• 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.)

3. 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.6

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.

[FR Doc. 2020–09099 Filed 5–15–20; 8:45 am]

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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)1 and 46 CFR 545.4(d).2 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.3 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).4 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.5

1 Section 41102(c) represents the recodification of section 10(d)(1) of the Shipping Act of 1984. Some authorities cited herein refer to section 41102(c) while others refer to section 10(d)(1). For ease of reading, we will generally refer to section 41102(c) in analyzing these authorities.

2 Notice of Proposed Rulemaking: Interpretive Rule on Demurrage and Detention Under the Shipping Act, 84 FR 48850 (Sept. 17, 2019).

3 The term “ocean carrier” in this document refers to ocean common carriers subject to 46 U.S.C. 41102(c). See 46 U.S.C. 40102(18). Although the rule focuses on the practices of ocean carriers, i.e., vessel-operating common carriers, and marine terminal operators as defined in the Shipping Act, section 41102(c) also applies to ocean transportation intermediaries, and some entities, specifically, non-vessel operating common carriers, are both “common carriers” and “ocean transportation intermediaries.” 46 U.S.C. 40102(17), (20).

4 84 FR at 48850–56.

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 position. 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 rules do not preclude the Commission from considering additional factors outside those specifically listed.6 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 addressing congestion in the international ocean supply system.7 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.”8

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.9 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.10 The report also noted “shippers’ perceptions that demurrage charges are not serving


9 FMC Demurrage Report at 1.10 FMC Demurrage Report at 2, 4, 32.

competition to speed the movement of cargo, the purpose for which those charges had originally been intended.”11

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.12 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.”13 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.14 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.”15 In so doing, the Commission acknowledged the petitioners’ concerns. It highlighted the nationwide scope of the Commission’s jurisdiction and the variety of demurrage and detention practices across the country, and recognized that

11 FMC Demurrage Report at 44.


14 Pet. 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.”).


6The 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,” abstaining 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 practices (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

28 84 FR at 48853–48856.
29 84 FR at 48852.
30 84 FR at 48853.
31 84 FR at 48853–48856.
32 In promulgating this final rule and as discussed below, the Commission has considered all comments filed on or before the comment deadline of October 31, 2019, as well as all comments filed between November 1, 2019 and March 31, 2020. Although we received additional comments in April 2020, it was not possible to consider these comments given the drafting schedule for the final rule.
33 Approximately 60 commenters expressly supported the proposed guidance, and another 20 commenters supported the proposed guidance implicitly or in part.
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-Mærsk. 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.43 WSC describes the rule as "prescri[bing] 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."37 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."38 And the Pacific Merchant Shipping Association (PMSA) insists that the NPRM's "rigid standards of reasonableness" seek to mandate a "perfect world."39

Theocean carrier 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 all the Administrative Procedure Act's (APA) rulemaking requirements.48 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."49 A legislative rule is "[a]n 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."50 Interpretive rules and policy statements, in contrast, are explanatory in nature; they do not impose new obligations.51 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

43 The Ocean Carrier Equipment Management Association (OCEMA) (FMC Agreement No. 011284), the Port of New York and New Jersey Sustainable Services Agreement (PONYNSSA) (FMC Agreement No. 201175), and the West Coast MTO Agreement (WCWTOA) (FMC Agreement No. 201143) are cooperative working agreements filed with the Commission under the Shipping Act. http://www.worldshipping.org/about-the-council/member-corporations.

37 The Institute of International Container Lessors’ (IICL) argument that “the FMC had no jurisdiction to permit the chassis management limited liability corporations that were formed by the ocean carriers to become parties to FMC agreements with resultant antitrust immunity” is beyond the scope of this rulemaking.

38 WSC at 2; see also id. at 4 (describing rule as a “blanket rule”).

39 NAWE at 8. NAWE represents marine terminal operators. Id. at 1.

40 PMSA at 1, 4. PMSA is an association of marine terminal operators and ocean carriers. Id. at 1.

41 46 U.S.C. 41102(c).

42 These characterizations bear little resemblance to the proposed rule.40 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).41 And aside from the general incentive principle, which the proposed rule indicated the Commission will consider,42 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 contexts43 and gave some examples of the attributes of demurrage and detention practices that might, in the abstract, weigh favorably or unfavorably in the analysis.44

43 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.”45 The application of the “incentive principle” the Commission reiterated, would “vary depending on the facts of a given case.”46 Moreover, the Commission specified that the illustrations of how the factors might apply in the NPRM were subject to “extenuating circumstances.”47 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 all the Administrative Procedure Act’s (APA) rulemaking requirements.48 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.”49 A legislative rule is “[a]n 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.”50 Interpretive rules and policy statements, in contrast, are explanatory in nature; they do not impose new obligations.51 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

47 84 FR at 48853 (“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.”); id. at 48853 (framing guidance as “[a]bsent extenuating circumstances”).

48 WSC at 6.

49 5 U.S.C. 553(b).

50 Nat’l Mining Ass’n v. McCarthy, 758 F.3d 243, 253 (D.C. Cir. 2014).

51 Id. at 252. Although the Commission refers to its guidance as an interpretive rule, whether it is an “interpretive rule” or “general statement of policy” within the meaning of the APA is not relevant to WSC’s argument that the rule is legislative.

52 WSC at 10 ("The NPRM effectively prohibits . . . .") cf. (“This new interpretation of reasonableness would essentially require . . . .”)

53 84 FR at 48855; 48855–56; see also FF28 Letter at 2 (noting that interpretive rule includes factors that the Commission may consider as contributing to the reasonableness inquiry). 42

54 84 FR at 48855–56. As noted in the NPRM, the “incentive principle” is simply another way of stating the preexisting test for reasonableness under section 41102(c): Whether a regulation or practice is “tailored to meet its intended purpose.” Id. at 48852 (quoting Distribution Servs. Ldt. v. Trans-Pac. Freight Conference of Japan and Its Member Lines, 24 S.R.R. 714, 722 (FMC 1988)).

55 84 FR at 48853; 48853 (“[T]he more time to notice that a container is available weigh in favor of reasonableness....”);

56 84 FR at 48854 ("[D]emurrage practices that link the start of free time to notice that a container is available weigh in favor of reasonableness. . . . ."); 46

57 84 FR at 48851.
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 “mere 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


WSC at 4.

53 WSC at 5.

54 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).

55 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 “[i]n 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).

56 See Splean v. W., 216 F.3d 1058, 1066 (Fed. Cir. 2000) (“[A]n 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. Business 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 correctly 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.” SEC v. Cherry Corp., 332 U.S. 194, 203 (1947).

57 84 FR at 48851.

58 Sec. Indus., 67 F. Supp. 3d at 422 (internal quotation marks and citations omitted).

59 46 CFR part 456.


61 Am. Mining Cong., 995 F.2d at 1109 (“Second, an agency presumably intends a rule to be legislative if the rule published in the Code of Federal Regulations ...”)


63 48 CFR part 545.


65 Am. Mining Cong., 995 F.2d at 1112 (“The protection that Congress sought to secure by requiring notice and comment for legislative rules is not advanced by reading the exemption for ‘interpretive rule’ so narrowly as to drive agencies into pure ad hoc—an ad hoc, moreover, that affords less notice, or less convenient notice, to affected parties.”).
charges. 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. 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.

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.

Additional, 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. 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. Commission precedent is not “binding” on the Commission—the Commission can change course in a subsequent case. The Commission has not explained why Commission could not also change course via an interpretive rule, especially when the Commission recently did so in a 2018 interpretive rule that ocean carriers and MTOs supported.

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. 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.” This burden of persuasion does not shift, even if the burden of producing evidence does in some cases. In the section 41102(c) case, the complaint that 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. In all instances, the complainant bears the ultimate burden of proving unreasonableness. The rule does not change that framework. A complainant would still have the burden of proving the parties’ claims. Under 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.

2. Statutory Authority

Another objection raised by commenters is that the Commission lacks authority under the Shipping Act to issue the interpretive rule. 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. The Shipping Act of 1946, 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.”

According to commenters, by removing the second sentence of section 17 of the 1916 Act” from its 1946 equivalent, Congress “eliminated the Commission’s right to prescribe regulations.”

72 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.

73 Interim Report at 9; Final Report at 18.

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

75 NAVE at 6 n.2 (asserting that “the NPRM raises additional legal issues in that it seeks to change binding precedent through a non-binding, interpretive rule.”).

76 See Gen. Am. Transp. Corp. v. ICC, 872 F.2d 1048, 1060 (D.C. Cir. 1989) (“It seems to us presuppositional 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 Chisholm v. FCC, 538 F.2d 349, 365 (D.C. Cir. 1976)).

77 Cf. Health Ins. Ass’n v. D.C. Dist. of Columbia, 29643 Federal Register.
authority to determine, prescribe and order enforcement of a just and reasonable regulation or practice.”

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 or unreasonable, and the D.C. Circuit has affirmed this authority.

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 “an element of 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, insofar 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 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 intrusion 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

88 NAWE at 4.
89 Put differently, the Commission is not saying “regulated entities must do X;” it is saying “here are factors the Commission may apply when determining whether practices are unreasonable.”
91 See, e.g., NPRM: Filing of Tariffs by Marine Terminal Operators Exculpatory Provisions, 51 FR 15655 (Apr. 25, 1986) (“Tariff provisions that exculpate or otherwise relieve marine terminal operators from liability for their own negligence, or exculpate or otherwise relieve marine terminal operators or intermediaries, and truckers.
93 NAWE at 9–10; WSC at 11–12; Ports Am. at 2–3.
94 46 U.S.C. 305.
95 See NAWE at 9–10; WSC at 11–12; Ports Am. at 2–3.
96 See NAC at Customs Brokers & Forwarders Ass’n v. United States, 683 F.2d 98, 100 (D.C. Cir. 1980); id. at 101 (“We uphold the FMC’s constant rule on the ground that the Commission, in the reasonable exercise of its rulemaking authority, may interpret section 10(d)(1) to prohibit forwarder discrimination in the charges billed to customers.”).
97 “The primary purpose of the shipping laws administered by the FMC is to protect the shipping industry’s customers, not members of the industry.” Boston Shipping Ass’n v. Fed. Mar. Comm’n, 706 F.2d 1231, 1238 (1st Cir. 1983).
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100 NAWE at 6.
“independent regulatory agencies” such as the Commission.

First, 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.92 But others have approached performance objectives with caution.

The Final 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.107 The Commission has, however, voluntarily undertaken regulatory reform efforts consistent with the spirit of the order.108 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 the terms.

Commenters argue that the rule might require ocean carriers to deviate from their tariffs in contravention of this doctrine.

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, 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.”

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 irrebuttable 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.

Similar to 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
The 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 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.

A few commenters, however, assert that Commission guidance is not necessary because the current freight delivery system is working, commercial solutions to demurrage and detention issues are adequate, and complaints by shippers, intermediaries, and truckers are not subject to cross examination and could contain hyperbole. The majority of the commenters, however, advocate for the proposed rule’s prompt adoption. 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. 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. 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).

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. 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. 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 address and detention problems, the Fact Finding record showed that commercial solutions are only adequate from the perspective of ocean carriers and marine terminal operators.

The second category of policy-related comments relate to the specificity of the rule. On one hand, some commenters argue that the rule is too broadly applicable and prescriptive and ignores the complexity of the transportation system. According to these commenters, “[t]he NPRM’s approach, which seeks to impose nationwide standards for all terminals and carriers, fails to reflect the nuances of the hundreds and thousands of different factual situations,” and “tries to mandate standards that may not be feasible or cost effective for many situations.” The commenters also argue a “national standard such as the NPRM” is inconsistent with the Commission’s statement that it would continue to consider the facts of each case.

On the other hand, many commenters request that the Commission be more specific and prescriptive. WSC argues that Commission did not provide enough guidance on how the rule would apply in specific situations, and takes issue with the Commission not stating, for instance, what the proper format, method, or timing of notice of cargo availability would be. Likewise, the record in Fact Finding No. 28 suggested that demurrage and detention collections have only increased since then, Interim Report at 7–8, and shipper complaints have not abated.

E.g., IICL at 10 (noting that “while the FMC is well-intentioned,” “in IICL’s 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 3 (“The NPRM is a broad-brush approach to a very complex subject.”).

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

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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 3; WCMTOA at 5 (arguing that the NPRM erodes the “broad and fact-specific” standard of section 41102(c)).

WCMTOA also states that the rule, even if just guidance, might cause stakeholders to adjust their practices in light of the guidance to avoid regulatory risk. According to WCMTOA, this might mean that no cases are filed and the specific facts of cases are not reached. WCMTOA at 5 n.2. WCMTOA does not note, however, why this would be a problem. WSC at 15–16.

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 shedding 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; 
- Specify what information ocean carriers or marine terminal operators must provide to shippers and their agents regarding cargo availability; 
- Mandate specific requirements for ocean carrier and marine terminal operator dispute resolution and billing processes, such as timeframes and internal appeals processes; 
- Prescribe reasonable free time periods; 
- Define uniform demurrage and detention terminology; 
- Specify that all cargo on a bill of lading be available before demurrage accrues on any container; 
- Set caps on the levels of, or total amount of, demurrage or detention that may be charged.

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

\textsuperscript{132} See Part III.G. Moreover, one commenter suggests that street turns should be cheaper than returning a container to the terminal. 
\textsuperscript{133} E.g., Int’l Fed. of Freight Forwarders Ass’ns at 10 ("FLATA would appreciate guidance on fair and reasonable free periods that are in line with market developments of higher peaks."). \textsuperscript{134} See Part III.K and Part III.L, infra. 
\textsuperscript{135} E.g., Int’l Fed. of Freight Forwarders Ass’ns at 10 ("FLATA would appreciate guidance on fair and reasonable free periods that are in line with market developments of higher peaks."). \textsuperscript{136} John S. Connor Global Logistics at 3 ("Further to this understanding of availability, there must be a clear and consistent method for calculating Free Time and "all parties (carriers, shippers, MTOS) 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."). 
\textsuperscript{140} The suggestion that case-by-case adjudication would not be a panacea; it is on its face speculative and was not raised by 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. 
\textsuperscript{142} 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.

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,\textsuperscript{146} that it ignores the costly burden it would impose on ocean carriers and marine terminal operators and others,\textsuperscript{147} that it limits contract flexibility and risk allocation. Additionally, these commenters contend that the rule could lead to an "explosion of time-consuming and expensive litigation."\textsuperscript{149} Increased container dwell time;\textsuperscript{150} and chassis shortages.\textsuperscript{151}

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

\textsuperscript{139} WCMTOA points out that in the FMC Congestion Report, the Commission’s Bureau of Trade Analysis stated that the “idea here is not to recommend or suggest ‘best practices’ ” regarding congestion and that it would “be invidious for the Commission to declare ‘best practices.’ ” WCMTOA at 6 (quoting FMC Congestion Report at 10). The Commission generally agrees with the idea that it should not be telling regulated entities what the “best practices” are. But the Commission is authorized and required to determine what practices are unreasonable, and it is thus appropriate for the Commission to provide guidance about what sorts of practices might or might not trend in that direction.

The suggestion that case-by-case adjudication means analyzing every case in a vacuum could result in inconsistent agency decisionmaking.\textsuperscript{141} That rule would have “essentially reviv[e]d rules that the Commission had in place for the port of New York for 20 years.” Pet. P4–16 at 12. But those rules only applied to one port—the Commission’s guidance here must be flexible enough to account for operations at all ports and marine terminals within the Commission’s jurisdiction. 
\textsuperscript{144} WSC at 16 (discussing technical feasibility of practices); WCMTOA at 11–12. 
\textsuperscript{145} For instance, SSA Marine Inc. points out that “[i]ncreasing 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.

\textsuperscript{146} NAWE 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. 
\textsuperscript{147} ICL at 3; NAWE at 8; OCEA at 4; Ocean Network Express at 3; WSC at 12; WCMTOA at 5; Am. Ass’n Port Auth. at 2. 
\textsuperscript{148} OCEA at 3; Ports Am. at 2–3; WSC at 11, 12; Am. Ass’n Port Auth. at 2. 
\textsuperscript{149} SSI 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 NAWE at 13.

Ocean Network Express at 2; WO at 1, 3
\textsuperscript{150} ICL at 3. This commenter argues that if a carrier waives or deviates from the provisions in its bill of lading, “it could 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. Even assuming that is true, the rule does not go so far as to require this change. 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. 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 or waiving a full day of demurrage due to a container being unavailable for less than an entire day or implementing new information technology systems or creating new dispute resolution teams. 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.

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 demurrage and detention do not work because cargo cannot move. Not charging a penalty because a container cannot move would not appear to increase its dwell time.

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. 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).

In this sense, ocean carriers and marine terminal operators are no different from participants in other regulated industries.

Ocean carriers and marine terminal operators benefit, however, from limited antitrust immunity for their agreements with their competitors and are also the beneficiaries of cargo lien law and law regarding tariffs and published marine terminal schedules, all of which may affect the negotiating playing field vis-à-vis shippers, intermediaries, and truckers. Whatever their merits, however, marine terminal schedules share elements of contracts of adhesion: they are presented on a take-it-or-leave-it basis, without the chance for much negotiation. And, like contracts of adhesion, the terms of tariffs and marine terminal schedules “may be drafted with a view to protect to the maximum degree the enterprise that propounds the form, thus minimizing the realization of the reasonable expectations of the adhering party.” This is not to say that shippers and intermediaries do not negotiate certain aspects of demurrage and detention, such as free time, in service contracts. But many, if not most, shippers lack significant bargaining power as compared to ocean carriers. The same goes for intermediaries and truckers. Under such circumstances, there is reason for the Commission to carefully scrutinize arguments that shippers, intermediaries, and truckers have the ability meaningfully to negotiate contractual terms relating to demurrage and detention.

152 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”).
153 84 FR at 48852.
154 Ocean Network Express at 1; OCEMA at 4. The rule might be other times within the free time that a shippers could have retrieved its cargo.
155 NAWE at 13; Ports Am. at 3; WSC at 15–16.
156 Ocean Network Express at 1; Ports Am. at 3; WSC at 15–16.
157 NAWE at 13; OCEMA at 4. A few commenters assert without citation that free time contemplates minute-by-minute basis or waiving a full day of demurrage due to a container being unavailable for less than an entire day.
158 WSC at 10–11 (describing rule as “effectively prohibition private parties from defining the contractual terms and conditions with their competitors”).
159 Two commenters point out that some of the practices mentioned in the NPRM regarding notice would require “significant additional sharing of information between the terminal and the carriers and clearly bears what responsibility.” Ocean Network Express at 2; WSC at 16. The Commission does not believe this would be a negative consequence of the proposed rule.
160 OCEMA at 3 (arguing the rule would deprive both shippers and ocean carriers of the ability to negotiate for competitive terms); Ports Am. at 3; Am. Ass’n of Port Auth. at 2 (claiming rule would “effectively strip them from negotiating how the risk of events beyond either’s control . . . are to be allocated, putting all the burden completely on the terminal operator and or/ carriers use WSC at 10–11 (describing rule as substantially restricting parties from defining the commercial terms and conditions of their own contractual relationships”).
162 See infra note 365.
163 See Huffman v. 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”].
164 See AgTC at 3 (“The opportunity to negotiate is a myth . . . .”).
165 1 Corbin on Contracts § 1.4 (2020).
166 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) (“NOCCs 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 NOCCs have stronger negotiating positions, they are able to set service contract terms and conditions with NVOCCs; indeed, the majority of service contracts on file with the Commission use boilerplate terms and conditions written by the VOCC.”).
167 In prohibiting certain exculpatory provisions in marine terminal schedules under section 41102(c), the Commission rejected the argument “that there is nothing unreasonable, and hence
Suffice it to say, ocean carriers and marine terminal operators do not have an invidious 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.

4. The Uniform Intermodal Interchange and Facilities Access Agreement

The next 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. That said, the UIIA has been in effect for decades and was negotiated with the participation of most ocean 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 leasing companies, the Commission cannot simply assume that the processes outlined in the UIIA sufficiently address concerns about ocean carrier detention practices vis-à-vis truckers.

Because 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. That said, 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).

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In the NPRM, the Commission explained that the reference to containerized cargo included cargo in refrigerated (reefer) containers. Given that the lack of standard terminology in the industry, the rule defines “demurrage” and “detention” broadly to cover all charges customarily referred to as demurrage, detention, or per diem. The rule specifically limits these definitions to “shipping containers” to exclude charges related to other equipment, such as chassis, because depending on the context, “per diem” can refer to containers, chassis, or both.

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

174 UIIA § B.2; see also Casey, supra note 175 ("Notably, to comply with antitrust law, the UIIA cannot include or dictate economic and commercial terms that are specific to each equipment provider. Such terms are handled through individual addenda to the UIIA.").

178 U.S.C. 41102(c) and 46 CFR 545.4(d) in the context of demurrage and detention. None of the comments specifically addressed this paragraph of the rule, and the Commission will include it without change in the final rule.

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for chassis availability, or the interests of chassis lessors.

argued that the scope of the rule should be enlarged to include charges imposed by

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 that the ocean carrier changes to

To be clear, the rule is not limited to import shipments and applies to export shipments as well. In particular, the

Another scope-related comment involved the application of the rule outside of marine terminals. The American


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 principles 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 actions, regulations “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.

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

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

193 See Part III.F, infra.

194 IICL at 2.

195 Section 41102(c) does not cover chassis providers who do not otherwise fall within the definition of a regulated entity under the Shipping Act.

196 This should allay some of the concerns raised by commenters like the American Association of Port Authorities that the rule would prevent marine terminal operators from being compensated for use of terminal space. Am. Ass’n of Port Auth. at 2.
terminal charges to ocean carriers are passed on to shippers and their agents via demurrage.\textsuperscript{197} 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.\textsuperscript{198} 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,\textsuperscript{199} that is, “fit and appropriate for the end in view.”\textsuperscript{200} 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 the intent to which demurrage and detention are serving their intended purposes as financial incentives to promote freight fluidity.\textsuperscript{201}

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 shutdown, might not be reasonable.\textsuperscript{202} 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.”\textsuperscript{203}

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 onerous-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.\textsuperscript{204} 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.\textsuperscript{205} 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.”\textsuperscript{206}

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.\textsuperscript{207} Marine terminal operators asserted that these charges are appropriate to compensate terminal operators for the use of terminal space.\textsuperscript{208} Shippers and intermediaries, too, indicated that demurrage and detention have a compensatory element.\textsuperscript{209} As a few commenters pointed out, the Final Report in Fact Finding Investigation No. 28 noted that “some cases refer to demurrage also serving a compensatory purpose.”\textsuperscript{210}

Additionally, some commenters asserted that demurrage and detention actually serve an illegitimate purpose:


demurrage, and detention charges are structured to serve as a recovery mechanism for the capital investment and container costs, as some commenters suggest.\textsuperscript{215} 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.\textsuperscript{216} This assumption was based on Commission caselaw requiring ocean carriers to charge at least compensatory

\textsuperscript{197} Interim Report at 16 (“The VOCC’s tariff rates and practices may also directly pass through or refer to those of the relevant port authority’s or MTO’s schedule.”).

\textsuperscript{198} 84 FR at 48852.


\textsuperscript{200} Distribution Servs., 24 S.R.R. at 722 (quoting Port of San Diego, 9 F.M.C. at 547).

\textsuperscript{201} 84 FR at 43 (Interim Report at 2–3; Final Report at 12. 13).

\textsuperscript{202} 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 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; Dresbach Enter. at 1.

\textsuperscript{203} 864 (1967) ("From the carrier’s perspective, demurrage charges are not justifiable demurrage charges, even if penal levels are not justifiable by reference to a carrier’s need for revenue.").

\textsuperscript{204} In re Free Time and Demurrage Practices on Inbound Cargo at New York Harbor, 9 S.R.R. 860, 864 (1967) (NYII); NYI, 3 U.S.M.C. at 107.

\textsuperscript{205} NYII, 9 S.R.R. at 864.

\textsuperscript{206} 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 such equipment costs in other ways, such as in their freight rate.

\textsuperscript{207} 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.”).

\textsuperscript{208} NYII, 9 U.S.M.C. at 109.
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 “Conclusion” 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 expired.”\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 obligation, 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.” NYI, 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, it 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 concepts 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, 3 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
costs be shifted to a shipper during free time, even in the event of a strike.231 Second, during free time ocean carriers remain subject to section 41102(c)’s reasonableness standard: its practices must be tailored to meet their purposes. Once free time expires, however, the first of these legal principles drops away because the transportation obligation of the carrier has ended.232 At that point, ocean carriers can, and should, charge demurrage. As the Commission recognized in the NPRM, demurrage is a valuable charge when it incentivizes prompt cargo movement.233 Ocean carriers remain subject, however, to section 41102(c) and its requirement that demurrage practices be tailored to meet their purposes—acting as financial incentives for cargo and equipment fluidity. If demurrage cannot act as an incentive for cargo and equipment fluidity because, for instance, a marine terminal is closed for several days due to a storm, charging demurrage in such a situation, even if a container is already in demurrage, raises questions as to whether such demurrage practices are tailored to their intended purpose in accordance with section 41102(c).

The ocean carrier and marine terminal operator commenters have two answers: precedent and incentives.234 According to the commenters, Boston Shipping Association stands for the proposition that it is “reasonable for a carrier to continue assessing demurrage against cargo that had exceeded free time when a strike broke out, thus precluding pick up.”235 Commenters rely on a single quotation: “Thus, in our view, it is only just and reasonable that the consignee, who has failed to avail himself of the opportunity to pick up his cargo during free time, should bear the risk of any additional charges resulting from a strike occurring after free time has expired.”

But this quotation must be read in context. The question in Boston Shipping Association was who should 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.”237 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.238

The Commission further held, however, that in such circumstances, the ocean carrier is entitled to fair compensation for sheltering and protecting the cargo.239 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.”240

To the extent, then, that these pre-containerization cases are relevant, they stand for the proposition that insofar as demurrage is a penalty i.e., an incentive to retrieve cargo, it is unreasonable to assess it on cargo “in demurrage.” This is consistent with the guidance in the rule. And, while those cases allowed ocean carriers to recover certain costs, as noted above, the rule does not preclude the Commission from considering whether demurrage and detention have some compensatory aspect when determining the reasonableness of specific practices in individual cases.

As for incentives, the commenters’ second argument—favoring “once-in-demurrage, always-in-demurrage” is that it provides an incentive for shippers and truckers to retrieve cargo and return equipment during free time. According to PMSA, “[i]f a cargo interest knows that if it does not pick up cargo or return equipment during the original free time period, it will be subject to charges even if a no-fault event occurs during the demurrage/per diem, it will have a strong incentive to pick up the cargo during the original free time, promoting container velocity.”241 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.242 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.

231 Boston Shipping Ass’n n. 10 F.M.C. at 416 (“No one would argue that the carrier should pay the terminals’ cost of providing the pier for the free time period itself.”); id. at 417 (“We would place the burden upon him who at the time of the strike owes an undischarged obligation to the cargo. Thus, where the cargo is in free time and a strike occurs, it is the vessel which has yet to discharge its obligation to tender for delivery and it is to the vessel that the terminal is at this point in time supplying the attendant facilities and services.”). 232 Id. at 417. 233 New York at 107–108. 234 0 S.R.R. at 875. The Commission reiterated that ocean carriers were entitled to compensation for use of their piers during longshoremen’s strikes for cargo in demurrage when strike began and also allowed the assessment of demurrage (penal and compensatory) after the end of a strike, despite post-strike congestion, on containers in demurrage when the strike began. Id. at 877, 880.

240 10 F.M.C. at 417 (emphasis added); id. (“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.”) (emphasis added).

239 9 S.R.R. at 87. The Commission reiterated that ocean carriers were entitled to compensation for use of their piers during longshoremen’s strikes for cargo in demurrage when strike began and also allowed the assessment of demurrage (penal and compensatory) after the end of a strike, despite post-strike congestion, on containers in demurrage when the strike began. Id. at 877, 880.

238 Id. at 107–108.

237 Id. at 107–108.

236 10 F.M.C. at 417–18.

235 Id. at 8.

234 10 F.M.C. at 417.”
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." Commenters agree that the risk principle—creating bright line rules—likely means that 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

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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 freight forwarding 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 (America) Inc. at 1. But see Thunderbolt Global Logistics at 1 ("The lack of an available chassis will not be considered a requirement of availability unless the steamship line is supplying the chassis as part of their contract of carriage.");
250 E.g., EMO Trans Atlanta, GA USA at 1; FedEx Trade Networks, Inc. at 1; Int’l Motor Freight at 1.
251 E.g., Nat’l Indus. Transp. League at 8 ("The League agrees wholeheartedly that the reasonableness of demurrage practices and charges, including free time, should be related to actual physical availability of the cargo."); Am. Cotton Shippers Ass’n at 4; Commodity Supplies at 1; CV Int’l at 1; Harbor Trucking Ass’n at 1; Fed. Of Freight Forwarders Ass’ns at 2; John S. Connor Global Logistics at 2; New Direx Inc. at 1; NYNWFFB&B at 4; Retail Indus. Leaders Ass’n at 2; Transp. Intermediaries Ass’n at 4.
252 E.g., Nat’l Indus. Transp. League at 8 ("The League agrees wholeheartedly that the reasonableness of demurrage practices and charges, including free time, should be related to actual physical availability of the cargo."); Am. Cotton Shippers Ass’n at 4; Commodity Supplies at 2; CV Int’l Fed. of Freight Forwarders Ass’ns at 2; John S. Connor Global Logistics at 2;
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.
254 See Final Report at 31–32.
255 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.
256 84 FR at 48853; Final Report at 20.
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.\textsuperscript{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.\textsuperscript{260} But the Commission has held that “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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{266} The rule states that 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.\textsuperscript{267} The Commission explained that such practices, absent extenuating circumstances, weigh heavily in favor of a finding of unreasonableness, 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.\textsuperscript{268} In addition to refusal to accept empty containers, the Commission listed additional situations where imposition of detention might weigh toward unreasonableness, such as uncommunicated or untimely communicated changes in container return, or uncommunicated or untimely communicated notice of terminal closures for empty containers.\textsuperscript{269}

Most of the comments about this aspect of the rule were supportive.\textsuperscript{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.\textsuperscript{271} Commenters also raised issues with marine terminal “dual move” requirements.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{276} Although the

\textsuperscript{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 WCMTOA at 11; SSA Marine, Inc. at 2.

\textsuperscript{260} id. 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 toroadworthy chassis is a source of ongoing and systemic stress to the system.”).

\textsuperscript{261} NYI, 3 U.S.M.C. at 100.

\textsuperscript{262} Inst. of Int’l Container Lessors at 7.

\textsuperscript{263} See Bill Mongelluzzo, Box rules hold back intermodal efficiency, The JOC.com (Dec. 12, 2019) (defining “box rules”).

\textsuperscript{264} AgTC at 5.

\textsuperscript{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. In ordinary circumstances, a shipper could not escape liability for demurrage because it is unable to procure a trucker or because its trucker cannot obtain a chassis. There could, however, be circumstances when the Commission could consider chassis availability in the reasonableness analysis.

\textsuperscript{266} 84 FR at 48853, 48855.

\textsuperscript{267} 84 FR at 48855.

\textsuperscript{268} 84 FR at 48855; see also id. (“Absent extenuating circumstances, assessing detention in such situations, or declining to pause the free time or detention clock, would likely be unreasonable.”).

\textsuperscript{269} 84 FR at 48853.

\textsuperscript{270} 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’ns at 2; Mohawk Global Logistics at 7; NYI, 3 U.S.M.C. at 3; Transp. Intermediaries Ass’n at 4; Transways Motor Express at 1; Yufi at 1; NCFFA at 7.

\textsuperscript{271} E.g., Best Transp. at 2; F.O.X. Intermodal Corp. at 1; Int’l Motor Freight at 1 (“All empty equipment

\textsuperscript{272} E.g., Mohawk Global Logistics at 7; S. Counties Express at 2 (“Empties only being received as a ‘dual transaction’ when the motor carrier has no load to pull from the terminal. Steamship line charges motor carrier for not returning the empty and pulling a load.”); Quik Pick Express, LLC (“Typically, this is due to terminals only receiving empty containers as part of a dual transaction. If our company does not have an import container to extract from that terminal, we are unable to bring them our empties. We have no viable option to return the container, but are still faced with Detention charges by the Steamship line.”).

\textsuperscript{273} Mohawk Global Logistics at 7.

\textsuperscript{274} Assuming the other elements of a section 41102(c) case are met.

\textsuperscript{275} 84 FR at 48853.

\textsuperscript{276} As between ocean carriers and marine terminal operators, in this context the focus would

Continued
The National Customs Brokers and Forwarders Association of America (NCBFAA) also advocates that the Commission “expand” the rule to reflect the railroad concept of constructive delivery of empty containers. Under this approach, the detention clock should stop once a container “has been or could be delivered back to the port, VOCC or CY [container yard], but for the recipient’s inability or unwillingness to receive the asset.” The Commission views this approach as one option an ocean carrier could use to mitigate detention under circumstances where the charges cannot serve their primary purpose of incentivizing freight fluidity. To the extent that NCBFAA is suggesting that the Commission should adopt the constructive delivery principle, the Commission believes that importing this concept from the railroad context is something better addressed in the context of a specific case or a future proceeding devoted to that topic, so that it can receive comments and arguments from all sides.

In sum, the Commission is adopting this paragraph of the rule without modification.

H. Notice of Cargo Availability

The rule also states that in assessing the reasonableness of demurrage practices and regulations, the Commission may consider whether and how consignees and terminal operators provide notice to cargo interests that cargo is available for retrieval. The rule further states that 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. This factor reflects that: (1) Ocean carriers are obligated under their contracts of carriage to give notice to consignees so that they have a reasonable opportunity to retrieve the cargo; (2) that notification practices must be reasonably tailored to fit their purposes under section 41102(c); and (3) the notion that aligning cargo retrieval processes with the availability of cargo will promote efficient removal of cargo from valuable terminal space.

In applying this factor, the most important consideration is the extent to which any notice is calculated to apprise shippers and their agents that a container is available for retrieval. The Commission explained that the type of notice is important—types of notice that are expressly linked to cargo availability weigh favorably in the analysis—and listed examples. The Commission also noted the merits of “push notifications” of cargo availability, notifying users of changes in container availability, linking free time to notice of availability, and appointment guarantees. The Commission stopped short, however, of specifying any particular form of notice. The comments about this paragraph of the rule were generally of two types. Shippers, intermediaries, and truckers strongly support notice of cargo availability and urged that the Commission require such notice and specify what information a notice must contain. Marine terminal operators opposed the Commission requiring any particular type of notice.

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 one 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 militate 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 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 an 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

Commission noted that “[c]onsignees are universally apprised of the arrival of vessels” and reasoned that “[i]nconsistency upon a notice of availability would subject the carriers to extra work and expense that would be futile and which appears quite unjustifiable.” Id. at 106. The advent of containerization and the technological advances that have occurred over the past 72 years raise serious questions as to the continuing validity of these conclusions. As the Fact Finding Officer found, and shippers, intermediaries, and trucker commenters persuasively asserted, notices of availability would have benefits. Final Report at 19–20.

NYNJJFFFAABA at 4. Final Report at 19 (noting that some terminal operators as well as cargo interests “believed that vessel arrival is a poor proxy for notice that a container is available”); see also Transp. Intermediaries Ass’n at 4 (“TIJA supports tying free time to actual cargo availability and not to vessel arrival: As FMC points out, demurrage cannot be charged ‘while the Commission may consider the factors listed in the NPRM in the analysis, it is not requiring any specific form of notice.”)}
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 or 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 ideas.

WCMTOMA 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 their purpose.

In light of the foregoing, the Commission is adopting the language regarding notice of cargo availability without change.

I. Government Inspections

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.

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." Option B simply treats "government inspections of cargo" as a type of circumstance, like a port closure due to weather, where demurrage and detention may not be serving their incentive function.

A few commenters support Option C, wherein there would be a cap on the amount of demurrage or detention that could be imposed while cargo is undergoing government inspection. Most of these commenters tie this cap to costs incurred by regulated entities opening, presentation for inspection, and closing of all types of cargo designated for examination by Customs. 19 CFR 118.2, 118.4(b). CES operators have the option of providing transportation for merchandise to the CES. 19 CFR 118.4(l). CES operators are obliged to perform in accordance with reasonable requirements imposed by a port director. 19 CFR 118.4(k). A port director may propose to cancel an agreement to operate a CES if the operator fails to comply with its § 118.4 obligations. 19 CFR 118.21.

Option D is not popular. 19 CFR 118.4(k). A port director may propose to cancel an agreement to operate a CES if the operator fails to comply with its § 118.4 obligations. 19 CFR 118.21.

297 19 CFR 118.2, 118.4(b). CES operators have the option of providing transportation for merchandise to the CES. 19 CFR 118.4(l). CES operators are obliged to perform in accordance with reasonable requirements imposed by a port director. 19 CFR 118.4(k). A port director may propose to cancel an agreement to operate a CES if the operator fails to comply with its § 118.4 obligations. 19 CFR 118.21.
298 19 CFR 118.4(k). A port director may propose to cancel an agreement to operate a CES if the operator fails to comply with its § 118.4 obligations. 19 CFR 118.21.
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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 to spread the costs of inspections among a "wider constituency" because "governmental 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' to see how demurrage or detention serve their intended purposes."\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 related to the inspections.\textsuperscript{315} 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 reasoning regarding government inspections in 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{316}

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 discharges its cargo, and that marine terminals are required to compensate the shippers for delays.\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 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 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}

313 3 U.S.M.C. at 96; id. at 99 ("As regarding either commodity, the sampling is not an operation required in connection with delivery by the carriers. Therefore, it can provide no valid ground to contend that free time allowed is unjust or unreasonable.").

318 NYIF, 9 S.R.R. at 880.

319 Volkswagenwerk, 390 U.S. at 282.


321 NAWE also cites 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 Distribution Services. Moreover, the context was very different. 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 Distribution Services. Moreover, the context was very different. 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 Distribution Services. Moreover, the context was very different. 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 Distribution Services. Moreover, the context was very different. 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 Distribution Services. Moreover, the context was very different.
securities its cargo in a container and that it carefully verifies the nature, quantity, safety, or labeling of its cargo.’” 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. 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.

Marine terminal operators and ocean carriers also point out that they suffer costs due to government inspections despite having no control over inspections. The Commission does not disagree, nor do shippers, intermediaries, or truckers. As one commenter noted, “government holds intermediaries, or truckers. As one commenter noted, ’government holds

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, nor can they exert much control of the timeliness of examinations.

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 mitigate against adopting a single approach in the Commission’s guidance.

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.” The first “other factor” is the existence and accessibility of policies implementing demurrage and detention practices and regulations.

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. 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.”

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.” There was little comment on this aspect of the rule, but what there was supports the Commission’s approach. 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.” The more accessible these policies are,” the Commission explained, “the greater this factor weighs against a finding of unreasonable.” 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.”

Although commenters agree that demurrage and detention policies should be accessible, 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. 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.” The Act also requires that a tariff be “made available electronically to any person through appropriate access from remote locations.”

A marine terminal
operator, may, but is not required to, “make available to the public a schedule of rates, regulations, and practices.”

A schedule “made available is enforceable by an appropriate court as an implied contract without proof of actual knowledge of its provisions.”

Similarly, a shipper is presumed to have knowledge of tariff rules. The Commission’s regulations regarding tariffs and marine terminal schedules are found in 46 CFR parts 520 and 525.

According to these commenters, the Commission’s statement disfavoring demurrage and detention policies buried in scattered sections in tariffs and favoring policies in easily accessible websites is inconsistent with the above Shipping Act and Commission provisions. “To the extent the NPRM purports to add any requirements beyond those set forth in the statute and Part 525 of the regulations,” a commenter argues, “such requirements would be unlawful.”

The Commission continues to believe that the delivery system would benefit from ocean carriers and marine terminal operators making their demurrage and detention policies available in easily accessible websites, in addition to their inclusion in ocean carrier tariffs and MTO schedules. And the Commission notes that unlike ocean carrier tariffs, marine terminal operator schedules are not required to be made public.

But commenters’ points are well-taken, and the Commission would avoid any interpretation of section 41102(c) that would be inconsistent with other Shipping Act provisions or Commission regulations or that would subject regulated entities to incompatible requirements. Consequently, to the extent the Commission considers the “accessibility” of demurrage and detention policies under section 41102(c), the factor will not be construed or weighed such that compliance with the minimum tariff and schedule obligations under the Shipping Act or the Commission’s regulations would tend toward a finding of unreasonableness. On the other hand, providing additional accessibility above and beyond the minimum tariff and schedule requirements would weigh in favor of a finding of reasonableness.

The Commission also remains concerned about the opacity of tariffs

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.

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. But 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

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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.”).
351 46 U.S.C. 40501(f).
352 84 FR at 48854. In fact, the UIIA provides a default dispute resolution process. UIIA H.1.
353 In addition, the Commission does not acknowledge or address the fact-specific nature of all dispute resolution policies, which are created by each individual carrier.
354 84 FR at 48854. (stating that OCEMA provided a useful model “which each regulated entity would tailor to fit its own circumstances”).
355 See also Final Report at 14–18; Final Report at 17–18.
356 WSC at 17 (“In addition, the Commission does not acknowledge or address the fact-specific nature of all dispute resolution policies, which are created by each individual carrier.”).
The Commission recognizes the merits of most 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. But for the Commission to require specific dispute resolution policies to include them, or to conclusively state that the absence of them makes a policy unreasonable, is beyond the scope of this rulemaking. 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).

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, but raises potentially serious concerns under other sections of the Shipping Act.

L. Billing

The rule text does not address ocean carrier or marine terminal operator billing or invoicing practices. In the NPRM, however, the Commission noted that the “efficacy (and reasonableness) of dispute resolution policies also depends on demurrage and detention bills having enough information to allow cargo interests to meaningfully contest the charges.” The Commission also pointed out that one idea that could promote transparency and the alignment of stakeholder interests was to tie billing relationships to ownership or control of the assets that are the source of the charges.

Additionally, the Commission noted that ocean carriers should bill their customers rather than imposing charges contractually-owed by cargo interests on third parties.

The Commission received a number of comments about billing and invoices. There was little dispute that demurrage and detention bills should have enough information for those receiving the bills to assess their accuracy and validity. There was significant comment, however, about the idea that demurrage and detention be billed based on the loss of possession of the asset (issue). Under this approach, “[o]cean carriers would bill cargo interest directly for the use of containers,” and “marine terminal operators would bill cargo interest directly for use of terminal land.” This idea was mentioned in both Fact Finding No. 28 reports.

Although this billing model is not included in the rule, and the Commission did not suggest adopting it as part of the reasonableness analysis under section 41102(c), comments about this model are mostly negative because most commenters preferred billing relationships tied to the entity with whom contractual relationships exist. Typically, the carrier unreasonably refusing to deal or negotiate, and 41106(3) (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.

358 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.

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

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

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

362 E.g., Int’l Fed. of Freight Forwarders Ass’n at 5 (noting that once a merchant pays an ocean carrier, the carrier has a motivation to look into such disputes delaying related refunds unreasonably” and that a more reasonable practice should not “shutting out” truckers, intermediaries, or consignees from ocean carrier systems or terminals not only appears to impede efficient cargo movement, but raises potentially serious concerns under other sections of the Shipping Act.

363 The idea that regulated entities should suspend charges pending a dispute or allow cargo to move freely during disputes, and not “shutting out” truckers, intermediaries, or consignees from engaged in a dispute with an ocean carrier or marine terminal operator simply because a trucker, intermediary, or consignee is engaged in a dispute with an ocean carrier or marine terminal operator.

364 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); CVI Int’l 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.

365 E.g., APL (“If truckers own one truck, are immigrants in their first job in this country, may not have command of the English. They have no way to defend themselves from being locked out—its bullying.”); Mohawk Global Logistics (“In the case of detention charges billed and disputed after the carrier, the carrier has ‘no motivation to look into these disputes delaying related refunds…’”); NYNJFFF&BA at 7 (explaining that locking out an intermediary can affect cargo of unrelated shipments handled by that intermediary and “when carriers threaten to cutoff truckers from picking up any containers for any of their customers all truckers are affected when detention is not paid for one of them due to a dispute.”).

366 Some commenters suggested that demurrage and detention disputes be subject to binding arbitration. See NYNJFFF&BA (“The NYNJFFF&BA would like to suggest that disputes cannot be resolved by the parties be decided by binding decision of an impartial arbitrator. Perhaps more authority can be given to CAGRS or parties incorporate the use of arbitrators in their contracts and agreements.”); Transworld Logistics & Shipping Services Inc. at 5.

367 Part III.B.2, supra.

368 See Part.III.J, supra.

369 NYNJFFF&BA at 7 (explaining that locking out an intermediary can affect cargo of related shipments handled by that intermediary and “when carriers threaten to cutoff truckers from picking up any containers for any of their customers all truckers are affected when detention is not paid for one of them due to a dispute.”).

370 See 46 U.S.C. 41104(a)(3) (prohibition against carrier retaliation), 41104(a)(10) (prohibition against

371 84 FR at 48854.

372 84 FR at 48854.

373 NCBFAA at 17 (“For anyone to, first, understand, and second, contest disputed charges, it must be clear what is being billed and by whom.”).

374 84 FR at 48854.


376 The Commission did not, as OCEMA insists, “propose[ ] to limit billing practices by function such that terminal would bill solely for land use and ocean carriers would bill for equipment use,” OCEMA at 7.

377 See, e.g., Best Transp. at 2; Nat’l Indus. Transp. League at 16; Nat’l Retail Fed. at 2;
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.378 And few shippers or intermediaries want to receive separate invoices from ocean carriers and marine terminal operators.379 Marine terminal operators and ocean carriers also prefer that billing be tied to contractual relationships.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.”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 UIIA.382 It also argues that ocean carriers define the term “merchant” in their bill of lading too broadly, resulting in parties being billed for demurrage and detention “regardless of whether they are truly in control of the cargo when the charges were incurred.”

To clarify, the Commission’s goal in the NPRM was to emphasize the importance of ocean carriers and marine terminal operator bills aligning with contractual responsibilities.383 This does not mean, however, that every billing mistake is a section 41102(c) violation. Section 41102(c) applies to acts or omissions that occur on a normal, customary, and continuous basis.384 Further, billing mistakes can presumably be addressed under contract law or other legal theories.385

As for the arguments that ocean carriers’ billing practices are unreasonable because carrier bills of lading, tariffs, service contracts, or the UIIA assigns responsibility for charges to the wrong parties, the Commission believes that whatever the merit of these arguments, they are better addressed in the context of specific fact patterns rather than in this interpretive rule, the purpose of which is to provide general guidance about enforcement. The Commission will apply section 41102(c). Likewise, shippers, intermediaries, and truckers identify ocean carrier and marine terminal operator practices that they believe raise reasonableness issues. These commenters urge the Commission to require, or address in the rule:

• **Billing timeframes.** Many commenters assert that ocean carriers and marine terminal operators should issue demurrage or detention bills or invoices within specified timeframes.386

Several commenters suggest that it is unreasonable for ocean carriers or marine terminal operators to require advance payment of charges before cargo is released, especially when:

- the regulated entity and the customer have negotiated credit arrangements;387 or
- (b) when the charges are disputed.

As to billing and invoice timeframes, the Commission believes that having time frames and abiding by them would be a positive development. It is beyond the scope of this guidance, though, for the Commission to decide what those timeframes should be.388 Similarly, in the abstract, it is not immediately clear why an ocean carrier or marine terminal operator would require payment of demurrage before releasing cargo if there is a credit arrangement involved. But specific situations may not so simple. As noted above, ocean carriers have liens on cargo that they can lose if they surrender the cargo.389

While the Commission does not believe it is appropriate in this interpretive rule to prescribe timeframes, let alone specific ones, or mandate that ocean carriers or marine terminal operators release cargo prior to payment when credit arrangements are involved, the Commission may address such issues in the context of particular facts, considering all relevant arguments. To reflect this, the Commission is including a reference to demurrage and detention billing practices and regulations in the final rule.

**M. Guidance on Evidence**

The rule paragraph on demurrage and detention policies mentions “corroboration requirements” because the Fact Finding record demonstrated that the international ocean freight delivery system would benefit from “[e]xPLICIT guidance regarding the types of evidence relevant to resolving demurrage and detention disputes.”390 In the NPRM, the Commission stated that “[d]ispute resolution policies that lack guidance about the types of evidence relevant to resolving

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378 See, e.g., The Evans Network of Companies at 1 (asserting that there is “no need for advance payment of all charges here credit has been agreed to between the shipper and ocean carrier” and that “pre-payment should not apply to disputed charges”); FedEx Trade Networks Transport & Brokerage Inc. (“[W]e feel that it is essential that cargoes not be ‘Held Hostage’ for the immediate payment of demurrage or detention charges.”); Retail Indus. Leaders Ass’n at (“Similarly, where shippers and carriers have agreed to credit terms as a part of an existing, contracted business relationship, there is no basis for requiring advance payment of all charges prior to release of cargo.”)

379 See Part III.B.2, supra. The Commission notes, however, that the standard UIIA agreement requires equipment providers to invoice motor carriers for “Per Diem, Container Use, Chassis Use/Rental and/or Storage Ocean Demurrage charges within sixty (60) days from the date on which the Equipment was returned.” UIIA § 6.6(c).

380 See supra note 365.

381 Id., p. 12.

382 NTNJJFFBBA at 9 (“Where detention is concerned the steamer passengers routinely have ignored the [UIIA], which holds the trucker accountable for the charges incurred when equipment is not returned on time.”); see also PMSA at 13 (“Specifically, equipment charges (detention or per diem) are generally assessed against motor carriers rather than cargo interests, under the provisions of the [UIIA].”)

383 84 FR at 48854.

384 46 CFR 545.4(b).

385 See, e.g., 80 FR 64479 (“[Matters that may previously have been brought under section 41102(c) however, can still find resolution in other provisions or regulations of the Shipping Act or be adjudicated by the parties of contract law, agency law, or admiralty law.”).

386 See, e.g., Crane Worldwide Logistics (suggests a “defined invoicing period”); Int’l Fed. of Freight Forwarders’Ass’ns at 6; Mohawk Global Logistics at 9; Shapiro at 2.
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, and the accessibility of definitions, and the extent to which the definitions differ from how the terms are used in other contexts.400 The Commission started with the basic principle that for demurrage and detention practices to be just and reasonable, it must be clear what the relevant terminology means.401 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 are apparently inconsistent with international practice.403

Shippers, intermediary, 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.405 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[d] 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”); A.N. Deringer Inc. at 1; Green Coffee Ass’n.
396 84 FR at 48854.
397 84 FR at 48854.
398 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.”).
399 The UIIA, for instance, requires equipment used in demurrage or detention practices to be just and reasonable, it must be clear what the relevant terminology means.
400 84 FR at 48856.
401 84 FR at 48854.
402 See, e.g., Am. Cotton Shippers Ass’n; Harbor Trucking Ass’n; NCBFAA; Retail Industry Leaders Ass’n.
403 NAWE at 18; OCEMA at 6.
404 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).
405 NCBFAA at 18.
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.

In their comments, shippers, intermediaries, and truckers largely support consistent or standardized demurrage and detention terminology.

Ocean carrier and marine terminal operator commentators, 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. 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.”

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 intermodal and American economy. 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.

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 commentators. 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. In contrast, in a “merchant haulage” arrangement, also known as CY (container yard) or port-to-port transportation, the shipper makes the trucking arrangements.

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 containers are timely retrieved from the terminal and delivered to the appropriate location.
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 should 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.

Rulemaking Analyses

The Commission assigns a regulation identifier number (RIN) to each rulemaking. The RIN is a number given to each final rulemaking. The RIN is used to identify each final rulemaking in the Federal Register, and to track public comment and agency response to the rulemaking.

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.
(c) Incentive principle—(1) General. 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 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

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. C1–2020–07109 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

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–19–05 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, docket NOAA–NMFS–2019–0149, or contact Rachael Wadsworth, NMFS WCR SFD, 7600 Sand Point Way NE, Building 1, Seattle, WA 98115, or WCR.HM5@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.