cap would be “akin to a compensatory component of a demurrage or detention charge that does not include the penal component of the charge.”\textsuperscript{306} Few commenters prefer Option A.\textsuperscript{307} As for ocean carrier and marine terminal operator commenters, they object to any change to the status quo, under which, they assert, “carriers and terminals are not required to extend free time based on delays in the availability of cargo resulting from government inspections.”\textsuperscript{308}

Some commenters also suggest different proposals, including disallowing any demurrage or detention during government inspections, so long as correct customs entries had been made,\textsuperscript{309} extending free time for five days, after which demurrage during a hold could accrue,\textsuperscript{310} disallowing demurrage and detention during government inspections and restarting free time clock from zero after inspection,\textsuperscript{311} and a Container Inspection Fund, funded by a fee on containers, used to defray ocean carrier and marine terminal operator costs incident to inspections as well as to pay for demurrage and detention.”\textsuperscript{312} The objective of the latter proposal would be spread the costs of inspections among a “wider constituency” because “[g]overnmental inspections and holds are performed for the benefit of the shipping community as a whole and society at large, not just for the individual shipper involved in a particular inspection.”\textsuperscript{313} For similar reasons, Mohawk Global Logistics suggests “assign[ing] the true cost of the resources as a ‘special government hold’ demurrage or detention charges or cap the fee at 25% assuming the punitive aspect being removed is 75%, or thereabouts.”\textsuperscript{314} The Commission has determined that, consistent with precedent, reasonableness should be assessed by considering whether demurrage and detention serve their intended purposes. As noted above, when shippers cannot retrieve cargo from a terminal, it is hard to see how demurrage or detention serve their primary incentive purpose. The question is, why shouldn’t that principle apply during government inspections of cargo? In other words, why are government inspections different from any other circumstance where a shipper cannot retrieve its cargo?

Ocean carriers and marine terminal operators argue that it is permissible to treat government inspections differently under Commission precedent. They also argue that to extend free time during government inspections or to not charge demurrage and detention during them disincentivizes shippers, for instance, to properly submit paperwork. Finally, they argue that ocean carriers and marine terminal operators incur costs during government inspections, and those costs are most appropriately allocated to shippers because they are the only ones with any control of whether inspections happen and how they proceed. In contrast, they argue, marine terminal operators and ocean carriers have no control over whether containers are inspected or how long inspections last.

Although Commission caselaw supports these commenters’ arguments, that caselaw pre-dates, and does not reflect, the Commission’s modern interpretation of section 41102(c). In Free Time and Demurrage Charges at New York, the Commission held that ocean carriers are not required to extend free time to account for government inspections of cargo.\textsuperscript{315} Delays related to government inspections, the Commission stated, “are not factors that carriers are required to consider in fixing the duration of free time.”\textsuperscript{316} The Commission in that case cited no precedent. It reasoned that allowing free time to run during government inspections was permissible because delays related to government inspections were not attributable to ocean carriers or related to their operations.\textsuperscript{317} The Commission reaffirmed this principle in 1967, finding that “inspection delays are occasioned by factors other than those relating to the obligation of the carrier.”\textsuperscript{318} Subsequently, however, the Supreme Court held that to determine reasonableness under section 41102(c)’s predecessor, one should look at how well charges correlate to their benefits.\textsuperscript{319} And the Commission later held in \textit{Distribution Services} that in the context of a carrier’s terminal practices, “a regulation or practice must be tailored to meet its intended purpose.”\textsuperscript{320} The reasoning regarding government inspections in \textit{Free Time and Demurrage Charges at New York}, which did not consider whether free time and demurrage practices were tailored to meet their intended purposes, is inconsistent with the analytical framework of these more recent cases. Consequently, Commission precedent does not bar the Commission from applying the incentive principle to government inspections—it supports its application.\textsuperscript{321}

Nor do the incentives at play suggest that government inspections should be treated specially under the rule. According to WCMTOA: “If the terminal operator or carrier may not reasonably impose demurrage during a government inspection or include such periods in free time the importer/exporter will have no incentive to avoid or minimize government inspections by ensuring that its paperwork is complete and accurate, that it properly loads and

\textsuperscript{305} E.g., CV Int’l at 2 (“There should be a cap to the potential D/D charges resulting from government holds: perhaps a level that corresponds clearly to the true cost of the resources as a ‘special government hold’”); Dow at 2; Int’l Ass’n of Movers at 2; Nat’l Indus. Transp. League at 13.


\textsuperscript{307} CV Int’l at 2 (“Accelerated D/D charges should not be permitted for cargo under government hold.”); Meat Import Council of Am. at 3; John S. Connor Global Logistics at 5 (“We do not believe it is appropriate for the carriers and/or MTO operators to escalate charges (i.e., impose penalty demurrage) in these situations.”).

\textsuperscript{308} NAWE at 15; see also OCEMA at 5; PMSA at 9–10; WCMTOA at 6–9; WSC at 10; FedEx Trade Networks at 2.

\textsuperscript{309} E.g., CV Int’l at 2 (“There should be a cap to the potential D/D charges resulting from government holds: perhaps a level that corresponds clearly to the true cost or income lost on the container or storage space during the hold period.”); Dow at 2; Int’l Ass’n of Movers at 2; Nat’l Indus. Transp. League at 13; Thunderbolt Global Logistics (cap for detention, demurrage should be waived).

\textsuperscript{310} Nat’l Indus. Transp. League at 13.

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\textsuperscript{312} NAWE at 15; see also OCEMA at 5; PMSA at 9–10; WCMTOA at 6–9; WSC at 10; FedEx Trade Networks at 2.

\textsuperscript{313} Ems Trans Atlanta, GA USA at 1.

\textsuperscript{314} AgPC at 6.

\textsuperscript{315} Sea Shipping Line at 2; Sefco Export Management Co. at 2 (“The proposal for a Container Inspection Fund is one of the rare out of the box suggestions that I have come across that might actually do some good.”).

\textsuperscript{316} Sea Shipping Line at 2.

\textsuperscript{317} Mohawk Global Logistics at 6.

\textsuperscript{318} Volkswagenwerk, 390 U.S. at 282.

\textsuperscript{319} VW also cites \textit{Truck & Lighter Unloading Practices at New York Harbor}, 12 F.M.C. 166 (FMC 1969) for the proposition that terminal operators are only responsible for delays within their control. NAWE at 5–6. This case did not discuss Volkswagenwerk, however, and pre-dated \textit{Distribution Services}. Moreover, the context was very different. \textit{Truck & Lighter} in involved truck detention. In contrast to the issues here, at the time, marine terminals were required to compensate truckers for delays, 12 F.M.C. at 170 (requiring adoption of a rule that “will compensate the truckers for unusual truck delays caused by or under the control of the terminals”). The Commission said that marine terminals only had to pay a fee (truck detention) when delays were within their control. Id. at 171. Here, however, it is shippers, intermediaries, and truckers who are arguing that they should not have to pay a fee (demurrage and detention) due to delays outside their control. In other words, \textit{Trucker & Lighter} does not stand for the proposition that marine terminal operators can impose fees when delays are outside of their control.
secures its cargo in a container and that it carefully verifies the nature, quantity, safety, or labelling of its cargo.” 322 This argument is unpersuasive. First, there are numerous incentives other than avoiding demurrage that motivate shippers to avoid or minimize government inspections. Not only are there examination costs, but government inspections delay cargo from reaching its intended destination and may result in cargo damage.323 Second, under the rule, the Commission may consider the extent to which a shipper complies with its customary responsibilities. These responsibilities include things like submitting complete, accurate, and timely paperwork.324

Marine terminal operators and ocean carriers also point out that they suffer costs due to government inspections despite having no control over inspections.325 The Commission does not disagree, nor do shippers, intermediaries, or truckers. As one commenter noted, “government holds [impose on marine terminal operators and ocean carriers] a hardship, too.” 326 Shippers, however, also incur costs due to inspections, and their control over an inspection is limited. Shippers cannot always control whether their cargo is inspected, for instance,327 nor can they exert much control of the timeliness of examinations.328

In sum, none of these features of government inspections distinguish them from other circumstances that prevent shippers from retrieving cargo. That said, the complexity of government inspections and the variety of types of government inspections militate against adopting a single approach in the Commission’s guidance.329 Consequently, the final rule does not incorporate any of the language options proposed in the NPRM. Instead, the rule makes clear that the Commission may consider the incentive principle in the government inspection context as it would in any other context. Additionally, given ocean carrier and marine terminal operator concerns about disincentivizing shippers from complying with the customary obligations, the final rule includes language expressly indicating that the Commission may consider extenuating circumstances. Specifically, the final rule states that in assessing the reasonableness of demurrage and detention practices in the context of government inspections, the Commission may consider the extent to which demurrage and detention are serving their intended purposes and may also consider any extenuating circumstances. If circumstances demonstrate the need for more specific guidance in this regard, especially as to specific ports or terminals or specific types of inspections, the Commission can refine these principles via adjudication or further rulemaking.

J. Demurrage and Detention Policies

Although the incentive principle and its applications were the focus of the rule, the Commission’s guidance also included “other factors that the Commission may consider as contributing to the reasonableness inquiry.” 330 The first “other factor” is the existence and accessibility of policies implementing demurrage and detention practices and regulations.331 This factor was based on the Fact Finding Officer’s finding that there existed a marked lack of transparency regarding demurrage and detention practices, including dispute resolution processes and billing procedures.332 The Commission reasoned in the NPRM that “[t]he opacity of current practices encourages disputes and discourages competition over demurrage and detention charges,” and stated that shippers, intermediaries, and agents “should be informed of who is being charged, for what, by whom, and how disputes can be addressed in a timely fashion.” 333

This paragraph of the rule first considers the existence of demurrage and detention policies, that is, “whether a regulated entity has demurrage and detention policies that reflect its practices.” 334 There was little comment on this aspect of the rule, but what there was supports the Commission’s approach.335 The Commission is therefore retaining this language about the “existence” of policies in the final rule.

The rule also refers to the accessibility of policies. The Commission stated in the NPRM that it would consider in the reasonableness analysis “whether and how those policies are made available to cargo interests and truckers and the public.” 336 The more accessible these policies are” the Commission explained, “the greater this factor weighs against a finding of unreasonableness.” 337 The Commission went on to note that “[t]his factor favors demurrage and detention practices and regulations that make policies available in one, easily accessible website, whereas burying demurrage and detention policies in scattered sections in tariffs would be disfavored.” 338

Although commenters agree that demurrage and detention policies should be accessible,339 ocean carriers and marine terminal operators object to this aspect of the rule on the grounds that it is inconsistent with statutory and regulatory provisions regarding publication of tariffs and marine terminal operator schedules.340 As these commenters point out, the Shipping Act requires a common carrier to “keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rule, and practices.” 341 The Act also requires that a tariff be “made available electronically to any person . . . through appropriate access from remote locations.” 342 A marine terminal

322 WCMTOA at 7.
323 AgTC at 6; NBCFAA at 8; NYNIFFFA&BA at 6; Int’l Fed. of Freight Forwarders Ass’n at 4.
324 See, e.g., WCMTOA at 6.
325 WCMTOA at 6 (“Government inspections of containers are never caused by the terminal operator, and never relate to the MTO’s facility or jurisdiction.”). See also FF28 Letter at 2.
326 WCMTOA at 6 at 7 (“[Government inspections] are a hardship, too.”)
327 Mohawk Global Logistics at 6.
328 WCMTOA at 6 (“Government inspections of containers are never caused by the terminal operator, and never relate to the MTO’s facility or jurisdiction.”).
329 Int’l Ass’n of Movers at 2 (“Delays are typically experienced because of a backlog or lack of CBP manpower, required to be present during the inspections.”)
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331 WCMTOA at 7 (“The proposals would impose a single approach to a complicated area involving a wide variety of inspections.”); PMSA at 9 (“It is difficult to mandate a single approach to inspections because there are so many types of inspections and inspection situations.”); id. (describing VACIS/X-ray inspection, Radioactive Portal Monitor inspections, and tailgate inspections).
332 WCMTOA at 7 (“The proposals would impose a single approach to a complicated area involving a wide variety of inspections.”); PMSA at 9 (“It is difficult to mandate a single approach to inspections because there are so many types of inspections and inspection situations.”); id. (describing VACIS/X-ray inspection, Radioactive Portal Monitor inspections, and tailgate inspections).
333 FF28 Letter at 2.
334 84 FR at 48856.
335 FF28 Letter at 2.
336 84 FR at 48856.
337 Interim Report at 3 (noting that the record supports consideration of the benefits of “[c]larity, simplification, and accessibility regarding demurrage and detention (a) billing practices and (b) dispute resolution processes”); id. at 2, 4, 10–12; Final Report at 13 (“The Phase Two meetings also reinforced the value of making demurrage and detention billing and dispute resolution policies and practices more transparent and accessible to cargo interest and truckers.”); id. at 14–18, 29; FF28 Letter at 2.
338 84 FR at 48853.
339 FF28 Letter at 2.
340 WCMTOA at 7 (“The proposals would impose a single approach to a complicated area involving a wide variety of inspections.”); PMSA at 9 (“It is difficult to mandate a single approach to inspections because there are so many types of inspections and inspection situations.”); id. (describing VACIS/X-ray inspection, Radioactive Portal Monitor inspections, and tailgate inspections).
341 WCMTOA at 7 (“The proposals would impose a single approach to a complicated area involving a wide variety of inspections.”); PMSA at 9 (“It is difficult to mandate a single approach to inspections because there are so many types of inspections and inspection situations.”); id. (describing VACIS/X-ray inspection, Radioactive Portal Monitor inspections, and tailgate inspections).
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and marine terminal operator schedules. They tend to be complicated and difficult to navigate even for those in the industry (let alone, say, household goods shippers or others less familiar with international ocean shipping). Although section 41102(c) and this interpretive rulemaking might not be the right vehicle for addressing these concerns, the Commission may consider in an appropriate case whether an ocean carrier tariff is “clear and definite” as required by 46 CFR 520.7(a)(1). The Commission could also assess whether a tariff is adequately searchable. Moreover, the Commission is charged with interpreting what it means for a tariff to be kept “open to public inspection,” what it means for a tariff to be “available electronically” through “appropriate access,” and what it means for a marine terminal schedule to be “made available to the public.”

The Commission is making two minor, non-substantive changes to this paragraph of the rule. The first sentence of the paragraph stated that the Commission may consider the existence and accessibility of demurrage and detention policies. The final rule makes explicit that the Commission’s analysis is not limited to those two factors and that it may also consider the content and clarity of any policies. That the Commission would consider the content of demurrage and detention policies reflecting demurrage and detention practices is implicit in the rule—the proposed rule stated that the Commission may consider certain aspects about dispute resolution policies, in other words, the content of those policies. As for clarity, the Commission emphasized in the NPRM the importance of shippers, intermediaries, and truckers knowing what they are being charged for and by whom. Adding the word “clarity” to the guidance is consistent with that emphasis, and appears unobjectionable.

K. Dispute Resolution Policies

The rule indicates that the Commission is particularly interested in demurrage and detention dispute resolution policies, and consequently, the Commission may consider the extent to which they contain information about points of contact, timeframes, and corroboration requirements. The Commission explained that it may consider in ascertaining reasonableness under section 41102(c) whether ocean carrier and marine terminal operator demurrage and detention dispute resolution policies “address things such as points of contact for disputing charges; time frames for raising disputes, responding to cargo interests or truckers, and for resolving disputes; and the types of information and evidence relevant to resolving demurrage or detention disputes.” Based on discussions with stakeholders during all three phases of the Fact Finding Investigation, the Commission listed examples of attributes of dispute resolution policies that, while not required, would weigh toward reasonableness. The Commission cited a best practices proposal put forward by OCEMA as a useful model for dispute resolution policies.

There was little substantive objection to this part of the rule. WSC protests that the Commission did not acknowledge the fact-specific nature of dispute resolution policies. The Commission expressly acknowledged in the NPRM that each regulated entity would tailor its dispute resolution policies to fit its own circumstances. Further, the list of dispute resolution policy characteristics in the NPRM is a common-sense list of ideas raised during the Fact Finding Investigation. For example, during the third phase of the investigation, shippers, intermediaries, and truckers pointed out that demurrage or detention waivers or free time extensions were often met with a negative response without any

343 46 U.S.C. 40501(f).
344 46 U.S.C. 40501(f).
346 NAWE at 17; PMSA at 12 (“The Commission has no authority to require non-tariff publication of rates and charges, however desirable it might be from a customer service standpoint.”).
347 46 CFR 520.6.
348 84 FR at 48856. Further, given the Commission’s ability to determine the reasonableness of demurrage and detention practices, it would also have the ability to assess the content of policies reflecting those practices.
349 84 FR at 48853; see also FF28 Letter at 2 (noting that under the proposed interpretive rule, the Commission could consider the “transparency of demurrage and detention policies”).
350 OCEMA at 6 (“OCEMA has long supported the notion of clarity and accessibility with regard to detention and demurrage practices.”).
The Commission recognizes the merits of most 365 of these proposals, and when considering the totality of the circumstances in a section 41102(c) case involving demurrage and detention, the inclusion of such proposals in ocean carrier and marine terminal operator dispute resolution policies would likely weigh in favor of reasonableness and against a violation. In fact, application of these proposals could likely reduce the need for formal disputes and thereby enhance operational efficiency. 366 But for the Commission to require specific demurrage and detention policies to include them, or to conclusively state that the absence of them makes a policy unreasonable, is beyond the scope of this rulemaking. 367 Accordingly, the Commission is retaining the language about dispute resolution policies in the final rule, with, as explained above, the clarification that the Commission may consider the content and clarity of demurrage and detention policies under section 41102(c). 368 The Commission further notes that the practice of "shutting out" truckers, intermediaries, or consignees from ocean carrier systems or terminals not only appears to impede efficient cargo movement, 369 but raises potentially serious concerns under other sections of the Shipping Act. 370

364 WSC at 17–18 (arguing that the Commission does not provide any guidance on what would render an appeals process sufficient). Some shippers, intermediaries, and truckers would also prefer more specific guidance in this regard.

365 E.g., Am. Cotton Shippers Ass'n v. 7; Int'l Fed. of Freight Forwarders Ass'ns v. 6; Best Transp. at 2; CVI In'tl 2; EMO Trans Atlanta, GA USA at 1; Mohawk Global Logistics at 8; Nat'l Indus. Transp. League at 15; Shapiro at 2.

366 VLM Foods USA Ltd. at 1; FedEx Trade Networks & Brokerage, Inc. at 2.

367 E.g., Florida Customs Brokers & Forwarders Ass'n at 1; Int'l Fed. of Freight Forwarders Ass'ns at 5; VLM Foods USA Ltd. at 1.

368 E.g., Int'l Fed. of Freight Forwarders Ass'ns at 5 (noting that once a merchant pays an ocean carrier, the carrier has the motivation to look into such disputes delaying related refunds "unreasonably" and that a more reasonable practice would be to suspend payment of disputed charges pending resolution of the dispute); Mondeléz Int'l at 2; Transp. Intermediaries Ass'n at 5.

369 E.g., NCBFAA at 16–17 (noting that "pay now/argue later" "uses coercion as a means to extract money from NVOCCs" and arguing that there should be mechanism allowing for release of cargo to NVOCCS without requiring them to first pay disputed demurrage or detention charges); CV In'tl at 2; FedEx Trade Networks Transport & Brokerage Inc. at 2; Container Port Group at 1; Transworld Logistics & Shipping Services Inc. at 5; Mohawk Global Logistics at 10.

370 Part III.B.2, supra.

371 See Part.III.J, supra.

372 NYNJFFF&BA at 7 ("What is most important is that it should be considered under the law for a carrier to freeze all activity with the cargo owner or its subcontractors such as truckers and OTIS when there is a dispute on one shipment."); VLM Foods Inc. at 1.

373 46 U.S.C. 41104(a)(3) (prohibition against carrier retaliation), 41104(a)(10) (prohibition against carrier unreasonable refusing to deal, or negotiate), and 41106(1) (prohibition against marine terminal operator refusing to deal or negotiate). Assessing the lawfulness of "lock out" practices, however, under these provisions is beyond the scope of this rulemaking.
commenters point out, there is no direct commercial mechanism for shippers to negotiate demurrage provisions directly with marine terminal operators, since shippers contract instead directly with ocean carriers.\textsuperscript{378} And few shippers or intermediaries want to receive separate invoices from ocean carriers and marine terminal operators.\textsuperscript{379} Marine terminal operators and ocean carriers also prefer that billing be tied to contractual relationships.\textsuperscript{380} In light of these comments, the Commission does not intend to consider the use or nonuse of this billing model in determining the reasonableness of demurrage and detention policies.

The Commission’s emphasis in the NPRM that ocean carriers bill the correct party reflected concerns raised by truckers that they were being required to pay charges that were more appropriately charged to others. Commenters reiterate these concerns. AgTC contends that “carriers should impose detention and/or demurrage on the actual exporter or importer customer with whom the carrier has a contractual relationship.”\textsuperscript{381} In contrast, the New York New Jersey Foreign Freight Forwarders & Brokers Association and others assert that truckers should be accountable for detention under the

NYNJFFFF&BA at 10–11; Harbor Trucking Ass’n at 2; NAVE at 20. But see Int’l Fed. of Freight Forwarders Ass’ns at 6 (“Shipping lines should only charge to the merchant for the demurrage of their containers. The terminals should charge the merchant directly for the space used for their terminals.”); NCHFAA at 17–18 (advocating for billing tied to party having ownership or control of assets as it “allows for greater transparency, consistency, prevents double billing, and eliminate confusion as to who and what the charges are for”).\textsuperscript{378} Nat’l Indus. Transp. Leagu at 16; see also Nat’l Retail Fed. at 2 (“Instead, we endorse the view, espoused by Coalition for Fair Port practices that disputes over detention and demurrage should [be] between the ocean carrier and the BCO, simply because the commercial relationship exists only between the BCO and the ocean carrier.”).\textsuperscript{379} E.g., Int’l Logistics, Inc at 2; Am. Coffee Corp. at 3.\textsuperscript{380} NAVE at 20; Pac. Merchant Shipping Ass’n at 13–15; WSC at 17 (“The Commission’s interpretation of reasonable billing practices would require separate invoices by MTOs and carriers.”).\textsuperscript{381} AgTC at 7; see also IMC Companies (“In turn, ocean carriers on carrier haulage should bill their shippers for detention per diem directly given motor carriers are not party to the service contract. Motor carriers are also not party to service contract exceptions on merchant haulage moves, and therefore any exceptions under service contract should require billing by ocean carrier directly to their shipper.”); J. Peter Hinge (“Therefore, it must be made crystal clear also in the context of the Commission’s intent to consider the ‘correct party’ that when you say ‘Ocean carriers would bill cargo interests directly for use of containers,’ the ‘cargo interest’ is the consignee on the Ocean carrier’s B/L as opposed to truckers and ultimate consignee on an NVOCO B/L.”); Mondelz Int’l at 2 (“The long-established rule of terminals and carriers billing the truckers for demurrage and detention (per diem) is a hardship.”).```
demurrage and detention disputes, are likely to fall on the unreasonable end of the spectrum.” 391 The Commission then listed examples of ideas proposed by shippers and truckers that could be incorporated into dispute resolution policies. The Commission noted that the OCEMA best practices proposal expressly contemplates that member dispute resolution policies include such guidance. 392

Most of the comments about this aspect of the rule reflect disagreement about who should bear the burden of providing evidence relevant to demurrage and detention issues. WSC contends that the Commission’s statements in the NPRM “would require carriers to supply truckers with evidence that truckers possess in several circumstances.” 393 Rather, the Commission stated that “[p]roviding truckers with evidence substantiating trucker attempts to retrieve cargo that are thwarted when the cargo is not available” is an idea that, if implemented by an ocean carrier or marine terminal operator, would weigh favorably in a reasonableness analysis. 394 By listing examples of ideas that would weigh favorably—ideas suggested by shippers and truckers—the Commission was not mandating a specific practice.

In contrast, other commenters assert that shippers and truckers should not have to prove that they do not owe demurrage and detention, rather “[t]he entity billing the fees should prove they are owed, as it is with any other business on Earth.” 395 Another commenter points out it would be helpful if truckers have geo-fencing data available to demonstrate attempts (and wait times) to retrieve cargo and log records of attempts to make appointments. 396

When the Commission discussed “corroboration requirements” in demurrage and detention dispute resolution policies, and “guidance about the types of evidence relevant to resolving demurrage and detention disputes,” 397 it was referring to informal dispute resolution among ocean carriers, marine terminal operators, shippers, intermediaries, and truckers, in the form of requests for free time extensions or waiver of charges. 398 The Commission was not referring to who should bear the burden of producing evidence in a lawsuit in court or a Shipping Act action before the Commission. 399 The Commission’s point was that disputes about demurrage and detention might be resolved more efficiently if a shipper or trucker knows in advance what type of documentation or other evidence an ocean carrier or marine terminal operator needs to see to grant a free time extension or waiver. If an ocean carrier or marine terminal operator provides things like trouble tickets or log records to its customers or their agents, so much the better. Dispute resolution policies that contain guidelines on corroboration will weigh favorably in the totality of the reasonableness analysis. It would seem to be in the best interests of ocean carriers and marine terminal operators to provide this sort of guidance and to avoid imposing onerous evidentiary requirements on their customers, as legitimate disputes that do not get resolved informally can lead to formal action in the form of Shipping Act claims or calls for additional Commission regulation.

N. Transparent Terminology

Paragraph (e) of the proposed rule states that the Commission may consider in the reasonableness analysis the extent to which regulated entities have defined the terms used in demurrage and detention practices and regulations. 399 In the Phase Two Final Report at 17 (“The Phase Two respondents generally agreed that cargo interests seeking a demurrage waiver or free time extension should substantiate their arguments with corroborating documentation and that having guidelines could resolve disputes more efficiently.”) 400

The UIIA, for instance, requires equipment providers to provide truckers documentation reasonably necessary to support invoices, whereas in other situations the UIIA requires the trucker to provide documentation supporting a claim. UIIA § E.6(d), (e). 400

Consequently, as the Commission explained, it would consider in the reasonableness analysis: (a) Whether a regulated entity has defined the material terms of the demurrage or detention practice at issue; (b) whether and how those definitions are made available to cargo interests, truckers, and the public; and (c) how those definitions differ from a regulated entity’s past use of the terms, how the terms are used elsewhere in the port at issue, and how the terms are used in the U.S. trade. 402

The Commission also supported defining demurrage and detention in terms of what asset is the source of the charge (land or container) as opposed to the location of a container (inside or outside a terminal). The Commission discouraged use of terms such as “storage” and “per diem” as synonyms for demurrage and detention because these terms add additional complexity and may be inconsistent with international practice. 403 Shippers, intermediaries, and trucker commenters strongly support the rule’s emphasis on clear language. 404 And those who otherwise opposed the Commission’s rule did not object to the principle that the definitions of terms used in demurrage and detention practices should be clear.

To better reflect this emphasis on clarity, the Commission is including the term “clearly” in paragraph (e) of the final rule.

Moreover, no commenters object to the notion that regulated entities should define material terms like “demurrage” and “detention.” 406 As NCBFAA points out, if shippers do not know what a charge means, they cannot “ascertain the nature of the charge and if it is justified.” 407 There are no substantive comments on the “accessibility” portion of this paragraph. The focus on accessibility, however, runs into some of the same issues addressed above regarding the accessibility of demurrage and detention policies: existing statutory and regulatory provisions regarding the publication and contents of common carrier tariffs and marine

391 84 FR at 48854.
392 84 FR at 48854.
393 WSC at 18.
394 84 FR at 48854.
395 Nat’l Retail Fed., at 3 (noting it “continued to be concerned that MTOs and carriers may develop transparent policies that place the evidentiary onus on cargo interests,” and arguing that “MTOs and carriers should have an obligation to provide information in instances where a BCO or its agent attempts to make an appointment but is unable to, or where truckers arrive at the terminal only to discover that cargo is not available”).
396 See Final Report at 17 (“The Phase Two respondents generally agreed that cargo interests seeking a demurrage waiver or free time extension should substantiate their arguments with corroborating documentation and that having guidelines could resolve disputes more efficiently.”).
397 The UIIA, for instance, requires equipment providers to provide truckers documentation reasonably necessary to support invoices, whereas in other situations the UIIA requires the trucker to provide documentation supporting a claim. UIIA § E.6(d), (e).
398 84 FR at 48856.
399 84 FR at 48854.
400 84 FR at 48854.
401 See, e.g., Am. Cotton Shippers Ass’n; Harbor Trucking Ass’n; NCBFAA; Retail Industry Leaders Ass’n.
402 NAWA at 18; OCema at 6.
403 Additionally, ocean common carrier tariffs must contain all “rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established.” 46 U.S.C. 40501(a); see also 46 CFR 520.4 (requiring tariffs to state “separately each terminal or other charge, privilege, or facility under the control of the carrier or conference and any rules or regulations that in any way change, affect, or determine any part of the aggregate of the rates or charges).
Consequently, to the extent the Commission considers the “accessibility” of demurrage and detention definitions under section 41102(c), the factor will not be construed or weighed such that minimum compliance with the applicable tariff and schedule requirements would tend toward a finding of unreasonableness. On the other hand, providing additional accessibility of such definitions above and beyond the requirements will be viewed favorably in any reasonableness analysis.

The most commented upon aspect of the rule regarding terminology was the clause stating that the Commission would consider in the reasonableness analysis the “extent to which the definitions differ from how the terms are used in other contexts,” i.e., how the definitions differ from a regulated entity’s past use of the terms, how the terms are used elsewhere in the port at issue, and how the terms are used in the U.S. trade. The rationale was that the more a regulated entity’s definitions of demurrage and detention differ from how it had used the terms and how the terms were used in the industry, the more important it was for the regulated entity to ensure that the definitions were clear. Further, considering how the terms were used elsewhere would encourage consistent demurrage and detention terminology, which was in line with the Fact Finding Officer’s finding that standardized demurrage and detention language would benefit the freight delivery system.409

In their comments, shippers, intermediaries, and truckers largely support consistent or standardized demurrage and detention terminology.410 Ocean carrier and marine terminal operator commenters, however, object to the Commission considering in the reasonableness analysis how terms were used in the past and elsewhere in a port or U.S. trade.411 They argue that the Commission should assess the transparency of terminology based on the face of demurrage and detention documents, and that the rule would chill innovation or improvements in technology; ignores differences between carriers and marine terminal operators that result in different terminology; indicates a Commission preference for uniformity over competition; could increase risk that regulated entities could be accused by the Department of Justice or private plaintiffs of engaging in concerted activity; and would “add to confusion within the industry by requiring ocean carriers to abandon familiar, existing terminology in favor of some undefined standard.”412

Despite these criticisms, the Commission is not deleting this portion of the rule. The NPRM merely proposed that one factor that the Commission may consider in combination with other factors in the reasonableness analysis is how terms are used in light of how they are used elsewhere. The Commission, by issuing this guidance, is not requiring regulated entities to change their current terminology, and the primary consideration when it comes to the clarity of terminology would be the definitional documents themselves. Moreover, this guidance does not mean that the Commission would find a section 41102(c) violation simply because another ocean carrier or marine terminal operator changed its terminology. The Commission is capable of distinguishing between a regulated entity simply changing its terminology, which would in most cases would not raise any issues, and a regulated entity using its own terminology inconsistently. Likewise, regulated entities are free to use terminology that differs from that used in a particular port or the U.S. trade generally, so long as they make it clear what the terms mean. While the commenters do not explain how operational differences between, say, marine terminal operators, would result in different definitions of demurrage and detention, the proposed guidance does not mean that the Commission would ignore such differences if raised in a case.

As for the competitive concerns, the Fact Finding Officer’s reports indeed indicate a preference for standardized or consistent demurrage and detention terminology, stating that it would benefit the infrastructure and American economy.413 The Commission finds unpersuasive the claim that ocean carriers and marine terminal operators compete on the basis of the demurrage and detention terminology they use, and these commenters provide no support for the contention that they are at risk of antitrust prosecution or litigation due to their choice of terminology. At the end of the day, the Commission’s proposed guidance in this regard is intended to provide advance notice that if ocean carriers or marine terminal operators use terms that are unclear, or use terms inconsistently, and as a consequence confuse or mislead shippers, intermediaries, or truckers, the Commission may take that into account as part of the reasonableness analysis under section 41102(c). Although the Commission believes that consistent demurrage and detention language would be beneficial, and encourages it, the rule should not be construed to mandate it.414

O. Carrier Haulage

Finally, it is worth highlighting comments about “carrier haulage,” because, while not specifically the subject of the Commission’s rule, the topic was mentioned by several commenters. In a carrier haulage arrangement, also referred to as “store door” delivery or a “door move” or “door-to-door” transportation, the ocean carrier is responsible for arranging transport of a container from the terminal to another location, such as a consignee warehouse. In other words, the ocean carrier provides drayage trucking.415 In contrast, in a “merchant haulage” arrangement, also known as CY (container yard) or port-to-port transportation, the shipper makes the trucking arrangements.416

Some commenters argue that ocean carriers should not be able to charge shippers demurrage or detention on carrier haulage moves because in those situations the ocean carrier, not the shipper or consignee, is responsible for ensuring that the container is timely retrieved from the terminal and delivered to the appropriate location.417

408 See Part III.J, supra.
409 Final Report at 3, 30, 32.
410 E.g., Am. Coffee Corp.; Green Coffee Ass’n; Am. Cotton Shippers’ Ass’n; Harbor Trucking Ass’n; IMC Companies; Meat Import Council of America; Nat’l Indus. Transp. League; NY/NJ Port & Trade; Retail Indus. Leaders Ass’n.
411 NAWE at 18-20; OCEMA at 6; WSC at 17.
412 OCEMA at 6; see also NAWE at 19.
413 Interim Report at 17; Final Report at 32.
414 The Commission in the NPRM supported certain definitions of “demurrage” and “detention” and discouraged other terms such as storage or per diem. Although some commenters support the Commission’s definitions, others did not. Moreover, one commenter noted that some ocean carriers use alternative terms such as “storage” or “per diem” to distinguish these charges from terminal demurrage. OCEMA at 6. While the Commission believes that, based on the Fact Finding Investigation, the definitions it suggested have merit, and that terms like storage and per diem could potentially cause confusion, use or nonuse of those definitions would not affect the reasonableness analysis.
415 FMC Congestion Report at 9, 18.
416 Id. at 9, 18.
417 Mohawk Global Logistics at 9; Samaritans Int’l of Waxhaw (“Many times the freight line is in control of door to door delivery, by lack of coordination container are not moved in a timely fashion. Once again they charge us demurrage for their lack of efficiency.”); W. Overseas Corp. at (describing situation in which ocean carrier was unable to find a trucker on a door move resulting in imposition of demurrage on importer because the carrier “had a provision in their tariff that allowed this to happen” and arguing that “[t]he whole point in making these books a door move was” so that...
As one commenter maintained: “Of late carriers have started billing importers for truck capacity issues at gateway ports (on carrier door moves) which, should immediately stop as the carrier is obliged to honor the terms of the ‘door bill of lading.’” 418 In contrast, truckers argue that “ocean carriers on carrier haulage should bill their shippers directly given motor carriers are not party to the [service] contract.” 419

Also of interest is the comment that “[d]uring recent terminal congestion, reports indicated that shipping lines charged demurrage to merchants who arranged the transport in merchant haulage but waived the charges for merchants for whom they arranged the transport in carrier haulage.” 420 The commenter asserts that when arranging haulage, ocean carriers in carrier haulage are competing with entities such as ocean transportation intermediaries.421 Because, the commenter asserted, markets are less efficient when entities have the power to levy unreasonable charges on their competitors, the Commission’s guidance should make clear that “containers in merchant haulage and carriers haulage be treated alike.” 422

Although the rule does not address these specific situations, the Commission has concerns about them, especially charging shippers demurrage on carrier haulage moves, under section 41102(c) and will closely scrutinize them in an appropriate case. Additionally, insofar as ocean carriers are not fulfilling contractual obligations, shippers may have additional remedies.423

IV. Rulemaking Analyses

Congressional Review Act

The rule is not a “major rule” as defined by the Congressional Review Act, codified at 5 U.S.C. 801 et seq. The rule will not result in: (1) An annual effect on the economy of $100,000,000 or more; (2) a major increase in costs or prices; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies. 5 U.S.C. 804(2).

Regulatory Flexibility Act

The Regulatory Flexibility Act (codified as amended at 5 U.S.C. 601–612) provides that whenever an agency promulgates a final rule after being required to publish a notice of proposed rulemaking under the Administrative Procedure Act (APA) (5 U.S.C. 553), the agency must prepare and make available for public comment a final regulatory flexibility analysis (FRFA) describing the impact of the rule on small entities. 5 U.S.C. 604. An agency is not required to publish a FRFA, however, for the following types of rules, which are excluded from the APA’s notice-and-comment requirement: interpretive rules; general statements of policy; rules of agency organization, procedure, or practice; and rules for which the agency for good cause finds that notice and comment is impracticable, unnecessary, or contrary to public interest. See 5 U.S.C. 553(b).

Although the Commission elected to seek public comment, the rule is an interpretive rule. Therefore, the APA did not require publication of a notice of proposed rulemaking in this instance, and the Commission is not required to prepare a FRFA.

National Environmental Policy Act

The Commission’s regulations categorically exclude certain rulemakings from any requirement to prepare an environmental assessment or an environmental impact statement because they do not increase or decrease air, water or noise pollution or the use of fossil fuels, recyclables, or energy. 46 CFR 504.4. This rule regarding the Commission’s interpretation of 46 U.S.C. 41102(c) falls within the categorical exclusion for investigatory and adjudicatory proceedings, the purpose of which is to ascertain past violations of the Shipping Act of 1984. 46 CFR 504.4(a)(22). Therefore, no environmental assessment or environmental impact statement is required.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) (PRA) requires an agency to seek and receive approval from the Office of Management and Budget (OMB) before collecting information from the public. 44 U.S.C. 3507. This rule does not contain any collections of information as defined by 44 U.S.C. 3502(3) and 5 CFR 1320.3(c).

Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards in E.O. 12988 titled, “Civil Justice Reform,” to minimize litigation, eliminate ambiguity, and reduce burden.

Regulation Identifier Number

The Commission assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda). The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda, available at http://www.reginfo.gov/public/do/eAgendaMain.

List of Subjects in 46 CFR Part 545

Antitrust, Exports, Freight forwarders, Maritime carriers, Non-vessel-operating common carriers, Ocean transportation intermediaries, Licensing requirements, Financial responsibility requirements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Federal Maritime Commission amends 46 CFR part 545 as follows:

PART 545—INTERPRETATIONS AND STATEMENTS OF POLICY

§ 545.5 Interpretation of Shipping Act of 1984—Unjust and unreasonable practices with respect to demurrage and detention.

(a) Purpose. The purpose of this rule is to provide guidance about how the Commission will interpret 46 U.S.C. 41102(c) and § 545.4(d) in the context of demurrage and detention.

(b) Applicability and scope. This rule applies to practices and regulations relating to demurrage and detention for containerized cargo. For purposes of this rule, the terms demurrage and detention encompass any charges, including “per diem,” assessed by ocean common carriers, marine terminal operators, or ocean transportation intermediaries (“regulated entities”) related to the use of marine terminal space (e.g., land) or shipping containers, not including freight charges.
In assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity.

(2) Particular applications of incentive principle—(i) Cargo availability. The Commission may consider in the reasonableness analysis the extent to which demurrage and detention practices and regulations relate demurrage or free time to cargo availability for retrieval.

(ii) Empty container return. Absent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable.

(iii) Notice of cargo availability. In assessing the reasonableness of demurrage practices and regulations, the Commission may consider whether and how regulated entities provide notice to cargo interests that cargo is available for retrieval. The Commission may consider the type of notice, to whom notice is provided, the format of notice, method of distribution of notice, the timing of notice, and the effect of the notice.

(iv) Government inspections. In assessing the reasonableness of demurrage and detention practices in the context of government inspections, the Commission may consider the extent to which demurrage and detention are serving their intended purposes and may also consider any extenuating circumstances.

(d) Demurrage and detention policies. The Commission may consider in the reasonableness analysis the existence, accessibility, content, and clarity of policies implementing demurrage and detention practices and regulations, including dispute resolution policies and regulations regarding demurrage and detention billing. In assessing dispute resolution policies, the Commission may further consider the extent to which they contain information about points of contact, timeframes, and corroboration requirements.

(e) Transparent terminology. The Commission may consider in the reasonableness analysis the extent to which regulated entities have clearly defined the terms used in demurrage and detention practices and regulations, the accessibility of definitions, and the extent to which the definitions differ from how the terms are used in other contexts.

(f) Non-Preclusion. Nothing in this rule precludes the Commission from considering factors, arguments, and evidence in addition to those specifically listed in this rule.

By the Commission.

Rachel Dickson,
Secretary.

[FR Doc. 2020–09370 Filed 5–15–20; 8:45 am]
BILLING CODE 6730–02–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 5, 8, 9, 12, 13, 15, 19, 22, 25, 30, 50, and 52

[FAC 2020–06; FAR Case 2018–007; Item II; Docket No. FAR–2018–0007; Sequence No. 1]

RIN 9000–AN67
Federal Acquisition Regulation: Applicability of Inflation Adjustments of Acquisition-Related Thresholds

Correction

In rule document 2020–07109 appearing on pages 27088–27097 in the issue of May 6, 2020, make the following correction:

52.212–5 [Corrected]

On page 27092, in the third column, Instruction 40 e. for 52.212–5, should read as set forth below:

e. Revising paragraphs (e)(1)(viii) through (x) and the first sentence of paragraph (e)(1)(xxi); and

[FR Doc. CI–2020–07109 Filed 5–15–20; 8:45 am]
BILLING CODE 1301–00–D

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 216 and 300

[Docket No. 200511–0133]

RIN 0648–BJ23
International Fisheries; Pacific Tuna Fisheries; Fishing Restrictions for Silky Shark, Fish Aggregating Devices, and Observer Safety in the Eastern Pacific Ocean

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues regulations under the Tuna Conventions Act to implement three Resolutions adopted by the Inter-American Tropical Tuna Commission (IATTC) in 2018 and 2019: Resolution C–19–01 (Amendment to Resolution C–18–05 on the Collection and Analyses of Data on Fish-Aggregating Devices); Resolution C–19–05 (Amendment to the Resolution C–16–06 Conservation Measures for Shark-Species, with Special Emphasis on the Silky Shark (Carcharhinus falciformis), for the Years 2020 and 2021); and Resolution C–18–07 (Resolution on Improving Observer Safety at Sea: Emergency Action Plan). NMFS also issues regulations under the Marine Mammal Protection Act to implement a Resolution adopted by parties to the Agreement on the International Dolphin Conservation Program (AIDCP): Resolution A–18–03 (On Improving Observer Safety At Sea: Emergency Action Plan). This final rule is necessary for the United States to satisfy its obligations as a member of the IATTC and Party to the AIDCP.

DATES: The amendment to § 300.27(e) is effective June 17, 2020, and the remaining amendments are delayed. NMFS will publish a document in the Federal Register announcing the effective date.

ADDRESSES: Copies of supporting documents are available via the Federal eRulemaking Portal: http://www.regulations.gov. For public comments, send comments to the addresses listed in the SUPPLEMENTARY INFORMATION section or contact Rachael Wadsworth, NMFS WCR SFD, 7600 Sand Point Way NE, Building 1, Seattle, WA 98115, or WCR.HMS@noaa.gov.

FOR FURTHER INFORMATION CONTACT: Rachael Wadsworth, NMFS at 562–980–4036.

SUPPLEMENTARY INFORMATION:

Background

On January 24, 2020, NMFS published the proposed rule in the Federal Register (85 FR 4250) to implement provisions of three IATTC Resolutions and one AIDCP Resolution on silky shark, data collection for fish aggregating devices (FADs), and observer safety. The proposed rule contains additional background information, including information on the IATTC, AIDCP, and Convention Areas; the international obligations of the United States as an IATTC member and Party to the AIDCP; and the need for these regulations. The 30-day public comment period for the proposed rule closed on February 24, 2020.