discuss the effects of this proposed rule elsewhere in this preamble.

*G. Taking of Private Property*

This proposed rule would not cause a taking of private property or otherwise have taking implications under Executive Order 12630 (Governmental Actions and Interference with Constitutionally Protected Property Rights).

*H. Civil Justice Reform*

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, (Civil Justice Reform), to minimize litigation, eliminate ambiguity, and reduce burden.

*I. Protection of Children*

The Coast Guard has analyzed this proposed rule under Executive Order 13045 (Protection of Children from Environmental Health Risks and Safety Risks). This proposed rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

*J. Indian Tribal Governments*

This proposed rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), because it would not have a substantial direct effect on one or more Indian tribes, or on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

*K. Energy Effects*

We have analyzed this proposed rule under Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use). We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

*L. Technical Standards*

The National Technology Transfer and Advancement Act, codified as a note to 15 U.S.C. 272, directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, the Coast Guard did not consider the use of voluntary consensus standards.

*M. Environment*

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f). We have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule appears to meet the criteria for categorical exclusion (CATEX) under paragraphs A3(d) and L54 in Appendix A, Table 1 of DHS Directive 023–01 (series). CATEX A3 pertains to the promulgation of rules and procedures that are: (d) ''those that interpret or amend an existing regulation without changing its environmental effect'' and CATEX A3 also pertains to regulations concerning the training, qualifying, licensing, and disciplining of maritime personnel. This rule proposes to revise mariner credentialing requirements to implement 46 U.S.C. 7101(j)(1) without substantive change. A preliminary Record of Environmental Consideration supporting this determination is available in the docket where indicated under the **ADDRESSES** section of this preamble. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

**List of Subjects in 46 CFR Part 11**

Penalties, Reporting and recordkeeping requirements, Schools, Seamen.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 46 CFR part 11 as follows:

## PART 11—REQUIREMENTS FOR OFFICER ENDORSEMENTS

■ 1. The authority citation for part 11 continues to read as follows:

**Authority:** 14 U.S.C. 633; 31 U.S.C. 9701; 46 U.S.C. 2101, 2103, and 2110; 46 U.S.C. chapter 71; 46 U.S.C. 7502, 7505, 7701, 8906, and 70105; Executive Order 10173; Department of Homeland Security Delegation No. 0170.1. Section 11.107 is also issued under the authority of 44 U.S.C. 3507.

■ 2. Amend § 11.201 as follows:
■ a. Redesignate paragraph (c)(1) as paragraph (c) introductory text and revise the newly redesignated paragraph (c) introductory text;
■ b. Redesignate paragraphs (c)(2) through (c)(6) as (c)(1) to (c)(5); and
■ c. Revise newly redesignated (c)(1).

The revisions to read as follows:

**§ 11.201 General requirements for national and STCW officer endorsements.**

* * * * *

(c) *Experience and service.* Applicants for officer endorsements should refer to § 10.232 of this subchapter for information regarding requirements for documentation and proof of sea service.

(1) An applicant for a national officer endorsement must meet one of the following:

(i) Have at least 3 months of required service on vessels of appropriate tonnage or horsepower within the 3 years immediately preceding the date of application; or

(ii) Have at least 3 months of required service on vessels of the uniformed services as defined in 10 U.S.C. 101(a)(5) of appropriate tonnage or horsepower within the 7 years immediately preceding the date of application; or

(iii) Have at least 3 months of required service attained through a combination of service established under paragraphs (c)(1)(i) or (ii) of this section.

* * * * *

Dated: September 6, 2019.

**R.V. Timme,**

*Rear Admiral, U.S. Coast Guard, Assistant Commandant for Prevention Policy.*

[FR Doc. 2019–19754 Filed 9–16–19; 8:45 am]

**BILLING CODE 9110–04–P**

## FEDERAL MARITIME COMMISSION

**46 CFR Part 545**

**[Docket No. 19–05]**

**RIN 3072–AC76**

## Interpretive Rule on Demurrage and Detention Under the Shipping Act

**AGENCY:** Federal Maritime Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Maritime Commission is seeking public comment on 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 will consider in assessing whether a demurrage or detention practice is unjust or unreasonable.

**DATES:** *Submit comments on or before:* October 17, 2019.

**ADDRESSES:** You may submit comments, identified by the Docket No. 19–05 by the following methods:

- *Email: secretary@fmc.gov.* Include in the subject line: ''Docket 19–05, Demurrage & Detention 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: *https://www2.fmc.gov/readingroom/proceeding/19-05/,* 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.*

**SUPPLEMENTARY INFORMATION:**

## I. Introduction

In 2018, the Commission initiated a non-adjudicatory fact-finding investigation, Fact Finding Investigation No. 28, into the conditions and practices relating to detention, demurrage, and free time.[1] On December 7, 2019, the Commission voted to accept the investigation's Final Report, in which the Fact-Finding Officer found that:

- Demurrage and detention are valuable charges when applied in ways that incentivize cargo interests to move cargo promptly from ports and marine terminals;
- All international supply chain actors could benefit from transparent, consistent, and reasonable demurrage and detention practices, which would improve throughput velocity at U.S. ports, allow for more efficient use of business assets, and result in administrative savings; and
- Focusing port and marine terminal operations on notice of actual cargo availability would achieve the goals of demurrage and detention practices and improve the performance of the international commercial supply chain.[2]

Based on the Fact Finding's Final Report, Interim Report,[3] and investigatory record, the Commission is considering incorporating those findings in guidance as to the Commission's interpretation of 46 U.S.C. 41102(c) and 46 CFR 545.4(d) in the context of demurrage and detention. Although each § 41102(c) case would continue to be decided on the particular facts of the case, the Commission believes that guidance in the form of a non-exclusive list of considerations will promote fluidity in the U.S. freight delivery system by ensuring that demurrage and detention serve their purpose of incentivizing cargo and equipment velocity. The proposed interpretive rule will also mitigate confusion, reduce and streamline disputes, and enhance competition and innovation in business operations and policies. The Commission is issuing this notice to obtain public comments on this guidance.

## II. Background

This notice of proposed rulemaking arises from the Commission's Fact Finding Investigation No. 28, which itself derived from repeated criticisms of ocean carrier and marine terminal operator demurrage and detention practices.[4] The investigation was nationwide and industry-wide in scope and involved thousands of pages of written discovery and interviews with numerous representatives of cargo interests (shippers and consignees), truckers, ocean transportation intermediaries, ocean carriers, marine terminal operators, and ports.[5]

The Fact-Finding Officer found that the primary purposes of demurrage and detention are to serve as financial incentives to encourage the productive use of assets (containers and terminal space) and promote optimal cargo velocity through marine terminals.[6] The Fact Finding Officer further found that the U.S. international ocean freight delivery system, and American economy, would benefit from: (1) ''Transparent, standardized language for demurrage and detention practices;'' (2) ''Clear, simplified, and accessible demurrage and detention billing practices and dispute resolution processes;'' (3) ''Explicit guidance regarding the types of evidence relevant to resolving demurrage and detention disputes;'' and (4) ''Consistent notice to cargo interests of container availability.'' [7]

## III. Summary of Proposed Guidance

The guidance proposed by the Commission is in the form of an interpretive rule.[8] The proposed rule concerns financial incentives, particularly with respect to cargo availability, empty container return, notice of availability, and government inspections; accessible and user-friendly demurrage and detention policies; and transparent, consistent terminology. The following consists of the text of the proposed rule and comments on each subparagraph.

### *A. Purpose and Scope of Proposed Rule*

The Commission's proposed rule would first specify that its purpose is to provide guidance about how the

[1] Fact Finding Investigation No. 28 Order of Investigation (Mar. 5, 2018) (''Order of Investigation''), *https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/ff-28_ord2.pdf/.*

[2] Fact Finding Investigation No. 28 Final Report (''Final Report''), *https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF-28_FR.pdf/.*

[3] Fact Finding Investigation No. 28 Interim Report (''Interim Report''), *https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF28_int_rpt2.pdf/.*

[4] *See, e.g.,* Coalition for Fair Port Practices Petition for Rulemaking, FMC Dkt. No. P4–16 (Dec. 7, 2016), *https://www2.fmc.gov/readingroom/docs/P4-16/P4-16_petition.pdf/;* Fed. Mar. Comm'n, *U.S. Container Port Congestion & Related International Supply Chain Issues: Causes, Consequences, and Challenges* (July 2015), *https://www.fmc.gov/wp-content/uploads/2019/04/PortForumReport_FINALwebAll.pdf;* (Fed. Mar. Comm'n *Report: Rules, Rates, and Practices Relating to Detention, Demurrage, and Free Time for Containerized Imports and Exports Moving Through Selected United States Ports* (Apr. 3, 2015), *https://www.fmc.gov/wp-content/uploads/2019/04/reportdemurrage.pdf.*

[5] Interim Report at 4–5; Final Report at 7–9, 11; Fact Finding Investigation No. 28 Order (Dec. 17, 2018), *https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF-28_Ord.pdf/.*

[6] *See* Final Report at 28–29.

[7] Final Report at 32. Although not the subject of this rulemaking, current variations in chassis supply models have frequently contributed to serious inefficiencies in the freight delivery system. Timely and reliable access to roadworthy chassis is a source of ongoing and systemic stress to the system.

[8] An interpretive rule is an agency rule that clarifies or explains existing laws or regulations.

Commission will interpret 46 U.S.C. 41102(c) and 46 CFR 545.4(d) in the context of demurrage and detention The proposed interpretive rule would also make clear that it applies to practices and regulations relating to demurrage and detention for containerized cargo. For purposes of this rule, demurrage and detention would include 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.

As for the scope and applicability of the proposed rule, first, it defines ''demurrage and detention'' broadly to encompass all charges customarily referred to as demurrage, detention, or per diem, however defined.[9] Second, the proposed rule would only apply to containerized cargo, including refrigerated (''reefer'') containers. Third, the proposed rule makes clear that it applies to charges related to shipping containers, not other equipment, such as chassis.[10]

*B. Incentive Principle*

1. General Incentive Approach

The Commission proposes that in assessing the reasonableness of demurrage and detention practices and regulations, it will consider the extent to which demurrage and detention are serving their intended purposes as financial incentives to promote freight fluidity.

To pass muster under § 41102(c), ''a regulation or practice must be tailored to meet its intended purpose.'' [11] 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)—a point which ocean carriers and marine terminal operators have repeatedly emphasized to the Commission.[12] The ''incentive principle'' in the proposed rule is merely an application of the general § 41102(c) reasonableness standard to the demurrage and detention context.

As Fact-Finding Investigation No. 28 made clear, demurrage and detention are valuable charges when they work—when they are applied in ways that incentivize cargo interests to move cargo promptly from ports and marine terminals.[13] When circumstances are such that demurrage and detention do not work, *i.e.,* when they do not incentivize cargo movement and productive asset use, there is cause to question the reasonableness of their application. For instance, if a cargo interest or its trucker cannot retrieve cargo from a marine terminal because the cargo is not available for retrieval due to circumstances such as weather, port or terminal closures, the container is in a closed area, or government inspections of the cargo, demurrage would not serve as an effective incentive for cargo retrieval.

The proposed rule states the incentive principle in general terms, but its application will vary depending on the facts of a given case. For example, 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.[14] An example of an extenuating circumstance is whether a cargo interest has complied with its customary responsibilities, especially regarding cargo retrieval (*e.g.,* making appointments, paying freight, submitting required paperwork, retaining a trucker). If it has not, this could be factored into the analysis. Another application of the incentive principle is if cargo cannot be retrieved, or empty containers cannot be returned, due to a lack of appointments, demurrage and detention cannot incentivize cargo retrieval or equipment return. The Commission may therefore consider in the reasonableness analysis how demurrage and detention practices and regulations account for the availability of appointments.

Particularly significant applications of the incentive principle involve cargo availability, empty container return, notice of cargo availability, and government inspections, as set forth below.

2. Cargo Availability

As for particular applications of the ''incentive principle,'' the proposed interpretive rule would clarify that 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.

A particularly important context for the incentive principle, and one given its own subparagraph in the proposed rule, is cargo availability. If cargo interests or truckers cannot pick up their cargo within free time, then demurrage cannot serve its incentive purpose. Cargo availability is key to demurrage serving its intended function, and thus the Commission may consider the relationship between demurrage and cargo availability in its analysis under 46 U.S.C. 41102(c).[15] The more a demurrage practice is tailored to cargo availability, the less likely the practice is to be found unreasonable.

In this context, ''cargo availability'' or ''accessibility'' refers to the *actual* ability of a cargo interest or trucker to retrieve its cargo. Cargo is not available, for instance, if a cargo interest or trucker cannot pick it up because it is in a closed area of a terminal, or if the port is closed.[16] Examples of demurrage practices that are expressly linked to container availability, and which the Commission would weigh positively in the reasonableness analysis, include: (a) Starting the free time clock upon container availability as opposed to container discharge from a vessel; (b) public notice of terminal yard closures; and (c) stopping a demurrage or free time clock when a container is rendered unavailable, such as upon notice of a yard or terminal closure or when a trucker cannot get an appointment

[9] The definitions of the terms ''demurrage,'' ''detention,'' and ''per diem'' vary among ocean carriers and marine terminal operators. Interim Report at 4 n.3, 5–7; Final Report at 11–12, 30.

[10] Although the Fact-Finding Officer in some contexts defined ''detention'' in terms of ''equipment,'' Interim Report at 5 n.3, the reports discussed containers, *e.g.,* Final Report at 30.

[11] *Distribution Services, Ltd.* v. *Trans-Pac. Freight Conference of Japan and Its Member Lines,* 24 S.R.R. 714, 722 (FMC 1988).

[12] Interim Report at 2–3; Final Report at 12, 13.

[13] *See, e.g.,* Final Report at 3, 32.

[14] There appears to be little appetite for more free time generally, and there is reason to question whether, in some situations, a one-day extension of free time would adequately mitigate one day of cargo unavailability.

[15] *See* Final Report at 3, 26–29; *see also id.* at 32 (''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.'').

[16] Final Report at 20. ''A container is in an open area when it is in an area from which it can be retrieved. In contrast, a closed area is a section of a container yard in which a ship is being worked. When a container is in a closed area, it cannot be retrieved for safety and labor reasons.'' Final Report at 16 n.19. Not every marine terminal has open and closed areas. *Id.* Another things that might impact availability is whether a trucker has access to a terminal (*e.g.,* has an appointment and there is an absence of congestion). Final Report at 20. During the investigation, some suggested that a container should be deemed unavailable if the wait for truckers outside the terminal gate is longer than fifteen minutes or the total wait time for truckers (inside and outside the terminal gate) exceeds ninety minutes.

within a reasonable time of it becoming available.[17]

3. Empty Container Return

The proposed interpretive rule would also indicate 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 flip side of cargo availability is empty container return. Absent extenuating circumstances, practices and regulations that result in detention being imposed when a container cannot be returned weigh heavily in favor of a finding of unreasonableness. The paradigmatic example is that if the marine terminal designated by an ocean carrier refuses to accept empty containers, no amount of detention can incentivize the return of those containers. Absent extenuating circumstances, assessing detention in such situations, or declining to pause the free time or detention clock, would likely be unreasonable. Imposing detention in situations of uncommunicated or untimely communicated changes in container return location also weighs on the side of unreasonableness, as might doing so when there have been uncommunicated or untimely communicated notice of terminal closures for empties.

4. Notice of Cargo Availability

Additionally, the Commission would clarify that in assessing the reasonableness of demurrage practices and regulations, it may consider whether and how regulated entities provide notice to cargo interests that cargo is available for retrieval. The Commission would 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 subparagraph promotes aligning cargo retrieval processes around notice that cargo is available.[18] The Commission will consider in the reasonableness analysis whether and how regulated entities provide notice to cargo interests that cargo is available for retrieval. The more notice is calculated to apprise cargo interests that cargo is available for retrieval, the more this factor favors a finding of reasonableness.

The Commission may consider the *type* of notice. Types of notice that are expressly linked to cargo availability will weigh toward reasonableness, and include: (a) Notice that cargo is discharged and in an open area; (b) notice that cargo is discharged, in an open area, free of holds, and proper paperwork has been submitted; and (c) notice of all the above and that an appointment is available.

Other factors include *to whom* notice is provided, *the format* and *method of distribution* of notice, the *timing* of notice, and the *effect* of notice. The more these factors align with the goal of moving cargo off terminal property, the less likely demurrage practices would be found unreasonable. For instance, while the Commission appreciates that many marine terminal operators make container status information available on websites and allow users to register to get electronic notice of changes in container status, cargo interests have persuasively explained the superior merits of ''push notifications'' related to cargo availability, including notice of yard closures.[19] Moreover, the Commission will consider how demurrage and detention practices account for cargo availability changes, such as when a container that is initially available becomes unavailable.[20] Regarding the effect of notice, demurrage practices that link the start of free time to notice that a container is available weigh in favor of reasonableness, as do practices that guarantee the availability of an appointment within a specified time of notice of container availability.

5. Government Inspections

The Commission is still considering its guidance related to government inspections of cargo. Imposition of demurrage and detention during government inspections of cargo, and the delays associated with such inspections, is a significant problem for cargo interests and truckers. Such inspections not only involve cargo interests and regulated entities but also government agencies, third-parties, and, in some cases, off-terminal facilities. In light of the incentive principle, the Commission is considering the following interpretive rules:

- 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;
- 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 inspection, such as by waiver or extension of free time, are likely to be found unreasonable; or
- 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.

The Commission is particularly interested in comments on such proposals and other suggestions for handling demurrage and detention in the context of government inspections, consistent with the incentive principle.

*C. Demurrage and Detention Policies*

The Commission further proposes making clear that it may consider in the reasonableness analysis the existence and accessibility of policies implementing demurrage and detention practices and regulations, including dispute resolution policies. In assessing dispute resolution policies, the Commission would further consider the extent to which they contain information about points of contact, timeframes, and corroboration requirements.

1. Existence and Accessibility of Policies

Cargo interests should be informed of who is being charged, for what, by whom, and how disputes can be addressed in a timely fashion.[21] The opacity of current practices encourages disputes and discourages competition over demurrage and detention charges. Accordingly, the proposed rule would have the Commission consider in the reasonableness analysis the *existence* of policies—whether a regulated entity has demurrage and detention policies that reflect its practices. The Commission would also consider the *accessibility* of policies—whether and how those policies are made available to cargo interests and truckers and the public. The more accessible these policies are, the greater this factor weighs against a finding of unreasonableness. This factor favors demurrage and detention practices and regulations that make policies available in one, easily

[17] Final Report at 16, 20–22.

[18] Interim Report at 4 (emphasizing importance of consistent notice to shippers of cargo availability); *see also id.* at 18.

[19] Final Report at 20.

[20] *See* Final Report at 29.

[21] The Fact-Finding Officer noted that there is a marked lack of transparency regarding demurrage and detention practices, including billing procedures and dispute resolution processes. Interim Report at 2, 4, 5, 10–12; Final Report at 7, 13–18, 29; *see also* Final Report at 32 (emphasizing need for clear, simplified, and accessible billing practices and dispute resolution processes and explicit guidance on evidence).

accessible website, whereas burying demurrage and detention policies in scattered sections in tariffs would be disfavored.[22]

As for dispute resolution policies, not only should they be accessible, but the Commission will consider whether they address things such as points of contact for disputing charges; time frames for raising disputes, for responding to cargo interests or truckers, and for resolving disputes; and the types of information or evidence relevant to resolving demurrage or detention disputes.[23] Other attributes of dispute resolution policies that will weigh in favor of reasonableness include step-by-step instructions for disputing a charge, dedicated dispute resolution staff at regulated entities, allowing priority appointments or waiving appointments after successful dispute resolution or when a container is not available; sufficient responses to cargo interests requests for free time extensions or waiver; processes for elevating disputes after an initial response; and allowing a trucker to continue to do business with a regulated entity during the pendency of a dispute.

As an example, the best practices proposal put forward by the Ocean Carrier Equipment Management Association (OCEMA)—and made available on OCEMA's website—is a useful model for demurrage and detention dispute resolution policies, which each regulated entity would tailor to fit its own circumstances.[24] That model supports including in demurrage and detention policies: (1) Points of contact for demurrage and detention disputes (names, phone numbers, and email addresses); (2) ''[a] description of what information is required to be provided by the shipper in order to make a detention and/or demurrage dispute claim;'' (3) timeframes for raising a dispute and providing a response; and (4) that individual entities' dispute resolution processes web pages be linked to the OCEMA website.[25]

2. Billing

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. Another proposal that could promote transparency and alignment of stakeholder interests is to tie billing relationships to ownership or control of the assets that are the source of charges.[26] Under this approach, marine terminal operators would bill cargo interests directly for use of terminal land. Ocean carriers would bill cargo interests directly for use of containers.[27] This approach is also consistent with the Commission's preferred definitions of ''demurrage'' and ''detention.'' [28] Moreover, regardless of billing model, ocean carriers should bill their customers, rather than imposing charges contractually-owed by cargo interests on third parties. The Commission is interested in comments on this proposal.

3. Guidance on Evidence

Dispute resolution policies that lack guidance on corroboration requirements, that is, guidance about the types of evidence relevant to resolving demurrage and detention disputes, are likely to fall on the unreasonable end of the spectrum. Cargo interests and truckers have suggested several ideas regarding this topic, which, if implemented by regulated entities, would weigh favorably in the § 41102 analysis, including: (a) Providing truckers with evidence substantiating trucker attempts to retrieve cargo that are thwarted when the cargo is not available (*e.g.,* a trouble ticket with information about container and container unavailability); and (b) providing cargo interests and truckers with log records that track attempts to make appointments. Dispute resolution policies should include evidentiary guidance. The OCEMA best practices proposal, for example, expressly contemplates such guidance.

*D. Transparent Terminology*

Finally, according to the proposed interpretive rule, the Commission may consider in the reasonableness analysis the extent to which regulated entities have defined the terms used in demurrage and detention practices and regulations, the accessibility of definitions, and the extent to which the definitions differ from how the terms are used in other contexts.

For demurrage and detention practices and regulations to be just and reasonable, it must be clear what the terminology means.[29] Accordingly, the Commission will consider in the reasonableness analysis whether a regulated entity has defined the material terms of the demurrage or detention practice at issue, whether and how those definitions are made available to cargo interests, truckers, and the public, and 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 Commission supports defining demurrage and detention in terms of what asset is the source of a charge (land or container) as opposed to the location of a container (inside or outside a terminal).[30] Under the former, ''demurrage'' would be a charge related to terminal space, and ''detention'' would be a charge related to containers.[31] The Commission strongly discourages the continued use of terms such as ''storage'' and ''per diem'' in this context because not only do they add unnecessary complexity, the Commission has been informed that they are inconsistent with international practice.

## IV. 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

[22] Interim Report at 17 (Part IV.2a); Final Report at 14, 29–30.

[23] *See* Interim Report at 14, 17–18; Final Report at 7–8, 17–18.

[24] *http://www.ocema.org/OCEMA%20Recommended%20Best%20Practice%20for%20Detention%20and%20Demurrage%20Dispute%20Resolution%20Processes.pdf.*

[25] *Id.*

[26] Interim Report at 18 (describing optional billing model).

[27] *Id.*

[28] *See infra* at Part III.E.

[29] Interim Report at 5–7, 17; Final Report at 11–12, 30, 32.

[30] Interim Report at 6–7; Final Report at 12. This preference does not limit the applicability of this rule to demurrage and detention so defined. As noted in Part III.A *supra,* the proposed interpretive rule applies however a regulated entity defines these types of charges.

[31] Interim Report at 6–7; Final Report at 12.

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 it 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**.

**V. 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 interpretive 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. This rule regarding the Commission's interpretation of the 46 U.S.C. 41102(c) falls within the categorical exclusion for investigatory and adjudicatory proceedings, the purpose of which is to ascertain past violations of the Shipping Act of 1984. 46 CFR 504.4(a)(22). Therefore, no environmental assessment or environmental impact statement is required.

*Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) (PRA) requires an agency to seek and receive approval from the Office of Management and Budget (OMB) before collecting information from the public. 44 U.S.C. 3507. This 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 in 46 CFR Part 545**

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

For the reasons set forth 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 § 545.5 to read as follows:

### § 545.5 Interpretation of Shipping Act of 1984-Unjust and unreasonable practices with respect to demurrage and detention.

(a) *Purpose.* The purpose of this rule is to provide guidance about how the Commission will interpret 46 U.S.C. 41102(c) and § 545.4(d) in the context of demurrage and detention.

(b) *Applicability and Scope.* This rule applies to practices and regulations relating to demurrage and detention for containerized cargo. For purposes of this rule, demurrage and detention include 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.* In assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider the extent to which demurrage and detention are serving their intended purposes as financial incentives to promote freight fluidity.

(d) *Particular Applications of Incentive Principle.*—(1) *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.

(2) *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.

(3) *Notice of Cargo Availability.* In assessing the reasonableness of

demurrage practices and regulations, the Commission may consider whether and how regulated entities provide notice to cargo interests that cargo is available for retrieval. The Commission may consider the type of notice, to whom notice is provided, the format of notice, method of distribution of notice, the timing of notice, and the effect of the notice.

(4) Government Inspections.

(e) *Demurrage and Detention Policies.* The Commission may consider in the reasonableness analysis the existence and accessibility of policies implementing demurrage and detention practices and regulations, including dispute resolution policies. In assessing dispute resolution policies, the Commission may further consider the extent to which they contain information about points of contact, timeframes, and corroboration requirements.

(f) *Transparent Terminology.* The Commission may consider in the reasonableness analysis the extent to which regulated entities have defined the terms used in demurrage and detention practices and regulations, the accessibility of definitions, and the extent to which the definitions differ from how the terms are used in other contexts.

By the Commission.

**Rachel Dickon,**

*Secretary.*

[FR Doc. 2019–19858 Filed 9–16–19; 8:45 a.m.]

**BILLING CODE 6731–AA–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 48 CFR Parts 1502, 1512, 1513, 1516, 1532, 1539, and 1552

**[EPA–HQ–OARM–2018–0714; FRL–9998–55–OMS]**

### Environmental Protection Agency Acquisition Regulation; Unenforceable Commercial Supplier Agreement Terms, Class Deviations, and Update for Fixed Rates for Services—Indefinite Delivery/Indefinite Quantity Contract

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to amend the Environmental Protection Agency Acquisition Regulation (EPAAR) to address common Commercial Supplier Agreement terms that are inconsistent with or create ambiguity with Federal Law, to create a new subpart for class deviations, and to update clause Fixed Rates for Services—Indefinite Delivery/Indefinite Quantity Contract.

**DATES:** Comments must be received on or before November 18, 2019.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–OARM–2018–0714, at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

**FOR FURTHER INFORMATION CONTACT:** Thomas Valentino, Policy, Training and Oversight Division, Acquisition Policy and Training Branch (3802R), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564–4522; email address: *valentino.thomas@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. General Information

1. *Submitting Classified Business Information.* Do not submit CBI to EPA website *https://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI, and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The Agency may ask you to respond to specific questions or organize comments by referencing a *Code of Federal Regulations* (CFR) Part or section number.
- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

## II. Background

1. Incompatibility of Commercial Supplier Agreements

EPA defines Commercial Supplier Agreements (CSAs) as terms and conditions that are customarily offered to the public by vendors of supplies or services that meet the Federal Acquisition Regulation (FAR) definition of ''commercial item'' and are intended to create a binding legal obligation on the end user. CSAs are common in information technology acquisitions, including acquisitions of commercial computer software and commercial technical data, and they may apply to any supply or service.

Commercial supplies and services are offered to the public under standard agreements that may take a variety of forms, including but not limited to license agreements, terms of service, and terms of sale or purchase. These standard CSAs contain terms and conditions that are appropriate when the purchaser is a private party, but not when the purchaser is the Federal Government.

The existence of Federally-incompatible terms in standard CSAs is recognized in FAR 27.405–3(b), which is limited to the acquisition of commercial computer software. This subsection advises contracting officers to exercise caution when accepting a