The global voice of freight logistics

FMC FINAL RULE ON DEMURRAGE AND DETENTION

Toolkit

Quick start guide

INTRODUCTION

The decision of the US Federal Maritime Commission (FMC) in its Final Rule on Demurrage and Detention has been welcomed by FIATA as a landmark decision in laying out key considerations to assess the reasonableness of demurrage and detention practices. This decision was the culmination of an extensive six-year investigation process, involving the input of all stakeholders, including FIATA.

As a result, the FMC has produced detailed and reasoned analysis as to the identification of what have most likely been for years unjust and unreasonable practices. These findings and conclusions have wider applicability to the rest of the world, noting that demurrage and detention is a common and widespread topic of contention.

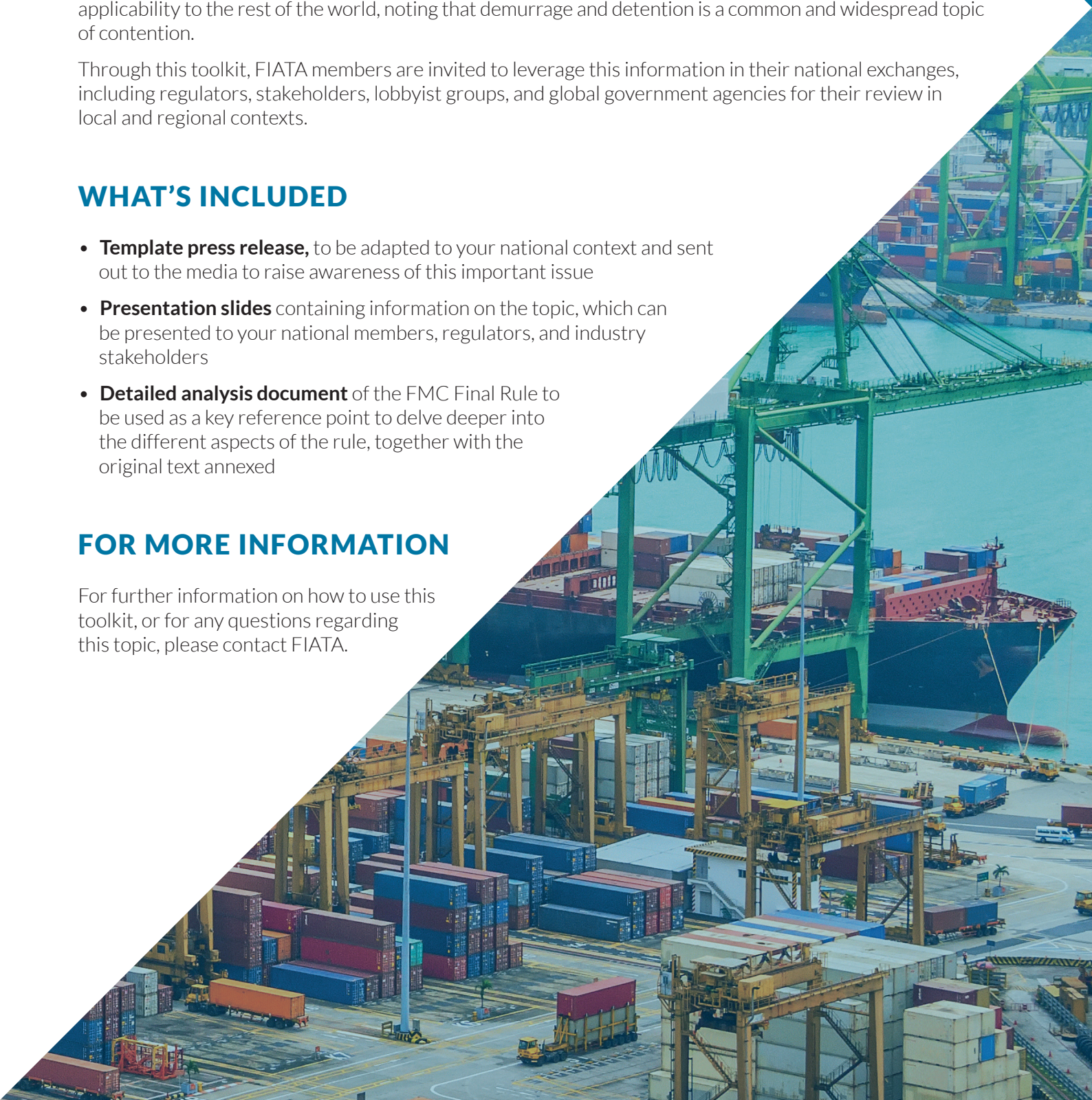
Through this toolkit, FIATA members are invited to leverage this information in their national exchanges, including regulators, stakeholders, lobbyist groups, and global government agencies for their review in local and regional contexts.

WHAT'S INCLUDED

- **Template press release,** to be adapted to your national context and sent out to the media to raise awareness of this important issue
- **Presentation slides** containing information on the topic, which can be presented to your national members, regulators, and industry stakeholders
- **Detailed analysis document** of the FMC Final Rule to be used as a key reference point to delve deeper into the different aspects of the rule, together with the original text annexed

FOR MORE INFORMATION

For further information on how to use this toolkit, or for any questions regarding this topic, please contact FIATA.



Template press release

[Insert your association/company] and FIATA call for government support of FMC rule in **[Insert your country]**

[Insert your city], [Insert date] – FIATA International Federation of Freight Forwarders Associations and **[Insert your association/company name]** call for government support of the key considerations laid out by the US Federal Maritime Commission (FMC) in its Final Rule on Demurrage and Detention to assess the reasonableness of these practices.

The FMC's decision came after six years of investigation with all actors in the supply chain, which concluded the likeliness of a long history of unjust and unfair demurrage and detention practices. Whilst there are country and port related variances, the FMC findings apply globally as demurrage and detention is a common and widespread topic of contention. If the FMC has identified demurrage and detention practices that are likely to be considered as unjust for the USA, these practices are also unjust and unreasonable for the rest of the world. Governments must therefore have greater scrutiny over demurrage and detention practices to ensure that they are considerate and reasonable for the good of their own economies.

It is crucial to ensure fluidity and good function of the supply chain, in unprecedented times as illustrated by COVID-19 and beyond. Policymakers are encouraged to consider the FMC's non-exclusive list of factors for consideration when assessing the reasonableness of demurrage and detention. Such guidance will promote fluidity in the US freight delivery system by ensuring that demurrage and detention serve their purpose of incentivizing cargo and equipment velocity; and that the interpretive rule will also mitigate confusion, reduce and streamline disputes, and enhance competition and innovation in business operations and policies.

FIATA and **[Insert your association/company name]** urge decisionmakers to ensure a level playing field for all actors in the supply chain of the reasonableness of demurrage and detention charges. This includes consideration of the extent to which demurrage and detention practices are serving their intended purposes as financial incentives to promote freight fluidity. All international maritime supply chain stakeholders should also benefit from transparent, consistent and reasonable demurrage and detention practices that improve fluidity in global ports and terminals for the benefit of fair, reasonable and ethical interactions between stakeholders in the maritime supply chain.

The FMC rule is therefore intended to stop unreasonable and unjust practices that shippers and freight forwarders alike have for years been exposed to. More information on the FMC rule can be found on the detailed analysis document produced by FIATA for its members.

ABOUT FIATA

FIATA International Federation of Freight Forwarders Associations is a nongovernmental, membership-based organization representing some 6,000 freight forwarding associations and logistics firms in about 150 countries. Based in Geneva, FIATA is 'the global voice of freight logistics' www.fiata.com.

ABOUT [INSERT YOUR ASSOCIATION/COMPANY NAME]

[Insert your association/company's boilerplate]

The global voice of freight logistics

Presentation slides

The toolkit's presentation slides introduce the FMC Final Rule on Demurrage and Detention, highlight the most significant findings, identify global relevance, and propose stakeholders to take action. They can be presented to national members, regulators, and industry leaders to stop unjust and unreasonable demurrage and detention practices.

Download the FMC toolkit presentation slides.

FMC Final Rule on Demurrage and Detention

Global impact and key actions for FIATA members

Presentation developed by the Working Group Sea Transport as part of the FIATA FMC toolkit

The FMC Final Rule on Demurrage and Detention

Analysis on the FMC's Final Rule on Demurrage and Detention and its global impact

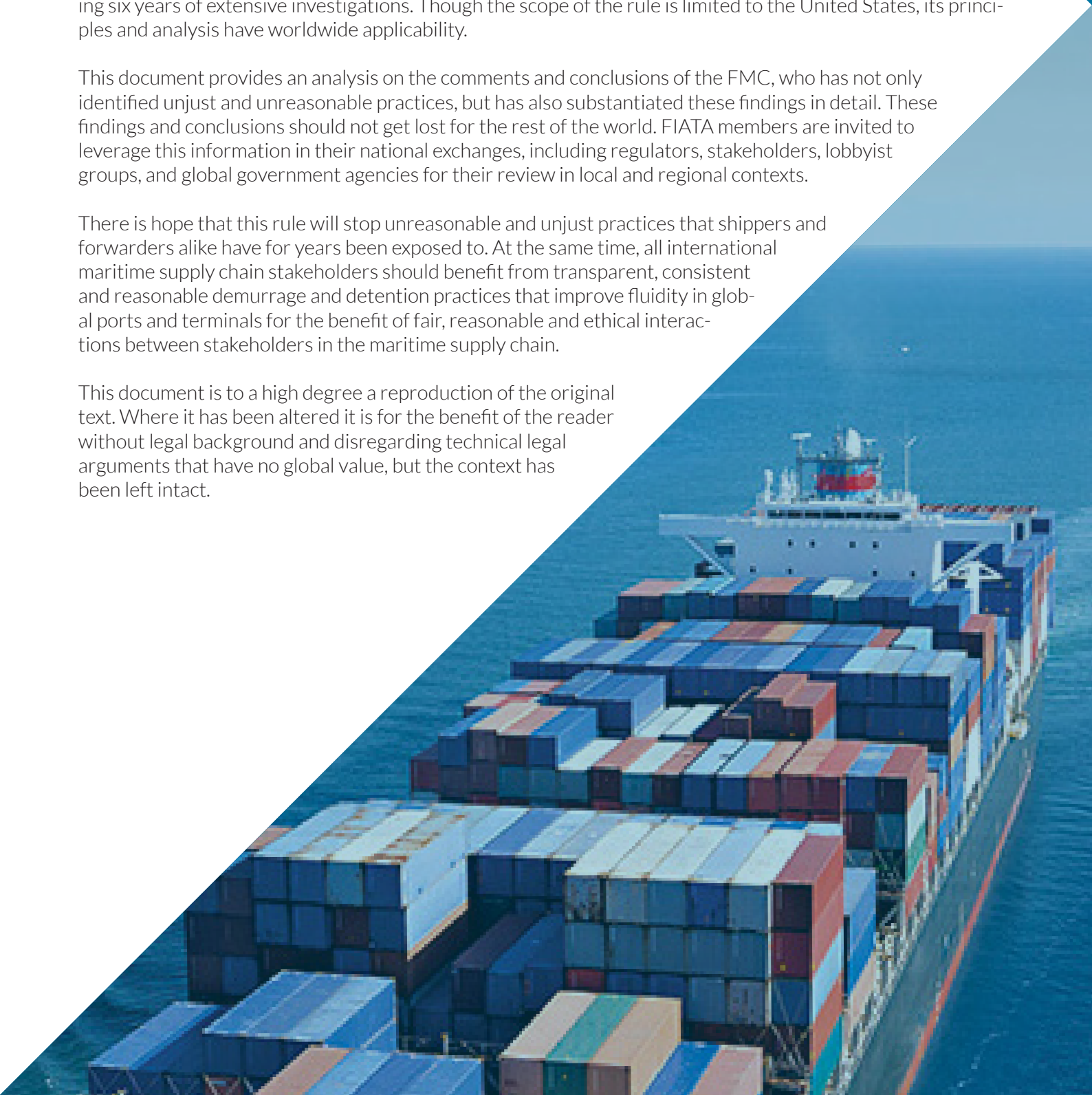
How to use this document

The US Federal Maritime Commission (FMC) Final Rule on Demurrage and Detention under the Shipping Act is a landmark decision on the assessment of the reasonableness of demurrage and detention charges, following six years of extensive investigations. Though the scope of the rule is limited to the United States, its principles and analysis have worldwide applicability.

This document provides an analysis on the comments and conclusions of the FMC, who has not only identified unjust and unreasonable practices, but has also substantiated these findings in detail. These findings and conclusions should not get lost for the rest of the world. FIATA members are invited to leverage this information in their national exchanges, including regulators, stakeholders, lobbyist groups, and global government agencies for their review in local and regional contexts.

There is hope that this rule will stop unreasonable and unjust practices that shippers and forwarders alike have for years been exposed to. At the same time, all international maritime supply chain stakeholders should benefit from transparent, consistent and reasonable demurrage and detention practices that improve fluidity in global ports and terminals for the benefit of fair, reasonable and ethical interactions between stakeholders in the maritime supply chain.

This document is to a high degree a reproduction of the original text. Where it has been altered it is for the benefit of the reader without legal background and disregarding technical legal arguments that have no global value, but the context has been left intact.



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Part I: Background to the rule

Executive summary

Based on its fact-finding investigation (FF28), the FMC clearly identified unjust and unreasonable practices in demurrage and detention. It therefore decided to 'develop guidance' and sought comment in a Notice of Proposed Rulemaking (NPRM). The FMC makes it clear that these are general terms and that each individual case may have its own merit, to ensure "*that the proposed interpretive rule was flexible enough to account for the variety of marine terminal operations nationwide and to allow for innovative commercial solutions to commercial problems*."

Consequently, instead of prescribing practices that stakeholders must adopt or avoid, the FMC's proposed rule is a non-exclusive list of factors that the FMC 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 FMC from considering, factors beyond those listed in the rule.

The FMC must be praised for having listened to various stakeholders over a multi-stage process spanning many years, with the objective to analyze and understand the complex practices related to the charging of demurrage and detention. The FMC left no doubt that it has fully understood the situation, rebuking, on various occasions, comments filed by shipping lines and terminal operators which purported to demonstrate that the transportation system was working well, and that FMC action was unnecessary. Nevertheless, the FMC clearly noticed that the opposite is true, and that demurrage and detention practices have for years likely been unjust and unreasonable.

Among others, the FMC commented that there are a number of reasons why a particular shipper, trucker, or intermediary might not file a formal complaint with the FMC, including relatively low amounts in dispute as compared to litigation costs, fear of retaliation from ocean carriers, or the absence of FMC guidance on § 41102(c) (just and reasonable practices). If the issuance of guidance results in more disputes because shippers are better able to challenge unreasonable practices, that is a feature, not a bug, of the rule. An increase in valid claims is not a negative result, and guidance is just as likely to reduce disputes because it allows parties to better assess the merits of a dispute before resorting to litigation. At present, there is little to no guidance on demurrage and detention and § 41102(c) in containerization context.

The FMC also concluded that 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) i.e. being just and reasonable. 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. 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 FMC believes that such guidance will promote fluidity in the US freight delivery system by ensuring that demurrage and detention serve their purpose of incentivizing cargo and equipment velocity, and that the interpretive rule will also mitigate confusion, reduce and streamline disputes, and enhance competition and innovation in business operations and policies. Whilst there are country andport related variances, the main principle of demurrage and detention practices are globally the same and this should lead to the conclusion that findings of the FMC are not only valid for the US but are equally valid for the world in general. In other words, if the FMC has identified demurrage and detention practices that are likely to be considered as unjust and unreasonable for the US, these practices are also unjust and unreasonable for the rest of the world.

This document starts with a timeline of the developments that led to the Notice of Proposed Rulemaking, followed by commentary on key paragraphs of the Final Rule.

Developments that led to the Notice of Proposed Rulemaking

Focus of the FMC

The FMC investigated demurrage and detention practices with a focus on:

- Whether those practices are tailored to meet their intended purpose. In the case of demurrage and detention, this means considering the extent to which demurrage and detention serve their purposes as financial incentives to promote freight fluidity.

- 46 U.S. Code § 41102 c. General prohibitions
  This paragraph refers to 'practices in handling property and notes':
  "A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property."

The official summary of the rule reads as follows:
"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."

Although the rule is derived from the "FMC's Fact-Finding Investigation No. 28", this was just the FMC'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 FMC action was unnecessary.

Timeline of investigations

2014 Regional port forums

The focus of the FMC on demurrage and detention began as early as 2014 when the FMC hosted four regional port forums related to the severe port congestions in that year, mainly due to heavy winter conditions and expiration of labour agreements covering most west coast port workers. During these forums, the discontent of various stakeholders with free time, demurrage and detention practices became obvious.

2015 FMC Demurrage Report

As a result of the regional port forums, the FMC issued a report published in 2015.

Among other things, the report noted that:

1. it appeared that ocean carriers, rather than marine terminal operators, generally control demurrage and detention practices; and
2. there was little uniformity in demurrage and detention terminology or the circumstances under which ocean carriers would waive, refund, or otherwise mitigate demurrage and detention, making comparisons across the industry difficult.

The report also noted "shippers' perceptions that demurrage charges are not serving to speed the movement of cargo, the purpose for which those charges had originally been intended."

2016 Coalition for Fair Port Practices petition for rulemaking

In 2016, aggrieved shippers, intermediaries, and truckers took action by petitioning the FMC to adopt a rule specifying certain circumstances under which it would be reasonable for ocean carriers or marine terminal operators to collect demurrage or detention.

The petitioners were chiefly concerned that although demurrage and detention are intended to incentivize efficient cargo retrieval and container return, "these charges did not abate consistently even though shippers, consignees, and drayage providers had no control over the events that caused the ports to be inaccessible and prevented them from retrieving their cargo or returning equipment."

Petitioners argued that not only were current ocean carrier and marine terminal demurrage and detention practices unjust and unreasonable, but permitting ocean carriers and marine terminal operators to levy these charges even when cargo and equipment could not be retrieved or returned weakened any incentive for them to address port congestion and their own operational inefficiencies.

The FMC received numerous comments on the petition and held two days of public hearings.

2018 Fact-Finding Investigation 28 (FF28)

In light of the petition, comments, and testimony, on 5 March 2018, the FMC launched a non-adjudicatory fact-finding investigation into "current conditions and practices of vessel operating common carriers and marine terminal operators, and US demurrage, detention, and per diem charges."

In so doing, the FMC acknowledged the petitioners' concerns, highlighted the nationwide scope of the FMC's jurisdiction and the variety of demurrage and detention practices across the country, and recognized that the international ocean liner trade has changed dramatically over the last 50 years, driven in large part by the advent of containerization."

Appointment of the Fact-Finding Officer

The FMC named Commissioner Rebecca F. Dye the Fact-Finding Officer and charged her with developing a record on five subjects related to demurrage and detention:

(a) comparative commercial conditions and practices in the United States vis-à-vis other maritime nations;
(b) tender of cargo;
(c) billing practices;
(d) practices regarding delays caused by intervening events; and
(e) dispute resolution practices.

The FMC stated it would use the resulting record and Fact-Finding Officer's recommendation to determine its policies with respect to demurrage and detention. The Fact-Finding Investigation lasted 17 months and involved written discovery, field interviews, and group discussions with industry leaders.

Findings

The investigation revealed a situation marked by:

(1) increasing demurrage and detention charges even after controlling for weather and labour events;
(2) complexity; and
(3) a lack of clarity and consistency regarding demurrage and detention practices, policies, and terminology.

On 3 December 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 US ports, allow for more efficient use of business assets, and result in administrative savings; and
- Focusing port and marine terminal operations on notice of actual cargo availability would achieve the goals of demurrage and detention practices and improve the performance of the international commercial supply chain.

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

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

The Fact-Finding Officer ultimately recommended that the FMC:

(a) implement the guidance from the investigation's Final Report in an interpretive rule;
(b) establish a Shipper Advisory Board; and
(c) continue to support the Fact-Finding Officers work with stakeholders in Memphis.

As to the first recommendation, the Fact-Finding Officer emphasized the "longstanding principle that practices imposed by tariffs, which are implied contracts by law, must be tailored to meet their intended purpose."

Accordingly, the Fact-Finding Officer explained, "when incentives such as demurrage and detention no longer function because shippers are prevented from picking up cargo or returning containers within time allotted," absent extenuating circumstances, also recommended that "charges should be suspended."

The Fact-Finding Officer also recommended that the FMC 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."

2019 **Issuance of a Notice of Proposed Rule Making[1]**

The FMC adopted the Fact-Finding Officer's recommendation on 6 September 2019, and on 13 September 2019, issued its proposed guidance in an NPRM. The proposed rule took the form of a non-exclusive list of factors that the FMC may consider when assessing the reasonableness of demurrage and detention regulations and practices under 46 U.S.C. 41102(c).

[1]The NOPR is an important tool of the US administrative law, i.e. the "Administrative Procedure Act (APA)". The APA governs the way in which federal administrative agencies of the United States may develop, propose and establish regulations and allows U.S. federal courts transparency over agency actions. It is an important piece of United States law, and serves as a sort of «constitution» for U.S. administrative law.

The APA includes requirements for NOPR which is focused on the possibility for the public to be involved and to comment on. The objective of the NOPR is to force federal agencies (such as the FMC) to listen to comments and concerns of people and parties who will be affected by the regulation. A NOPR is published in the Federal Register and typically allows the public 60 days for comments, with all comments being published to allow for full transparency. Rules are finalized when a report and order (R&O) is issued.

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

In the case of demurrage and detention, the rule stated, this means considering the extent to which demurrage and detention serve their purposes as financial incentives to promote freight fluidity.

The rule also set forth illustrations of how the FMC might apply this principle, and additional considerations the FMC might weigh, in various contexts e.g. empty container return. The FMC 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 100 comments. Most commenters supported the proposed guidance. This support came primarily from importers, exporters, transportation intermediaries, and truckers, large and small, and their trade associations, from across the US. To the extent their comments departed from the rule, it was to ask the FMC to do more.

In contrast, ocean carriers, marine terminal operators, chassis lessors, and cooperative working agreements of ocean carriers and marine terminal operators opposed the rule. Also opposing the rule were trade associations such as the World Shipping Council (WSC), a trade group representing the interest of approximately 90% of the global liner capacity. They argued that the FMC lacks the authority to issue the rule, and that the rule is unnecessary, costly, burdensome, and unfair to ocean carriers and marine terminal operators.

Part II: Step-by-step commentary on the rule

Purpose of the rule

§ 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 FMC will interpret 46 U.S.C. 41102(c) and § 545.4(d) in the context of demurrage and detention.

No further comments.

Applicability and scope

(b) Applicability and Scope.
This rule applies to practices and regulations relating 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.

The rule applies to practices and regulations relating to demurrage and detention for containerized cargo, as defined in the above paragraph. In the NPRM, the Commission explained that the reference to containerized cargo included cargo in refrigerated (reefer) containers.

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

Another scope-related comment involved the application of the rule outside of marine terminals. There was a request that the rule account for the inland components of ocean-borne shipping transactions and apply to point-to-point service contracts. The FMC concluded that 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 FMC oversight, regardless of whether the practices relate to conduct at ports or inland, with some caveats.

The rule specifically limits these definitions to "shipping containers" to exclude charges related to other equipment, such as chassis, because depending on the context, "per diem" can refer to containers, chassis, or both.

Incentive principle

(c) Incentive Principle.
(1) General.
In assessing the reasonableness of demurrage and detention practices and regulations, the FMC will consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity.

The main thrust of the rule is that although demurrage and detention are valid charges when they work, when they do not, there is cause to question their reasonableness. This derives from the well-established principle that to pass muster under § 41102(c), a regulation or practice must be tailored to meet its intended purpose, that is "fit and appropriate for the end in view."

The FMC 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.

The FMC 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. Similarly, the FMC stated, "absent extenuating circumstances, demurrage and detention practices and regulations that do not provide for a suspension of charges when circumstances are such that demurrage and detention are not serving their purpose would likely be found unreasonable."

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

For further clarification, the FMC has commented in detail on all the above-mentioned concerns below.

FMC arguments against objections presented

Objection 1: Demurrage and detention serve purposes other than acting as financial incentives for cargo movement

The FMC 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 FMC.

Many commenters agreed that the "incentive principle" is "supported by law and Shipping Act policies" and assert that charges should be mitigated when efficiency incentives cannot be achieved. Commenters also recognized that "the primary purpose of detention and demurrage is to provide an incentive for cargo interests to remove their cargo from the terminal promptly or to return equipment in a timely manner."

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

Historically, the FMC 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." It is important to specify, however, what this compensatory aspect of demurrage traditionally meant. To the extent demurrage had a compensatory aspect, it was to reimburse ocean carriers for costs incurred after free time expired – "costs" in this context meant additional costs associated with cargo remaining on a pier after free time. In other words, demurrage and detention are not the mechanism by which ocean carriers recover all costs related to their equipment, and the FMC cannot assume that these charges are the primary method by which ocean carriers recover their capital investment and container costs, as some commenters suggest.

However, the FMC makes it clear that 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.

In this context the FMC made the following provisions in the rule:

- the word "primary" was added to the "Incentive Principle" paragraph of the rule, recognizing that demurrage and detention might have other purposes
- adding a "Non-Preclusion" paragraph of the rule, which confirms that the FMC 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.

Objection 2: Disincentivising cargo movement and equipment return

Ocean carrier and marine terminal operators objected to the 'incentive principle' on the grounds that it would effectively disincentivize cargo movement and equipment return. It was argued that: "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." 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.

As to the former concern, the FMC 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 one could "contractual delivery deadlines and perishable condition time limits." Additionally, on the flipside, the ability of ocean carriers and marine terminal operators to collect demurrage even if it is impossible for a shipper to retrieve cargo or a truck to return equipment might disincentivize ocean carriers and marine terminal operators from acting efficiently.

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. 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 FMC "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." The FMC 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.

Objection 3: Once-in-demurrage, always-in-demurrage

The FMC has commented in some detail on the "once in demurrage – always in demurrage" principle. These conclusions are very important also with regard to the incentive principle and compensation of charges. It is worthwhile to quote the comments in some detail.

Ocean carriers and marine terminal operators urged the FMC to reaffirm that notwithstanding the rule, the principle of "once-in-demurrage, always-in-demurrage" still governs. According to these commenters, under this principle shippers bear the risk of any disability that arises after free time has ended. In other words, once free time ends, it would not be unreasonable to impose demurrage on a shipper even if the shipper is unable to retrieve the container due to circumstances outside the shipper's, or anyone's, control.

Conversely, other commenters request that the FMC expressly overrule the once-in-demurrage, always-in-demurrage principle. As an initial matter, it is useful to describe the legal context before and after the expiration of free time.

Prior to the expiration of free time, there are two relevant legal principles in play relevant to demurrage:

1. As part of its transportation obligation, an ocean carrier must allow a shipper a "reasonable opportunity to retrieve its cargo," i.e. free time. Free time is "free" because during this time period, an ocean carrier cannot assess any demurrage. Nor can marine terminal costs be shifted to a shipper during free time, even in the event of a strike.
2. 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. At that point, ocean carriers can, and should, charge demurrage. As the FMC recognized in the NPRM, demurrage is a valuable charge when it incentivizes prompt cargo movement.

Ocean carriers remain subject, however, to § 41102(c) and its requirement that demurrage practices be tailored to meet their purposes - acting as financial incentives for cargo and equipment fluidity. If demurrage cannot act as an incentive for cargo and equipment fluidity because, for instance, a marine terminal is closed for several days due to a storm, charging demurrage in such a situation, even if a container is already in demurrage, raises questions as to whether such demurrage practices are tailored to their intended purpose in accordance with § 41102(c).

The ocean carrier and marine terminal operator commenters have two answers: precedent and incentives. 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."

Commenters rely on a single quotation: "Thus, in our view, it is only just and reasonable that the consignee, who has failed to avail himself of the opportunity to pick up his cargo during free time, should bear the risk of any additional charges resulting from a strike occurring after free time has expired." But this quotation must be read in context. The question in Boston Shipping Association was who should be responsible, the ocean carrier or the consignee, for paying the terminals' cost: "Thus, where the terminal is the intermediate link between the carrier and the shipper or consignee, one of these two persons must pay the terminal's cost of providing the services rendered.

The FMC 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.

The FMC in its argumentation is making reference to previous rules during pre-containerization times
This interpretation of Boston Shipping Association is consistent with the New York cases. In Free Time and Demurrage Charges at New York, the FMC 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.

The FMC further held, however, that in such circumstances, the ocean carrier is entitled to fair compensation for sheltering and protecting the cargo. The FMC reached a similar conclusion almost 20 years later in "Free Time and Demurrage Practices on Inbound Cargo at New York Harbor, explaining that "during 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."

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 FMC from considering whether demurrage and detention have some compensatory aspect when determining the reasonableness of specific practices in individual cases.

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

The FMC 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 FMC 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.

Objection 4: Risk allocation – unfair and one-sided allocation of risks?

Finally, ocean carriers and marine terminal operators argue that the rule unfairly allocates all risks in force majeure situations to ocean carriers and marine terminal operators and prevents allocation of those risks by contract. Commenters refer to "risk related to fluctuations in terminal fluidity," "risk and all of the attendant costs related to events beyond their control," and "the entire financial responsibility for no-fault situations." Similarly, NAWE'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."

The FMC 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 FMC would be incapable of exercising common sense when applying the factors. As explained above, nothing precludes the FMC from considering whether demurrage and detention have some compensatory aspect when determining the reasonableness of specific practices in individual cases.

Particular applications of the incentive principle

Cargo availability

> **(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.

In addition to describing how the incentive principle may apply, the FMC in the NPRM also sought to explain how that principle might work in particular contexts.

The FMC clarified that it may consider in the reasonableness analysis the extent to which demurrage practices and regulations relate demurrage or free time to cargo availability for retrieval. If, the FMC stated, shippers or truckers cannot pick up cargo within free time, then demurrage cannot serve its incentive purpose. Put slightly differently, if a free time practice is not tailored so as to provide a shipper a reasonable opportunity to retrieve its cargo, it is not likely to be reasonable.

The FMC emphasized that concepts such as cargo availability or accessibility refer to the actual availability of cargo for retrieval by a shipper or trucker. The FMC did not go so far as to define what availability means, but it said that certain practices would weigh favourably 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 FMC's guidance from shippers, truckers, and intermediaries, and the FMC will include the language on container availability from the proposed rule in the final rule. A number of commenters request bright line rules. For instance, several commenters argue that free time should not start until a container is available, and that starting free time before availability should be deemed an unreasonable practice. Others assert that free time and demurrage and detention clocks should stop when containers become non-accessible due to situations beyond the control of shipper or trucker.

Still others the FMC expressly request that the FMC define "container availability," that address things like terminal hours of operation vis-à-vis free time, appointment systems and that the concept of availability should include chassis availability. 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 FMC recognizes the merits of that approach.

But the FMC 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.

For similar reasons, while the FMC 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. The FMC is sympathetic to shipper, intermediary, and trucker arguments that bright line rules will be more beneficial to them and would be clearer than the FMC's factor-based approach. But imposing bright line rules could inhibit the development of better solutions.

As for defining "container availability," the FMC 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).

Depending on the facts of the case, the FMC may consider things such as appointment systems and appointment availability and trucker access to the terminal, i.e. congestion.

The FMC also commented on container chassis availability, however, this is not further discussed in this document as it has a very specific focus on US related practices and has no global relevance.

Empty container return

> **(2) Particular Applications of Incentive Principle.**
> (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.

The second application of the incentive principle discussed in the rule is empty container return. 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.

The FMC explained that such practices, absent extenuating circumstances, weigh heavily in favour 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 detention can incentivize its return. In addition to refusal to accept empty containers, the FMC 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.

Most of the comments about this aspect of the rule were supportive. 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.

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

> "When winding down peak season, there are typically more empty containers being returned than full containers available to pick up, so single empty returns are more commonly needed, and without inbound loads, dual moves are hard to effect. When terminals go for days without accepting single moves, the trucker is stuck holding the container, usually on a chassis that is being charged for daily, and in a storage yard that is also charging daily.
>
> When a few single slots open up, everyone scrambles to get there with empties, quickly closing the yard down again. Changes in return location, and requiring dual moves, are certainly practices that the FMC could review under § 41102(c) in light of the guidance in rule."

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. The FMC 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. Although the FMC 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 FMC would carefully scrutinize such practices.

The National Customs Brokers and Forwarders Association of America (NCBFAA) also advocates that the FMC "expand" the rule to reflect the railroad concept of constructive delivery of empty containers. Under this approach, the detention clock should stop once a container "has been or could be delivered back to the port, VOCC or CY [container yard], but for the recipient's inability or unwillingness to receive the asset."

The FMC 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 FMC should adopt the constructive delivery principle, the FMC 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.

Notice of cargo availability

> **(2) Particular Applications of Incentive Principle.**
> (iii) Notice of Cargo Availability.
> In assessing the reasonableness of demurrage practices and regulations, the FMC may consider whether and how regulated entities provide notice to cargo interests that cargo is available for retrieval. The FMC 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.

The rule also states that in assessing the reasonableness of demurrage practices and regulations, the FMC may consider whether and how regulated entities provide notice to cargo interests that cargo is available for retrieval. The rule further states that the FMC 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.

In applying this factor, the most important consideration is the extent to which any notice is calculated to apprise shippers and their agents that a container is available for retrieval.

The FMC explained that the type of notice is important – types of notice that are expressly linked to cargo availability weigh favourably in the analysis – and listed examples. The FMC also noted the merits of "push notifications" of cargo availability, notifying users of changes in container availability, linking free time to notice of availability, and appointment guarantees. The FMC 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 FMC require such notice and specify what information a notice must contain. Marine terminal operators opposed the FMC requiring any particular type of notice. The substantial supportive comments bolster the FMC's belief that consistent notice that cargo is actually available for retrieval would provide significant benefits to ocean freight delivery system, especially if that notice is tied to free time. As pointed out by a commenter, notice of availability "would serve the important function of clearly identifying when the cargo is truly available for pick up and thus when the free time clock should start and end."

The FMC remains concerned that legacy forms of notice might not be providing shippers with a reasonable opportunity to retrieve cargo. Those concerns militate in favour of the FMC keeping "notice" as a factor in its guidance. That said, the FMC is not requiring specific types of notice. The FMC'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 FMC is wary of asking regulated entities to develop tools that their customers are unwilling to use. Consequently, while the FMC 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 FMC is "requiring" marine terminal operators to do these things. This is based on a misreading of the NPRM. The marine terminal operators also make a number of claims about the costliness and technical feasibility and necessity of some of the suggestions. These are arguments that the commenters would be free to make if relevant in a particular case. Further, in describing things likely to be found reasonable, the FMC was reacting to what it heard from shippers, intermediaries, and truckers during the Fact-Finding Investigation, and pointing out their potential advantages.

The FMC mentioned the "type" of notice because notice related to cargo availability was, in some circumstances, more aligned with the ability to retrieve the cargo than notice of vessel arrival. But that is not necessarily the case at all ports or at all terminals or for all shippers.

The FMC referred "to whom" notice would be provided as a consideration because truckers and others said that efficient retrieval of cargo could be enhanced if they were directly notified.

As for the notice format and distribution method, the FMC commented on push notifications because truckers explained that even when marine terminal operators provide container status information on websites, truckers would have to continuously monitor or "scrape" the websites to know when a container would be ready.

And as for appointment availability and notice, the FMC was noting the potential advantages of an idea proposed during the Fact-Finding Investigation wherein once an appointment is made, a marine terminal operator would guarantee that the container would be available at the appointed time. If for some reason the marine terminal could not honour 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 FMC, 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. WCMTOA claims that the FMC "would seem to impose a requirement for a terminal operator to update cargo interests on a minute-by-minute basis as to the availability status of individual containers."

But nothing in the rule requires "minute-by-minute updates" of changes in container status. Rather, the FMC 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.

Government inspections

> **(2) Particular Applications of Incentive Principle.**
> (iv) Government Inspections.
> In assessing the reasonableness of demurrage and detention practices in the context of government inspections, the FMC may consider the extent to which demurrage and detention are serving their intended purposes and may also consider any extenuating circumstances.

The FMC acknowledged in the NPRM that significant demurrage and detention issues involve government inspections of cargo. Such inspections not only involve shippers, intermediaries, truckers, and marine terminal operators, but also government agencies, third- parties, and off-terminal facilities, such as centralized examination stations. The FMC sought comment on three proposals, and any other suggestions for "handling demurrage and detention in the context of government inspections, consistent with the incentive principle."

The FMC's proposals were:

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

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

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

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

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

A few commenters support Option (c), wherein there would be a cap on the amount of demurrage or detention that could be imposed while cargo is undergoing government inspection. Most of these commenters tie this cap to costs incurred by regulated entities related to the inspections. 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."

Few commenters prefer Option (a). 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." Some commenters also suggest different proposals, including disallowing any demurrage or detention during government inspections, so long as correct customs entries had been made, extending free time for five days, after which demurrage during a hold could accrue, is allowing demurrage and detention during government inspections and restarting free time clock from zero after inspection. 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."

The objective of the latter proposal would be spread the costs of inspections among a "wider constituency" because "governmental inspections and holds are performed for the benefit of the shipping community as a whole and society at large, not just for the individual shipper involved in a particular inspection."

For similar reasons, Mohawk Global Logistics suggests "assigning 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."

The FMC 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 FMC precedent. They also argue that to extend free time during government inspections or to not charge demurrage and detention during them disincentivizes shippers, for instance, to properly submit paperwork.

Finally, they argue that ocean carriers and marine terminal operators incur costs during government inspections, and those costs are most appropriately allocated to shippers because they are the only ones with any control of whether inspections happen and how they proceed. In contrast, they argue, marine terminal operators and ocean carriers have no control over whether containers are inspected or how long inspections last.

Although FMC caselaw supports these commenters' arguments, that caselaw pre- dates, and does not reflect, the FMC's modern interpretation of § 41102(c). In Free Time and Demurrage Charges at New York, the FMC held that ocean carriers are not required to extend free time to account for government inspections of cargo. Delays related to government inspections, the FMC stated, "are not factors that carriers are required to consider in fixing the duration of free time." The FMC 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. The FMC reaffirmed this principle in 1967, finding that "inspection delays are occasioned by factors other than those relating to the obligation of the carrier."

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. 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." The reasoning regarding government inspections in Free Time and Demurrage Charges at New York, which did not consider whether free time and demurrage practices were tailored to meet their intended purposes, is inconsistent with the analytical framework of these more recent cases.

Consequently, FMC precedent does not bar the FMC from applying the incentive principle to government inspections – it supports its application. 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."

This argument is unpersuasive. First, there are numerous incentives other than avoiding demurrage that motivate shippers to avoid or minimize government inspections. Not only are there examination costs, but government inspections delay cargo from reaching its intended destination and may result in cargo damage. Second, under the rule, the FMC may consider the extent to which a shipper complies with its customary responsibilities. These responsibilities include things like submitting complete, accurate, and timely paperwork.

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

In sum, none of these features of government inspections distinguish them from other circumstances that prevent shippers from retrieving cargo. That said, the complexity of government inspections and the variety of types of government inspections militate against adopting a single approach in the FMC's guidance. Consequently, the final rule does not incorporate any of the language options proposed in the NPRM. Instead, the rule makes clear that the FMC 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 FMC 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 FMC may consider the extent to which demurrage and detention are serving their intended purposes and may also consider any extenuating circumstances.

If circumstances demonstrate the need for more specific guidance in this regard, especially as to specific ports or terminals or specific types of inspections, the FMC can refine these principles via adjudication or further rulemaking.

Demurrage and detention policies

(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 FMC may further consider the extent to which they contain information about points of contact, timeframes, and corroboration requirements.

Although the incentive principle and its applications were the focus of the rule, the FMC's guidance also included other factors that the FMC may consider as contributing to the reasonableness inquiry:

- Existence and accessibility of policies
- Dispute Resolution Policies
- Billing
- Guidance on Evidence

Accessibility of demurrage and detention policies

The first "other factor" is the existence and accessibility of policies implementing demurrage and detention practices and regulations. This factor was based on the Fact-Finding Officer's finding that there existed a marked lack of transparency regarding demurrage and detention practices, including dispute resolution processes and billing procedures.

The FMC reasoned in the NPRM that "the opacity of current practices encourages disputes and discourages competition over demurrage and detention charges," and stated that shippers, intermediaries, and agents "should be informed of who is being charged, for what, by whom, and how disputes can be addressed in a timely fashion."

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

The rule also refers to the accessibility of policies. The FMC stated in the NPRM that it would consider in the reasonableness analysis "whether and how those policies are made available to cargo interests and truckers and the public." "The more accessible these policies are" the FMC explained, "the greater this factor weighs against a finding of unreasonableness." The FMC went on to note that "this factor favours 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 disfavoured."

Although commenters agree that demurrage and detention policies should be accessible, ocean carriers and marine terminal operators object to this aspect of the rule on the grounds that it is inconsistent with statutory and regulatory provisions regarding publication of tariffs and marine terminal operator schedules. As these commenters point out, the Shipping Act requires a common carrier to "keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rule, and practices." The act also requires that a tariff be "made available electronically to any person through appropriate access from remote locations. A marine terminal operator may, but is not required to, "make available to the public a schedule of rates, regulations, and practices."

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

"Similarly, a shipper is presumed to have knowledge of tariff rules. The FMC regulations regarding tariffs and marine terminal schedules are found in 46 CFR parts 520 and 525. According to these commenters, the FMC's statement disfavouring demurrage and detention policies buried in scattered sections in tariffs and favouring policies in easily accessible websites is inconsistent with the above Shipping Act and FMC provisions. "To the extent the NPRM purports to add any requirements beyond those set forth in the statute and Part 525 of the regulations," a commenter argues, "such requirements would be unlawful."

The FMC 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 FMC 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 FMC would avoid any interpretation of § 41102(c) that would be inconsistent with other Shipping Act provisions or FMC regulations or that would subject regulated entities to incompatible requirements.

Consequently, to the extent the FMC 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 FMC's regulations would tend toward a finding of unreasonableness.

On the other hand, providing additional accessibility above and beyond the minimum tariff and schedule requirements would weigh in favour of a finding of reasonableness. The FMC 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 FMC 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 FMC could also assess whether a tariff is adequately searchable. Moreover, the FMC 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 FMC is making two minor, non-substantive changes to this paragraph of the rule. The first sentence of the paragraph stated that the FMC may consider the existence and accessibility of demurrage and detention policies.

The final rule makes explicit that the FMC's analysis is not limited to those two factors and that it may also consider the content and clarity of any policies. That the FMC 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 FMC may consider certain aspects about dispute resolution policies, in other words, the content of those policies.

As for clarity, the FMC emphasized in the NPRM the importance of shippers, intermediaries, and truckers knowing what they are being charged for and by whom.

Adding the word "clarity" to the guidance is consistent with that emphasis, and appears unobjectionable.

Dispute resolution policies

The rule indicates that the FMC is particularly interested in demurrage and detention dispute resolution policies, and consequently, the FMC may consider the extent to which they contain information about points of contact, timeframes, and corroboration of its requirements.

The FMC 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."

Based on discussions with stakeholders during all three phases of the Fact-Finding Investigation, the FMC listed examples of attributes of dispute resolution policies that, while not required, would weigh toward reasonableness. The FMC cited a best practices proposal put forward by OCEMA as a useful model for dispute resolution policies.

There was little substantive objection to this part of the rule. WSC protests that the FMC did not acknowledge the fact-specific nature of dispute resolution policies. But the FMC expressly acknowledged in the NPRM that each regulated entity would tailor its dispute resolution policies to fit its own circumstances.

Further, the list of dispute resolution policy characteristics in the NPRM is a common-sense list of ideas raised during the Fact-Finding Investigation. For example, during the third phase of the investigation, shippers, intermediaries, and truckers pointed out that demurrage or detention waivers or free time extensions were often met with a negative response without any 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.

The former suggest that the FMC should set specific timeframes for dispute resolution and billing, processes for internal appeals of disputes within an ocean carrier or marine terminal operator, and points of contact with actual authority to settle disputes. They also argue in favour of ocean carriers and marine terminal operators suspending charges during disputes about those charges, allowing cargo to move freely during disputes, 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.

The FMC recognizes the merits of most 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 favour of reasonableness and against a violation. In fact, application of these proposals could likely reduce the need for formal disputes and thereby enhance operational efficiency.

But for the FMC to require specific dispute resolution policies to include them, or to conclusively state that the absence of them makes a policy unreasonable, is beyond the scope of this rulemaking.

Accordingly, the FMC is retaining the language about dispute resolution policies in the final rule, with, as explained above, the clarification that the FMC may consider the content and clarity of demurrage and detention policies under § 41102(c).

The FMC further notes that the practice of "shutting out" truckers, intermediaries, or consignees from ocean carrier systems or terminals not only appears to impede efficient cargo movement, but raises potentially serious concerns under other sections of the Shipping Act.

Billing

The rule text does not address ocean carrier or marine terminal operator billing or invoicing practices. In the NPRM, however, the FMC noted that the "efficacy (and reasonableness) of dispute resolution policies also depends on demurrage and detention bills having enough information to allow cargo interests to meaningfully contest the charges."

The FMC also pointed out that one idea that could promote transparency and the alignment of stakeholder interests was to tie billing relationships to ownership or control of the assets that are the source of the charges. Additionally, the FMC noted that ocean carriers should bill their customers rather than imposing charges contractually owed by cargo interests on third parties.

The FMC received a number of comments about billing and invoices. There was little dispute that demurrage and detention bills should have enough information for those receiving the bills to assess their accuracy and validity. There was significant comment, however, about the idea that demurrage and detention be billed based on who owns the asset at issue. Under this approach, "ocean carriers would bill cargo interest directly for the use of containers," and "marine terminal operators would bill cargo interest directly for use of terminal land." This idea was mentioned in both Fact-Finding No. 28 reports.

Although this billing model is not included in the rule, and the FMC did not suggest adopting it as part of the reasonableness analysis under § 41102(c), the comments about this model are mostly negative because most commenters preferred billing relationships commenters tied to the entity with whom contractual relationships exist.

Typically, they 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. And few shippers or intermediaries want to receive separate invoices from ocean carriers and marine terminal operators.

Marine terminal operators and ocean carriers also prefer that billing be tied to contractual relationships. In light of these comments, the FMC does not intend to consider the use or non-use of this billing model in determining the reasonableness of demurrage and detention policies.

The FMC'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." 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.

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

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 FMC 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 FMC 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 FMC 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.

- 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; or
  (b) when the charges are disputed.

As to billing and invoice timeframes, the FMC 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 FMC to decide what those timeframes should be.

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 be so simple. As noted above, ocean carriers have liens on cargo that they can lose if they surrender the cargo.

While the FMC 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 FMC 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.

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 "explicit guidance regarding the types of evidence relevant to resolving demurrage and detention disputes."

In the NPRM, the FMC stated that "dispute 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." The FMC then listed examples of ideas proposed by shippers and truckers that could be incorporated into dispute resolution policies. The FMC noted that the OCEMA best practices proposal expressly contemplates that member dispute resolution policies include such guidance.

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 FMC's statements in the NPRM "would require carriers to supply truckers with evidence that truckers possess in several circumstances."

Rather, the FMC stated that "providing 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 favourably in a reasonableness analysis. By listing examples of ideas that would weigh favourably – ideas suggested by shippers and truckers – the FMC 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 "the entity billing the fees should prove they are owed, as it is with any other business on Earth." 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.

When the FMC discussed "corroboration requirements" in demurrage and detention dispute resolution policies, and "guidance about the types of evidence relevant to resolving demurrage and detention disputes," 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. The FMC was not referring to who should bear the burden of producing evidence in a lawsuit in court or a Shipping Act action before the FMC.

The FMC'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 favourably 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 FMC regulation.

Transparent terminology

> **(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.

The FMC 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.

Consequently, as the FMC 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.

The FMC 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 FMC 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.

Shippers, intermediary, and trucker commenters strongly support the rule's emphasis on clear language. Those who otherwise opposed the FMC's rule did not object to the principle that the definitions of terms used in demurrage and detention practices should be clear. To better reflect this emphasis on clarity the FMC is including the term "clarity" in paragraph (e) of the rule.

Moreover, no commenters object to the notion that regulated entities should define material terms like "demurrage" and "detention." 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."

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.

Consequently, to the extent the FMC 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 favourably in any reasonableness analysis.

The most commented upon aspect of the rule regarding terminology was the clause stating that the FMC would consider in the reasonableness analysis the "extent to which the definitions differ from how the terms are used in other contexts," i.e., how the definitions differ from a regulated entity's past use of the terms, how the terms are used elsewhere in the port at issue, and how the terms are used in the U.S. trade.

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

In their comments, shippers, intermediaries, and truckers largely support consistent or standardized demurrage and detention terminology. Ocean carrier and marine terminal operator commenters, however, object to the FMC considering in the reasonableness analysis how terms were used in the past and elsewhere in a port or U.S. trade.

They argue that the FMC 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 FMC 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 favour of some undefined standard."

Despite these criticisms, the FMC is not deleting this portion of the rule. The NPRM merely proposed that one factor that the FMC 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 FMC, 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 FMC would find a § 41102(c) violation simply because an ocean carrier or marine terminal operator changed its terminology. The FMC 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 US 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 FMC 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. The FMC finds unpersuasive the claim that ocean carriers and marine terminal operators compete on the basis of the demurrage and detention terminology they use, and these commenters provide no support for the contention that they are at risk of antitrust prosecution or litigation due to their choice of terminology.

At the end of the day, the FMC'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 FMC may take that into account as part of the reasonableness analysis under § 41102(c). Although the FMC believes that consistent demurrage and detention language would be beneficial, and encourages it, the rule should not be construed to mandate it.

Non-preclusion

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

The FMC made these provisions in the rule to confirm that the FMC 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.

General comment on carriers haulage

Interestingly, the FMC dedicates a separate paragraph on carrier's haulage and merchant haulage. This is a subject that has always been very close to the heart of FIATA, CLECAT and other forwarders associations. In fact, the FMC was motivated to make reference to this subject due to the comment filed by FIATA.

The FMC reports that it is worth highlighting comments about "carrier haulage," because, while not specifically the subject of the FMC'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.

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

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

As one commenter maintained: "Of late carriers have started billing importers for truck capacity issues at gateway ports (on carrier door moves) which, should immediately stop as the carrier is obliged to honour the terms of the 'door bill of lading.'"

By contrast, truckers argue that "ocean carriers on carrier haulage should bill their shippers directly given motor carriers are not party to the [service] contract."

Also of interest is the comment that "during 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." The commenter asserts that when arranging haulage, ocean carriers in carrier haulage are competing with entities such as ocean transportation intermediaries. Because, the commenter asserted, markets are less efficient when entities have the power to levy unreasonable charges on their competitors, the FMC's guidance should make clear that "containers in merchant haulage and carriers haulage be treated alike."

Although the rule does not address these specific situations, the FMC 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.

Conclusion

The FMC has clearly taken its responsibility to investigate demurrage and detention practices in the maritime container supply chain. The FMC's conclusions as documented above are clear and do not leave any doubts. Demurrage and detention practices have likely been unjust and unreasonable with shipping lines taking advantage and considering demurrage and detention charges as additional income.

The rule and comments as documented above will have an impact in the US, putting an end to unjust and unreasonable demurrage and detention practices, and leading to a widely improved fluidity of containers through ports and terminals.

But it should not stop here. The demurrage and detention practices as applied in the US and investigated by the FMC are globally valid. Freight forwarders and shippers associations, other stakeholders as well as government agencies around the world should take the opportunity and use the ground work done by the FMC to ensure that also their ports and terminals improve fluidity and just and reasonable practices prevail.

ANNEX I: Official text of the rule

§ 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 FMC 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 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 FMC 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 FMC may consider whether and how regulated entities provide notice to cargo interests that cargo is available for retrieval. The FMC 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 FMC 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 FMC 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 FMC from considering factors, arguments, and evidence in addition to those specifically listed in this rule.

The global voice of freight logistics

FIATA
International Federation of Freight Forwarders Associations

Rue Kléberg 6
CH-1201 Geneva
Switzerland

+41 22 715 45 10
info@fiata.com
www.fiata.com