

**FEDERAL MARITIME COMMISSION**

**46 CFR Part 545**

**Docket No. 18-06**

**RIN: 3072-AC71**

**Interpretive Rule; Shipping Act of 1984**

**AGENCY:** Federal Maritime Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Maritime Commission (FMC or Commission) is seeking public comment on its interpretation of the scope 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. Specifically, the Commission is clarifying that the proper scope of that prohibition in the Shipping Act of 1984 and the conduct covered by it is guided by the Commission's interpretation and precedent articulated in several earlier Commission cases, which require that a regulated entity engage in a practice or regulation on a *normal*, *customary*, and *continuous* basis and that such practice or regulation is unjust or unreasonable in order to violate that section of the Shipping Act.

**DATES:** Submit comments on or before: October 10, 2018.

**ADDRESSES:** You may submit comments, identified by the Docket No. 18-06 by the following methods:

- *Email: secretary@fmc.gov.* Include in the subject line: "Docket 18-06, Interpretive Rule Comments." Comments should be attached to the email as a Microsoft Word or text-

searchable PDF document. Only non-confidential and public versions of confidential comments should be submitted by email.

- *Mail:* Rachel E. Dickon, Secretary, Federal Maritime Commission, 800 North Capitol Street NW, Washington, DC 20573–0001.
- *Instructions:* For detailed instructions on submitting comments, including requesting confidential treatment of comments, and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document. Note that all comments received will be posted without change to the Commission’s website, unless the commenter has requested confidential treatment.
- *Docket:* For access to the docket to read background documents or comments received, go to the Commission’s Electronic Reading Room at: <http://www.fmc.gov/18-06>, or to the Docket Activity Library at 800 North Capitol Street NW, Washington, DC 20573, 9:00 a.m. to 5:00 p.m., Monday through Friday, except Federal holidays. Telephone: (202) 523-5725.

**FOR FURTHER INFORMATION CONTACT:** Rachel E. Dickon, Secretary; Phone: (202) 523-5725; Email: [secretary@fmc.gov](mailto:secretary@fmc.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. EXECUTIVE SUMMARY**

The Federal Maritime Commission is issuing this notice to obtain public comments on clarification and guidance regarding the Commission’s interpretation of the scope of 46 U.S.C. 41102(c) (section 10(d)(1) of the Shipping Act of 1984).<sup>1</sup> Section 41102(c) provides that

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<sup>1</sup> Some authorities cited herein refer to § 41102(c) while others refer to section 10(d)(1). For ease of reading, we will generally refer to § 41102(c) in analyzing these authorities.

regulated entities “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.”<sup>2</sup>

Beginning with the *Houben*<sup>3</sup> decision in 2010 and presented in full in the Commission’s 2013 decision in *Kobel v. Hapag-Lloyd*, the Commission has held in a line of recent cases that discrete conduct with respect to a particular shipment, if determined to be unjust or unreasonable, represents a violation of § 41102(c), regardless of whether that conduct represents a respondent’s *practice or regulation*.<sup>4</sup> These decisions diverge from consistent Commission precedent dating back to 1935 and reaffirmed as recently as 2001 which required that a regulated entity must engage in a practice or regulation on a *normal, customary, and continuous* basis in order to be found to have violated § 41102(c) of the Shipping Act. In simple summary, discrete or occasional actions by regulated entities not reflecting a *practice or regulation* would not constitute a violation of § 41102(c).

Specifically, the Commission is considering an interpretive rule consistent with Commission precedent articulated in cases including *Intercoastal Investigation*,<sup>5</sup> *Altieri*,<sup>6</sup> *Stockton Elevators*,<sup>7</sup> *European Trade*,<sup>8</sup> *A.N. Deringer*,<sup>9</sup> and *Kamara*<sup>10</sup> that would restore the scope of § 41102(c) to prohibiting unjust and unreasonable *practices and regulations*. These decisions require that a regulated entity engage in a practice or regulation on a *normal*,

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<sup>2</sup> 46 U.S.C. 41102(c).

<sup>3</sup> *Houben v. World Moving Services, Inc.*, 31 S.R.R. 1400 (FMC 2010).

<sup>4</sup> *Kobel v. Hapag-Lloyd A.G.*, 32 S.R.R. 1720, 1731 (2013) (“The allegation that a single failure to “observe or enforce” just and reasonable regulations or practices is not a failure does not comport with the language of section 10(d)(1), which mandates regulated entities not to ‘fail to . . . observe and enforce’ just and reasonable regulations and practices.”).

<sup>5</sup> *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400 (1935).

<sup>6</sup> *J.M. Altieri v. Puerto Rico Ports Authority*, 7 F.M.C. 416 (ALJ 1962).

<sup>7</sup> *Investigation of Certain Practices of Stockton Elevators*, 3 S.R.R.605 (FMC 1964).

<sup>8</sup> *European Trade Specialists v. Prudential-Grace Lines*, 19 S.R.R. 59, 63 (FMC 1979).

<sup>9</sup> *A.N. Deringer, Inc. v. Marlin Marine Services, Inc.*, 25 S.R.R. 1273 (SO 1990).

<sup>10</sup> *Kamara v. Honesty Shipping Service*, 29 S.R.R. 321(ALJ 2001).

*customary*, and *continuous* basis and a finding that such practice or regulation is unjust or unreasonable to violate that section of the Shipping Act. The Commission believes that this represents the proper interpretation of the statutory language of the provision that, within the full context of the 1916 Act and the 1984 Act, is consistent with statutory and legislative history, judicial precedent and Commission case law embodied in cases such as *Stockton Elevators*, and comports with accepted rules of statutory construction.

This interpretation restores § 41102(c) to its proper function and purpose under the Shipping Act of 1984 and will return the Commission's focus and priorities to the activities of maritime regulated entities that negatively affect the broader shipping public – all as intended by Congress in its enactment of the 1916 Act and the 1984 Act. Recognizing that this interpretation would prune and pare back the types of recent claims that have been be filed with the Commission to those related to the purposes of the Shipping Act's § 41102(c), traditional legal venues will continue to be available to parties injured by discrete instances of unreasonable or unjust conduct consistent with long established maritime actions and other statutes specifically enacted by Congress, and long recognized common law remedies, all designed to address such circumstances.

We are seeking comment on this refocus of § 41102(c), how such an interpretation would affect regulated entities including ocean carriers, marine terminal operators (MTOs), and ocean transportation intermediaries (OTIs), as well as members of the shipping public, including cargo shippers and drayage truckers, and whether claims that would no longer fall under § 41102(c) under the contemplated interpretation would be adequately resolved before the Commission under other sections of the Act or in other legal dispute venues. The interpretation would take the

form of an interpretive rule codified in 46 CFR part 545. The language of the proposed rule is set forth below.

## **II. BACKGROUND**

### **A. Statutory Language and Legislative History**

Congress first used the statutory language addressing the legal duty of transportation common carriers to “establish, observe, and enforce just and reasonable . . . regulations and practices . . . affecting [cargo] classification, rates, or tariffs . . . [and] the manner and method of presenting, marking, packing, and delivering property for transportation . . .” in the 1910 Mann-Elkins Act amendment (Mann-Elkins)<sup>11</sup> to the Interstate Commerce Act (ICA).<sup>12</sup> The Mann-Elkins language clearly focused on the *operating and business practices* of railroads as commonly used and imposed upon passengers and cargo shippers. This fundamental *common carrier duty* is the foundational cornerstone of the ICA legislation, its statutory purpose, and its proper interpretation.

The provenance of the statutory language and its inclusion six years later in the Shipping Act of 1916 (1916 Act)<sup>13</sup> has been recognized by the courts. In *United States Navigation Co. v. Cunard S.S. Co. Ltd.* 284 U.S. 474 (1932), the U.S. Supreme Court tied a firm knot binding the ICA and the 1916 Act where the court gave a general review of various sections of the 1916 Act, including section 17<sup>14</sup> and held that, “[t]hese and other provisions of the Shipping Act clearly exhibit the close parallelism between the act and its prototype, the ICA, and the applicability both of the principals of construction and administration.”<sup>15</sup>

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<sup>11</sup> Mann-Elkins Act, 61st Congress, 2nd session, Ch. 309, 36 Stat. 539, enacted June 18, 1910.

<sup>12</sup> The Interstate Commerce Act of 1887, Ch. 104, 24 Stat 379 (1887).

<sup>13</sup> The Shipping Act of 1916, Sept. 7, 1916, Ch. 451, 39 Stat. 728.

<sup>14</sup> Section 17 is the origin of section 10(d)(1), as discussed *infra*.

<sup>15</sup> *Id.* at 484.

As the enactment of the 1916 Act demonstrates, together with the use of identical language in other federal statutes,<sup>16</sup> Congress fully understood what it was doing in using the phrase “establish, observe, and enforce just and reasonable regulations and practices” - and what those words meant.<sup>17</sup>

Section 41102(c) of the 1984 Act originates from section 17 of the 1916 Act. Section 17 was commonly divided into two parts and referred to as “section 17, first paragraph” and “section 17, second paragraph.” The first paragraph addressed unjustly discriminatory rates charged to shippers while the second paragraph addressed just and reasonable practices by carriers and other persons subject to the Act. The second paragraph of section 17 reads as follows:

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

Pub. L. 64-260 § 17 (1916) (emphasis added).<sup>18</sup>

As a part of the general transportation deregulatory reform trends in the 1970’s through 1990’s,<sup>19</sup> Congress eliminated the sentence regarding the Commission’s authority to prescribe or order regulations or practices in the 1984 Act. Congress, however, reenacted the first sentence of

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<sup>16</sup> For example, the Packers and Stockyards Act of 1921, which was enacted to maintain competition in the livestock industry. The Act bans discrimination, manipulation of price, weight, livestock or carcasses; commercial bribery; misrepresentation of source, condition, or quality of livestock; and other unfair or manipulative practices. Section 208 of the Packers and Stockyards Act of 1921 provides that, “[i]t shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services.” 7 U.S.C. § 208.

<sup>17</sup> For a more detailed discussion of the legislative history of this statutory language, see *Gruenberg-Reisner v. Respondent Overseas Moving Specialist*, 34 S.R.R. 613, 638-644 (FMC 2016).

<sup>18</sup> The two separate provisions of section 17 of the Shipping Act are commonly referred to as “section 17, first paragraph” and “section 17, second paragraph.”

<sup>19</sup> See the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210; Staggers Act of 1980, Pub. L. 96-448; Motor Carrier Act of 1990, Pub. L. 96-296; Airline Deregulation Act, Pub. L. 95-504; and the Interstate Commerce Commission Termination Act of 1995, Pub. L. 104-88.

section 17's second paragraph and placed that provision in section 10(d)(1), which, following the 2006 recodification of the 1984 Act, became 46 U.S.C. 41102(c). That language from section 17, second paragraph, first sentence, requiring that no regulated entity may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivery of property - is now found in § 41102(c) of the 1984 Act.

Having a long legislative provenance, Congress used the word “practice” and the full phrase, “establish, observe, and enforce just and reasonable regulations and practices,” in both the original 1916 Act and in section 10(d)(1) of the 1984 Act, now § 41102(c), in a particular way and in a context that was clear to the drafters, to the Commission, and to the reviewing courts.

## **B. Judicial Precedent**

In *Baltimore & Ohio Railroad Company v. United States*, 277 U.S. 291 (1923), the U.S. Supreme Court considered the question of what constituted a “practice” within the contemplation of Congress in the Interstate Commerce Act:

The word “practice”, considered generally and without regard to context, is not capable of useful construction. If broadly used, it would cover everything carriers are accustomed to do. Its meaning varies so widely and depends so much upon the connection in which it is used that Congress will be deemed to have intended to confine its application to acts or things belonging to the same general class as those meant by the words associated with it.

*Id.* at 299-300 (citation omitted) (emphasis added).

The Interstate Commerce Commission (ICC), the United States Shipping Board (USSB) (the agency created by Congress in the 1916 Act), its successor agencies, and the currently

constituted Commission,<sup>20</sup> together with state and federal courts have consistently ruled that “practice” means; 1) the acts/omissions of the regulated common carrier that were positively established by the regulated common carrier and imposed on the passenger/cargo interest, and 2) such act/omission was the normal,<sup>21</sup> customary, often repeated,<sup>22</sup> systematic,<sup>23</sup> uniform,<sup>24</sup> habitual,<sup>25</sup> and continuous manner<sup>26</sup> (hereinafter “Normal, Customary & Continuous”) in which the regulated common carrier was conducting business.

The USSBB, a predecessor to the Commission, considered the term “practice” as used in

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<sup>20</sup> The United States Shipping Board (USSB) was succeeded in 1933 by the United States Shipping Board Bureau of the Department of Commerce (USSBB), Executive Order No. 6166 (1933). The USSBB was succeeded in 1936 by the United States Maritime Commission (USMC), 49 Stat. 1985. In 1950, the USMC was succeeded by the Federal Maritime Board (FMB), 64 Stat. 1273. The FMC was established as an independent regulatory agency by Reorganization Plan No. 7, effective August 12, 1961. The U.S. Supreme Court treated the FMC and all predecessor agencies as the “Commission” for purposes of judicial review. *See Volkswagenwerk v. Federal Maritime Commission*, 390 U.S. 261, 269 (1968).

<sup>21</sup> *See European Trade Specialists v. Prudential-Grace Lines*, 19 S.R.R. 59, 63 (FMC 1979). (Unless its normal practice was not to so notify the shipper, such adverse treatment cannot be found to violate the section as a matter of law [emphasis in original].”

<sup>22</sup> *See Intercoastal Investigation*, 1935, 1 U.S.S.B.B. 400, 432. (“Owing to its wide and variable connotations, a practice which unless restricted ordinarily means an *often and customary action*, is deemed to acts or things belonging to the same class as those meant by the words of the law that are associated with it.” [cites omitted][emphasis added].

<sup>23</sup> *See Whitam v. Chicago, R.I. & P. Ry. Co.*, 66 F. Supp. 1014 (ND TX 1946)(“The word ‘a practice’ as used in the decision, or used anywhere properly, implies *systematic* doing of the acts complained of, and usually as applied to carriers and shippers generally.” (emphasis added).”

<sup>24</sup> *See Stockton Elevators*, 3 S.R.R.605, 618 (FMC 1964). (“It cannot be found that the Elevator engaged in a ‘practice’ within the meaning of Section 17. The essence of a practice is *uniformity*. It is something habitually performed and it implies continuity ... the usual course of conduct. It is not an occasional transaction such as here shown. *Intercoastal Investigation*, 1935, 1 U.S.S.B.B. 400, 432; *B&O By. Co. v. United States* 277 U.S. 291, 300, *Francesconi & Co. v. B&O Ry. Co.*, 274 F. 687, 690; *Whitham v. Chicago R.I. & P. Ry. Co.*, 66 F. Supp. 1014; *Wells Lamont Corp. v. Bowles*, 149 F.2d 364 (emphasis added). *See also, McClure v. Blackshere*, F. Supp. 678, 682 (D. Md. 1964)(“‘Practice’ ordinarily implied uniformity and continuity, and does not denote a few isolated acts, and *uniformity* and universality, general notoriety and acquiescence, must characterize the actions on which a practice is predicated.” (citations omitted)(emphasis added)).

<sup>25</sup> *See Stockton Elevators*, 3 S.R.R.605, 618 (FMC 1964). (“It cannot be found that the Elevator engaged in a ‘practice’ within the meaning of Section 17.... It is something *habitually* performed and it implies continuity ... the usual course of conduct.” (citations omitted) (emphasis added)).

<sup>26</sup> *See Stockton Elevators*, 3 S.R.R.605, 618 (FMC 1964). (“It cannot be found that the Elevator engaged in a ‘practice’ within the meaning of Section 17.... It is something habitually performed and it *implies continuity* ....” (citations omitted) (emphasis added)). *See also, McClure v. Blackshere*, F.Supp. 678, 682 (D. Md. 1964)(“‘Practice’ ordinarily implied uniformity and continuity, and does not denote a few isolated acts, and *uniformity* and universality, general notoriety and acquiescence, must characterize the actions on which a practice is predicated.” (citations omitted) (emphasis added)).

the 1916 Act in *Intercoastal Investigation, 1935*, 1 FMC 400 (1935), an investigation that covered sixteen years of steam ship conference activities. The USSBB held:

The provisions of the Shipping Act, 1916, also apply to these respondents. It is there provided . . . that carriers shall establish, observe, and enforce just and reasonable rates, charges, (cargo) classifications, and tariffs and just and reasonable regulations and practices related thereto . . . The terms “rates”, “charges”, “tariffs”, and “practices” as used in transportation have received judicial interpretation . . . Owing to its wide and variable connotation, a practice, which unless restricted ordinarily means an often repeated and customary action, is deemed to apply only to acts or things belonging to the class as those meant by the words of the law that are associated with it. . . . In section 18, the term “practices” is associated with various words, including “rates”, “charges”, and “tariffs”.

*Id.* at 431-432 (emphasis added).<sup>27</sup>

Prior to the 1984 Act, Commission decisions analyzing situations that involved discrete conduct focused on the meaning of the word “practice” and determined that conduct that did not reflect a practice was outside the scope of the first sentence of the second paragraph of section 17. In *Altieri, Stockton Elevators*, and *European Trade Specialists, A.N. Deringer, Kamara*, and other cases<sup>28</sup> the Commission used the term “practice” in a consistent manner for all the places it appears in the Shipping Act.

In *Stockton Elevators*, which was later adopted by the Commission in its entirety, the FMC’s Presiding Examiner found that a violation did not occur because of the infrequency of the relevant actions. According to that decision, a practice is something that, “is habitually performed and implies continuity . . . not an occasional transaction such as here shown.”<sup>29</sup> The Presiding Examiner found the respondent’s actions to be occasional transactions and not a

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<sup>27</sup> *Intercoastal Investigations* cited two ICA railroad cases as authority. See *Baltimore & Ohio Railroad Company v. United States*, 277 U.S. 291 (1923) and *Missouri Pacific R. Co. v. Norwood*, 283 U.S. 249, 257 (1931).

<sup>28</sup> A series of cases alleging section 10(d)(1) violations has established that a complainant must demonstrate regulations and practices, as opposed to identifying what might be an isolated error or understandable misfortune. See, e.g., Informal Docket No. 1745(I), *Mrs. Susanne Brunner v. OMS Moving Inc.*, slip decision served January 27, 1994, administratively final March 8, 1994.

<sup>29</sup> *Investigation of Certain Practices of Stockton Elevators*, 8 F.M.C. 187, 200-201 (Examiner 1964).

“practice” because they were not the “usual course of conduct” and so not a violation of section 17.<sup>30</sup>

Similarly, in *European Trade Specialists, Inc. v. Prudential-Grace Lines, Inc.*, the ALJ specifically noted, “[a] ‘practice’ unless the term is in some way restricted by decision or statute, means ‘an often repeated and customary action.’”<sup>31</sup> There, the ALJ was considering if an alleged failure to notify a shipper of a dispute on the applicable tariff rate violated section 17 of the 1916 Act. The ALJ found that in examining the record, the respondent’s normal practice was to notify shippers of problems and this case involved the allegation of a single departure from that practice which was otherwise just and reasonable. Regardless of the unjustness or unreasonableness of the respondent’s failure to notify the shipper, such action did not represent a practice and thus there could be no section 17 violation.

In *Kamara v. Honesty Shipping Service*, 29 S.R.R. 321(ALJ 2001), the ALJ held that, “It is not clear that a carrier’s simple failure to remit payment to a subcontracting carrier constitutes a Shipping Act violation, although the shipper would certainly have a commercial contractual claim.

These cases addressing Section 10(d)(1) violations correctly hold that a complainant must demonstrate *regulations* and *practices* and articulates the correct scope and interpretation of § 41102(c). This precedent stands in stark contrast to recent Commission decisions that adopted a far more expansive interpretation of the conduct covered by § 41102(c) untethered to the language of the statute, the legislative history, Commission precedent, or, most importantly, the purpose of the Shipping Act to address common carrier duties.<sup>32</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> 17 S.R.R. 1351, 1361 (ALJ 1977).

<sup>32</sup> See *Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11 (ALJ 1991); *Tractors & Farm Equip. Ltd v. Cosmos Shipping Co., Inc.*, 26 S.R.R. 788 (ALJ 1992); *Houben v. World Moving Servs., Inc.*, 31 S.R.R. 1400 (FMC 2010).

In the 2013 *Kobel* decision, the Commission charted a different course by disjoining the statute’s conjunctive language of “establish, observe, *and* enforce” and specifically identified that § 41102(c) contains three discrete prohibitions: (1) a prohibition against failing to establish just and reasonable regulations and practices; (2) a prohibition against failing to observe just and reasonable regulations and practices; and (3) a prohibition against failing to enforce just and reasonable regulations.<sup>33</sup> Since *Kobel*, the Commission has interpreted section § 41102(c) to mean that a single failure to fulfill a single legal obligation of any description *itself* could constitute a violation of § 41102(c).<sup>34</sup>

The Commission looked to a single rule of construction, the surplusage canon, to support its course change from prior Commission and court rulings. That rule provides that, “If possible, every word and every provision is to be given effect.”<sup>35</sup> However, the commentators offer two relevant notes of caution.

First, in discussing the Principle of Interrelating Canons, they advise, “No canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions. . . . It is a rare case in which each side does *not* appeal to a different canon to suggest its desired outcome.”<sup>36</sup> Second, in later discussion of the surplusage canon, they note, “If a provision is susceptible of (1) a meaning that . . . deprives another provision of all independent effect, and (2) another meaning that leaves both provisions with some independent operation, the later should be preferred. . . . So, like all other canons, this one must be applied with

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<sup>33</sup> *Kobel*, 32 S.R.R. at 1735.

<sup>34</sup> See, e.g., *Bimsha Int’l v. Chief Cargo Servs.*, 32 S.R.R. 1861, 1865 (FMC 2013) (“NVOCCs violate [§ 41102(c)] when they fail to fulfill NVOCC obligations, through single or multiple actions or mistakes, and *therefore engage in an unjust and unreasonable practice*” (emphasis added)).

<sup>35</sup> *Reading Law: The Interpretation of Legal Texts*, Scalia and Garner, 2012, pg. 174.

<sup>36</sup> *Id.* at 59, emphasis in the original.

judgement and discretion, and with careful regard to *context*.”<sup>37</sup>

The Commission has, in these recent cases, strained to give independent application of the elements, “establish, observe, *or* enforce” but, in so doing, has deprived any operation of a discussion or application of the alleged unjust or unreasonable *practice or regulation* being inflicted upon the general shipping public. The “context” of § 41102(c) itself within the Shipping Act and other factors discussed below demonstrate the flaws in the Commission’s recent line of section 41102(c) decisions. Moreover, numerous other canons of construction “point in other directions,”<sup>38</sup> all as discussed below.

It is this line of recent cases determining that a discrete failure to observe and enforce an established just and reasonable regulation or practice that the Commission seeks to reform in this rulemaking so as to return the scope of § 41102(c) to its proper role and purpose within the Shipping Act. In the future, the Commission intends to follow the reasoning in *Intercoastal Investigation, Altieri, Stockton Elevators, European Trade Specialists, Deringer, and Kamara* which offer precedent as to what properly applies the full meaning and purpose of “establish, observe, and enforce just and reasonable regulations and practices” under the Shipping Act and a violation of § 41102(c).

### **C. Rules of Statutory Construction**

The precedent in *Intercoastal Investigation, Altieri, Stockton Elevators, European Trade Specialists, Deringer, and Kamara* as to what constitutes “regulations and practice” under the Shipping Act is supported by and consistent with multiple accepted rules of statutory construction. Proper consideration and application of numerous canons of statutory construction

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<sup>37</sup> *Id.* at page 176, emphasis added.

<sup>38</sup> *Id.* at 59.

demonstrates that Congress has spoken to the issue at hand.<sup>39</sup>

1) The *Syntactic Canon* concerns grammar. Reviewing § 41102(c), the regulated entity is the subject of the sentence. The subject is directed – i.e. do not fail to – then comes the active verbs – “establish, observe, and enforce” just and reasonable *regulations* and *practices*. The regulated entity is ordered to, first, initiate the creation, dissemination, and publication of such just and reasonable regulations and practices, and simultaneously, to observe and enforce those regulations and practices that were created by that regulated entity.<sup>40</sup>

2) The *Ordinary Meaning Canon* requires that the words of a statute are to be taken in their natural and ordinary signification and import.<sup>41</sup> The judicial interpretation of the phrase “practices” by multiple courts applying the Mann-Elkins Act, the 1916 Act, and other statutes, all utilized the Ordinary Meaning Canon to find the meaning of the term “practice” as intended by Congress.<sup>42</sup> All came to a reasoned conclusion that confirms the Commission’s proposed interpretation.<sup>43</sup>

3) The *Prior-Construction Canon* requires that “[w]hen administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.”<sup>44</sup> Congress used the same 1916 Shipping Act

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<sup>39</sup> See *Bell Atlantic Telephone Companies v. Federal Communications Commission*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (“Context serves an especially important role in textual analysis of a statute when Congress has not expressed itself as univocally as might be wished.”).

<sup>40</sup> For a fuller discussion of the *Syntactic Canon*, see *Gruenberg-Reisner v. Respondent Overseas Moving Specialist*, 34 S.R.R. 613, 641 (FMC 2016).

<sup>41</sup> See, e.g., James Kent, *Commentaries on American Law* 432 (1826) (“The words of a statute are to be taken in their natural and ordinary signification and import; and if technical words are used, they are to be taken in a technical sense.”).

<sup>42</sup> See *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400 (1935); *Whitam v. Chicago, R.I. & P. Ry. Co.*, 66 F. Supp. 1014 (N.D. Tex. 1946); *McClure v. Blackshere*, 231 F. Supp. 678 (D. Md. 1964); *Stockton Elevators*, 8 F.M.C. 187 (1964); and *European Trade Specialists*, 19 S.R.R. 59 (FMC 1979).

<sup>43</sup> For a fuller discussion of the *Ordinary Meaning Canon*, see *Gruenberg-Reisner v. Respondent Overseas Moving Specialist*, 34 S.R.R. 613, 641-642 (FMC 2016).

<sup>44</sup> *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (emphasis added).

language in the new 1984 Act. The Commission’s holdings in *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400 (1935), the case law, including ICA federal court cases, cited therein as supporting precedent,<sup>45</sup> *Altieri*,<sup>46</sup> *Stockton Elevators*,<sup>47</sup> the case law, including ICA federal court cases, cited therein as supporting precedent, and *European Trade*<sup>48</sup> was incorporated into the new statute as well.<sup>49</sup> Justice Felix Frankfurter expressed the maxim as “if a word is obviously transplanted from a legal source, whether the common law or other legislation, it brings the old soil with it.”<sup>50</sup>

4) The *Associated Words Canon* of construction requires that associated words bear on one another’s meaning. In *Intercoastal Investigation, 1935*, the United States Shipping Board considered the term “practice” as used in the 1916 Act and determined that, “[o]wing to its wide and variable connotation, a practice which unless restricted *ordinarily means an often repeated and customary action, is deemed to apply only to acts or things belonging to the class as those meant by the words of the law that are associated with it.*” 1 U.S.S.B.B. at 431-432 (emphasis added). The application of the term “practices” must be confined within the regulated

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<sup>45</sup> *Intercoastal* at 432.

<sup>46</sup> *J.M. Altieri v. Puerto Rico Ports Authority*, 7 F.M.C. 416 (ALJ 1962). “If the action of respondent were one of a series of such occurrences, a *practice* might be spelled out that would invoke the coverage of section 17. *Hecht, Levis and Kahn, Inc. v. Isbrandtsen, Co., Inc.*, 3 F.M.B. 798 (1950). However, the action of the respondent is an isolated or ‘one shot’ occurrence. Complainant has alleged and proved only the one instance of such conduct. It cannot be found to be a ‘practice’ within the meaning of the last paragraph of section 17.” *Id.* at 420 (emphasis in original).

<sup>47</sup> 3 S.R.R. at 618 (“It cannot be found that the Elevators engaged in a ‘practice’ within the meaning of section 17. The essence of a practice is uniformity. It is something habitually performed and it implies continuity . . . the usual course of conduct. It is not an occasional transaction such as here shown. *Intercostal Investigation, 1935*, 1. USSBB 400, 432; *B&O Ry. Co.*, 274 F. 687, 690; *Whitham v. Chicago R.I. & P. Ry. Co.*, 66 F. Supp. 1014; *Wells Lamont Corp. v. Bowles*, 149 F.2d 364.”).

<sup>48</sup> 19 S.R.R. at 63. (“Even assuming, without deciding, that *European* was not notified of the classification and rating problem we cannot say that such conduct by Hipage amounts to a violation of Section 17. Unless its normal *practice* was not to so notify the shipper, such adverse treatment cannot be found to violate the section as a matter of law. *Investigation of Certain Practices of Stockton Elevators*, 8 F.M.C. 181, 200 [3 S.R.R. 605] (1964).” (emphasis in original)).

<sup>49</sup> For a more detailed discussion of the *Prior-Construction Canon*, see *Gruenberg-Reisner v. Respondent Overseas Moving Specialist*, 34 S.R.R. 613, 647-649 (FMC 2016).

<sup>50</sup> Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947).

transportation world of common carriage, its specialized lexicon and its association with various words including “rates,” “charges,” and “tariffs.”<sup>51</sup>

5) In *Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427 (1932), the U.S. Supreme Court framed the *Presumption of Consistent Usage Canon* as follows, “[t]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning. *Id.* at 433 (emphasis added). In the 1984 Act, Congress used the term “practice” or “practices” eight times in three different sections of the new legislation: section 5 (Agreements); section 8 (Tariffs); and section 10 (Prohibited Acts). These usages of “practice” are in complete harmony with the original 1910 Mann-Elkins Act and the original section 17 of the 1916 Act’s usage of “practices” referenced above.<sup>52</sup>

6) The *Whole-Text Canon* requires that the entire statutory structure, statutory scheme and analysis must be considered. In *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988), the U.S. Supreme Court expressed the Whole-Text Canon as follows, “In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.” *Id.* at 291. The Congressional intent, overall context and statutory mandate of the 1984 Shipping Act makes clear that Congress wanted the Commission to focus its regulatory authority on “establish[ing] a nondiscriminatory regulatory process for the common carriage of goods by water . . .”<sup>53</sup> and on maritime activities that: result in substantial reduction in competition and are detrimental to commerce. In the 1998 amendments, Congress injected additional competitive market-driven provisions into the

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<sup>51</sup> For a more detailed discussion of the *Associated Word Canon*, see *Gruenberg-Reisner v. Respondent Overseas Moving Specialist*, 34 S.R.R. 613, 645 (FMC 2016).

<sup>52</sup> For a more detailed discussion of the *Presumption of Consistent Usage Canon*, see *Gruenberg-Reisner v. Respondent Overseas Moving Specialist*, 34 S.R.R. 613, 642-643 (FMC 2016).

<sup>53</sup> See 46 U.S.C. § 40101.

Shipping Act of 1984.<sup>54</sup>

7) The *Gruenberg-Reisner* decision, *supra*, also discusses the relevant application of the negative implication canon and the presumption against extraterritorial application canon. Last, *Gruenberg-Reisner* also discusses the duty of federal agencies to observe and adhere to the doctrine of *stare decisis*.<sup>55</sup>

#### **D. Remedies**

The Commission is aware that modifying the application of recent § 41102(c) cases may pare back complainants' ability in some factual circumstances to claim a Shipping Act violation and thus seek redress before the Commission when they are harmed by an act or omission of a regulated entity. However, § 41102(c) was not designed to be the universal *panacea* for each and every problem or grievance that arises in the maritime realm of receiving, handling, storing, or delivering property. To interpret the Shipping Act as duplicative of every other statutory and common law maritime remedy would frustrate Congressional intent in enacting different statutory schemes and undermine the purpose of the Shipping Act.

In *A.N. Deringer, Inc. v. Marlin Marine Services, Inc.*, 25 S.R.R. 1273, 1276, 1277 (SO 1990), a post 1984 case that followed the *Altieri*, *Intercoastal Investigation*, *Stockton Elevators*, *European Trade Specialists* line of precedent in a case considering what is now § 41102(c), the Settlement Officer addressed the effect of an overly broad interpretation of section 10(d)(1) on

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<sup>54</sup> For a more detailed discussion of the *Whole Text Canon*, see *Gruenberg-Reisner v. Respondent Overseas Moving Specialist*, 34 S.R.R. 613, 644 (FMC 2016).

<sup>55</sup> See *Motor Vehicle Mfrs. Ass'n v. State Farm Insurance*, 463 U.S. 29 (1983). “[A]n agency changing its course . . . is obligated to supply a reasoned analysis for the change. . . .” *Id.* at 42. The Commission’s case law affirmed this obligation in *Harrington & Co. v. Georgia Ports Authority*, 23 S.R.R. 753 (ALJ 1986), where the Commission held, “the decision to depart from precedent is not taken lightly and requires compelling reasons . . . the courts are emphatic in requiring agencies to follow their precedents or explain with good reason why they choose not to do so.” *Id.* at 766.

other maritime statutes, such as the Carriage of Goods by Sea Act (COGSA).<sup>56</sup> COGSA is the United States enactment of the international convention commonly referred to as the Hague Rules. This treaty was intended to achieve a common set of international rules for the handling of cargo damage and loss claims.<sup>57</sup> The Commission ALJ acknowledged the status of COGSA with the following Commission ruling:

It is clear that COGSA was enacted to clarify the responsibilities as well as the rights and immunities of carriers and ships with respect to loss and damage claims. Consequently, the use of the Shipping Act of 1984 to circumvent COGSA provisions would constitute a wholly unwarranted frustration of Congressional intent. Furthermore, some of the logical conclusions of such a step would be absurd. For example, COGSA provides a one-year period for the filing of suit; after that period, a claim is time barred. To accept *Deringer's* premise, one would have to conclude that a one-year period exists during which a claimant may file suit, but two additional years exist in which to file with the FMC. Inasmuch as COGSA stipulates that the carrier and ship, in the absence of a suit, are discharged from liability after one year, such a conclusion is unacceptable.

*Id.* at 1277 (footnotes omitted).<sup>58</sup>

As a further note on the discordant conflict between COGSA and the Commission's current usage of section 10(d)(1) of the Shipping Act, consider that COGSA provides for a limitation of liability scheme, including a cargo valuation cap of \$500 per customary freight unit unless the shipper declares a higher cargo value. As the *A.N. Deringer* decision noted, a claimant

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<sup>56</sup> 46 U.S.C. 3070, Pub. L. 109-304, § 6(c), 120 Stat. 1516 (2006).

<sup>57</sup> See Gilmore and Black, *The Law of Admiralty*, (2d ed. 1975). "This compromise was so well thought of that when, between 1921 and 1924, representatives of the shipping world and of the maritime nations sought by conference to arrive at terms suitable for uniform worldwide treatment of the shipper carrier relation under ocean bills of lading, the "Hague Rules" which they adopted, first as a set of clauses for voluntary inclusion in bills of lading and then as a Convention to which the adherence of maritime nations was invited, embodied the Harter Act compromise in the main outline. In 1936, the United States adhered to the Convention, and Congress passed in implementation the Carriage of Goods By Sea Act, which with minor differences follows verbatim the Hague Rules." *Id.* at 144-145.

<sup>58</sup> In addition, with any COGSA litigation, the parties pay their own legal fees. Under a recent amendment to the 1984 Act in Title IV of the Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. 113-281 enacted on December 18, 2014, the prevailing party in Shipping Act claims wins full reparation and may be awarded attorney fees.

could wait for 366 days and then file its claim at the Commission under section 10(d)(1) and thereby avoid any COGSA limitations on the value of its cargo loss.

This proffer of a conflict between section 10(d)(1) and COGSA is not speculation or a mere hypothetical. In the Commission's *Kobel* decision, *supra*, Respondent Hapag-Lloyd, the ocean vessel common carrier, was found to have violated section 10(d)(1) by virtue of damaging the Claimant's container during the loading process and then subsequently placing that damaged container on a later Hapag-Lloyd ship. The Commission then held that Hapag-Lloyd was; however, not liable for reparations because the damage to the container was not the proximate cause of the losses to the cargo. If the damaged container *had* allowed for water inundation with resulting cargo damage, then all legal elements would have been presented for an award to Claimants by virtue of the section 10(d)(1) violation.

As a last observation concerning the comity between COGSA and the Shipping Act, consider section 2 of the Shipping Act's Declaration of Policy where Congress stated:

The purposes of this Act are . . . (2) to provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, *in harmony with*, and responsive to, *international shipping practices* . . .<sup>59</sup>

As the Commission looks for guidance on Congressional intent concerning the scope, applicability, and proper interpretation of section 10(d)(1) and its relationship to the COGSA/Hague Rules, we find here a clear affirmative Congressional statement that directs the Commission to harmonize the Shipping Act with international shipping practices. The Hague Rules, as adopted by Congress, provide for a single internationally accepted set of rules for the treatment of the shipper-carrier relation under ocean bills of lading. An interpretation of the

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<sup>59</sup> 46 U.S.C. § 40101(2) (emphasis added).

Shipping Act's section 10(d)(1) that provides for an alternative legal remedy for a cargo claim in the United States would create diametrical discord to this area of law.

Returning the Commission's interpretation to its proper statutory purpose and scope will not leave claimants without remedy. Claimants would have full and adequate remedies under numerous legal proscriptions including common law, state statutes, admiralty law, and other federal statutes. Such claims should be presented to proper courts of common pleas. The Commission notes that other provisions or regulations of the Shipping Act could also provide remedy.<sup>60</sup> The Commission also notes that bringing actions in traditional venues, such as state and federal courts, may be appropriate. Matters that may now be brought under § 41102(c) could also potentially be adjudicated as matters of contract law, agency law, or admiralty law. In cases prior to *Kobel*, it has been noted that remedy could have been sought in other venues. In *Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11 (ALJ 1991), the ALJ noted that the relevant conduct “would undoubtedly have contravened other standards of law under principles of contract and common carrier law applicable in courts of law and quite possibly Mr. Adair could have obtained relief . . . in a court of law or perhaps admiralty rather than before this Commission.”<sup>61</sup> The Commission is seeking public comment on whether alternative avenues for redress would be available should the Commission choose to reinterpret § 41102(c).

#### **IV. CONCLUSION**

The Commission believes that the interpretation and application of § 41102(c) should be properly aligned with the broader common carriage foundation and purposes of the Act. The interpretive rule is consistent with the purposes of the Shipping Act and focuses Commission

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<sup>60</sup> See *Total Fitness Equipment, Inc. d/b/a/ Professional Gym v. Worldlink Logistics, Inc.*, 28 S.R.R. 45 (ID 1997); *Brewer v. Maralan*, 29 S.R.R. 6 (FMC 2001).

<sup>61</sup> *Adair*, 26 S.R.R. at 20–21.

activities on regulated entities who abuse the maritime shipping public by imposing unjust and unreasonable business methods, and who do so on a normal, customary, and continuous basis, and thereby negatively impact maritime transportation competition or inflict detrimental effect upon the commerce of the United States. This interpretation reflects the clear intent of Congress and reflects Commission precedent articulated in *Intercoastal Investigation, Altieri, Stockton Elevators, European Trade, and Deringer*. Though the Commission is aware that the interpretive rule may redirect some claims in certain fact situations from being brought under the Shipping Act, the Commission believes that existing alternative avenues of redress are fully sufficient to address those cases. The Commission is therefore seeking comment on the proposed interpretation.

**V. PUBLIC PARTICIPATION**

*How do I prepare and submit comments?*

Your comments must be written and in English. To ensure that your comments are correctly filed in the docket, please include the docket number of this document in your comments.

You may submit your comments via e-mail to the e-mail address listed above under ADDRESSES. Please include the docket number associated with this notice and the subject matter in the subject line of the e-mail. Comments should be attached to the email as a Microsoft Word or text-searchable PDF document. Only non-confidential and public versions of confidential comments should be submitted by email.

You may also submit comments by mail to the address listed above under ADDRESSES.

*How do I submit confidential business information?*

The Commission will provide confidential treatment for identified confidential

information to the extent allowed by law. If your comments contain confidential information, you must submit the following by mail to the address listed above under ADDRESSES:

- A transmittal letter requesting confidential treatment that identifies the specific information in the comments for which protection is sought and demonstrates that the information is a trade secret or other confidential research, development, or commercial information.
- A confidential copy of your comments, consisting of the complete filing with a cover page marked “Confidential-Restricted,” and the confidential material clearly marked on each page. You should submit the confidential copy to the Commission by mail.
- A public version of your comments with the confidential information excluded. The public version must state “Public Version—confidential materials excluded” on the cover page and on each affected page, and must clearly indicate any information withheld. You may submit the public version to the Commission by e-mail or mail.

*Will the Commission consider late comments?*

The Commission will consider all comments received before the close of business on the comment closing date indicated above under DATES. To the extent possible, we will also consider comments received after that date.

*How can I read comments submitted by other people?*

You may read the comments received by the Commission at the Commission’s Electronic Reading Room or the Docket Activity Library at the addresses listed above under ADDRESSES.

## **VI. RULEMAKING ANALYSES**

*Regulatory Flexibility Act*

The Regulatory Flexibility Act (codified as amended at 5 U.S.C. 601–612) provides that whenever an agency is required to publish a notice of proposed rulemaking under the

Administrative Procedure Act (APA) (5 U.S.C. 553), the agency must prepare and make available for public comment an initial regulatory flexibility analysis (IRFA) describing the impact of the proposed rule on small entities. 5 U.S.C. 603. An agency is not required to publish an IRFA, however, for the following types of rules, which are excluded from the APA's notice-and-comment requirement: interpretative rules; general statements of policy; rules of agency organization, procedure, or practice; and rules for which the agency for good cause finds that notice and comment is impracticable, unnecessary, or contrary to public interest. *See* 5 U.S.C. 553(b).

Although the Commission has elected to seek public comment on this proposed rule, the rule is an interpretative rule. Therefore, the APA does not require publication of a notice of proposed rulemaking in this instance, and the Commission is not required to prepare an IRFA.

#### *National Environmental Policy Act*

The Commission's regulations categorically exclude certain rulemakings from any requirement to prepare an environmental assessment or an environmental impact statement because they do not increase or decrease air, water or noise pollution or the use of fossil fuels, recyclables, or energy. 46 CFR 504.4. The proposed rule describes the Commission's proposed interpretation of the scope of 46 U.S.C. 41102(c) and the elements necessary for a successful claim for reparations under that section. This rulemaking thus falls within the categorical exclusion for matters related solely to the issue of Commission jurisdiction and the exclusion for investigatory and adjudicatory proceedings to ascertain past violations of the Shipping Act. *See* 46 CFR 504.4(a)(20), (22). Therefore, no environmental assessment or environmental impact statement is required.

#### *Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521) (PRA) requires an agency to seek and receive approval from the Office of Management and Budget (OMB) before collecting information from the public. 44 U.S.C. 3507. The agency must submit collections of information in proposed rules to OMB in conjunction with the publication of the notice of proposed rulemaking. 5 CFR 1320.11. This proposed rule does not contain any collections of information as defined by 44. U.S.C. 3502(3) and 5 CFR 1320.3(c).

*Executive Order 12988 (Civil Justice Reform)*

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

*Regulation Identifier Number*

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

**List of Subjects**

*46 CFR part 545*

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

For the reasons set forth above, the Federal Maritime Commission proposes to amend 46 CFR part 545 as follows:

## **PART 545-INTERPRETATIONS AND STATEMENTS OF POLICY**

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

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

2. Add § 545.4 to read as follows:

### **§ 545.4 Interpretation of Shipping Act of 1984—Unjust and unreasonable practices.**

46 U.S.C. 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations:

(a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;

(b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;

(c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;

(d) The practice or regulation is unjust or unreasonable; and

(e) The practice or regulation is the proximate cause of the claimed loss.

By the Commission.

Rachel Dickon  
Secretary