**FEDERAL MARITIME COMMISSION**

**46 CFR part 542**

**[Docket No. 22-24]**

**RIN: 3072-AC92**

**Definition of Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier**

**AGENCY:** Federal Maritime Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Maritime Commission (Commission) is seeking public comment on its proposed rule arising from the Ocean Shipping Reform Act of 2022 requirement that prohibits ocean common carriers from unreasonably refusing to deal or negotiate with respect to vessel space accommodations. Specifically, the Commission is proposing to define the elements necessary to establish a violation and the criteria it will consider in assessing reasonableness.

**DATES:** Submit comments on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by Docket No. 22-24, by sending an email to *secretary@fmc.gov*. For comments, include in the subject line: "Docket No. 22-24, Definition of Unreasonable Refusal to Deal or Negotiate." 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. Comments received by the Commission may be viewed at the Commission's Electronic Reading Room at https://www2.fmc.gov/readingroom/.

*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.

**FOR FURTHER INFORMATION CONTACT:** William Cody, Secretary; Phone: (202) 523-5725; Email: secretary@fmc.gov.

**SUPPLEMENTARY INFORMATION:**

## I. Introduction and Background

On June 16, 2022, the President signed the Ocean Shipping Reform Act of 2022 ("OSRA 2022") into law.[1] OSRA 2022 amended various statutory provisions contained in Part A of Subtitle IV of Title 46, U.S. Code. In Section 7(d) of OSRA 2022, Congress directed the Federal Maritime Commission (Commission), in consultation with the United States Coast Guard (Coast Guard), to initiate a rulemaking to define unreasonable refusal to deal or negotiate with respect to vessel space accommodations provided by an ocean common carrier.[2] This definition would work in conjunction with 46 U.S.C. 41104(a)(10), which was amended by OSRA 2022 to prohibit a common carrier, either alone or in conjunction with any other person, directly or indirectly, from unreasonably refusing to deal or negotiate, including with respect to vessel space accommodations provided by an ocean common carrier.

OSRA 2022 amended Section 41104(a) by replacing "may not" with "shall not" to highlight the mandatory nature of the entire list of common carrier prohibitions. OSRA 2022 further clarified the specific prohibition in Section 41104(a)(10) on refusal to deal or negotiate,

[1] Pub. L. 117-146.

[2] Codified at 46 U.S.C. 41104(a)(10), as amended.

by noting that this prohibition includes dealings and negotiations "with respect to vessel space accommodations provided by an ocean common carrier." The phrase "ocean common carrier" is currently defined as a vessel-operating common carrier (VOCC) in the Shipping Act.[3] However, other key terms and phrases in the Shipping Act as amended - "unreasonably," "refuse to deal or negotiate," and "vessel space accommodations" - are not defined.

The common carrier prohibitions in 46 U.S.C. 41104 do not distinguish between U.S. exports or imports. If adopted, this proposed rule would apply to both.[4] One basis, but not the only one, for some of the OSRA 2022 provisions were the challenges expressed by U.S. exporters trying to obtain vessel space to ship their products.[5] This export-focus arguably is also supported by the amendments to the "Purposes" section of the Commission's overall authority contained in 46 U.S.C. 40101. Specifically, Section 40101(4) ratified the purpose to "promote the growth and development of United States exports through a competitive and efficient system for the carriage of goods by water." Congress further highlighted issues related to U.S. exports and imports in Section 9 of OSRA 2022. This section created 46 U.S.C. 41110 and the requirement for ocean common carriers to provide information to the Commission to enable the Commission to publish quarterly statistics on total import and export tonnage and the total loaded and empty 20-foot equivalent units (TEUs) [6] per vessel.

The Commission is also aware of the long-running U.S. trade deficit in goods

---

[3] See 46 U.S.C. 40102(18).

[4] Section 41104 applies generally to both VOCCs and NVOCCs. However, the specific prohibition that is the subject of this proposed rule applies only to VOCCs.

[5] OSRA 2022 originated as S. 3580 and the bill is partially summarized as: "This bill revises requirements governing ocean shipping to increase the authority of the Federal Maritime Commission (FMC) to promote the growth and development of U.S. exports through an ocean transportation system that is competitive, efficient, and economical." See Congress.gov summary for S. 3580 accessed July 10, 2022.

[6] "TEU" stands for "twenty-foot equivalent unit" A standard marine shipping container measures 20' long, 8' wide, and 8.6' tall. It is the standard unit of measurement of the capacity of a container ship. Twenty-Foot Equivalent Unit (TEU) Definition | UPS Supply Chain Solutions - United States.

(approximately $1.1 trillion in 2021) and the imbalance of imports and exports moving through U.S. ports in international trade. VOCCs, particularly those on the major east-west trade lanes between the U.S. and Asia and the U.S. and Europe, make operational decisions regarding the import and export goods they carry based on both economic and engineering considerations.

Export loads are, on average, heavier than import loads. This means that ships that come into U.S. ports largely laden with goods cannot safely load the same number of laden twenty-foot equivalent units (TEUs) when leaving the U.S. for foreign ports. A higher volume of laden exports will result in a lower vessel utilization rate on the outbound voyage from the U.S., resulting in fewer containers returning to where the equipment is in highest demand.

The economics of this trade imbalance results in very different revenue returns for import and export trades. U.S. imports feature higher value items on average and the rates that shippers pay to move these goods are historically higher than the rates paid to move U.S. exports. For example, the average rate of a 20-foot dry container moving from Shanghai to the U.S. West Coast was $1,740 in January 2019, $4,270 in January 2021, and $8,130 in January 2022. The corresponding rate for a 20-foot dry container moving from the U.S. West Coast to Shanghai was $730 in January 2019, $800 in January 2021, and $1,220 in January 2022.[7] Further, the inland destination of import containers is often not located near export customers, which requires equipment repositioning costs as well as the opportunity cost of unused equipment.

Prior to the pandemic, the ratio of import TEUs to export TEUs moving through U.S. ports across all trade lanes was over 50 percent; in April 2019 this ratio was 59 percent.[8] While containerized imports (measured in TEUs) increased steadily from May 2020 through April 2022, containerized exports declined over the same period, leading to an import-export TEU

[7] Data source: Drewry Container Freight Rate Insight, accessed June 21, 2022.
[8] Data source: PIERS, S&P Global Market Intelligence, accessed June 21, 2022.

ratio of 39 percent in April 2022. Approximately 2.6 million TEUs of all U.S. imports moved through U.S. ports in April 2022, versus 1.98 million in April 2019. Total U.S. exports fell from 1.2 million TEUs in April 2019 to 950,178 in April 2022.[9]

Trade on some specific lanes is even more imbalanced. Trade from Asia to U.S. ports was characterized by an import/export TEU ratio of 39 percent in 2019, 36 percent in 2020, and 29 percent in 2021. The number dropped further to 26 percent in the first quarter of 2022. There is no homogeneity among carriers, even within trade lanes. On the Asia to U.S. trade lane, among the largest carriers, the ratio of exports to imports ranged from 27 percent to 52 percent in 2019 and ranged from 23 to 44 percent in 2021. Some carriers had very stable export to import ratios throughout the pandemic, though most saw a substantial drop in both the ratio of exports to imports and the absolute number of export containers moved, particularly between 2020 and 2021. This pattern has continued into the first quarter of 2022.

While some export markets have been affected by trade shocks, such as China's ban on solid waste imports and other items, these trade shocks do not fully explain the drop in total exports carried, neither do safety concerns over ship loading. Largely these changes can be explained by carrier operational decisions based on equipment availability and differential revenues from import and export transportation.[10] VOCCs should offer service in both directions within the trade lanes in which they operate in common carriage, regardless of trade lane, length of time active in the trade, or vessel size.

VOCCs typically maintain documented procedures and policies related to their operations. Through its recently revised VOCC audit program, Commission staff reviewed a number of well-documented operating procedures and policies specifically related to export

[9] Data source: PIERS, S&P Global Market Intelligence, accessed June 21, 2022.
[10] https://www.nytimes.com/2021/11/14/business/economy/farm-exports-supply-chain-ports.html.

cargo. Ocean common carriers operating in the U.S. trade should have a documented export strategy that enables the efficient movement of export cargo.[11] By way of illustration only, effective export strategies should be tailored to specific categories, such as programs, customers, markets, or commodities, and include documented policies on export business practices, including equipment provisioning, free time, outreach plans for contingencies and instances of imbalance in equipment availability, clearly defined and tracked performance metrics, identification of key export staff, and regular internal review of such policies. The Commission presumes that every ocean carrier operating in the U.S. market will have the ability to transport exports in addition to imports until further information is provided. In other words, an ocean carrier may not categorically exclude U.S. exports from a backhaul trip without showing how this action is reasonable.

Common carriers stated they have seen delays in the movement of export cargo due to a lack of mutual commitment between shippers and common carriers leading to cancellations of vessel space accommodation by either party, sometimes up to the day of sailing. This contributes to uncertainty for both the shippers and common carriers.

In addition to the challenges faced by exporters, there have also been reports of restricted access to equipment and vessel capacity for U.S. importers, particularly in the Trans-Pacific market. Access to import vessel space was impacted by congestion, equipment availability, and VOCC commercial decisions.[12]

Finally, it is the Commission's experience, and as detailed in the Commission's Fact

[11] This comports with OSRA 2022 generally, and specifically with the purpose in Section 41104(4) to "promote the growth and development of United States exports."
[12] https://www.nytimes.com/2022/05/04/business/shipping-container-shortage.html.

Finding 29 Final Report,[13] that ocean common carriers and those with whom they contract to operate and load/unload their vessels, have the best information on the ability of any particular vessel to accept cargo for import or export. Shippers generally do not have access to this information. Therefore, while the ultimate burden of proving a violation of Section 41104(a)(10) will remain with the complainant or the Commission's Bureau of Enforcement, Investigations, and Compliance (BEIC), this proposed rule includes a mechanism by which, upon a *prima facie* case of a violation of Section 41104(a)(10) being made, the burden shifts from the shipper (or the BEIC) to the ocean common carrier. The ocean common carrier must establish that its refusal to deal or negotiate with regard to vessel space, which in some cases results in a decision not to accept cargo, was reasonable. It is important to clarify that this proposed rule concerns the negotiations or discussions that lead up to a decision about whether an import or export load is accepted for transportation. There will undoubtedly be situations where an ocean common carrier and a shipper engage in good faith negotiations or discussions that do not result in the provision of transportation. However, as mentioned earlier in the preamble, a situation where an ocean common carrier categorically excludes U.S. exports from its backhaul trip will create a presumption of an unreasonable refusal to deal.

The Commission also notes that, consistent with Section 7(d) of OSRA 2022, it has consulted with the Coast Guard regarding the approach taken by the proposal. The Coast Guard offered no objections to the Commission's approach.

## II. Summary of the Proposed Rule

This proposed rule describes how the Commission will consider private party and

[13] *See generally*, Fact Finding Investigation 29 Final Report (F.M.C.), 2022 WL 2063347 at 11, 21-23, 26, 34-35 (noting difficulties experienced by non-carrier entities to obtain information such as earliest return dates and vessel scheduling information held by ocean common carriers).

enforcement cases where a violation of 46 U.S.C. 41104(a)(10) is alleged, and relates to vessel space accommodation.[14] This proposed rule considers the common carriage roots of Section 41104(a)(10), as well as the overall competition basis of the Commission's authority.[15] The proposed rule first lists the elements necessary to establish a violation of Section 41104(a)(10), and then lays out the criteria the Commission will consider in evaluating the reasonableness of the refusal, including a burden shifting regime. In proposing this rule, the Commission acknowledges that it is impossible to regulate for every possible scenario and thus, cases that allege a violation of Section 41104(a)(10) will be factually driven and determined on a case-by-case basis.[16]

**A. Elements**

Pursuant to OSRA 2022 and Commission precedent, complainants must meet three elements to establish a violation for unreasonable refusal to deal or negotiate. The Commission proposes to continue to adhere to those elements, including in cases where the allegation relates to vessel space accommodations by an ocean common carrier. The elements are derived directly from the statutory text established in OSRA 1998 and are: 1) the respondent is a [ocean] common carrier under FMC jurisdiction; 2) the respondent refuses to deal or negotiate [with respect to vessel space accommodations]; and 3) that the refusal is unreasonable.[17]

**B. Definitions**

[14] The framework for this proposed rule is taken from Commission precedent on refusal to deal cases generally and could be applicable outside the "vessel space accommodation" context. This proposed rule, however, is solely focused on the OSRA 2022 requirements related to vessel space accommodations provided by an ocean common carrier.
[15] *See Orolugbagbe v. A.T.I.,U.S.A., Inc.*, Informal Docket No. 1943(I) at *31-38.
[16] *See Canaveral Port Authority – Possible Violations of Section 10(b)(10)*, 29 S.R.R. 1436, 1449 (FMC 2003). Note that Section 10(b)(10) is the former Shipping Act section for unreasonable refusals to deal or negotiate.
[17] *Id*. at 1448.

Neither the Shipping Act, as amended, nor OSRA 2022 define the phrase "vessel space accommodations," and this phrase has not been interpreted in prior Commission matters. Therefore, the Commission proposes to define "vessel space accommodations" generally as space provided aboard a vessel of an ocean common carrier for laden containers being imported to, or exported from, the United States. This proposed definition is based on the common meaning of the words in the phrase as applied in ocean shipping.

The phrase "refusal to deal or negotiate" does not lend itself to a general definition and instead must be evaluated on a case-by-case basis. In general, a "refusal to deal or negotiate" presumes that in order for there to be a refusal, there first must be something to refuse. In other words, a party has attempted in good faith to engage in discussions with an ocean common carrier for the purposes of obtaining vessel space accommodations.[18] This good faith attempt is something more than one communication with no response or reply. The party must prove an actual refusal to even entertain the proposal or to engage in good faith discussions. Likewise, an ocean common carrier's refusal to deal or negotiate is only a violation if it is unreasonable, and as described below, this analysis will consider whether the ocean common carrier, in turn, gave good faith consideration to a party's efforts at negotiation.[19]

As noted above, reasonableness is necessarily a case-by-case determination, and the Commission will continue to adhere to that principle. However, the Commission believes it is necessary to provide, and OSRA 2022 requires, criteria that it will use to assess whether a refusal to deal or negotiate with respect to vessel space accommodation is reasonable. These criteria will be considered for the reasonableness evaluation for any given case.

---

[18] *See Canaveral*, supra at 1450; cf. *Chilean Nitrate Sales Corp. v. San Diego Unified Port District*, 24 S.R.R. 1314 (1988).

[19] *See Canaveral, id. See also Maher Terminals, LLC v. PANYNJ,* 33 S.R.R. 821, 853 (F.M.C. 2014).

Case law indicates that "reasonableness" of the refusal to deal or negotiate has historically been interpreted broadly in this context, with courts deferring to the Commission's reading of that term in administering its statutes and regulations.[20] The Commission has previously found reasonable those decisions that are connected to a legitimate business decision or motivated by legitimate transportation factors.[21] "Reasonableness" can be given its dictionary definition but is judged on a case-by-case basis, with particular attention paid to the relevant circumstances; the Commission has said that a just and reasonable practice is one otherwise lawful but not excessive and suited to the end in view.[22]

Transportation-related factors can include, without limitation, the character of the cargo, vessel safety and stability, operational schedules, and the adequacy of facilities.[23] Generally,

---

[20] In fact, the Commission has observed that "[s]hipping law terms such as 'unjust,' or 'unreasonable,' are indeed broad and may plausibly admit consideration of a number of competing policies. It is well-established, however, that '[t]he primary objective of the shipping laws administered by the FMC is to protect the shipping industry's customers, not members of the industry.'" *New York Shipping Ass'n, Inc. v. Fed. Mar. Comm'n,* 854 F.2d 1338, 1374 (D.C. Cir. 1988) (quoting *Boston Shipping Ass'n v. FMC,* 706 F.2d 1231, 1238 (1st Cir.1983)).

[21] *See*, *e.g*., *Docking & Lease Agreement By & Between City of Portland, ME & Scotia Princess Cruises, Ltd.,* Order of Investigation & Hearing, 30 S.R.R. 377, 379 (F.M.C. 2004).

[22] In *Investigation of Free Time Practices--Port of San Diego*, 9 F.M.C. 525, 547 (1966), discussing Section 17 of the 1916 Act, the Commission noted:

> "Reasonable" may mean or imply "just, proper," "ordinary or usual," "not immoderate or excessive," "equitable," or "fit and appropriate to the end in view." Black's Law Dictionary, Fourth Edition. It is by application to the particular situation or subject matter that words such as "reasonable" take on concrete and specific meaning. As used in Sec. 17 and as applied to terminal practices, we think that "just and reasonable practice" most appropriately means a practice, otherwise lawful but not excessive and which is fit and appropriate to the end in view.
>
> The justness or reasonableness of a practice is not necessarily dependent upon the existence of actual preference, prejudice or discrimination. It may cause none of these but still be unreasonable.

[23] For example, in *Dart Containerline Co. v. FMC*, 639 F.2d 808, 813 (D.C. App. 1981), in considering whether a diversion of cargo from its naturally tributary port was unreasonable, the Commission considered "any operational difficulties or other transportation factors that bear upon the carrier's ability to provide direct service (e.g., lack of cargo volume, inadequate facilities)[.]" *See also Harborlite Corp. v. I.C.C*., 613 F.2d 1088, 1100 (D.C. Cir. 1988), citing to *United States v. Illinois Central Railroad*, 263 U.S. 515, 524, 44 S.Ct. 189, 193, 68 L.Ed. 417 (1924), a case involving common-carriage principles, for the proposition that rate disparity is not unlawful if it is "justified by the cost of the respective services, by their values, or by other transportation conditions*"; Credit Practices of Sea-land Service, Inc., and Nedlloyd Lijnen, B.v.,* 1990 WL 427463, at *8 ("Transportation or wharfage charges are dependent upon the particular commodity involved; the cost for shipping or storing bananas, for example, bears no

however, transportation-related factors relate to the characteristics of the cargo or vessel, not the status of the shipper.[24]

The Commission has found various situations that inform what refusal to deal entails. It has found that a common carrier must avoid shutting out any person or party for reasons not connected to legitimate transportation-related factors.[25] A common carrier must therefore give actual consideration to the other party's efforts or attempts at negotiation.[26] For example, a common carrier's repeated refusal to respond to email or telephone requests for negotiations over an extended period of time may be viewed as an unreasonable method of shutting another party out. Similarly, there must be an affirmative act by a party to deal or engage in negotiations with the common carrier. Commercial convenience alone is not a reasonable basis for a common carrier's refusal to deal or negotiate.[27] A common carrier granting special treatment to one party over another because that party is a regular customer is likewise likely to be viewed as unreasonable.[28]

The Commission also has a history of recognizing that it is appropriate to defer to a party's reasonable business decisions and not to substitute its business judgement for that of an entity conducting negotiations.[29] However, this precedent does not eliminate the Commission's

---

relation to the fees levied for heavy industrial equipment"); *Grace Line, Inc. v. Federal Maritime Board*, 280 F.2d 790 (1960); *Investigation of Free Time Practices – Port of San Diego*, 9 F.M.C. 525, 541 (1966).

[24] *See, e.g*., *Credit Practices of Sea-land Service, Inc., and Nedlloyd Lijnen, B.v.,* 1990 WL 427463 (F.M.C. 1990); *Department of Defense and Military Sealift Command v. Matson Navigation Co*., 19 F.M.C. 503 (1977).

[25] *New Orleans Stevedoring Co. v. Bd. of Commissioners of the Port of New Orleans*, 29 S.R.R. 1066, 1070 (F.M.C. 2002), *aff'd mem*., 30 S.R.R. 261 (D.C. Cir. 2003).

[26] *Canaveral Port Authority – Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate*, 29 S.R.R. 1436 (F.M.C. 2003).

[27] *Investigation of Free Time Practices – Port of San Diego*, 9 F.M.C. 525, 541 (1966).

[28] *Chr. Salvesen & Co., Ltd. v. West Michigan Dock & Market Corp.*, 12 F.M.C. 135, 146 (1968).

[29] *See Seacon Terminals, Inc. v. The Port of Seattle*, 26 S.R.R. 886 (F.M.C. 1993); *New Orleans Stevedoring Co. v. Bd. of Commissioners of the Port of New Orleans*, 29 S.R.R. 1066 (F.M.C. 2002), aff'd mem., 30 S.R.R. 261 (D.C. Cir. 2003); *Canaveral Port Authority – Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or*

responsibility to evaluate whether a party's decision-making practices resulted in a violation of the Shipping Act.[30] The Commission continues to acknowledge that its "role is not to ensure that all interested parties get the same deal or make a certain profit. Rather, the Commission's role is to ensure that parties are not precluded from obtaining preferential treatment due to unreasonable or unjustly discriminatory reasons."[31] The Commission further recognizes that an ocean common carrier does not have a duty to grant a contract to every potential party. However, upon establishing its criteria for granting preferential terms to parties who are able to meet those specified terms, the ocean common carrier then has a duty under the Shipping Act to apply such criteria in a consistent and fair manner without differentiating based on illegitimate transportation factors.[32] An ocean common carrier may be viewed as having acted reasonably in exercising its business discretion to proceed with a certain arrangement over another by taking into account such factors as profitability and compatibility with its business development strategy.[33]

**C. Shifting burden from complainant to ocean common carrier**

This proposed rule also sets forth a framework for an ocean common carrier to establish that its efforts to consider an entity's proposal or efforts at negotiation were done in good faith based on the criteria above. Once a complainant (or the BEIC) has established a *prima facie* case for each of the three elements above, the ocean common carrier will have the burden of production to show or justify why its refusal was reasonable. However, the ultimate burden of

---

*Negotiate*, 29 S.R.R. 1436 (F.M.C. 2003); *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 33 S.R.R. 821 (F.M.C. 2014).

[30] *Seacon Terminals* at 898-899; *New Orleans Stevedoring Co.*, at 1071.

[31] *Ceres Marine Terminals v. Maryland Port Administration*, 29 S.R.R. 356, 369 (F.M.C. 2001).

[32] *Id.* at 370.

[33] *Seacon Terminals* at 899.

persuasion remains with the complainant to show that the refusal to deal or negotiate was unreasonable.[34] Further, the proposed rule includes a rebuttable presumption of unreasonableness for those situations where an ocean common carrier categorically excludes U.S. exports from its backhaul trips from the U.S.

The proposed rule includes a mechanism for an ocean common carrier to justify its actions through means of a certification. Although this proposal does not require a certification for this purpose, the Commission is considering whether to make certification by a U.S.-based compliance officer mandatory. The Commission also notes that, as a preliminary matter, any justification must be directly relevant and specific to the case at hand. Information or data that supports generalized propositions is not helpful in determinations of reasonableness for a specific case. A certification should document the ocean common carrier's decision in a specific matter, the good faith consideration of an entity's proposal or request to negotiate, and the specific criteria considered by the ocean common carrier to reach its decision. Certification in this context means that an appropriate U.S.-based representative of the ocean common carrier attests that the decision and supporting evidence is correct and complete. An appropriate representative can include the ocean common carrier's U.S.-based compliance officer.

As to all of the issues discussed in this document, the Commission seeks comment and supporting information regarding its proposal.

[34] *Canaveral Port Authority – Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate*, 29 S.R.R. 1436 (F.M.C. 2003).

## III. 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 email to the email address listed above under ADDRESSES. Please include the docket number associated with this notice and the subject matter in the subject line of the email. 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 email 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.

**IV. Rulemaking Analyses**

**Regulatory Flexibility Act**

The Regulatory Flexibility Act, 5 U.S.C. 601-612, provides that whenever an agency publishes a notice of proposed rulemaking under the Administrative Procedure Act (APA), 5 U.S.C. 553, the agency must prepare and make available for public comment a regulatory flexibility analysis describing the impact of the rule on small entities, unless the head of the agency certifies that the rulemaking will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603-605. As the head of the agency, the Chairman, by voting to approve this NPRM, is certifying that this proposed rule, if adopted, will not have a significant economic impact on a substantial number of small entities.

**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 criteria to determine whether an ocean common carrier has engaged in an unreasonable refusal to deal with respect to vessel space accommodations under 46 U.S.C. 41104(a)(10), and the elements necessary for a successful claim 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) 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).

**Regulation Identifier Number**

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

**List of Subjects in 46 CFR Part 542**

Administrative practice and procedure, Non-vessel-operating common carriers, Ocean common carrier, Refusal to deal or negotiate, Vessel-operating common carriers, Vessel space accommodations.

For the reasons set forth in the preamble, the Federal Maritime Commission proposes to amend 46 CFR part 542 as follows:

**Part 542 – COMMON CARRIER PROHIBITIONS (UNDER Sec. 41104)**

1. The authority citation for part 542 reads 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 new section 542.1 to read as follows:

Section 542.1

(a) *Purpose*. This provision establishes the elements and definitions necessary for the Commission to apply 46 U.S.C. 41104(a)(10) with respect to vessel space accommodations provided by an ocean common carrier. This includes complaints brought before the Commission by a private party or enforcement cases brought by the Commission.

(b) *Definitions.*

(1) *Transportation factors* means, for the purposes of this section, factors that encompass the genuine operational considerations underlying an ocean common carrier's practical ability to accommodate laden cargo for import or export, which can include, without limitation, vessel safety and stability, scheduling considerations, and the effect of blank sailings.

(2) *Unreasonable* means, for the purposes of this section, an ocean common carrier's refusal to deal or negotiate as prohibited under 46 U.S.C. 41104(a)(10). In evaluating an ocean common

carrier's actions, the Commission will consider the following factors, without limitation, when deciding whether a refusal to deal or negotiate under section 542.1(c)(3) is unreasonable:

(a) whether the ocean common carrier follows a documented export strategy that enables the efficient movement of export cargo;

(b) whether the ocean common carrier engaged in good-faith negotiations, and made business decisions that were subsequently applied in a fair and consistent manner;

(c) the existence of legitimate transportation factors; and

(d) any other factors the Commission deems relevant.

(3) *Vessel space accommodations* means, for the purposes of this section, space provided aboard a vessel of an ocean common carrier for laden containers being imported to or exported from the United States.

(c) Elements. In order to establish a successful private party or enforcement claim under 46 U.S.C. 41104(a)(10) for refusal to deal or negotiate with respect to vessel space accommodations:

(1) the respondent must be an ocean common carrier as defined in 46 U.S.C. 40102;

(2) the respondent refuses to deal or negotiate, including with respect to vessel space accommodations; and

(3) the refusal is unreasonable.

(d) Shifting of burden of production.

The burden to establish a violation of this part is with the complainant (or Bureau of Enforcement, Investigations, and Compliance). Once a complainant sets forth a *prima facie* case of a violation, the burden shifts to the ocean common carrier to justify that its actions were reasonable. This justification may take the form of a certification by an appropriate

representative of the ocean common carrier to attest that the decision and supporting evidence is correct and complete. An appropriate representative can include the ocean common carrier's compliance officer.

By the Commission.

William Cody
Secretary