Issued: April 28, 2020

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 [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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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]

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.

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

[5] *See* 84 FR at 48851-53; *Fact Finding Investigation No. 28 Final Report* at 32 ((Dec. 3, 2018) (Final Report), https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF-28_FR.pdf.

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 § 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 rule. In particular, American importers, exporters, intermediaries, and truckers urged that the Commission adopt it, and, in many instances, implored the Commission to do more. Ocean carriers and their marine terminal operator partners opposed the proposed guidance on legal and policy grounds.

Having considered the comments, the Commission adopts the rule as set forth in the NPRM, with a few minor changes. In particular, the Commission is revising the regulatory text to: (1) adopt a policy regarding demurrage and detention practices and government inspections; and (2) to make clear that the rule does not preclude the Commission from considering additional factors outside those specifically listed.[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 § 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

[6] The Commission is also making minor changes in the final rule, described in more detail below. The Commission has also made technical formatting changes to the paragraph levels in the final regulatory text.

equipment velocity, and that the interpretive rule will also mitigate confusion, reduce and streamline disputes, and enhance competition and innovation in business operations and policies.

II. NPRM AND SUMMARY OF COMMENTS

A. Background

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

The Commission's recent focus on demurrage and detention began in 2014, when the Commission hosted four regional port forums regarding congestion in the international ocean supply system.[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

[7] *See* Fed. Mar. Comm'n, 2014 Port Forums, https://www.fmc.gov/about-the-fmc/2014-public-port-forums/; Fed. Mar. Comm'n, *Report, Rules, Rates, and Practices Relating to Detention, Demurrage, and Free Time for Containerized Imports and Exports Moving Through Selected United States Ports* at 3 (April 3, 2015) (FMC Demurrage Report), https://www.fmc.gov/wp-content/uploads/2019/04/reportdemurrage.pdf.
[8] Fed. Mar. Comm'n, *Report, U.S. Container Port Congestion & Related International Supply Chain Issues: Causes, Consequences & Challenges* at 75 (July 2015) (FMC Congestion Report), https://www.fmc.gov/wp-content/uploads/2019/04/PortForumReport_FINALwebAll.pdf.
[9] FMC Demurrage Report at 1.

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 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

[10] FMC Demurrage Report at 2,4, 32.
[11] FMC Demurrage Report at 44.
[12] Coalition for Fair Port Practices Petition for Rulemaking, FMC No. P4-16, Ex. A (Dec. 7, 2016) (Pet. P4-16). Petitioners' rule would "essentially revive rules that the Commission had in place for the port of New York for over 40 years." *Id*. at 32.
[13] Pet. P4-16 at 3.
[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.").

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, highlighted the nationwide scope of the Commission's jurisdiction and the variety of demurrage and detention practices across the country, and recognized that "[t]he international ocean liner trade has changed dramatically over the last fifty years, driven in large part by the advent of containerization."[16] 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.[17] 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.[18]

The Fact Finding Investigation lasted 17 months and involved written discovery, field interviews, and group discussions with industry leaders.[19] The investigation revealed a situation

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[15] *Conditions and Practices Related to Detention, Demurrage, and Free Time in Int'l Oceanborne Commerce*, 1 F.M.C.2d 1 (FMC 2018) (Order of Investigation), https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/ff-28_ord2.pdf/.

[16] *Id*. at 2.

[17] *Id*. at 2-3.

[18] *Id*. at 2.

[19] In the first phase of the investigation, the Fact Finding Officer (FFO) obtained information and documents from twenty-three ocean carriers and forty-four marine terminal operators and operating ports, as well as importers, exporters, truckers, and intermediaries. Final Report at 7-8. In the investigation's second phase, the FFO met in-person and telephonically with representatives from a cross section of the industry, including over twenty-five ports and marine terminal operators. *Id*. at 11. In the third phase, the FFO met with stakeholders in groups to discuss the feasibility of implementing some of the recommendations from the first two investigatory phases. Letter from Rebecca F. Dye, Commissioner, to Michael A. Khouri, Chairman, Daniel B. Maffei, Commissioner, Louis E. Sola, Commissioner, Federal Maritime Commission (Aug. 27, 2019) (FF28 Letter).

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.[20] 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.[21]

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.[22]

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

[20] *Fact Finding Investigation No. 28 Interim Report* at 5-14 (Sept. 4, 2018) (Interim Report), https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF28_int_rpt2.pdf/; Final Report at 25, 29-30.
[21] Final Report at 32.
[22] Final Report at 32.

Advisory Board; and (c) continue to support the FFO's work with stakeholders in Memphis.[23] 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."[24] 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," absent extenuating circumstances, "charges should be suspended."[25] 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 § 41102(c), including the "existence, accessibility, and transparency of demurrage and detention policies, including dispute resolution policies (and related concepts such as clear bills and evidence guidelines), and clarified language."[26]

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.[27] 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).[28] Consistent with Commission caselaw on § 41102(c), the chief consideration was whether ocean carrier and marine terminal operator practices are tailored to meet their

[23] FF28 Letter at 1.
[24] FF28 Letter at 1.
[25] FF28 letter at 2.
[26] FF28 Letter at 2.
[27] *See* Fed. Mar. Comm'n, *Commission Approves Dye's Final Recommendations on Detention and Demurrage* (Sept. 6, 2019), https://www.fmc.gov/commission-approves-dyes-final-recommendations-on-detention-and-demurrage/; Fed. Mar. Comm'n, *Proposed Interpretive Rule on Demurrage and Detention Issued* (Sept. 13, 2019), https://www.fmc.gov/proposed-interpretive-rule-on-demurrage-and-detention-issued/.
[28] 84 FR at 48855-48856.

intended purposes.[29] 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.[30] 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.[31] 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.[32] Most commenters supported the proposed guidance.[33] This support came primarily from importers, exporters, transportation intermediaries, and truckers, large and small, and their trade associations, from across the United States. To the extent their comments departed from the rule, it was to ask the Commission to do more: to be more prescriptive and require ocean carriers to take certain actions and refrain from others, to apply the proposed guidance to more situations and contexts than described expressly in the NPRM, and to consider more circumstances as justifying mitigation of demurrage and detention.

In contrast, ocean carriers, marine terminal operators, chassis lessors, and cooperative working agreements of ocean carriers and marine terminal operators[34] opposed the rule. Also

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[29] 84 FR at 48852.
[30] 84 FR at 48855.
[31] 84 FR at 48855-48856.
[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.
[34] The Ocean Carrier Equipment Management Association (OCEMA) (FMC Agreement No. 011284), the Port of New York and New Jersey Sustainable Services Agreement (PONYNJSSA) (FMC Agreement No. 201175), and the West Coast MTO Agreement (WCMTOA) (FMC Agreement No. 201143) are cooperative working agreements filed with the Commission under the Shipping Act.

opposing the rule were trade associations such as the World Shipping Council (WSC), a trade group representing the interests of approximately 90 percent of the global liner vessel capacity, whose members include companies such as China COSCO Shipping Corporation, Mediterranean Shipping Company, and A.P. Møller-Maersk.[35] 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.[36] WSC describes the rule as "prescrib[ing] 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]

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

[35] http://www.worldshipping.org/about-the-council/member-corporations.
[36] 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.
[37] WSC at 2; *see also id.* at 4 (describing rule as a "blanket rule").
[38] NAWE at 8. NAWE represents marine terminal operators. *Id.* at 1.
[39] PMSA at 1, 4. PMSA is an association of marine terminal operators and ocean carriers. *Id.* at 1.
[40] WSC implicitly concedes that the rule does not set forth requirements by using the adverb "effectively" when

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 contexts[43] 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]

The Commission emphasized that although the factors in the proposed rule would guide its analysis, "each § 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

portraying what it believes the guidance would do. *See* WSC at 10 ("The NPRM effectively prohibits . . . ."); *id.* at 11 ("the NPRM effectively requires . . ."); *cf.* ("This new interpretation of reasonableness would essentially require . . . .").

[41] 84 FR at 48851, 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] 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 § 41102(c): whether a regulation or practice is "tailored to meet its intended purpose." Id. at 48852 (quoting *Distribution Servs. Ltd. v. Trans-Pac. Freight Conference of Japan and Its Member Lines*, 24 S.R.R. 714, 722 (FMC 1988)).

[43] *E.g.*, 84 FR at 48852; *see also id.* 48853 ("The more notice is calculated to apprise cargo interests that cargo is available for retrieval, the more this factor favors a finding of reasonableness."); *id.* ("The more these factors align with the goal of moving cargo off terminal property, the less likely demurrage practices would be found unreasonable.").

[44] 84 FR at 48852 (listing "[e]xamples of demurrage practices that are expressly linked to container availability and which the Commission would weigh positively in the reasonableness analysis"); *id.* at 48853 ("Imposing detention in situations of uncommunicated or untimely communicated changes in container return location also weighs on the side of unreasonableness, as might doing so when there have been uncommunicated or untimely communicated notice of terminal closures for empties."); *id.* ("[D]emurrage practices that link the start of free time to notice that a container is available weigh in favor of reasonableness. . . . ."); *id.* at 48854 (listing attributes of dispute resolution policies that will weigh in favor of reasonableness).

[45] 84 FR at 48851.

[46] 84 FR at 48852.

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:

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[47] 84 FR at 48855 ("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, 251 (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.

> (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.[52]

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

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

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[52] *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).
[53] WSC at 4.
[54] WSC at 5.
[55] *Cf. Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 381 (D.C. Cir. 2013) (noting that guidance in form of a seven-factor test was not subject to the APA's notice-and-comment provision).

Moreover, that the industry might rely on the guidance in the Commission's rule, and that ocean carriers and marine terminal operators might feel "pressure to voluntarily conform" does not make the rule legislative.[56] The Commission is issuing guidance in part to mitigate confusion about how the Commission may apply § 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 § 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 § 41102(c) in the CFR as recently as

[56] *Sec. Indus. & Fin. Mkts. 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 "[p]ractical consequences, such as the threat of having to defend itself in an administrative hearing should the agency actually decide to pursue enforcement pursuant to the policies within the Cross-Border Action are insufficient to bring an agency's conduct under [the Court's] purview." *Id.* (internal quotation marks omitted).
[57] 84 FR at 48851.
[58] *Sec. Indus.*, 67 F. Supp. 3d at 422 (internal quotation marks and citations omitted).
[59] *Cent. Texas Tel. Coop. v. FCC,* 402 F.3d 205, 214 (D.C. Cir. 2005).
[60] *Am. Mining Cong.*, 995 F.2d at 1109 ("Second, an agency presumably intends a rule to be legislative if it has the rule published in the Code of Federal Regulations . . . .).
[61] *Health Ins. Ass'n of Am. v. Shalala,* 23 F.3d 412, 423 (D.C. Cir. 1994).
[62] 46 CFR part 545.

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

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[63] Final Rule: Interpretive Rule, Shipping Act of 1984, 83 FR 64478 (Dec. 17, 2018).
[64] *Cf. 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 hocery--an ad hocery, moreover, that affords less notice, or less convenient notice, to affected parties.").
[65] *See Splane 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 § 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 § 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. Chenery Corp.*, 332 U.S. 194, 203 (1947).
[66] 84 FR at 48855.
[67] 5 U.S.C. 553.

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 § 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 § 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 charges.[70] The Commission's guidance emphasizes cargo availability and notice thereof because ocean carrier and marine terminal operators generally agreed that their carrier obligations were related to the concepts of reasonable notice of cargo availability and reasonable opportunity to retrieve cargo, and because the "issue most frequently discussed during Phase Two was notice of container availability and the relationship between container availability and demurrage free time.[71] The Commission's guidance focused on the existence, clarity, content, and accessibility of demurrage and detention dispute resolution and billing practices, and demurrage and detention terminology, because the Commission's review of ocean carrier and marine terminal operator records (some of which are public, e.g., tariffs) and

[68] WSC at 6-8.
[69] *Distribution Servs.*, 24 S.R.R. at 722.
[70] Final Report at 12 ("Importantly, almost every Phase Two respondent characterized demurrage as an incentive, to get containers out of the terminal."); Interim Report at 2-3.
[71] Interim Report at 9; Final Report at 18.

discovery responses showed that the practices were rife with complexity, inconsistency, lack of transparency, and variability.[72]

WSC's objection appears to be that the Commission did not cite or discuss the specific documents it reviewed during the Fact Finding Investigation. The Commission does not, however, typically make public its investigatory records in such proceedings.[73] Additionally, most ocean carriers and marine terminal operators requested confidentiality for the responses and documents they submitted to the Commission during Phase One of the investigation. The Commission assumes that WSC is not suggesting that the Commission should ignore those requests for confidentiality.

Several ocean carrier and marine terminal operator commenters also argue that the Commission's rule would depart from Commission precedent without adequate explanation.[74] The rule, however, with a few exceptions explained in more detail below, is consistent with the Commission's approach to applying § 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.[75] Commission precedent is not "binding" on the Commission – the Commission can change course in a subsequent case.[76] NAWE has not explained why Commission could not also change course via an interpretive

[72] Interim Report at 5-6, 10-11, 12, 14; *see also* Final Report at 11-18.
[73] *See, e.g.*, Order of Investigation (authorizing the fact finding officer to hold public or nonpublic sessions); 46 CFR 502.291.
[74] Am. Ass'n of Port Authorities at 2; NAWE at 5-6; OCEMA at 5; PMSA at 8-9; WCMTOA at 7, 8, 12; WSC at 8, 13.
[75] NAWE at 6 n.2 (asserting that "the NPRM raises additional legal issues in that it seeks to change binding precedent through a non-binding, interpretative rule").
[76] *See Gen. Am. Transp. Corp. v. ICC*, 872 F.2d 1048, 1060 (D.C. Cir. 1989) ("It seems to us presumptively reasonable that a controlling principle announced in one adjudication may be modified in a subsequent adjudication . . . ."); *id.* ("As we have said before, 'adjudicatory decisions do not harden into "rules" which cannot be altered or reversed except by rulemaking simply because they are longstanding.'") (quoting *Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir. 1976)).

rule,[77] especially when the Commission recently did so in a 2018 interpretive rule that ocean carriers and MTOs supported.[78]

Many of these same commenters further contend that the interpretive rule would shift the burden of proof in § 41102(c) cases in violation of the APA.[79] But nothing in the rule changes the burden of proof. Under the APA and Commission regulations, "the proponent of a rule or order has the burden of proof."[80] This burden of persuasion does not shift, even if the burden of producing evidence does in some cases.[81] In a § 41102(c) case, the complainant has 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.[82] In all instances, the complainant bears the ultimate burden of proving unreasonableness.[83]

The rule does not change that framework. A complainant would still have the burden of proving all the elements of § 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

[77] *Cf. Health Ins. Ass'n*, 23 F.3d at 424-25 (noting that disincentivizing the issuance of interpretive rules would lead to the "ironic result" that "the entities affected by the agency's interpretations would be left more in the dark than before, for clues to the agency's reading of the relevant texts would emerge only on an ad hoc basis").
[78] *See* Final Rule: Interpretive Rule, Shipping Act of 1984, 83 FR 64478, 64478 (Dec. 17, 2018); NPRM: Interpretive Rule, Shipping Act of 1984, 83 FR 45367, 45367-68 (Sept. 7, 2018).
[79] NAWE at 6 ("Here, the NPRM would have the effect of shifting the burden of proof from a complaining shipper, receiver or motor carrier to the marine terminal operator, which would be required to overcome the presumption of unreasonableness effectively established by the NPRM and demonstrate the reasonableness of assessing the charge in that situation."); Am. Ass'n of Port Authorities at 2; OCEMA at 2-3; WCMTOA at 5 n.2.
[80] 5 U.S.C. 556(d); 46 CFR 502.203.
[81] *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Case No. 08-03, 2014 FMC LEXIS 35, at *41-*43 (FMC 2014), *remanded on other grounds, Maher Terminals, LLC v. Fed. Mar. Comm'n*, 816 F.3d 888 (D.C. Cir. 2016).
[82] *Maher Terminals*, 2014 FMC LEXIS at *35 (citing *River Parishes Co. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 751, 765 (FMC 1999)); *Exclusive Tug Arrangements in Port Canaveral, Fla.*, 29 S.R.R. 1199, 1222 (ALJ 2003).
[83] *Id.* at *42.

relevant. Setting forth factors that the Commission might consider in a case, however, does not shift the burden of proof.[84]

2. Statutory Authority

Another objection raised by commenters is that the Commission lacks authority under the Shipping Act to issue the interpretive rule.[85] Commenters point out that section 17 of the Shipping Act of 1916, the predecessor of § 41102(c), stated that:

> Every such carrier and every other person subject to this Act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering property. *Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.*[86]

The Shipping Act of 1984, however, replaced this language with: "No common carrier, ocean freight forwarder, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property."[87] According to commenters, by removing the second sentence of section 17 of the 1916 Act" from its 1984 equivalent, Congress "eliminated the Commission's authority to determine, prescribe and order enforcement of a just and reasonable regulation or practice."[88]

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

[84] In *Maher Terminals, LLC v. Port Auth. of NY. & N.J.*, for instance, the Commission listed a number of factors it would consider in determining whether a respondent granted an unreasonable preference, and in so doing it did not change the burden of proof. FMC Case No. 08-03, 2016 FMC LEXIS 61 *9-*11 (FMC Oct. 26, 2016).
[85] NAWE at 3-4 ("Because the NPRM would have the effect of specifying those regulations and practices which are reasonable and those which are not, it is beyond the scope of the Commission's authority under the Shipping Act and would be unlawful."); WSC at 10-11.
[86] Shipping Act, 1916, Pub. L. No. 64-260, § 17, 39 Stat. 728, 734-35 (1916) (emphasis added).
[87] Shipping Act of 1984, Pub. L. No. 98-237, § 10(d)(1), 98 Stat. 67, 89 (1984). This is substantially similar to how the statute appears today. 46 U.S.C. 41102(c).
[88] NAWE at 4.

regulated entities must adopt.[89] 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 § 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."[90] The Commission has relied on this authority and § 41102(c) to issue regulations prohibiting certain practices determined to be unjust and unreasonable,[91] and the D.C. Circuit has affirmed this authority.[92]

3. Shipping Act Purposes

A few marine terminal operator and ocean carrier commenters further claim that the rule is inconsistent with the purposes of the Shipping Act because it represents "extreme government

[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 Y practices are unreasonable."

[90] This section represents a recodification of two similarly worded provisions, section 201(c) of the Merchant Marine Act of 1936, Pub. L. No. 74-835, and section 17(a) of the Shipping Act of 1984. *See* H.R. Rep. No. 109-170, at 28 (2005)

[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 that would impose upon others the obligation to indemnify or save harmless the terminals from liability for their own negligence, are, as a rule, unjust and unreasonable and, therefore, contrary to the provisions of section 17 of the Shipping Act, 1916 and section 10(d)(1) of the Shipping Act of 1984."); NPRM: Exemption of Certain Marine Terminal Services Arrangements, 56 FR 22384, 22387-22388 (May 15, 1991) (concluding that the differences between section 17 of the 1916 Act and section 10(d)(1) of the 1984 Act did not preclude the Commission from requiring filing of marine terminal operator tariffs, and relying on section 10(d)(1) and section 17 of the 1984 Act as authority to continue those requirements); *See also* 46 CFR 515.32(d); 46 CFR 515.41(c); 46 CFR 525.2(a)(1).

[92] *See Nat'l Customs Brokers & Forwarders Ass'n v. United States*, 883 F.2d 93, 98-101 (D.C. Cir. 1989); *id.* at 100 ("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.").

intrusion into the market" and discriminates against ocean carriers and marine terminal operators by placing all risk on them.[93] The purposes of the Shipping Act are to:

> (1) 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;
>
> (2) 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;
>
> (3) encourage the development of an economically sound and efficient liner fleet of vessels of the United States capable of meeting national security needs; and
>
> (4) promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.[94]

The Commission fails to see how issuing an interpretive rule while declining calls for more prescriptive regulation,[95] 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.[96] That one purpose of the Shipping Act is to minimize government intervention does not mean that the Commission may abandon its duty to prevent unreasonable practices under § 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 §

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[93] NAWE at 9-10; WSC at 11-12; Ports Am. At 2-3.
[94] 46 U.S.C. 40101.
[95] *E.g.*, Pet. P4-16, Ex. A.
[96] *E.g.* WCMTOA at 3 ("Any proposed change to the current model introduces risk that cargo dwell times on the terminals will increase, effectively reducing terminal throughput capacity causing increased non-compensated costs to MTOs"); WSC at 12-13 ("Those charges and the way each line build[s] them and use[s] them creates real competition among carriers and should not be regulated because these would distort those factors in the marketplace.") (citing testimony of Paolo Magnani, an ocean carrier executive).

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.[97] This general purpose aligns with the more specific mandate in § 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."[98] 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."[99] According to NAWE, the "effect of the NPRM is to require regulated entities to engage in specific behavior," contrary to the executive order.[100]

[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), and the Act "exists in large measure to protect shippers and other persons from unreasonable or discriminatory carrier practices,"*50 Mile Container Rules" Implementation by Ocean Common Carriers Serving U.S. Atl. & Gulf Coast Ports*, 24 S.R.R. 411, 457-58 (FMC 1987). *See also Credit Practices of Sea-Land Service, Inc.*, 25 S.R.R. 1308, 1313 (FMC 1990) ("The Commission most recently recognized this policy in stating that '[t]he prevention of *economic* discrimination is at the heart of the regulatory scheme established by Congress in the 1984 Act.'") (emphasis added).
[98] NAWE at 6.
[99] Exec. Order No. 12866, § 1(b)(8), 51 FR 51735, at 51736 (Oct. 4, 1993).
[100] NAWE at 7-8.

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

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

The other executive order mentioned by commenters is Executive Order 13777, titled "Enforcing the Regulatory Reform Agenda."[104] Issued in 2017, this Executive Order's purpose was to "lower regulatory burdens on the American people by implementing and enforcing

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[101] Exec. Order No. 12866 § 3(b), 51 FR at 51737; 44 U.S.C. 3502(5).
[102] Nat'l Retail Sys. at 1 (requesting "KPI's for terminal operators to be agreed upon with the import community (drayage) terminal operators"); Transways Motor Express at 1 ("Free time should be extended on all cargo at a terminal when service levels (turn times/congestion) fall below an acceptable level"); Transworld Logistics & Shipping Servs. ("As far as ports go it[']s important each terminal be certified with a capacity like in any other industry, this capacity should be based on the standard of efficiency and the turnaround time.").
[103] The Final Report of the Commission's Supply Chain Innovation Initiative noted that the Initiative excluded two subjects "infrastructure investment and port performance metrics." Commissioner Rebecca F. Dye, *Supply Chain Innovation Initiative Final Report* at 16 (Dec. 5, 2017), https://www.fmc.gov/wp-content/uploads/2019/03/SCITFinalReport-reduced.pdf. The Final Report pointed out that the Commission "did not want to duplicate or impede efforts by local port performance task forces to address supply chain bottlenecks or to second-guess the decisions of port officials." *Id.* at 2
[104] Exec. Order No. 13777, 82 FR 12285 (Mar. 1, 2017).

regulatory reform."[105] WSC asserts that the "NPRM's imposition of additional regulatory costs and burdens is in direct contrast with the Executive Order."[106]

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 spirt 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 those terms."[109] Commenters argue that the rule might require ocean carriers to deviate from their tariffs in contravention of this doctrine.[110]

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[105] *Id*. at 12285.
[106] WSC at 12 n.3.
[107] Fed. Mar. Comm'n, *FMC Regulatory Reform*, https://www.fmc.gov/regulatory-reform/, (last visited Apr. 5, 2020) (noting that "as an independent regulatory agency the FMC is not required to comply with the recent regulatory reform executive orders").
[108] *Id*.; Notice of Inquiry: Regulatory Reform Initiative, 85 FR 25221 (June 1, 2017).
[109] *Muzorori v. Can. State Africa Lines, Inc.*, 2016 FMC LEXIS 45 at *71 n.62 (FMC July 14, 2016) (Khouri, Commissioner, dissenting).
[110] IICL at 9-10 ("Failure of a carrier to collect its tariff charges could be viewed as a violation of the Shipping Act . . . .What circumstances would allow a carrier to waive some or all of the charges required to be paid under applicable rules?); Int'l Logistics at 1 ("I do not think it is fair to say the ocean lines are responsible for the problems associated with billing port storage and container per diem when they are required by your tariff requirements to bill everyone according to their published tariff."); *cf*. National Customs Brokers and Forwarders Association of America (NCBFAA) at 15 ("Carriers often decline mitigation citing FMC regulations that necessitate that they must apply all tariffed charges without exception, which is of course not a reasonable construction of the Shipping Act's requirements.").

This issue involves reconciling two different prohibitions in the Shipping Act. The Shipping Act incorporates the filed rate doctrine by prohibiting common carriers from providing service in the liner trade that is "not in accordance with the rates, charges, classifications, rules, and practices contained in a" published tariff.[111] The Shipping Act also, however, prohibits common carriers from failing "to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property."[112] If a practice (or the absence of a practice) in a tariff is "unreasonable" under the latter prohibition, it is no defense to rely on the former. "The [filed rate] doctrine is meant to preserve the integrity of filed tariff laws, not to provide carriers with an 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.[114] Similarly, the Commission has permitted deviations

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[111] 46 U.S.C. 41104(a)(2)(A).
[112] 46 U.S.C. 41102(c).
[113] *Total Fitness Equipment, Inc. v. Worldlink Logistics, Inc.*, 1998 FMC LEXIS 18 *26-27 (FMC Dec. 10, 1998); *id.* at *26 ("The filed rate doctrine does not function as a carte blanche to justify whatever action a carrier believes is appropriate.").
[114] Interim Report at 12; *see also* FMC Demurrage Report at 18 ("There are exceptions to the application of demurrage fees known sometimes as "stop the clock" provisions."); *id.* at 33 ("Carriers may "stop the clock," waive, reduce or compromise fees relating to congestion if they have the flexibility to do so under their tariff or service contract."). *But see* Interim Report at 12 ("[S]everal produced tariffs that specifically state that free time is not automatically extended for events outside the terminal's control, including labor strikes or weather, and at least one said that in those circumstances free time would not be adjusted.").

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

1. Desirability of Guidance

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

A few commenters, however, assert that Commission guidance is not necessary because the current freight delivery system is working,[117] commercial solutions to demurrage and

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[115] *Univ. Cargo Mgmt., Inc. v. Hyundai Merchant Marine Co.*, 1996 FMC LEXIS 57, *21-22 (ALJ Dec. 11 1996) ("[T]he Commission long ago began to allow parties in cases involving disputes over the proper rating under filed tariffs to settle their disputes even though this meant that shippers ended up paying something less than what the filed rate otherwise required.").

[116] Pet. P4-16 at 22-23.

[117] *E.g.*, Ports Am. at 4 ("There is no showing in the Commission's fact-finding or rationale expressed for the proposed rule that suggests this is a material problem in the industry. This is demonstrated conclusively by the virtually total absence of Commission complaint proceedings for many decades.").

detention issues are adequate,[118] and complaints by shippers, intermediaries, and truckers are not subject to cross examination and could contain hyperbole.[119]

The majority of the commenters, however, advocate for the proposed rule's prompt adoption.[120] Although the freight delivery system works in the sense that cargo gets delivered, the notion that there are no problems is belied by the consistent complaints of shippers, intermediaries, and carriers.[121] In light of these complaints, the Commission cannot assume that the lack of Shipping Act proceedings about demurrage and detention means these complaints are illusory or hyperbolic.[122] There 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 § 41102(c).[123]

As for commercial solutions, to the extent that they adequately resolve demurrage and detention issues, then the Commission's guidance will arguably have little effect. Commenters correctly note that the Fact Finding Investigation revealed that most ocean carriers have policies for extending free time or mitigating demurrage and detention charges caused by circumstances

[118] *E.g.*, Ports Am. at 3 ("As the Commission found, when major disruptions occur, such as storms or labor disputes, the terminals work out waivers or other suitable accommodations in individual cases. Terminals are already highly disincentivized by the marketplace from having disputes with their customer vessel operators and their shippers."); PONYNJSSA at 3 ("The PONYNJSSA has long made available at their own cost commercial solutions to provide enhanced cargo information and transparency.); PMSA at 4-5 ("[I]t appears from the Commission's report that the free market has voluntarily addressed the conditions raised in its NPRM.").
[119] IICL at 2 ("We note, however, that statements and contentions by interested parties are generally reflections of the problems they have had; they have not been subjected to cross-examination; they may be true or partially true; they may reflect a single occurrence or many; they may be legally admissible or inadmissible; they frequently contain hyperbole.").
[120] *E.g.*, Letter from 67 Organizations to Michael A. Khouri, Chairman, Fed. Mar. Comm'n (Mar. 16, 2020) ("urg[ing] the Commission to promptly adopt the rule as published which will assist the maritime industry in evaluating the fairness of these charges and resolving potential disputes").
[121] *See* Part II, *supra*.
[122] Shippers, intermediary, and trucker comments are no more self-interested than comments from ocean carriers, marine terminal operators, or chassis providers.
[123] Pet. P4-16 at 23 ("Ambiguity has a chilling effect on valid claims.").

outside the control of cargo interests or truckers.[124] But not all did, and a shipper's right under the Shipping Act to be free from unreasonable practices under § 41102(c) does not turn on the identity of the regulated entity at issue. Further, several ocean carriers noted that their policies give them the discretion to waive demurrage under certain circumstances.[125] But if application of demurrage in those circumstances would be unreasonable, a shipper, intermediary, or trucker should not have to rely on an ocean carrier or marine terminal operator's discretion for a remedy. In other words, while the Commission prefers commercial solutions to demurrage and detention problems, the Fact Finding record showed that commercial solutions are only adequate from the perspective of ocean carriers and marine terminal operators. [126]

2. Specificity of Guidance

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.[127] 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."[128] The

[124] Interim Report at 12.
[125] Interim Report at 12.
[126] WCMTOA points out that in the FMC Congestion Report, the Commission's Bureau of Trade Analysis stated that at the FMC port forums, "[w]ith appropriate leadership and support, constant encouragement, and a willingness to cooperate, industry stakeholders' thoughtful insights and expressions of concern seemed to demonstrate that the intermodal industry itself is well-capable of accurately diagnosing the problems and crafting enduring solutions." WCMTOA at 4 (quoting FMC Congestion Report at 7). While that may have been the case at the port forums in 2014, 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.
[127] *E.g.*, IICL at 10 (noting that "while the FMC is well-intentioned," "in IICL Providers' view the Interpretive Rule presents more problems than it attempts to resolve because the problems at issue exist at many levels and across multiple jurisdictions"); PMSA at 3 ("The NPRM is a broad-brush approach to a very complex subject.").
[128] PMSA at 3; *see also* WCMTOA at 5 ("The NPRM seeks to mandate the same practices nationwide, without regard to geography, terminal configuration (including operating ports vs. landlord ports), cargo volumes, and other local conditions.").

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.[129]

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,[130] and takes issue with the Commission not stating, for instance, what the proper format, method, or timing of notice of cargo availability would be.[131] Likewise, several shipper, intermediary, and trucker commenters want the Commission to do more – to declare certain practices unreasonable or to require various practices. For example, these commenters would have the rule:

- Require that regulated entities extend free time when an ocean carrier requires an empty container to be returned to a location other than where it was retrieved;[132]
- Specify what information ocean carriers or marine terminal operators must provide to shippers and their agents regarding cargo availability;[133]
- Mandate specific requirements for ocean carrier and marine terminal operator dispute resolution and billing processes, such as timeframes and internal appeals processes;[134]

[129] WCMTOA at 5 n. 2 ("If each case depends on an analysis of the facts of each case, as has historically been the case under Section 10(d)(1) cases, it is unnecessary, and in fact counter-productive, to have a national standard such as in the NPRM."); Nat'l Fed. of Indep. Business at 3; PMSA at (arguing that the NPRM erodes the "broad and fact-specific" standard of § 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, however, explain why this would be a problem.

[130] WSC at 15-16.

[131] WSC at 16; *see also id.* at 18-19 (asserting that references to "extenuating circumstances" in NPRM are so vague as to be useless in shedding any light on what particular circumstances would counter-balance 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 any number of circumstances brought to the FMC depending on what it views as 'unreasonable'").

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

[133] *See* Part III.H, *infra*.

[134] *See* Part III.K and Part III.L, *infra*.

- Prescribe reasonable free time periods;[135]
- Define uniform demurrage and detention terminology;[136]
- Specify that all cargo on a bill of lading be available before demurrage accrues on any container;[137]
- Set caps on the levels of, or total amount of, demurrage or detention that may be charged.[138]

These comments do not justify withdrawing or substantially altering the rule. The Commission proposed general guidance in the form of factors because the operations of industry stakeholders are too varied nationwide, and the risk of inhibiting commercial innovation is too great, for the Commission to prescribe or prohibit specific practices, at least in this rulemaking.[139] Nor is issuing guidance inconsistent with case-by-case adjudication, especially when the Commission expressly states that it will continue to consider all arguments raised in an individual case.[140]

[135] *E.g.*, Int'l Fed. of Freight Forwarders Ass'ns at 10 ("FIATA would appreciate guidance on fair and reasonable free periods that are in line with market developments of higher peaks.") *cf.* 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 "[a]ll parties (carriers, MTOs, rail operators) that provide Free Time should be utilizing the same method of calculation"); New Direx, Inc. ("[F]ree time would not count on days when the terminal or rail yards are not open.").
[136] John S. Connor Global Logistics at 6.
[137] CV Int'l, Inc. at 1; Shapiro at 1.
[138] *E.g.* Int'l Fed. of Freight Forwarders Ass'ns at 7; Int'l Motor Freight at 2 ("Finally, the rates we are charged for per diem and demurrage need to be looked at. Every year, per diem charges increase, regardless of the economic climate, for the same container that sits out year after year."); Nat'l Retail Sys. at 1; Thunderbolt Global Logistics, LLC at 2 ("We feel that ocean carriers use detention charges as a profit center. There should be a formula for detention charges that can be applied across the board by all carriers at all ports.").
[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.
[140] The suggestion that case-by-case adjudication means analyzing every case in a vacuum could result in inconsistent agency decisionmaking.

It was because the Commission was issuing guidance applicable to all regulated entities within its purview that the Commission declined to issue a legislative rule or the rule proposed by the petitioners in Docket No. P4-16.[141] It is also why the Commission's rule is not as granular as some commenters would prefer, even if many of the proposals suggested by shippers, truckers, and intermediaries appear to have merit.

The Commission understands that there may be questions about how the rule would apply in practice. Regarding "extenuating circumstances" specifically,[142] the Commission used that phrase as a way of indicating that it would consider all arguments raised by the parties, including those involving considerations not listed in the rule. As to what these "extenuating circumstances" could be, the NPRM specified one: "An example of an extenuating circumstance is whether a cargo interest has complied with its customary responsibilities, especially regarding cargo retrieval (e.g., making appointments, paying freight, submitting paperwork, retaining a trucker). If it has not, this could be factored into the analysis."[143] Many of the arguments raised by ocean carriers and regulated entities about things such as cost, technical feasibility, and the conduct of shippers, intermediaries, and truckers are issues that could be raised as "extenuating circumstances" in a particular case.[144]

The guidance was drafted with the complexity and variety of the U.S. freight delivery system in mind. Further refinement of the Commission's approach would be accomplished by

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[141] That rule would have "essentially revive[d] rules that the Commission had in place for the port of New York for over 40 years." Pet. P4-16 at 32. 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.
[142] WSC at 19.
[143] 84 FR at 48852. WCMTOA and PMSA read this incorrectly to mean that a shipper who was sloppy in its paperwork or did not pay its freight would get extra free time under the rule. WCMTOA at 12; PMSA at 6. The statement in the NPRM means the opposite: if a shipper does not pay its freight, or does not submit timely or correct paperwork, it would likely have difficulty showing that the application of demurrage or detention because of resulting delays was unreasonable.
[144] WSC at 16 (discussing technical feasibility of practices); WCMTOA at 11-12.

adjudication. Comments by ocean carriers and marine terminal operators suggesting that the rule is fatally flawed because it does not address every fact pattern that could possibly arise set a standard that no Commission guidance could possibly meet. But, as the Commission noted at the outset, the inability of the Commission to solve every problem does not justify doing nothing.[145]

3. Consequences of Guidance

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

Some of these comments, particularly those about the practicability and costliness of the rule, are based on 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.[152] Even assuming that is true, the rule does not go so far as to require this

[145] For instance, SSA Marine Inc. points out that "[r]equiring that demurrage be waived when a terminal fails to provide appointments is not a panacea to solve congestion." The Commission is not attempting, however, to provide a panacea; rather it is providing guidance in an effort to ensure that marine terminal operator and ocean carrier practices involving demurrage and detention are reasonable.
[146] NAWE at 12; OCEMA at 4; Ocean Network Express at 1-2; SSA Marine at 2; Ports Am. at 2-3; WCMTOA at 5, 10-11.
[147] IICL at 3; NAWE at 8; OCEMA at 4; Ocean Network Express at 3; WSC at 12; WCMTOA at 5; Am. Ass'n Port Auth. at 2.
[148] OCEMA at 3; Ports Am. at 2-3; WSC at 11, 12; Am. Ass'n Port Auth. at 2.
[149] SSA Marine at 2; WCMTOA at 5 n.2 (asserting that rule "will encourage an explosion of litigation by shippers and truckers who do not want to pay demurrage or detention"); *see also* NAWE at 13.
[150] Ocean Network Express at 2; WO at 1, 3
[151] IICL at 3. This commenter argues that if a carrier waives or deviates from the provisions in its bill of lading, "it could theoretically" void its protection and indemnity insurance. This concern is on its face speculative and was not raised by ocean carrier commenters themselves.
[152] NAWE at 13; Ports Am. at 3; WSC at 15-16.

change.[153] 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.[154] 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[155] or waiving a full day of demurrage due to a container being unavailable for less than an entire day[156] or implementing new information technology systems[157] or creating new dispute resolution teams.[158] 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 § 41102(c) violations. And, to reiterate, the standard under § 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

[153] 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").
[154] 84 FR at 48852.
[155] NAWE at 13; OCEMA at 4. A few commenters assert without citation that free time contemplates that there are "pockets within that time where units will be unavailable for various reasons." Ocean Network Express at 1; OCEMA at 4. The Commission would make clear that the reasonableness of free time turns on the needs of a shipper or its agent. *Investigation of Free Time Practices -- Port of San Diego*, 9 F.M.C. 525, 539 (FMC 1966). Relatedly, a frequent complaint of ocean carriers and marine terminal operators is that shippers wait until the last free day to retrieve cargo and that the rule does not account for whether there might be other times within the free time that a shipper could have retrieved its cargo. *E.g.* WCMTOA at 11. Shippers and cargo interests are entitled to reasonable demurrage free time, and it is unclear why regulated entities would have the right to determine unilaterally when within that free time period shippers or their agents should pick up their cargo.
[156] Ocean Network Express at 1.
[157] NAWE at 15; OCEMA at 4; WSC at 12; WCMTOA at 4.
[158] WSC at 12.

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 § 41102(c) in the containerization context.[159]

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.[160] 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 § 41102(c). Although the general trend in the industry has been deregulatory, Congress retained § 41102(c) when it enacted the Ocean Shipping Reform Act in 1998.[161] In this sense, ocean carriers and marine terminal operators are no different from participants in other regulated industries.

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[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 clear guidelines as to who 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 prohibit private parties 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/carrier"); WSC at 10-11 (describing rule as substantially restricting parties from defining the commercial terms and conditions of their own contractual relationships").

[161] Ocean Shipping Reform Act of 1998, Pub. L. 105-258, 112 Stat. 1902. (May 1, 1999).

Ocean carriers and marine terminal operators benefit, however, from limited antitrust immunity for their agreements with their competitors,[162] and they are also the beneficiaries of cargo lien law[163] 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, both tariffs and marine terminal schedules share elements of contracts of adhesion:[164] they are presented on a take-it-or-leave-it basis, without the chance for much negotiation.[165] 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."[166]

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.[167] 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.[168]

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[162] 46 U.S.C. 40307.
[163] *See infra* note 365.
[164] *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").
[165] *See* AgTC at 3 ("The opportunity to negotiate is a myth . . . .").
[166] 1 Corbin on Contracts § 1.4 (2020).
[167] *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) ("VOCCs hold market power through the antitrust immunity secured pursuant to their filed agreements as well as their ability to discuss and coordinate freight rates and/or vessel capacity and services. . . . Because VOCCs have stronger negotiating positions, they are able to set service contract terms and conditions with NVOCCs; indeed, the majority of service contracts on file with the Commission use boilerplate terms and conditions written by the VOCC.").
[168] In prohibiting certain exculpatory provisions in marine terminal schedules under § 41102(c), the Commission rejected the argument "that there is nothing unreasonable, and hence unlawful, about a terminal operator and user agreeing upon a liability-shifting arrangement after an arms-length negotiation over the terms and conditions for the

Suffice it to say, ocean carriers and marine terminal operators do not have an inviolate 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.[169] 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.[170]

4. The Uniform Intermodal Interchange and Facilities Access Agreement

The final general category of policy comments involved the Uniform Intermodal Interchange and Facilities Access Agreement (UIIA). The UIIA "is a multimodal negotiated interchange agreement that serves as the standard interchange agreement for most intermodal equipment interchanges except chassis."[171] Generally, it governs relationships between signatory

use of such facilities. Final Rule: Filing of Tariffs by Marine Terminal Operators Exculpatory Provisions, 51 FR 46668, 46668 (Dec. 24, 1986). Given the vastly unequal bargaining power between the parties in that instance, the Commission saw "little validity to the suggestion advanced in some comments that 'free market forces' exist and should govern the promulgation of liability provisions in terminal tariffs."

[169] *See, e.g.*, Mohawk Global Logistics at 10 ("These [detention] transactions are in many cases much more than arm's reach away, billed by a terminal, to a trucker that is contracted to a consignee, not necessarily related to the NVOCC, whose detention free time is added to the contract by the ocean carrier.").

[170] *E.g.*, WSC at 18 (arguing that a "common thread" in the NPRM is that it is completely one-sided). In a similar vein, WCMTOA requests that the Commission apply the incentive principle in the rule to shippers and truckers. WCMTOA 11-12. Most of WMCTOA's suggestions, however, would effectively limit shipper free time without any regard to whether it represents a reasonable amount of time to retrieve cargo. Moreover, the Commission does not have authority over shippers or truckers under § 41102(c), and the impetus for the fact finding and the NPRM were complaints about ocean carrier and marine terminal operator practices.

[171] FMC Congestion Report at 27; *see also* Joni Casey, *Letter: The UIIA and Street Turn Fees*, Transport Topics (Feb. 19, 2019), ("[T]he UIIA is the only standard industry contract that governs the interchange of equipment

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.[172] Others noted problems with the UIIA or the extent to which other parties adhere to it.[173]

A few points about the UIIA. First, not all ocean carriers and truckers are parties to the UIIA. In addition, although there is a standard UIIA agreement, many terms are dictated by each equipment provider's addendum to the UIIA, which is defined as the provider's "schedule of economic and commercial terms not appropriate for inclusion in the uniform Agreement and other terms and conditions of Equipment use."[174]

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.[175] Ocean carrier practices, whether incorporated in the UIIA or not, are within the Commission's purview under § 41102(c).[176] To the extent UIIA terms or

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between intermodal trucking companies and equipment providers such as ocean carriers, railroads and leasing companies."), https://www.ttnews.com/articles/letter-clarifying-uiia-and-ianas-role.

[172] OCEMA at 4; Ocean Network Express at 3-4; WSC at 17.

[173] IMC Companies at 2 (arguing that UIIA billing process may conflict with service contract language); S. Counties Express at 4 ("Terminals do not have appointments to receive an empty container, steamship line holds the motor carrier responsible until unit has a secured appointment and terminates the container. UIIA violation, no agreement in place.").

[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.").

[175] PMSA at 14.

[176] PMSA asserts that the Commission "probably does not have jurisdiction" to "mandate wholesale changes that are inconsistent with the UIIA." PMSA at 14. PMSA cites no authority for this proposition. To the contrary, ocean

conditions are relevant to determining the reasonableness of particular detention practices, nothing precludes parties from raising these issues in individual cases.

C. Purpose of Rule

The first paragraph of the proposed interpretive rule in the NPRM describes its purpose: to provide guidance about how the Commission will interpret 46 U.S.C. 41102(c) and 46 CFR 545.4(d) in the context of demurrage and detention.[177] None of the comments specifically addressed this paragraph of the rule, and the Commission will include it without change in the final rule.

D. Applicability and Scope of Rule

The next paragraph of the rule outlines its applicability and scope. The rule applies to practices and regulations relating to demurrage and detention for containerized cargo. For purposes of the rule, demurrage and detention includes 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.[178]

In the NPRM, the Commission explained that the reference to containerized cargo included cargo in refrigerated (reefer) containers.[179] Given that the lack of standard terminology in the industry,[180] the rule defines "demurrage" and "detention" broadly to cover all charges customarily referred to as demurrage, detention, or per diem.[181] The rule specifically limits these

carrier demurrage and detention practices and regulations are within the Commission's jurisdiction under § 41102(c).
[177] 84 FR at 48851-52, 48855.
[178] 84 FR at 48852, 48855
[179] 84 FR at 48852.
[180] Interim Report at 5-7, 17; Final Report at 11-13, 30.
[181] 84 FR at 48852.

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.[182]

Commenters did not object to limiting the rule to containerized cargo, to defining demurrage and detention broadly, or to including reefer cargo within the rule's ambit. And while some commenters believe that the Commission's guidance should account for chassis availability[183] or the interests of chassis lessors,[184] none argued that the scope of the rule should be enlarged to include charges imposed by chassis owners.[185]

Commenters did, however, raise questions about the scope of the rule. Several commenters urged that the rule apply to export shipments as well as imports, and they raised issues unique to exports, such as rolled bookings due to vessel and schedule changes and ocean carrier changes to container return cutoff dates and insufficient notice of such changes.[186]

To be clear, the rule is not limited to import shipments and applies to export shipments as well. In particular, the guidance on the incentive principle, demurrage and detention policies, and transparent terminology would apply in situations involving exports. The NPRM preamble focused on import issues because imports were the focus of the Fact Finding Investigation and most of the complaints.

Another scope-related comment involved the application of the rule outside of marine terminals. The American Cotton Shippers Association noted that ocean carriers, "responding to

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[182] For instance, commenters such as International Motor Freight and Wheaton Grain Inc. refer to container charges in terms of per diem rather than detention. Int'l Motor Freight at 2; Wheaton Grain Inc. at 1. Similarly, the UIIA defines per diem as charges related to "equipment," which includes containers and chassis. *See* UIIA § B.22.
[183] *See* Part III.F, *infra*.
[184] IICL at 2.
[185] Section 41102(c) does not cover chassis providers who do not otherwise fall within the definition of a regulated entity under the Shipping Act.
[186] *See* Florida Customs Brokers & Forwarders Ass'n; IMC Companies at 2; John S. Connor Global Logistics at 7; Int'l Fed. Of Freight Forwarders Ass'ns at 7; Miami Global Lines; New England Groupage; New York New Jersey Foreign Freight Forwarders and Brokers Ass'n (NYNJFFF&BA) at 5.

the demands of consumers, have crafted service contracts that incorporate inland movements and services" and "[t]hus the reasonableness of detention and demurrage practices and regulations, as they apply to inland movements in point-to-point service contracts, have an equally significant impact on the fluidity of all ocean-borne trade."[187] It urges that the rule account for the inland components of ocean-borne shipping transactions and apply to point-to-point service contracts.[188] 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."[189]

Nothing in the rule limits its scope to shipping activities occurring at ports or marine terminals. Rather, § 41102(c) concerns ocean carrier, marine operator, and ocean transportation intermediary practices and regulations "relating to or connected with receiving, handling, storing, or delivering property." Ocean carrier demurrage and detention practices are subject to § 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.[190] This is often not a difficult question, but the further one

[187] Am. Cotton Shippers Ass'n at 7-8.
[188] Am. Cotton Shippers Ass'n at 8.
[189] IMC Companies at 3-4.
[190] *See, e.g., Auction Block Co. v. Fed. Mar. Comm'n*, 606 Fed. Appx. 347, 348 (9th Cir. 2015) ("The Commission reasonably concluded that it makes little sense to bring into its regulatory ambit all facilities operated by an entity merely because a single one of them is connected to international marine transportation."); *Crocus Investments, LLC v. Marine Transp. Logistics, Inc.*, 1 F.M.C.2d 403, 415 (FMC 2019) ("The approach supported by the text of § 41102(c) and Commission caselaw asks: was the respondent acting as a regulated entity with respect to the conduct at issue?").

gets away from the terminal, the more complicated the inquiry may become, and it is not a question that can always be answered in the abstract.[191]

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.[192]

Commenters were also concerned about railroads and railyards.[193] To be clear, § 41102(c) of the Shipping Act applies to common carriers, marine terminal operators, and ocean transportation intermediaries. The Commission is without authority to address practices of railroads or rail facilities unless they fall within one of those statutory definitions. That said, if the practice at issue relates to rail but is nonetheless an ocean carrier practice, e.g., is contained in an ocean carrier tariff or service contact, then the guidance in the rule would likely apply.

In sum, the rule is not limited, in its language or intent, to import shipments, nor is it limited solely to ocean carrier practices related to conduct at marine terminals. The precise outer

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[191] *Crocus*, 1 F.M.C.2d at 415 (noting that determining whether respondent is a regulated entity, in this case an ocean transportation intermediary, is a "fact-intensive analysis" taking into account statutory definitions and evidence about the parties' conduct during the relevant time frame).

[192] Surface Transp. Bd., Policy Statement on Demurrage and Accessorial Rules and Charges (STB Oct. 4, 2019), https://www.stb.gov/decisions/readingroom.nsf/UNID/F844367E52874F138525848C0042BFB3/$file/47133.pdf. STB's proposed policy statements also references the incentive principle:

> First, demurrage rules and charges are not reasonable when they do not serve to incentivize the behavior of shippers and receivers to encourage the efficient use of rail assets. In other words, charges should not be assessed in circumstances beyond the shipper's or receiver's reasonable control. It follows, then, that revenue from demurrage charges should reflect reasonable financial incentives to advance the overarching purpose of demurrage and that revenue is not itself the purpose." Second, transparency and mutual accountability by both rail carriers and the shippers and receivers they serve are important factors in the establishment and administration of reasonable demurrage and accessorial rules and charges.

Id. at 21.

[193] Aluminum Bahrain ("The rail carrier and the yard itself made sure that every container paid extra for the chassis and for detention"); APL Logistics ("APL Logistics seeks clarification whether the proposed interpretive rule applies to railroad terminals when an international shipment passes through a marine terminal operator and is then transported to its final destination via rail on a through bill of lading"); Global Fairways LLC (complaining about rail practices and ocean carriers not providing sufficient information); IMC Companies; Wheaton Grain.

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.[194] 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."[195] 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."[196] The rule might be relevant to that compensation if marine terminal charges to ocean carriers are passed on to shippers and their agents via demurrage.[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.

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[194] Final Report at 27; *Boston Shipping Ass'n v. Port of Boston Marine Terminal Ass'n*, 10 F.M.C. 409, 415 (FMC 1967).
[195] *Boston Shipping Ass'n*, 10 F.M.C. at 415.
[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.
[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.").

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.[198] This derives from the well-established principle that to pass muster under § 41102(c), a regulation or practice must be tailored to meet its intended purpose,[199] that is, "fit and appropriate for the end in view."[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 § 41102(c) the extent to which demurrage and detention are serving their intended purposes as financial incentives to promote freight fluidity.[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.[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."[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 once-in-

[198] 84 FR at 48852.
[199] 84 FR a 48852 (citing *Distribution Servs. Ltd. v. Trans-Pac. Freight Conference of Japan and Its Member Lines*, 24 S.R.R. 714, 722 (FMC 1988)).
[200] *Distribution Servs.*, 24 S.R.R. at 722 (quoting Port of San Diego, 9 F.M.C. at 547).
[201] 84 FR at 48852, 48855.
[202] *See* 84 FR at 48852.
[203] 84 FR at 48852.

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.[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.[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."[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.[207] Marine terminal operators asserted that these charges are appropriate to compensate terminal operators for the use of terminal space.[208] Shippers and intermediaries, too, indicated that demurrage and detention have a compensatory element.[209] As a few commenters pointed out, the Final Report in Fact Finding Investigation No.

[204] 84 FR at 12 (citing Interim Report at 2-3; Final Report at 12, 13).
[205] *E.g.*, Wal Mart at 1 ("Wal Mart has also experienced abuse of such charges in ways that do not incentivize efficient movement and therefore applauds FMC's identification of efficient cargo movement as the key consideration in assessing reasonableness of demurrage and detention practices under 46 U.S.C. § 41102(c)."); Cal. Cartage Co. at 1; Dreisbach Enter. at 1.
[206] SSA Marine at 1; Nat'l Indus. Transp. League at 5 ("Demurrage and detention practices should be applied to serve their intended purpose, with correct financial incentives to promote freight fluidity."); NCBFAA at 5.
[207] OCEMA at 2; WCMTOA at 8-9.
[208] Am. Ass'n Port Auth. at 2; NAWE at 10-11; WCMTOA at 2-3.
[209] *E.g.*, Am. Coffee Corp. at 2; Int'l Fed. of Freight Forwarders Ass'ns at 1-2; Nat'l Indus. Transp. League at 13; Sea Shipping Line at 2; *see also* IICL at 2.

28 noted that "some cases refer to demurrage also serving a compensatory purpose."[210] Additionally, some commenters asserted that demurrage and detention actually serve an illegitimate purpose: serving as a revenue stream for ocean carriers and marine terminal operators.[211]

Historically, the Commission recognized that demurrage has "penal elements which are designed to encourage the prompt movement of cargoes off the piers" and includes a compensatory element which accounts for "the use of the pier facilities, for watchmen, fire protection, etc., on the cargo not picked up during free time."[212] It is important to specify, however, what this compensatory aspect of demurrage traditionally meant. To the extent demurrage had a compensatory aspect, it was to reimburse ocean carriers for costs incurred *after* free time expired – "costs" in this context meant *additional* costs associated with cargo remaining on a pier after free time.[213] In other words, demurrage and detention are not the mechanism by which ocean carriers recover all costs related to their equipment,[214] and the Commission cannot assume that these charges are the primary method by which ocean carriers recover their capital investment and container costs, as some commenters suggest.[215]

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[210] Final Report at 28 n.36.
[211] AgTC at 3 ("It is also clear that the penalties have now become a significant revenue source for the carriers."); Mohawk Global Logistics at 5; NCBFAA at 7; Lee Hardeman Customs Broker, Inc. at 1 (arguing that demurrage and detention are "CLEARLY revenue streams from frequently unreasonable application of them"); Bunzl Int'l Servs. Inc. at 1; Int'l Motor Freight at 2; The Judge Org. at 1; Mondelez Int'l at 2; Thunderbolt Global Logistics at 2; Transp. Intermediaries Ass'n at 4; Retail Indus. Leaders Ass'n at 2*; see also Free Time and Demurrage Charges at New York*, 3 U.S.M.C. 86, 107 (FMC 1948) (NYI) ("We hold, however, that demurrage charges *at penal levels* are not justifiable by reference to a carrier's need for revenue.").
[212] *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.
[213] *NYII*, 9 S.R.R. at 864.
[214] For example, in the "ideal" situation, where a container is retrieved and returned with free time, an ocean carrier would collect no demurrage or detention. The Commission cannot assume that in this preferred scenario that ocean carriers would have to absorb their equipment costs. Rather, they presumably recover their equipment costs in other ways, such as in their freight rate.
[215] WSC at 9 ("From the carrier's perspective, detention charges are structured to serve as a recovery mechanism for the capital investment and cost of the container, including repair, maintenance, and leasing, as well as opportunity costs associated with not having the equipment available for revenue-producing cargo transport.").

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.[216]This assumption was based on Commission caselaw requiring ocean carriers to charge at least compensatory demurrage.[217] Given that that this caselaw pre-dated containerization, its precedential value is an open question, and in the absence of evidence establishing the extent to which ocean carrier demurrage or detention are compensatory, the Commission cannot assume that demurrage and detention have compensatory aspects in every case. As noted above, however, the rule does not preclude ocean carriers and marine terminal operators from arguing and producing evidence regarding the compensatory aspects of demurrage and detention in individual cases.

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

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[216] *NYI*, 9 U.S.M.C. at 109.
[217] *NYI*, 9 U.S.M.C. at 93, 109.
[218] Shippers, intermediaries, and truckers do not necessarily oppose ocean carriers and marine terminal operators

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."[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.[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 time limits."[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

recovering, in certain circumstances, legitimate costs. Mohawk Global Logistics at 6 (noting that in government hold situations, "[t]here 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.

[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.

[220] WCMTOA at 12; PMSA at 6.

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

retrieve cargo or a truck to return equipment might disincentivize ocean carriers and marine terminal operators from acting efficiently.[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.[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."[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.[225] According to these commenters, under this principle shippers "bear the risk of any disability that arises after free time has ended."[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

[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).
[223] 84 FR at 48852.
[224] Nat'l Indus. Transp. League at 6.
[225] J. Peter Hinge at 3; NAWE at 14 n.5; OCEMA at 5; PMSA at 7-8.
[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.

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.[227]

As an initial matter, it is useful to describe the legal context before and after the expiration of free time.[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.[229] Free time is "free" because during this time period, an ocean carrier cannot assess any demurrage.[230] Nor can marine terminal 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 § 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 § 41102(c) and its requirement that demurrage practices be tailored to meet their purposes --

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[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).
[228] The caselaw involves demurrage, but similar concepts would apply in detention context.
[229] Final Report at 27 (citing *Port of San Diego*, 9 F.M.C. at 539).
[230] *NYII*, 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 accept delivery of cargo without incurring liability for penalties.").
[231] *Boston Shipping Ass'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 full 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] *Boston Shipping Ass'n*, 10 F.M.C. at 417; NYII, 9 S.R.R. at 874.
[233] 84 FR at 48852.

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 § 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."[236]

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, a shipper may be responsible for any compensatory aspect of demurrage.

[234] NAWE at 14 n.5; OCEMA at 5; PMSA at 7-8; WCMTOA at 9.
[235] OCEMAT at 5.
[236] 10 F.M.C. at 417-18.
[237] 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).

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 – penal, 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 Demurrage 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

[238] *NYI*, 3 U.S.M.C. at 107.
[239] *Id*. at 107-108.
[240] 9 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.

some compensatory aspect when determining the reasonableness of specific practices in individual cases.

As for incentives, the commenters' second argument in favor of "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.

[241] PMSA at 8.
[242] *E.g.*, AgTC at 4,

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.[243] Commenters refer to "risk related to fluctuations in terminal fluidity," "risk and all of the attendant costs related to events beyond their control,"[244] and "the entire financial responsibility for no-fault situations."[245] Similarly, NAWE's 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."[246]

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

F. Cargo Availability

In addition to describing how § 41102(c) may apply in the demurrage and detention context – the incentive principle – the Commission in the NPRM also sought to explain how that

[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.

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.[247] If, the Commission stated, shippers or truckers cannot pick up cargo within free time, then demurrage cannot serve its incentive purpose.[248] 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.[249]

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.[250] Others assert that free time and demurrage and detention clocks should stop when containers

[247] 84 FR at 48852, 488555.
[248] 84 FR at 48852.
[249] 84 FR at 48852 ("The more a demurrage practice is tailored to cargo availability, the less likely the practice is to be found unreasonable.").
[250] *E.g.*, Dow Chemical Co. at 2 ("Free time should be tied to actual cargo availability and not vessel arrival since efficient cargo pickup cannot be incentivized if the cargo may not yet be available."); Am. Cotton Shippers Ass'n at 4; Am. Coffee Corp. at 2; Commodity Supplies at 1; CV Int'l at 1; Harbor Trucking Ass'n at 1-2; Int'l Fed. of Freight Forwarders Ass'ns at 2; John S. Connor Global Logistics at 2; New Direx Inc. at 1; NYNJFFF&BA at 4; Retail Indus. Leaders Ass'n at 2; Transp. Intermediaries Ass'n at 4.

become non-accessible due to situations beyond the control of shipper or trucker.[251] Still others request that the Commission define "container availability,"[252] that the Commission expressly address things like terminal hours of operation vis-à-vis free time,[253] appointment systems,[254] and that the concept of availability should include chassis availability.[255]

As explained in the NPRM, it makes sense that if free time represents a reasonable opportunity for a shipper to retrieve a container, it should be tied, to the extent possible, to cargo availability, and the Commission recognizes the merits of that approach. But the Commission will not in this general interpretive rule make a finding that failure to start free time upon "availability" is necessarily unreasonable. The operational environments and commercial conditions at terminals across the country vary significantly, and in some situations, there might not be much difference between tying free time to vessel discharge and tying it to availability.[256] For similar reasons, while the Commission will consider in the reasonableness analysis how demurrage and detention practices address interruptions in availability during free time, requiring specific "stop-the-clock" procedures is beyond the scope of this rulemaking.[257] The Commission is sympathetic to shipper, intermediary, and trucker arguments that bright line rules will be more

[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 rules, should be related to actual physical availability of the cargo."); Am. Cotton Shippers Ass'n at 4; Commodity Supplies at 2; Int'l Fed. of Freight Forwarders Ass'ns at 2; John S. Connor Global Logistics at 2

[252] *E.g.* EMO Trans Atlanta, GA USA at 1; FedEx Trade Networks, Inc. at 1; Int'l Motor Freight at 1.

[253] *E.g.*, Mondelez Int'l at 1 ("All free time should be defined as business days as not all ports allow pick up/return on weekends."); Rio Tinto at 1.

[254] *E.g.*, Retail Indus. Leaders Ass'n at 2 ("A terminal's volume of appointment times and appointment availability are a critical component of cargo owners' ability to collect cargo. It is essential to consider the details of a terminal's appointment system, including availability and time frames of appointments, when assessing if fees are justified."); Harbor Trucking Ass'n at 2 ("Important to consider the workings of terminal appointment systems in evaluating reasonableness – should be some minimum period of appointment availability.").

[255] *E.g.*, Am. Cotton Shippers Ass'n at 5; CV Int'l, Inc. at 1; John Steer Co. at 1; John S. Connor Global Logistics, Inc. at 2-3; Yusen Logistics (Americas) Inc. at 1. *But see* Thunderbolt Global Logistics at 1 ("The lack of an available chassis should not be considered a requirement of availability unless the steamship line is supplying the chassis as part of their contract of carriage.").

[256] *See* Final Report at 21-22.

[257] 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.

beneficial to them and would be clearer than the Commission's factor-based approach. But imposing bright line rules could inhibit the development of better solutions.

As for defining "container availability," the Commission declines to do so here, as it can vary by port or marine terminal. Suffice it to say, availability at a minimum includes things such as the physical availability of a container: whether it is discharged from the vessel, assigned a location, and in an open area (where applicable).[258] Depending on the facts of the case, the Commission may consider things such as appointment systems and appointment availability and trucker access to the terminal, i.e., congestion.[259]

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

[258] 84 FR at 48853; Final Report at 20.
[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.
[260] 84 FR at 48851 at n.7 ("Current variations in chassis supply models have frequently contributed to serious inefficiencies in the freight delivery system."); *id.* ("Timely and reliable access to roadworthy chassis is a source of ongoing and systemic stress to the system.").
[261] *NYI*, 3 U.S.M.C. at 100.
[262] Inst. of Int'l Container Lessors at 7.

use in a carrier haulage situation.[263] According to the Agriculture Transportation Coalition (AgTC), "carriers' 'box rules' limit availability of chassis, forcing trucker to 'hunt' for a container brand designated by the carrier, and cannot use other containers more conveniently located."[264]

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

G. Empty Container Return

The second application of the incentive principle discussed in the rule is empty container return.[266] The rule states that absent 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.[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, no amount of

[263] *See* Bill Mongelluzzo, *Box rules hold back interoperable chassis pools: truckers*, JOC.com (Dec. 12, 2019) (defining "box rules").
[264] AgTC at 5.
[265] *NYI*, 3 U.S.M.C. at 100. To be clear, the Commission agrees in general with the assumption that a shipper or its agent has or can obtain the equipment necessary to retrieve cargo. 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.
[266] 84 FR at 48853, 48855.
[267] 84 FR at 48855.

detention can incentivize its return.[268] In addition to refusal to accept empty containers, the Commission listed additional situations where imposition of detention might weigh toward unreasonableness, such as uncommunicated or untimely communicated changes in container return, or uncommunicated or untimely communicated notice of terminal closures for empty containers.[269]

Most of the comments about this aspect of the rule were supportive.[270] Several commenters suggest additional ideas. Some argue that an ocean carrier should grant more detention free time when the carrier requires an empty to be returned to a location other than where it was retrieved, or when a marine terminal operator requires an appointment to return an empty container.[271] Commenters also raised issues with marine terminal "dual move" requirements.[272] In the import context, a "dual move" is where a trucker drops off an empty container and picks up a loaded container on the same trip to a terminal. Mohawk Global Logistics described some of the issues that arise when a marine terminal operator requires a dual move to return an empty container:

> When winding down peak season, there are typically more empty containers being returned than full containers available to pick up, so single empty returns are more commonly needed, and without inbound loads, dual moves are hard to effect. When terminals go for days without accepting single moves, the trucker is stuck holding

[268] 84 FR at 48853; *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.").
[269] 84 FR at 48853.
[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; NYNJFFF&BA at 3; Transp. Intermediaries Ass'n at 4; Transways Motor Express at 1; Yupi at 1; NCBFAA at 7.
[271] *E.g.*, Best Transp. at 2; F.O.X. Intermodal Corp. at 1; Int'l Motor Freight at 1 ("All empty equipment should be returned to the marine terminal it was picked up from in order to increase truck efficiency and reduce the number of chassis splits."); Mohawk Global Logistics at 7 ("Some carriers argue the containers should be returned to a different facility, but typically they are more distant, or also closing down."); S. Counties Express at 2.
[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 empty. We have no viable option to return the container, but are still faced with Detention charges by the Steamship line.").

> the container, usually on a chassis that is being charged for daily, and in a storage yard that is also charging daily. When a few single slots open up, everyone scrambles to get there with empties, quickly closing the yard down again.[273]

Changes in return location, and requiring dual moves, are certainly practices that the Commission could review under § 41102(c) in light of the guidance in rule.[274] While the rule does not discuss the extension of free time when containers must be returned to a different terminal than that from which they were retrieved, the approach may have merit. The NPRM referred to the similar situation when container return location changes and the change is not communicated in a timely fashion.[275] The Commission is particularly concerned about the reasonableness of dual move requirements, or more specifically, an ocean carrier imposing detention when a trucker's inability to return a container within free time is due to it not being able to satisfy a dual move requirement.[276] Although the Commission assumes there are operational reasons for dual move requirements, they effectively tie a trucker's ability to avoid charges to doing additional business with a carrier or at a terminal. In an appropriate case, the Commission would carefully scrutinize such practices.[277]

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.[278] 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

[273] Mohawk Global Logistics at 7.
[274] Assuming the other elements of a § 41102(c) case are met.
[275] 84 FR at 48853.
[276] As between ocean carriers and marine terminal operators, in this context the focus would likely be on ocean carrier practices. *See* FMC Demurrage Report at 7 ("For the return of their empty containers, VOCCs instruct the consignees and terminal operators who serve them when, where, and how this equipment can be returned.").
[277] Some commenters also asserted that off-terminal empty container storage areas should have the same hours as marine terminals. Int'l Motor Freight at 1; Transways Motor Express at 1. While that is something regulated entities may consider, delving into the hours of operation of particular facilities is beyond the scope of the rule, which is to provide general guidance.
[278] NCBFAA at 7.

the recipient's inability or unwillingness to receive the asset."[279] 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 regulated entities 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 § 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.[280]

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.[281] The

[279] NCBFAA at 7.
[280] Final Report at 18-20, 27-28; Interim Report at 9, 18; 84 FR at 98853 ("The more these factors align with the goal of moving cargo off terminal property, the less likely demurrage practices would be found unreasonable.").
[281] 84 FR at 48853.

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.[282] 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.[283] 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.[284] Marine terminal operators opposed the Commission requiring any particular type of notice.[285]

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.[286] As pointed out by a commenter, notice of availability "would serve the important function of clearly identifying when the cargo is truly available for pick up and thus when the free time clock should start and

[282] 84 FR at 48853 ("[n]otice that cargo is discharged and in an open area," "notice that cargo is discharged, in an open area, free of holds, and proper paperwork has been submitted," and "notice of all of the above and that an appointment is available.").
[283] 84 FR at 48853.
[284] *E.g.*, Mohawk Global Logistics at 2; NCBFAA at 13; Airforwarders Ass'n at 1; ContainerPort Group at 1; CV Int'l, Inc. at 2; FedEx Trade Networks, Inc. at 1-2; Florida Customs Brokers & Forwarders Ass'n at 1; Int'l Fed. of Freight Forwarders Ass'ns at 2; John S. Connor Global Logistics at 3-4; Thunderbolt Global Logistics at 2; *cf*. Int'l Logistics; ContainerPort Group.
[285] PMSA at 5-6; WCMTOA at 10-11. In contrast, WSC argues that the rule is too vague in this regard because the Commission did not specify "what it considers to be the proper format, method, or timing" of notice." WSC at 16.
[286] In *NYI*, the Commission declined to require that free time start upon issuance of a notice of availability. *NYI*, 3 U.S.M.C. at 105-06. The Commission noted that "[c]onsignees are universally apprised of the arrival of vessels" and reasoned that "[i]nsistence upon a notice of availability would subject the carriers to extra work and expense that would be largely 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.

end."[287]The Commission remains concerned that legacy forms of notice might not be providing shippers with a reasonable opportunity to retrieve cargo.[288] 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.[289] 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.[290] The marine terminal operators also make a number of claims about the costliness and technical feasibility and necessity of some of the suggestions.[291] These are arguments that the commenters would be free to make if relevant in a particular case.

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[287] NYNJFFF&BA at 4.
[288] 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 ("TIA supports tying free time to actual cargo availability and not to vessel arrival: as FMC points out, demurrage cannot incentivize efficient cargo pickup if the cargo is not truly available yet.").
[289] Final Report at 19 ("In other words, the terminal operators stated, they are being asked to create tools that are not effective for the market.").
[290] WCMTOA insists that the NPRM "seeks to mandate the optimum level and type of notice for all terminal operators and carries in all circumstances." WCMTOA at 11. The language of the rule, however, belie WCMTOA's inferences.
[291] PMSA at 10-11 (noting that few industry players use push notifications because existing technology does not accommodate them."); PONYNJSSA ("[T]he NPRM suggests that if such a system does not 'push' relevant information, then such a system might not be considered a reasonable notice of cargo availability.").

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.[292] But that is not necessarily the case at all ports or at all terminals or for all shippers.[293] 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.[294] 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.[295] 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

[292] *E.g.*, Transworld Logistics & Shipping Servs., Inc. at 3 ("It must be mentioned here that the arrival notice which is a courtesy information cannot be confused or construed to replace a cargo availability notice.").
[293] Yupi at 1.
[294] There was significant discussion during the investigation about who should be providing notice related to cargo availability. Ocean carriers have a notice obligation under their contracts of carriage, which they purport to fulfil by providing notice of vessel arrival. *See* Final Report at 27. Otherwise, notice about container status is typically provided by marine terminal operators. The difficulty is that the entity in the best position to know about container status – the marine terminal operator – is not necessarily privy to information about who should receive notice, which is information the carrier has via bills of lading and other shipping documents. The solution would seem to involve better coordination between ocean carriers and the marine terminal operators with whom they contract to provide terminal facilities.
[295] *E.g.* Harbor Trucking Ass'n ("Notice must be timely and readily accessible to the contracting party or its designee, must provide clear information as to when and where cargo may be retrieved, and 'push notices' are favored."); Mohawk Global Logistics at 2 ("Truckers must proactively and continuously po[re] over multiple websites to check on availability of containers they have been assigned."). *But see* PMSA at 10-11 (arguing that there is little difference between getting a push notification and "accessing the web site or app to get the information at the shipper's or trucker's convenience").

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.[296]

WCMTOA claims that the Commission "would seem to impose a requirement for a terminal operator to update cargo interests on a minute-by-minute basis as to the availability status of individual containers."[297] 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 purposes.[298]

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.[299] 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.[300] The Commission

[296] For instance, the International Federation of Freight Forwarders Associations advocates "advance notice of cargo availability." Int'l Fed. of Freight Forwarders Ass'ns at 3-4; *see also* Mondelez Int'l at 1 ("If the carriers could advise even within a few days prior to vessel arrival that the cargo will be ready at a certain date for pickup it would allow for more efficient planning and appointment making instead of a constant scramble.").
[297] WCMTOA at 12.
[298] *Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n*, 390 U.S. 261, 295 (1968) ("Of course charges need only be 'reasonably' related to benefits, and not perfectly or exactly related . . . .") (Harlan, J, concurring).
[299] 84 FR at 48853.
[300] A "centralized examination station" is "a privately operated facility, not in the charge of a Customs officer, at which merchandise is made available to Customs officers for physical examination." 19 CFR 118.1. CESs are established by port directors, and a CES operator agrees to, among other things, "[p]rovide adequate personnel and equipment to ensure reliable service for the 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

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."[301] 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.[302]

Option B is the most popular option among the shipper, intermediary, and trucker commenters.[303] 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."[304] 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.

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.

[301] 84 FR at 48853.

[302] 84 FR at 48853.

[303] *E.g.*, Commodity Supplies Inc. at 2; Harbor Trucking Ass'n at 2; Dow Chemical Co. at 2; FedEx Trade Networks at 2; Green Coffee Ass'n at 2; Int'l Ass'n of Movers at 2; Meat Import Council of America at 3; Nat'l Retail Fed. at 2.

[304] 84 FR at 48852.

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 related to the inspections.[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."[306] Few commenters prefer Option A.[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."[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,[309] extending free time for five days, after which demurrage during a hold could accrue,[310] disallowing demurrage and detention during government inspections and restarting free time clock from zero after inspection,[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."[312] The objective of the latter proposal would be spread the costs of inspections among a "wider constituency" because "[g]overnmental

[305] *E.g.*, CV Int'l at 2 (There should be a cap to the potential D/D charges resulting from government holds: perhaps a level that corresponds clearly to the true cost or income lost on the container or storage space during the hold period."); Dow at 2; Int'l Ass'n of Movers at 2; Nat'l Indus. Transp. League at 13; Thunderbolt Global Logistics (cap for detention, demurrage should be waived).
[306] Nat'l Indus. Transp. League at 13.
[307] CV Int'l at 2 ("Accelerated D/D charges should not be permitted for cargo under government hold."); Meat Import Council of Am. at 3; John S. Connor Global Logistics at 5 ("[W]e do not believe it is appropriate for the carriers and/or MTO operators to escalate charges (i.e., impose penalty demurrage) in these situations.").
[308] NAWE at 15; *see also* OCEMA at 5; PMSA at 9-10; WCMTOA at 6-9; WSC at
[309] FedEx Trade Networks at 2.
[310] Emo Trans Atlanta, GA USA at 1.
[311] AgTC at 6.
[312] Sea Shipping Line at 2; Sefco Export Management Co. at 2 ("The proposal for a Container Inspection Fund is one of the rare out of the box suggestions that I have come across that might actually do some good.").

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."[313] For similar reasons, Mohawk Global Logistics suggests "assign[ing] the true cost of the resources as a 'special government hold' demurrage or detention charges or cap the fee at 25% assuming the punitive aspect being removed is 75%, or thereabouts."[314]

The Commission has determined that, consistent with precedent, reasonableness should be assessed by considering whether demurrage and detention serve their intended purposes. As noted above, when shippers cannot retrieve cargo from a terminal, it is hard to see how demurrage or detention serve their primary incentive purpose. The question is, why shouldn't that principle apply during government inspections of cargo? In other words, why are government inspections different from any other circumstance where a shipper cannot retrieve its cargo?

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

[313] Sea Shipping Line at 2.
[314] Mohawk Global Logistics at 6.

Although Commission caselaw supports these commenters' arguments, that caselaw predates, and does not reflect, the Commission's modern interpretation of § 41102(c). In *Free Time and Demurrage Charges at New York*, the Commission held that ocean carriers are not required to extend free time to account for government inspections of cargo.[315] Delays related to government inspections, the Commission stated, "are not factors that carriers are required to consider in fixing the duration of free time."[316] The Commission in that case cited no precedent. It reasoned that allowing free time to run during government inspections was permissible because delays related to government inspections were not attributable to ocean carriers or related to their operations.[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."[318]

Subsequently, however, the Supreme Court held that to determine reasonableness under § 41102(c)'s predecessor, one should look at how well charges correlate to their benefits.[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."[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.

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[315] *NYI*, 3 U.S.M.C. at 96, 99; *id*. at 101 (holding that "the carriers, in determining the duration of free time, are not obliged to take account of delays in the removal of cargo which arise from the causes hereinabove discussed.").
[316] 3 U.S.M.C. at 96.
[317] 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] *NYII*, 9 S.R.R. at 880.
[319] *Volkswagenwerk*, 390 U.S. at 282.
[320] *Distribution Servs*., 24 S.R.R. at 722.

Consequently, Commission precedent does not bar the Commission from applying the incentive principle to government inspections – it supports its application.[321]

Nor do the incentives at play suggest that government inspections should be treated specially under the rule. According to WCMTOA: "If the terminal operator or carrier may not reasonably impose demurrage during a government inspection or include such periods in free time the importer/exporter will have no incentive to avoid or minimize government inspections by ensuring that its paperwork is complete and accurate, that it properly loads and secures its cargo in a container and that it carefully verifies the nature, quantity, safety, or labelling of its cargo."[322] This argument is unpersuasive. First, there are numerous incentives other than avoiding demurrage that motivate shippers to avoid or minimize government inspections. Not only are there examination costs, but government inspections delay cargo from reaching its intended destination and may result in cargo damage.[323] Second, under the rule, the Commission may consider the extent to which a shipper complies with its customary responsibilities. These responsibilities include things like submitting complete, accurate, and timely paperwork.[324]

Marine terminal operators and ocean carriers also point out that they suffer costs due to government inspections despite having no control over inspections.[325] The Commission does not

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[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* in involved *truck* detention. In contrast to the issues here, at the time, marine terminals were required to compensate truckers for delays. 12 F.M.C. at 170 (requiring adoption of a rule that "will compensate the truckers for unusual truck delays caused by or under the control of the terminals"). The Commission said that marine terminals only had to pay a fee (truck detention) when delays were within their control. *Id*. at 171. Here, however, it is shippers, intermediaries, and truckers who are arguing that they should not have to pay a fee (demurrage and detention) due to delays outside their control. In other words, *Trucker & Lighter* does not stand for the proposition that marine terminal operators can *impose* fees when delays are outside of their control.

[322] WCMTOA at 7.

[323] AgTC at 6; NCBFAA at 8; NYNJFFF&BA at 6; Int'l Fed. of Freight Forwarders Ass'ns at 4.

[324] *See, e.g.*, WCMTOA at 6.

[325] WCMTOA at 6 ("Government inspections of containers are never caused by the terminal operator, and never relate to the MTO's facility or operations."); *id*. at 7-8; NAWE at 16; OCEMA at 5; PMSA at 9-10

disagree, nor do shippers, intermediaries, or truckers. As one commenter noted, "government holds [impose on marine terminal operators and ocean carriers] a hardship, too."[326] Shippers, however, also incur costs due to inspections, and their control over an inspection is limited. Shippers cannot always control whether their cargo is inspected, for instance,[327] nor can they exert much control of the timeliness of examinations.[328]

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

[326] Mohawk Global Logistics at 6.
[327] *E.g.*, Meat Import Council of Am. at 3 ("All imported meat is subject to 100% inspection by the U.S. Department of Agriculture . . .").
[328] Int'l Ass'n of Movers at 2 ("Delays are typically experienced because of a backlog or lack of CBP manpower, required to be present during the intensive exams.").
[329] WCMTOA at 7 ("The proposals would impose a single approach to a complicated area involving a wide variety of inspections."); PMSA at 9 ("It is difficult to mandate a single approach to inspections because there are so many types of inspections and inspection situations."); *id*. (describing VACIS/X-ray inspection, Radioactive Portal Monitor inspections, and tailgate inspections).

of inspections, the Commission can refine these principles via adjudication or further rulemaking.

J. Demurrage and Detention Policies

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

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

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[330] FF28 Letter at 2.
[331] 84 FR at 48856.
[332] Interim Report at 3 (noting that the record supports consideration of the benefits of "[c]larity, simplification, and accessibility regarding demurrage and detention (a) billing practices and (b) dispute resolution processes"); *id*. at 2, 4, 10-12; Final Report at 13 ("The Phase Two meetings also reinforced the value of making demurrage and detention billing and dispute resolution policies and practices more transparent and accessible to cargo interest and truckers."); *id*. at 14-18, 29; FF28 Letter at 2.
[333] 84 FR at 48853.
[334] 84 FR at 48853.
[335] OCEMA at 6 ("As noted in the NPRM, OCEMA has encouraged its members to publish their demurrage and detention policies and related dispute resolution processes either directly or via link on the OCEMA website.").

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

Although commenters agree that demurrage and detention policies should be accessible,[339] ocean carriers and marine terminal operators object to this aspect of the rule on the grounds that it is inconsistent with statutory and regulatory provisions regarding publication of tariffs and marine terminal operator schedules.[340] As these commenters point out, the Shipping Act requires a common carrier to "keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rule, and practices."[341] The Act also requires that a tariff be "made available electronically to any person . . . through appropriate access from remote locations."[342] A marine terminal operator, may, but is not required to, "make available to the public a schedule of rates, regulations, and practices."[343] A schedule "made available is enforceable by an appropriate court as an implied contract without proof of actual knowledge of

[336] 84 FR at 48853.
[337] 84 FR at 48853.
[338] 84 FR at 48853-54.
[339] OCEMA at 6; Int'l Fed. of Freight Forwarders Ass'ns at 5 ("Policies should be transparent and easily available on web pages which should be identified in the cargo notification.").
[340] NAWE at 16-17; PMSA at 12-13; Ports America 8-9; WSC at 17.
[341] 46 U.S.C. 40501(a)(1); *see also* 46 U.S.C. 40501(b)(4) (requiring tariff to "state separately each terminal or other charge . . . and any rules that in any way change, affect, or determine any part of the total of the rates or charges").
[342] 46 U.S.C. 40501(c).
[343] 46 U.S.C. 40501(f).

its provisions."[344] Similarly, a shipper is presumed to have knowledge of tariff rules.[345] 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."[346]

The Commission continues to believe that the ocean freight 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 § 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 s 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,

[344] 46 U.S.C. 40501(f).
[345] *Kraft Foods v. Moore McCormack Lines*, 17 FMC 320, 323 n.4 (FMC 1974).
[346] NAWE at 17; PMSA at 12 ("[T]he Commission has no authority to require non-tariff publication of rates and charges, however desirable it might be from a customer service standpoint.").

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 § 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.[347] 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.[348] As for clarity, the Commission emphasized in the NPRM the importance of shippers, intermediaries, and truckers

[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.

knowing what they are being charged for and by whom.[349] Adding the word "clarity" to the guidance is consistent with that emphasis, and appears unobjectionable.[350]

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.[351] The Commission explained that it may consider in ascertaining reasonableness under § 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."[352] 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.[353] The Commission cited a best practices proposal put forward by OCEMA as a useful model for dispute resolution policies.[354]

[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] 84 FR at 48856.
[352] 84 FR at 48854 (citing Interim Report at 14-17-18; Final Report at 7-8. 17-18).
[353] 84 FR at 48854 (citing favorably "step-by-step instructions for disputing a charge, dedicated dispute resolution staff at regulated entities, allowing priority appointments after successful dispute resolution or when a container is not available; sufficient responses to cargo interests request for free time extensions or waiver; processes for elevating disputes after an initial response; and allowing a trucker to continue to do business with a regulated entity during the pendency of a dispute").
[354] 84 FR at 48854.

There was little substantive objection to this part of the rule.[355] WSC protests that the Commission did not acknowledge the fact-specific nature of dispute resolution policies.[356] But the Commission expressly acknowledged in the NPRM that each regulated entity would tailor its dispute resolution policies to fit its own circumstances.[357] 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 explanation or the ability to raise the issue to higher level management.

Shippers, intermediaries, and truckers, like WSC, would also like specific guidance on what sort of attributes dispute resolution policies must have to pass muster.[358] The former suggest that the Commission should set specific timeframes for dispute resolution and billing,[359] processes for internal appeals of disputes within an ocean carrier or marine terminal operator,[360] and points of contact with actual authority to settle disputes.[361] They also argue in favor of ocean carriers and marine terminal operators suspending charges during disputes about those

[355] In fact, the UIIA provides a default dispute resolution process. UIIA H.1.
[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.").
[357] 84 FR at 48854 (stating that OCEMA provided a useful model "which each regulated entity would tailor to fit its own circumstances").
[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 & Forwarders Ass'n at 1; Int'l Fed. of Freight Forwarders Ass'ns at 5; VLM Foods USA Ltd. at 1.

charges,[362] allowing cargo to move freely during disputes,[363] and not "shutting out" truckers, intermediaries, or consignees from doing business 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]

The Commission recognizes the merits of most[365] of these proposals, and when considering the totality of the circumstances in a § 41102(c) case involving demurrage and detention, the inclusion of such proposals in ocean carrier and marine terminal operator dispute resolution policies would likely weigh in favor of reasonableness and against a violation. In fact, application of these proposals could likely reduce the need for formal disputes and thereby enhance operational efficiency.[366] But for the Commission to require specific dispute resolution

[362] *E.g.*, Int'l Fed. of Freight Forwarders Ass'ns at 5 (noting that once a merchant pays an ocean carrier, the carrier has "no motivation to look into such disputes delaying related refunds unreasonably" and that a more reasonable practice would be to suspend payment of disputed charges pending resolution of the dispute); Mondelez Int'l at 2; Transp. Intermediaries Ass'n at 5.

[363] *E.g.*, NCBFAA at 16-17 (noting that "pay now/argue later" "uses coercion as a means to extract money from NVOCCs" and arguing that there should be mechanism allowing for release of cargo to NVOCCS without requiring them to first pay disputed demurrage or detention charges); CV 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.

[364] *E.g.* AgTC ("Many 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 fact, the terminals collecting on behalf of the carriers will frequently shut out truckers from access to their terminals when coming to pick up another unrelated container, again compelling payment before resolution."); NYNJFFF&BA at 7 ("What is most important is that it should be considered unreasonable for a carrier to freeze all activity with the cargo owner or its subcontractors such as truckers and OTIS when there is a dispute on one shipment."); VLM Foods Inc. at 1, ("Truckers and consignees should be able to obtain access to the containers and continue doing business with a carrier even if there is a pending dispute OR outstanding charges to their account.").

[365] The idea that regulated entities should suspend charges pending a dispute or allow cargo to move freely runs up against the long-established lien law. Ocean carriers have maritime liens on cargo they transport. *Petra Pet Inc. v. Panda Logistics, Ltd.*, FMC Case No. 11-14, 2012 FMC LEXIS 33, at *43-*44 (ALJ Aug. 14, 2012), *aff'd* 2013 FMC LEXIS 37, at *17-*18 (FMC Oct. 31, 2013) (quoting *Bernard & Weldcraft Welding Equip. v. Supertrans Int'l*, Inc., 29 S.R.R. 1348, 1356 n.14 (ALJ 2003)). A carrier loses the lien if it surrenders the cargo. *Id.* But in any case, the Commission would need to examine precisely the lien at issue. *See Adenariwo v. BDP Int'l*, FMC Case No. 1921(I), 2014 FMC LEXIS 46, at *3 (FMC Feb. 20, 2014), *vacated on other grounds Adenariwo v. Fed. Mar. Comm'n*, 808 F.3d 73 (D.C. Cir. 2015); *Petra Pet* at *43-*44.

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

policies to include them, or to conclusively state that the absence of them makes a policy unreasonable, is beyond the scope of this rulemaking.[367] Accordingly, the Commission is retaining the language about dispute resolution policies in the final rule, with, as explained above, the clarification that the Commission may consider the content and clarity of demurrage and detention policies under § 41102(c).[368] The Commission further notes that the practice of "shutting out" truckers, intermediaries, or consignees from ocean carrier systems or terminals not only appears to impede efficient cargo movement,[369] but raises potentially serious concerns under other sections of the Shipping Act.[370]

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."[371] 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.[372] Additionally, the Commission noted that ocean carriers should bill their customers rather than imposing charges contractually-owed by cargo interests on third parties.

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[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 unrelated shipments handled by that intermediary and "when carriers threaten to cutoff truckers from picking up any containers for any of their customers all shippers 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 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.
[371] 84 FR at 48854.
[372] 84 FR at 48854.

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.[373] There was significant comment, however, about the idea that demurrage and detention be billed based on who owns the asset at 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."[374] This idea was mentioned in both Fact Finding No. 28 reports.[375]

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 § 41102(c),[376] the comments about this model are mostly negative because most commenters preferred billing relationships tied to the entity with whom contractual relationships exist.[377] Typically, the 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

[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.
[375] Interim Report at 18; Final Report at 26 n.26.
[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; NYNJFFF&BA at 10-11; Harbor Trucking Ass'n at 2; NAWE at 20. *But see* Int'l Fed. of Freight Forwarders Ass'ns at a 6 ("Shipping lines should only charge to the merchant for the demurrage of their containers. The terminals should charge the merchant directly for the space used in their terminals."); NCBFAA at 17-18 (advocating for billing tied to party having ownership or control of assets as it "allows for greater transparency, consistency, prevents double billing, and eliminate confusion as to who and what the charges are for").
[378] Nat'l Indus. Transp. League at 16; *see also* Nat'l Retail Fed. at 2 ("Instead, we endorse the view, espoused by Coalition for Fair Port practices that disputes over detention and demurrage should [be] between the ocean carrier and the BCO, simply because the commercial relationship exists only between the BCO and the ocean carrier.").
[379] *E.g.*, Int'l Logistics, Inc at 2; Am. Coffee Corp. at 3.

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 § 41102(c) violation. Section

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[380] NAWE at 20; Pac. Merchant Shipping Ass'n at 13-15; WSC at 17 ("The Commission's interpretation of reasonable billing practices would require separate invoices by MTOs and carriers.").

[381] AgTC at 7; *see also* IMC Companies ("In turn, ocean carriers on carrier haulage should bill their shippers for detention/per diem directly given motor carriers are not party to the service contract. Motor carriers are also not party to service contract exceptions on merchant haulage moves, and therefore any exceptions under service contract should require billing by ocean carrier directly to their shipper."); J. Peter Hinge ("Therefore, it must be made crystal clear also in the context of the Commission's findings that when you say 'Ocean carriers would bill cargo interests directly for use of containers,' the 'cargo interest' is the consignee on the Ocean carrier's B/L as opposed to truckers and ultimate consignees on an NVOCC B/L."); Mondelez Int'l at 2 ("The long-established rule of terminals and carriers billing the truckers for demurrage and detention (per diem) is a hardship.").

[382] NTNJFFF&BA at 9 ("Where detention is concerned the steamship lines 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, not cargo interests, under the provisions of the [UIIA].").

[383] 84 FR at 48854.

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 how the Commission will apply § 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]

- *Advance payment of charges*. 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: (a) the regulated entity and the customer have negotiated credit arrangements; [387] or (b) when the charges are disputed.

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[384] 46 CFR 545.4(b).
[385] *See, e.g.*, 83 FR 64479 ("Matters that may previously have been brought under § 41102(c) however, can still find resolution in other provisions or regulations of the Shipping Act or be adjudicated as matters 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 8; Shapiro at 2.
[387] *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").

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 demurrage and detention disputes, are likely to fall on the unreasonable end of the spectrum."[391]

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[388] *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 § E.6(c).
[389] *See supra* note 365.
[390] Final Report at 17-18.
[391] 84 FR at 48854.

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]

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[392] 84 FR at 48854.
[393] WSC at 18.
[394] 84 FR at 48854.
[395] Nat'l Retail Fed. at 3 (noting it "continue[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] John S. Connor Global Logistics at 6.

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.

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

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, 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

[400] 84 FR at 48856.
[401] 84 FR at 48854.
[402] 84 FR at 48854.
[403] 84 FR at 48854.
[404] *See*, *e.g.*, Am. Cotton Shippers Ass'n; Harbor Trucking Ass'n; NCBFAA; Retail Industry Leaders Ass'n.

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 terminal operator schedules.[408] Consequently, to the extent the Commission considers the "accessibility" of demurrage and detention definitions under § 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

[405] NAWE at 18; OCEMA at 6.
[406] 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).
[407] NCBFAA at 18.
[408] *See* Part III.J, *supra*.

port at issue, and how the terms are used in the U.S. trade. The rationale was that the more a regulated entity's definitions of demurrage and detention differ from how it had used the terms and how the terms were used in the industry, the more important it was for the regulated entity to ensure that the definitions were clear. Further, considering how the terms were used elsewhere would encourage consistent demurrage and detention terminology, which was in line with the Fact Finding Officer's finding that standardized demurrage and detention language would benefit the freight delivery system.[409]

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

[409] Final Report at 3, 30, 32.
[410] *E.g.*, Am. Coffee Corp.; Green Coffee Ass'n; Am. Cotton Shipper's Ass'n; Harbor Trucking Ass'n; IMC Companies; Meat Import Council of America; Nat'l Indus. Transp. League; NYNJFFF&BA; Retail Indus. Leaders Ass'n.
[411] NAWE at 18-20; OCEMA at 6; WSC at 17.
[412] OCEMA at 6; *see also* NAWE at 19.

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 § 41102(c) violation simply because an 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 industry and American economy.[413] The Commission finds unpersuasive the claim that ocean carriers and marine terminal operators compete on the basis of the demurrage and detention terminology they use, and these commenters provide no support for the contention that they are at risk of antitrust prosecution or litigation due to their choice of terminology.

[413] Interim Report at 17; Final Report at 32.

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 § 41102(c). Although the Commission believes that consistent demurrage and detention language would be beneficial, and encourages it, the rule should not be construed to mandate it.[414]

O. Carrier Haulage

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

Some commenters argue that ocean carriers should not be able to charge shippers demurrage or detention on carrier haulage moves because in those situations the ocean carrier, not the shipper or consignee, is responsible for ensuring that containers are timely retrieved from

[414] The Commission in the NPRM supported certain definitions of "demurrage" and "detention" and discouraged other terms such as storage or per diem. Although some commenters support the Commission's definitions, others did not. Moreover, one commenter noted that some ocean carriers use alternative terms such as "storage" or "per diem" to distinguish these charges from terminal demurrage. OCEMA at 6. While the Commission believes that, based on the Fact Finding Investigation, the definitions it suggested have merit, and that terms like storage and per diem could potentially cause confusion, use or nonuse of those definitions would not affect the reasonableness analysis.
[415] FMC Congestion Report at 9, 18.
[416] *Id*. at 9, 18.

the terminal and delivered to the appropriate location.[417] As one commenter maintained: "Of late carriers have started billing importers for truck capacity issues at gateway ports (on carrier door moves) which, should immediately stop as the carrier is obliged to honor the terms of the 'door bill of lading.'"[418] In contrast, truckers argue that "ocean carriers on carrier haulage should bill their shippers directly given motor carriers are not party to the [service] contract."[419]

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

Although the rule does not address these specific situations, the Commission has concerns about them, especially charging shippers demurrage on carrier haulage moves, under § 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]

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[417] Mohawk Global Logistics at 9; Samaritans Int'l of Waxhaw ("Many times the freight line is in control of door to door delivery, by lack of coordination container are not moved in a timely fashion, Once again they charge us demurrage for their lack of efficiency."); W. Overseas Corp. at (describing situation in which ocean carrier was unable to find a trucker on a door move resulting in imposition of demurrage on importer because the carrier "had a provision in their tariff that allowed this to happen" and arguing that "[t]he whole point in making these books a door move was" so that the ocean carrier would make the delivery arrangements").
[418] Transworld Logistics & Shipping Servs. Inc. at 4.
[419] Harbor Trucking Ass'n at 2. It is possible that those comments can be reconciled, if the former is referring to demurrage and the latter, detention.
[420] Int'l Fed. of Freight Forwarders Ass'ns at 7.
[421] *Id.*
[422] *Id.*
[423] *See* 83 FR at 64479 (noting that shippers may have remedies outside the Shipping Act for some complaints, under principles of contract law, agency law, or admiralty law).

IV. RULEMAKING ANALYSES

Congressional Review Act

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

Regulatory Flexibility Act

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

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

National Environmental Policy Act

The Commission's regulations categorically exclude certain rulemakings from any

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

Paperwork Reduction Act

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

Executive Order 12988 (Civil Justice Reform)

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

Regulation Identifier Number

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

List of Subjects

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 above, the Federal Maritime Commission amends 46 CFR part 545 as follows:

PART 545-INTERPRETATIONS AND STATEMENTS OF POLICY

1. The authority citation for part 545 continues to read as follows:

Authority: 5 U.S.C. 553; 46 U.S.C. 305, 40307, 40501-40503, 41101-41106, and 40901-40904; 46 CFR 515.23.

2. Add § 545.5 to read as follows:

§ 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 practices 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 E. Dickon
Secretary