Comments of the

World Shipping Council

Submitted to the

Federal Maritime Commission

In the matter of

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

Docket No. FMC-2023-0010

Regulatory Identification Number - 3072-AC92

July 31, 2023

1. Identity and Interest of the World Shipping Council (WSC).

The World Shipping Council (WSC) is a non-profit trade association that represents the liner shipping industry, which is comprised of operators of containerships and roll-on/roll-off (ro-ro) vessels (including vehicle carriers). Together, WSC's members operate approximately 90 percent of the world's liner vessel services including more than 5,000 ocean-going vessels of which approximately 1,500 vessels make more than 27,000 calls at ports in the United States each year.[1]

WSC's container liner members are the parties that will be regulated under the proposed rule. WSC files these comments in the spirit of assisting the Commission in creating a final rule that is consistent with the Shipping Act, provides predictable guidance to all parties, and recognizes the operational and commercial realities of the liner shipping industry.

This document serves as WSC's comments for both the proposed regulation[2] and as comments for the proposed collection of information.[3]

2. Executive Summary.

The Ocean Shipping Reform Act of 2022, Pub. L. 117-146, ("OSRA 22") Section 7, directed the Federal Maritime Commission (FMC) to undertake a rulemaking to define when a carrier has unreasonably refused to negotiate or deal with respect to vessel space accommodations, as provided under 46 U.S.C. § 41104(a)(10). Section 7 also requires the FMC to develop regulations to define unfair or unjustly discriminatory methods, which includes "unreasonable refusal of cargo space accommodations when available" under 46 U.S.C § 41104(a)(3).[4]

WSC agrees with the Commission that allegations of "unreasonable refusal to deal or negotiate" should be dealt with on a case-by-case basis and that using a suite of non-exclusive factors is both appropriate and consistent with its past precedent.

[1] A full description of the Council and a list of its members are available at www.worldshipping.org.
[2] *See* 88 FR 38789-38808.
[3] *See Id.* at 38806.
[4] The FMC has decided to defer the latter half of this rulemaking for "other unfair or unjustly discriminatory practices."

Although WSC agrees with the Commission's general approach, there are <u>ten specific points</u> on which WSC urges the Commission to amend its proposal before publishing a final rule:

i. Revise the proposed definition of unreasonable – or said another way, the description of when a shipper or the Commission has stated a prima facie case – to provide clarity and regulatory certainty to carriers, shippers, and finders of fact as to what actions the Commission believes constitute unreasonable behavior under 46 U.S.C. § 41104(a)(3) or (a)(10). The proposed definition is so vague that any conduct could fit into the Commission's definition of unreasonable. The revised text should also, consistent with the Commission's precedents, make clear that the standard for reasonable behavior is one of commercial reasonableness.

ii. Reincorporate business factors into the regulatory text. The Commission removed business factors in its SNPRM under the rationale that business factors are too important to be included in the regulation. This is directly contrary to the Commission's claim that all legitimate factors will be considered. Removing business factors from the regulatory text is a conscious and systematic refusal by the Commission to consider what it has itself identified as an important part of the analysis, and thus constitutes a failure to consider a critical part of the issue under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. WSC provided a list of reasonable business factors in its comments to the NPRM and incorporates them by reference in these comments.

iii. Revise the definition of transportation factors in 542.1(b)(4) to include not just vessel transportation factors but the landside transportation issues and other factors that reflect the operational and commercial realities of the liner shipping industry. This will also ensure the factors that were the root cause of the COVID-19 supply chain congestion are incorporated into the Commission's definition. WSC has proposed amended regulatory text to define transportation factors more accurately.

iv. Remove the requirement for an export policy in 542.1(j) and remove the use of an export policy in 542.1(d)(1), and 542.1(g)(1) as a factor to be considered in determining unreasonableness.
    - There is no authority in the Shipping Act or OSRA 22 to impose an export policy requirement on ocean carriers or use a required export policy as a factor in determining reasonableness.
    - Imposing a requirement to produce an export policy is an impermissible attempt by the Commission to rewrite OSRA 22 as an export-focused statute.
    - The Commission's claim that 46 U.S.C § 40104, Reports filed with the Commission, authorizes it to impose an export policy requirement is not supported by the statute's plain language. In addition, the Commission's proposal exceeds the limitations in its general report authority set forth in 46 U.S.C. § 40104(a)(3)(A), which states the Commission, "shall…limit the scope of any filing ordered under this section to fulfill the objective of the order."
    - The Commission fails to adequately explain how an export policy or strategy document can be used as a benchmark for determining reasonableness, rendering it arbitrary, capricious, and not in accordance with the law. The Commission's proposal that carriers "must follow" the export policy that the regulation would require to be created and filed with the Commission far exceeds a reporting or accounting of past events contemplated or authorized by 46 U.S.C. § 40104. It is also an unprecedented Commission interference with commercial businesses that is untethered to any statutory authority and is plainly unlawful.

- The Commission needs to clarify its intentions regarding the confidentiality (or not) of export policies, to include how a confidential export policy will have any probative or precedential value in litigation.
- The Commission's request to the Office of Management and Budget (OMB) for authority to collect information in the form of an export policy will fail for not meeting the requirements of the Paperwork Reduction Act, 44 U.S.C. §§ 3501-3521 (PRA). This is because the Commission has failed to show how its proposal to require an export policy will have any utility to the agency, either in benchmarking unreasonable action, or for use in litigation.

v. Blank Sailings.
- Explain the Commission's interpretation of the term "when available" in the regulatory text implementing 46 U.S.C. § 41104(a)(3) (refusal to provide cargo space accommodations when available) and provide further clarification in the regulatory text stating that blank sailings are commercially reasonable.
- The Commission's use in 542.1(e)(1) of lack of advance notice or insufficient advance notice as an example of unreasonable refusal to deal under 46 U.S.C. § 41104(a)(3) is an improper attempt by the Commission to rewrite service contracts and should be withdrawn.

vi. Sweeper Vessels.
- Amend the regulatory text to include the preamble comment that nothing in this regulation is meant to restrict the ability of ocean common carriers to reposition empty containers.
- Remove the restriction on designated sweeper vessels that only allows them to carry empty containers so they can also carry export cargo if they have the capacity to do so.
- WSC has proposed regulatory text to incorporate these points.

vii. Remove 542.1(e)(4), scheduling insufficient time for vessel loading so that cargo is constructively refused, as an example of unreasonable ocean carrier conduct. Ports and maritime terminal operators determine port loading times, not ocean carriers. Thus, this example is improperly directed at ocean carriers.

viii. Remove 542.1(h)(1), "quoting rates that are so far above current market rates they cannot be considered a real offer . . .," as an example of unreasonable ocean carrier conduct. The Commission has no authority to regulate prices, and the proposal to use "so far above current market rates" as a standard is vague and unworkable.

ix. Burden Shifting: The FMC needs to clarify the burden shifting process to explicitly state it is the burden of production that shifts, not the burden of proof.

x. Exemption of Non-Vessel-Operating Common Carriers (NVOCCs). The Commission impermissibly exempts NVOCCs from the effects of 46 U.S.C. § 41104(a)(3) through this regulation. In so doing, the Commission creates a competitive advantage for NVOCCs by exempting them from liability, while at the same time creating a situation that is "detrimental to commerce" by denying the NVOCC's customer a meaningful remedy, all of which would fail an exemption analysis under 46 U.S.C. § 40103(a).

3. The Commission should continue to evaluate unreasonableness on a case-by-case basis, using a factors-based test.

OSRA 22, Section 7, directs the Federal Maritime Commission (FMC) to undertake a rulemaking to define when a carrier has unreasonably refused to negotiate or deal with respect to vessel space accommodations, as provided under 46 U.S.C. § 41104(a)(10). Section 7 also requires the FMC to develop regulations to define unfair or unjustly discriminatory methods, which include "unreasonable refusal of cargo space accommodations when available" under 46 U.S.C § 41104(a)(3).

In both the NPRM and SNPRM, the Commission states that the term "unreasonable" must be determined on a case-by-case basis. WSC agrees with the Commission that allegations of "unreasonable refusal to deal or negotiate" or allegations of "unreasonable refusal of cargo space accommodations when available" are best dealt with on a case-by-case basis and that using a suite of non-exclusive factors is both appropriate and consistent with the Commission's past precedent. This is the approach that the Commission has consistently used when adjudicating cases brought under 46 U.S.C. § 41104(a) and its predecessors.[5]

4. The Commission's proposed definition of "unreasonable" in 542.1(b)(5) violates the APA, does not make clear when a prima facie case of refusal to deal or negotiate to provide vessel space or cargo space accommodations exists, and its vagueness incentivizes unnecessary litigation.

Defining "unreasonable" is precisely the same thing as defining when a shipper or the Commission has stated a prima facie case – it is the sole purpose of OSRA's direction to undertake this rulemaking. Unfortunately, we know no more in the SNPRM than we did in the NPRM with respect to how the Commission will determine what behavior under (a)(3) or (a)(10) is unreasonable. This is because the Commission has chosen to define "unreasonable", a word that on its face is vague and subjective, with two more vague and subjective terms: "unduly restricted" and "meaningful access" to ocean carriage service. The use of these two terms offers no additional clarity to carriers, shippers, or finders of fact on what actions the Commission believes constitute unreasonable behavior. In fact, this is no definition at all, but rather a

[5] After review of the proposed text, it appears this regulation ***would not apply*** to vehicle carriers / ro-ro vessels. The proposed regulation in this SNRPM defines Cargo Space Accommodations as, "space which has been negotiated for aboard the vessel of an ocean common carrier ***for laden containers*** being imported to or exported from the United States," and Vessel Space Accommodations as, "space available aboard a vessel of an ocean common carrier ***for laden containers*** being imported to or exported from the United States." Both definitions only apply to containerized and not vehicle cargo. Arguably the export policy requirement found in 542.1(j) would still apply on its face to all cargo. However, the overall scheme of this regulation is to enforce 46 U.S.C. § 41104(a)(3) and (10) with respect to laden containers, so logically vehicle cargo is outside the scope of the export policy requirement as well. The Commission should clarify the applicability of its regulation to VOCCs that are vehicle carriers.

statement of an abstract concept under which almost any conduct could be deemed unreasonable. The APA requires the Commission to articulate a "rational connection between the facts found and the choice made" in deciding how it has chosen to define unreasonable.[6] The Commission has not offered an explanation that makes this connection, rendering its proposed definition of unreasonable arbitrary and capricious.

A vague and subjective definition of "unreasonable" is also bad policy because it does not provide certainty or predictable outcomes for parties. As proposed, neither shippers nor carriers will be able to properly analyze the strengths and weaknesses of their case. Thus, every allegation of unreasonable refusal to deal or negotiate and refusal of cargo space accommodations will have to be litigated to understand if a violation has occurred. This will cost both shippers and carriers significant amounts of money and time. This will also lower the likelihood of successful mitigation and bring more cases to the FMC for adjudication, resulting in slower response times, and increasing the burden on the Commission's staff and administrative law judges. This is the opposite of what Congress intended in directing the Commission to undertake this rulemaking.

5. The Commission should set forth in its regulatory text that the proper standard for determining compliance under (a)(3) and (a)(10) is one of commercial reasonableness.

It is important to remember that OSRA 22 did not create the "unreasonable refusal to deal or negotiate" prohibition found in 46 U.S.C. § 41104(a)(10). Instead, OSRA 22 merely added language to the section by expressly naming vessel space accommodations as a factual situation to which the prohibition applies. Thus, adherence to past Commission precedent is required absent a reasoned explanation why its prior policies and standards are being changed.[7] The same is true for the Commission's proposal to define when a carrier has unreasonably refused cargo space accommodations when available under 46 U.S.C. § 41104(a)(3). Though the new statutory language found in 41104(a)(3) is arguably broader than its predecessor language, the Commission has rich caselaw discussing the application of the term "unreasonable" for cases brought under subsection 41104(a) and must adhere to that precedent or explain why it has departed. Notably, the central feature of this precedent is a standard of commercial

[6] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 245–246, 9 L.Ed.2d 207 (1962)). The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made."

[7] *See Erie Blvd. Hydropower, LP v. FERC*, 878 F.3d 258, 269 (D.C. Cir. 2017) ("An agency decision that departs from agency precedent without explanation is similarly arbitrary and capricious."); *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995) ("[W]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.")

reasonableness.[8] This is because the Commission is regulating a for-profit industry, not a public utility where ratemaking guarantees a reasonable rate of return. Accordingly, the Commission should incorporate into the regulatory text that the appropriate standard for interpreting conduct under (a)(3) and (a)(10) is one of commercial reasonableness.

6. The Commission's list of factors under (a)(3) and (a)(10) is insufficient to determine commercial reasonableness.

a. <u>The FMC must explicitly reincorporate business factors into the list of factors to be considered by the Commission when adjudicating a claim</u>.

The SNPRM has jettisoned legitimate business factors as a tool to use in determining the reasonableness of a carrier's actions under (a)(3) and (a)(10). The Commission's explanation for doing so is:

> Section 542.1(g) proposes a list of factors that the Commission may choose to consider in evaluating whether a particular ocean common carrier's conduct was unreasonable. The factors in this section are those that were proposed in § 542.1(b)(2)(i) through (iv) of the NPRM except that business decisions are no longer a factor to be explicitly considered. The Commission decided with the help of the public comments that ***there is the potential for business decisions to overwhelm the rest of the factors and thus it decided to remove that language*** from the proposed rule. (emphasis added).[9]

By expressly removing business factors from the regulatory text, the Commission is effectively saying – its preambular assurances notwithstanding – that business factors will no longer be considered in evaluating reasonableness. The explanation the Commission offers – that business factors are too important to be included in the regulation – is directly contrary to the Commission's claim that all legitimate factors will be considered. The Commission's explanation also violates the APA because the Commission's approach is a conscious and systematic refusal by the agency to consider what it has itself identified as an important part of the equation, and thus constitutes a failure to consider a critically important part of the issue.[10] Moreover, the removal of legitimate business factors only creates further ambiguity as to the

[8] *See Maher Terminals, LLC v. The Port Auth. Of N.Y. and N.J.*, 2015 WL 435475 at *21 (F.M.C. 2015) ("[T]he Commission may defer to a port's reasonable, discretionary business decisions during negotiations."); *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886, 899 (F.M.C. 1993) (Commission holding that a port's decision not to enter into a lease "was a wholly reasonable exercise of its business discretion.")

[9] *See* 88 FR 38804.

[10] *See Viasat, Inc. v. F.C.C.*, 47 F.4th 769, 776 (D.C. Cir. 2022) ("An action is arbitrary and capricious if the agency relied on inappropriate factors, failed to consider important aspects of the problem, or ignored relevant evidence.")

definition of "unreasonable" which, as explained above, violates both the APA and Congress's fundamental direction to the Commission.[11]

Finally, the Commission's preambular statement that, notwithstanding the fact that it has removed business factors from the regulatory text, it will still take business factors into account under other factors, amounts to saying, "trust us." That is not how the APA works. Recent direct experience illustrates that for the FMC to take into account a particular factor it must be expressly included in the regulatory text, and the regulatory text must also require the Commission to consider the enumerated factor. Failing to include business factors in the regulatory text risks the Commission taking the position, as it just did in ongoing litigation, that it "*may consider"* but is not required to consider factors not expressly incorporated into the regulatory text.[12] This provides zero certainty for carriers – or their customers – that their legitimate and relied-upon business considerations will be considered by the FMC. A business cannot reliably contract if the reasonable business factors that undergird the negotiations that lead to a successful contract can arbitrarily be changed or ignored by the Commission.

In its comments to the Notice of Proposed Rulemaking, 87 FR 57674-57679, WSC provided a list of reasonable business factors for the Commission to incorporate into this regulation. The list of factors and reasoning behind those factors can be found in the docket FMC-2023-0010, Comments to NPRM of World Shipping Council (Doc. No. 21) pages 11-14, sections 6 and 7. WSC's full NPRM comments are incorporated and attached to this document through the link found in Appendix 1. We urge the Commission to include the business factors identified in WSC's NPRM comments in the regulatory text adopted in the final rule.

b. <u>The FMC's definition of transportation factors in 542.1(b)(4) inappropriately focuses solely on vessel operations and fails to take into account the landside transportation issues that were the root cause of the COVID-19 supply chain congestion. Transportation factors must include other factors that reflect the operational and commercial realities of the liner shipping industry</u>.

WSC agrees with the Commission that its definition of transportation factors in 542.1(b)(4) should include vessel operational factors including, but not limited to, vessel safety, stability, and

[11] *See Id.* at fn 4; *see also Community for Creative Non-Violence v. Kerrigan*, 865 F.2d 382, 385 ("To be valid, a regulation must be reasonably related to the purposes of the enabling legislation." (citations and quotations omitted)).

[12] *See Evergreen v. United States*, (D.C. Cir. 2023) Case No. 23-1052, Brief for Respondents Federal Maritime Commission and United States, Docket. No. 2005698 at 10. Regarding factors set forth in the regulatory text that the Commission must consider vis-á-vis other factors, the Commission argues it may consider, but is not required to consider, other factors that are not expressly set forth in the regulatory text, or for which the regulatory text does not require that the Commission shall consider them.

weather-related scheduling. However, the transportation factors need to be expanded to expressly incorporate the nature of liner service in international trade. Specifically, as we explain in our comments on export policy, there is not a separate export or import system – rather, liner service runs on a continuous loop that is one system. Thus, for example, port congestion that causes delays in Asia will also impact service reliability in the U.S. The Commission must expressly incorporate disruptions in carriers' networks into its regulatory definition of transportation factors that will inform what it considers "legitimate transportation factors" in evaluating whether conduct is unreasonable under (a)(3) and (a)(10).

The Commission should also expand the list of transportation factors to include landside transportation factors. The Commission will recall that the root cause of the recent COVID-19 supply chain congestion was not a lack of vessel capacity or containers, but rather the inability of the U.S. landside logistics network (ports, motor carriers, rail, warehouses, and other logistics providers) to process the record volume of U.S. import cargo, as well as shippers not picking up their cargo from marine terminals. The landside congestion caused more than 100 container vessels to wait for weeks off Southern California, as well as other U.S. ports, to come into berth to discharge and load cargo.

Limiting transportation factors solely to vessel operations ignores these facts, when it is often logjams in other segments of the intermodal supply chain that are responsible for congestion resulting in delay. Those non-vessel disruptive effects are the most important part of the service interruption equation, and those non-vessel factors must be considered when evaluating unreasonable behavior under (a)(3) or (a)(10). Therefore, the Commission must revise its definition of transportation factors in 542.1(b)(4) to include disruptions caused along an ocean carrier's international service networks, including delays caused by U.S. landside transporters and logistics providers. If the Commission does not take these non-vessel sources of service disruption into account, it will make the same mistake that it has proposed to make with respect to business factors – a conscious decision to ignore a critical part of the problem being addressed – in violation of the APA.

WSC proposes that the Commission define "Transportation Factors" as follows:

Transportation Factors means: Factors that impact an ocean carrier's ability to accommodate laden cargo for both import and export, which can include, but are not limited to:

a) Vessel Safety.
b) Vessel Stability.
c) Compliance with Vessel Loading Regulations including, but not limited to, the International Maritime Dangerous Goods Code (IMDG).
d) Weather, sea, or navigational conditions.

e) Port and terminal congestion, overcrowding, closures, equipment shortages, and infrastructure or capacity issues.
f) Labor shortages, strife, or strikes.
g) Shortages of chassis, trucks, or drivers.
h) Warehouse, distribution center and other destination facility congestion, disruption and delays.
i) Rail congestion, disruptions, or delays.
j) Congestion, disruption or delays by other freight transporters or logistics providers.
k) Customs authorities inspections or actions resulting in delays.
l) Information technology, communications, software or cyber systems threats, interruptions, malfunctions, or attacks.
m) Unexpected or unforeseen spike or drop or shift in demand or consumer behavior.
n) Shift in governmental regulations such as sanctions, trade barriers or tariffs.
o) Government requirements to prioritize shipments of medical, defense or other critical goods.
p) Government actions that cause delay, including quarantines, lockdowns, shutdowns, sanctions, or other geo-political actions.
q) Humanitarian, natural, or environmental occurrences (including disease outbreaks), natural disasters and impacts of climate change.
r) Global bottlenecks and resulting ripple effects on global logistics.
s) Any other causes of supply chain disruption outside an ocean carrier's control.

7. There is no authority in the Shipping Act or OSRA 22 to impose an Export Policy requirement on ocean carriers.

Proposed section 542.1(j) requires carriers to produce, submit, and follow a documented export policy, which must contain "pricing strategies, services offered, strategies for equipment provision, and description of markets served." The Commission further states "[o]ther topics a documented export strategy should also address if applicable, include (i) The effect of blank sailings or other schedule disruptions on the ocean common carrier's ability to accept shipments; and (ii) The alternative remedies or assistance the ocean carrier would make available to a shipper to whom it refused vessel space accommodations." In 542.1(b)(2), the Commission defines "Documented export policy" as "a written report produced by an ocean common carrier that details the ocean common carrier's practices and procedures *for U.S. outbound services*." (emphasis added).

There is no authority in OSRA 22 or the Shipping Act for the Commission to require ocean carriers to develop and submit an export policy document to the Commission. It is also critical to note that the requirement is not just a requirement to develop and submit such a document, but also a requirement in 542.1(j) that "Ocean common carriers must follow a documented export policy . . ." (emphasis added). The Commission thus proposes not just to examine the

commercial decision-making and operational plans of carriers; the Commission proposes, under threat of penalty, to force carriers to conform their commercial activities to those plans. This is an unprecedented Commission interference with commercial businesses that is untethered to any statutory authority, and it is plainly unlawful.

As WSC stated in its comments to the NPRM, and reiterates here, the Commission should focus on doing the job Congress directed it to do in Section 7 of OSRA 22 – which is to define unreasonableness – in the context of refusals to deal or negotiate with respect to vessel space accommodations and refusal to provide cargo space accommodations when available. Accordingly, because Congress did not give the Commission authority to require an export policy, the Commission must withdraw the "documented export policy" requirement, as well as its use as a factor to determine reasonableness or as a non-binding example of unreasonable conduct.

8. The Commission is impermissibly attempting to rewrite OSRA 22 as an export-focused statute.

The Commission's attempt to impose a requirement on ocean carriers to develop, submit, and follow an export policy also constitutes an impermissible attempt to rewrite OSRA 22 as an export-focused statute. As the Commission well knows, and as it stated in its NPRM, "[t]he common carrier prohibitions in 46 U.S.C § 41104 do not distinguish between U.S. exports or imports."[13] The Commission reemphasized this critical fact in its SNPRM, stating: "In applying the common carrier prohibitions in 46 U.S.C § 41104, the ***Commission stresses*** that the statute does not distinguish between U.S. exports or imports and this supplemental proposal also applies to both."[14] (emphasis added). Yet, the Commission's regulatory proposal belies its preambular statements. Specifically, the Commission's proposal defines the "documented export policy" in 542.1(b)(2) as only applying to "U.S. outbound services" and doubles down on its export focus in 542.1(d)(1) and (g)(1) by using "whether an ocean carrier followed a documented export policy that enables the efficient movement of ***export cargo"*** as the first non-binding consideration in determining reasonableness. (emphasis added).

Recasting OSRA 22 as an export-focused statute – and imposing export-specific regulatory requirements – constitutes a fundamental misunderstanding of the ocean transportation system. There is no separate import system or export system. Rather, the ocean transportation system is one continuous loop. The vessels and equipment used to load and carry imports are the same used to load and carry exports. Ocean carriers must constantly rebalance and adjust their networks to ensure there is sufficient capacity and equipment to meet both import and export

[13] *See* 87 FR 57674.
[14] *See* 88 FR 38790.

demand to optimize service for all customers. Thus, any law or regulation that is import or export focused cannot result in good transportation policy because it does not account for the fact that ocean liner service is a scheduled service on a pre-determined route – or a single system – using the same vessels and equipment for both imports and exports. This is precisely why Congress did not make OSRA 22 import or export focused. Yet, the Commission is impermissibly attempting to use its regulatory authority to recast OSRA 22 as an export focused statute in an attempt to rewrite the version of OSRA 22 that actually passed into law. The Commission's approach is not authorized by the statute, violates the APA, and must be withdrawn.[15]

9. The Commission's claim that 46 U.S.C § 40104, Reports filed with the Commission, authorizes it to impose an export policy requirement is not supported by the statute's plain language.

The Commission's claim that 46 U.S.C § 40104, Reports filed with the Commission, authorizes it to impose an export policy requirement is flawed.[16] Subsection 40104(a)(1)'s relevant text states:

> In General. – The Federal Maritime Commission may require a common carrier or marine terminal operator . . . to file with the Commission a periodical or special report, an account, record, rate, or charge, or a memorandum of facts and transactions related to the business of the common carrier or marine terminal operator, as applicable.

The statutory text makes clear that subsection 40104(a)(1) is a general authority to collect information or an accounting of events that have already taken place – not authorization for the Commission to direct the development and submission of a forward-looking policy or strategy document. If Congress had intended to give the FMC authority to seek or require the development of prospective information in the form of a policy or strategy document and to require commercial parties to conduct their businesses in accordance with such a document under threat of government penalties, it would have done so explicitly. Congress has not taken such a drastic and far-reaching action in either the Shipping Act or in OSRA 22.

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[15] *See Decker v. Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 608-09 (2013) ("It is a basic tenet that 'regulations, in order to be valid, must be consistent with the statute under which they are promulgated.'" quoting *U.S. v. Larionoff*, 431 U.S. 864, 873 (1977); *Citizens for Responsibility and Ethics in Washington v. F.E.C.*, 904 F.3d 1014, 1018 (D.C. Cir. 2018).

[16] In its NPRM, the Commission cited its authority to require an "export strategy" as the Shipping Act's Purpose Section in 46 U.S.C. § 40101(4). In WSC's comments to the NPRM, we noted that a statute's purpose section is not authorizing language and thus not a proper basis for authority. WSC NPRM comments at 5-6. The Commission appears to have withdrawn its reliance on 40101.

The Commission is attempting to shoehorn its export policy document into subsection 40104's general authority by crafting 542.1(b)(2) to include the term "report." This approach is misguided, disingenuous, and not permitted by the APA.[17] Furthermore, 542.1(b)(2)'s definition is in discord with section 542.1(j)(1), where the Commission states that an export policy must include "pricing ***strategies***, services ***offered***, ***strategies*** for equipment provision, and descriptions of ***markets*** **served**." (emphasis added). Strategies, offers, and markets served are inherently prospective in nature – they are not events that have already occurred and been recorded. The Commission's attempt to self-define a prospective strategy or policy document as a retrospective report must be rejected.

10. The Commission has failed to adequately explain how it will use an export policy as a benchmark for determining reasonableness, rendering it arbitrary, capricious, and not in accordance with the law.

The Commission's proposal on how it will use an export policy to determine unreasonableness is fundamentally flawed. As a general matter, the Commission has not adequately explained how an export policy will be used to determine whether a carrier reasonably negotiated with respect to vessel space accommodations or reasonably provided cargo space accommodations when available – which is the task Congress directed it to do in this rulemaking.

What the Commission has set forth in section 542.1(j)(1) is that an export policy must include "pricing strategies, services offered, strategies for equipment provision, and descriptions of markets served" – and that ocean common carriers "must follow" such policies.

On "pricing strategies" the Commission has no authority to regulate prices, so a pricing strategy cannot be a legitimate factor.[18] Even if the Commission had authority to regulate pricing, how would it determine the reasonableness of the carrier's pricing choices? Additionally, what does pricing strategy have to do with reasonableness of space accommodations under 41104(a)(3) and (10)?

On services offered, strategies for equipment provision, and descriptions of markets served, carriers are constantly having to recalibrate their services – to include repositioning containers – and adjust service based upon ever-changing operational conditions including, but not limited to,

[17] *See Decker v. Northwest Envtl. Def. Ctr*., 568 U.S. 597, 608-09 (2013).

[18] *See Notice of Inquiry Concerning Use and Effect of Surcharges by Common Carriers and Conferences*, 26 S.R.R. 108, 119 (FMC 1992) ("We note, however, that the Commission does not have statutory authority to regulate the level of rates charged, nor does the 1984 Act prohibit carriers from seeking to earn profits.")

supply and demand, import versus export demand, unexpectedly expanding, contracting or emerging markets, or where shippers direct their cargo to be loaded and discharged.

In addition, carriers must constantly adjust their networks to overcome the impacts of geopolitical events (war in Ukraine and sanctions, transiting high-risk waters for piracy), navigational issues (low-water Panama Canal), labor disputes (resulting in shippers switching loading and discharge ports to manage supply chain risk), pandemics (first crashing all demand and then spiking import demand), or natural disasters (resulting in port and waterway closures). These are tactical business decisions that would not be included in a document containing strategic aims and policy visioning.

Most relevant here, the Commission says it will use the information required by section 542.1(j)(1) to determine reasonableness. If so, the Commission must explain how it will objectively use this information to benchmark reasonableness. What is the Commission's acceptable or unacceptable standard of deviation from a goal in a carrier's export policy that constitutes unreasonableness? Are there minimum levels of service required in order for an export policy itself to be reasonable? If one carrier sets a less ambitious plan to attract export market share than another carrier, is the less aggressive carrier's policy unreasonable? The Commission has not answered any of these and many more questions, leaving the unavoidable conclusion that the Commission itself has no idea how the existence of an export policy would contribute to a rational determination of reasonableness under 41104(a)(3) or (10). If in fact the Commission does have an explanation of how the export plan requirement relates to a subsection 41104(a) reasonableness determination, that explanation does not appear in the SNPRM.

Because the Commission has predicated its authority to require an export policy on 46 U.S.C. § 40104(a)(1), the Commission also must abide by the limitations set forth in 40104(a)(3)(A), which states that the Commission, "shall…limit the scope of any filing ordered under this section to fulfill the objective of the order." The limitation section was created to prohibit the Commission from asking for information unless it can articulate why it is needed to fulfill a stated objective. If the Commission cannot explain how the information it is requesting will meet that stated objective, it cannot justify its request. Thus, without a detailed explanation of "how and why" an export policy will be used to determine whether actions taken by an ocean carrier are "unreasonable", the Commission has failed to fulfill the objective of its order as required by 40104(a)(3)(A), and it is barred from requiring ocean carriers to produce an export policy.

The Commission's export policy proposal also fails to pass muster under the APA. An agency is required by the APA to "articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." The Commission has provided no such rational connection in the proposed rule as it relates to the export policy document and determining the reasonableness of a carrier's actions, and thus this aspect of the rule is arbitrary and capricious on its face.[19]

11. The SNPRM's confusing statements about the extent to which export policies would be confidential must be clarified if the export policy requirement is retained.

The Commission also does not explain how a confidential export policy will have any probative or precedential value in litigation. Indeed, WSC asked this precise question in its comments to the NPRM but did not receive a response.[20] The Commission states in the preamble, but not the regulatory text, that the document would be considered confidential business material, yet the FMC apparently expects it to be provided during the document production phase of a complaint process.[21] At one point in the preamble the Commission even states that an export policy can guide shippers (presumably during negotiations) – but how can the policy serve that purpose if it is confidential?[22] If the FMC is true to its word and shields the policy's disclosure, then how does it have any probative value for the complainant? Furthermore, if an administrative law judge uses a confidential export policy to decide the reasonableness of a carrier's action, then how can the opinion set a repeatable precedent if the export policy at the heart of the opinion cannot be disclosed? As WSC commented in the NPRM, complainant and respondent will not know if their case was decided in accordance with past decisions. This will create a fundamental fairness issue for all parties and destroy the guidance and deterrence functions of agency adjudication.

The Shipping Act, at 46 U.S.C. § 40306, addresses generally the confidentiality of documents filed with the FMC. That section, however, includes an exception under which confidential information and documents may be disclosed "as may be relevant to an administrative or judicial proceeding." Given the imprecise statements in the SNPRM, section 40306 raises more questions than it answers in this context. By the Commission's own description, these proposed export policies would contain the most commercially and competitively sensitive business secrets of

[19] *See Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 206 (D.C. Cir. 2007) (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

[20] *See* WSC Comments to FMC Docket No. 22-24, NPRM, WSC at 9-10, Docket Entry No. 21.

[21] *See* 88 FR 38789 at 38805.

[22] The preamble states "When a shipper acting in good faith follows the export policy of the ocean carrier with which it has been negotiating, either 46 U.S.C. 41103(a)(3) or (a)(10) would still apply if the shipper was unreasonably denied space." 88 FR 38791.

carriers – some of which carriers could not share with competitors without risk under the antitrust laws. Given the market-distorting effects of disclosing this information, the Commission must be clearer about its intentions regarding the confidentiality (or not) of export policies.

Depending on the Commission's further clarification, it appears that there are two possible scenarios with respect to the confidentiality of export policies: (1) export policies are confidential, and therefore largely useless for litigation or compliance guidance purposes, or (2) export policies are not confidential, and the Commission will release competitively and commercially sensitive information into the marketplace in a way that would not occur absent the regulation. The fact that these are the two possible results of the proposed regulation should convince the Commission that the export policy requirement is not an appropriate tool for assisting in determining reasonableness under subsection 41104(a).

12. The Office of Management and Budget must reject FMC's information collection request for the export policy under the Paperwork Reduction Act.

The Commission's export policy requirement is an information request that must comply with the Paperwork Reduction Act, 44 U.S.C. §§ 3501-3521 (PRA). It does not. This is because the Commission has failed to show how its proposal to require an export policy will have any utility to the agency, either in benchmarking unreasonable action, or for use in litigation.

The collection notification found at 88 FR 38806 also fails to consider that making the export policy mandatory may require multiple submissions per year. While the FMC states that the export policy is required to be submitted only once per year, it fails to mention that a carrier will be required to follow the policy or face civil penalties. If adhered to as the Commission requires, carriers may have to adjust and resubmit their export policies multiple times a year as operating and market conditions change. Thus, the export policy requirement makes it impossible for carriers to determine the actual burden of compliance. What is clear is that a requirement to keep an export policy constantly updated would cause the burden on industry to vastly exceed the Commission's estimates.

In summary, the Commission's proposed requirement that carriers submit a forward-looking export policy exceeds the Commission's authority under 46 U.S.C. § 40104 and includes a pricing element that is nowhere authorized in the statute. Moreover, the Commission draws no logical connection between its export policy proposal and the task at hand – defining "unreasonableness" for the purposes of subsections 41104(a)(3) and (10). When one examines the additional proposed requirement that a carrier "must follow" the export policy that the Commission would require to be filed, it becomes clear that the Commission no longer feels

bound by the limits of the statutory authority granted by Congress. There is absolutely nothing in the Shipping Act, as amended by OSRA 22, that would give the Commission anything like the power to climb into carriers' operations centers and boardrooms and dictate that they operate according to a plan deemed acceptable by the Commission instead of according to carriers' own lawful business strategies. The overreach is spectacular, and WSC urges the Commission to take a long look in the mirror and at the lawbooks and to withdraw its export policy proposal in its entirety.

13. The term "when available" must be explained in the regulatory text implementing 46 U.S.C. § 41104(a)(3) (refusal to provide cargo space accommodations when available), and the regulation must provide further clarification recognizing that blank sailings are commercially reasonable.

Subsection 41104(a)(3) provides that a common carrier shall not "unreasonably refuse cargo space accommodations ***when available*** . . ." (emphasis added). However, nowhere in the preamble or the proposed regulatory factors or examples does the Commission explain how a carrier, complainant or administrative law judge is to know when cargo space *is available*. The FMC cannot ignore this qualification when defining unreasonable refusal to provide cargo space. Under the "surplusage cannon" of statutory interpretation the FMC must take into account all of the instructions given by Congress.[23]

"When available" is an important qualifier because it narrows when the FMC can say a carrier has unreasonably refused cargo space accommodations to occasions when the space can reasonably be considered available. The meaning of "when available" is directly relevant to the Commission's treatment of cancelled voyages (the Commission calls them "blank sailings"), which the Commission discusses in the context of the proposed export policy requirement and in the example in proposed section 542.1(e)(1). Although not defined in the regulation, the preamble essentially describes a blank sailing as any occurrence of the vessel failing to arrive at the port on the day it was scheduled to arrive.[24] That in turn arguably invites the filing of a Shipping Act complaint whenever a voyage or port call is cancelled, or a vessel fails to make a scheduled call on time. The Commission must make pellucidly clear that it is not in fact proposing

[23] *See Nat'l Ass'n of Mfrs. v. Dep't of Def., 199 L. Ed. 2d 501, 138 S. Ct. 617, 632 (2018),* "Absent clear evidence that Congress intended this surplusage, the Court rejects an interpretation of the statute that would render an entire subparagraph meaningless. As this Court has noted time and time again, the Court is "obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.,* 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979). *See also* A Dozen Canons of Statutory and Constitutional Text Construction, Bolch Judicial Institute, Duke University Law School, written by Bryan A. Garner and Antonin Scalia. "Surplusage Canon. If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence."

[24] *See* 88 FR 38789 at 38801, "…the Commission notes that the causes of blank sailings may vary, ranging from inclement weather, force majeure events, port congestion, vessel mechanical failure and a steep decline in demand."

a strict liability framework that vessels must make their scheduled date of port call or be subject to penalties under the Shipping Act. A date certain arrival date is not what ocean carriers offer in their service contracts or tariffs, nor, more broadly, is it an accurate representation of the way the transportation system operates.

By not addressing the meaning of the statutory phrase "when available," the Commission ignores the obvious point that when a vessel call is cancelled or delayed, by definition there is no space available on that vessel on its originally scheduled call date (if ever). Under a statutory provision that is limited to situations in which vessel space is available, it is logically incoherent to impose regulations that, by definition, apply to situations in which the vessel is not even present, let alone has available space. Put differently, the statutory language indicates quite clearly that the Congress intended to address the situation (and only the situation) that arises when a vessel is at the port and has useable space, but the carrier nevertheless unreasonably denies loading of cargo. Instead of limiting itself to what the statute plainly contemplates, the Commission has ignored the "when available" limitation in the statute and in so doing has opened up an almost limitless universe of possible Shipping Act claims never contemplated or authorized by the Congress in OSRA 22. The Commission must in the final rule correct this overreach and explain its interpretation of the "when available" language in 46 U.S.C. § 41104(a)(3).

14. The Commission's use in 542.1(e)(1) of lack of advance notice or insufficient advance notice as an example of unreasonable refusal to deal under 46 U.S.C. § 41104(a)(3) is an improper attempt by the Commission to rewrite service contracts and should be withdrawn.

WSC agrees with the Commission's preamble statement that blank sailings are reasonable when they are based upon decreased demand, port congestion, weather, force majeure, vessel mechanical failure, or changes in service by a vessel sharing partner.[25] However, in setting forth non-binding examples of unreasonable conduct to be considered in evaluating a claim under 46 U.S.C § 41104(a)(3) for refusal to deal or negotiate, the Commission's example in 542.1(e)(1) is, "Blank sailings or schedule changes with no advance notice or with insufficient advance notice."

As discussed above, the relevant standard for evaluating reasonableness is one of commercial reasonableness. In most cases, a service contract or a carrier's tariff offering does not guarantee that a booking will be loaded on a particular ship or sailing. Thus, how is it unreasonable not to give notice that a given box will not go on a given vessel? Section 542.1(e)(1)'s proposal makes lack of notice or insufficient notice into a presumptive violation of

[25] *See*, *Id*. The Commission's correct observations regarding the reasonableness of these operational realities should be incorporated into the regulatory text.

subsection 41104(a)(3). Yet, under most service contracts, a guarantee that a given shipment will be loaded to a particular vessel is not contained in the carrier's service offering, and therefore such a strict liability proposal does not comport with a standard of commercial reasonableness. The Commission's proposal amounts to it rewriting the service contract or the carrier's tariff. Moreover, the Commission's rewrite is asymmetrical because it provides strict liability against carriers, but no corresponding responsibility on the part of shippers or a remedy for carriers when shippers "fall down" and fail to deliver the cargo they promised.

Even if the Commission were to make shipper and carrier responsibilities and obligations reciprocal, that would not solve the problem. In the same way that the Commission cannot simply ignore the "when available" qualifier in subsection 41104(a)(3), there is no authority in the Shipping Act, as amended, for the Commission to broadly redefine the basic commercial bargain between carriers and shippers. But that is precisely what the Commission proposes to do. In its final rule, the Commission must correct its overreach, but if it persists with the rule as proposed, it must explain what provisions of the Shipping Act authorize it to place Shipping Act liability on a carrier whenever it misses a scheduled port call without giving "sufficient" (but undefined) notice.

15. The Commission's use in 542.1(e)(4) of scheduling insufficient time for vessel loading so that cargo is constructively refused is improperly directed at ocean carriers and should be withdrawn.

Vessel loading times are generally controlled by marine terminal operators and ports–not ocean carriers. As proposed, 542.1(e)(4) improperly places the responsibility for insufficient loading times on ocean carriers. Accordingly, the Commission should withdraw this provision.

16. The Commission has no authority to regulate prices, therefore its use in 542.1(h)(1) of "quoting rates that are so far above current market rates they cannot be considered a real offer . . ." is improper, otherwise overly broad and vague, and should be withdrawn.

As we mentioned in our discussion of export policy and 542.1(j)(1)'s requirement that requires inclusion of pricing strategies, the Commission has no authority to regulate prices. The Commission's attempt in 542.1(h)(1) to use high market rates as a factor fails for the same lack of authority and must be withdrawn. There is no scenario under which an agency that does not have authority to regulate rates can permissibly use rate levels as a measure of reasonableness, and that legal reality is the end of the matter. Clear law aside, the Commission's proposal cannot work as a practical matter. How high is too high, and on what basis is the Commission to decide? If the comparison in a service contract scenario is to other service contracts, then the exercise runs contrary to the fact that Congress expressly ended the service contract "me-too" right in

1998. For tariff rates, a rate that is "too high" takes the carrier out of the affected market for all shippers, not just for a particular shipper, and such theoretical actions are thus policed by the market. We urge the Commission to recognize that rate-based tests are simply unavailable to the Commission as a tool and to withdraw the proposed provisions that rely on rates.

17. Burden Shifting: The FMC needs to clarify the burden shifting process to explicitly state it is the burden of production that shifts, not the burden of proof.

The FMC's intent with respect to the burden of the parties in the adjudication process is clear, but the wording of the regulation is not as clear as the Commission's intent. WSC therefore requests the regulation be amended. The proposed regulatory text in the SNPRM reads:

> "Shifting the burden of production. In accordance with applicable laws, the following standard applies:
> (1) The burden to establish a violation of this part is with the complainant or Bureau of Enforcement, Investigations, and Compliance.
> (2) Once a complainant sets forth a prima facie case of a violation, the burden shifts to the ocean common carrier to justify that its action *[sic]* were reasonable.
> (3) The ultimate burden of persuading the Commission remains with the complainant or Bureau of Enforcement, Investigations, and Compliance."

The Commission makes clear in the preamble that the burden that shifts to the carrier is the burden of production, not the ultimate burden of persuasion:

> "[The] Commission notes that this SNPRM proposes to continue using the process followed in cases arising under the Administrative Procedure Act (APA). The initial burden of production is with the complainant (Step 1). **If the complainant can satisfy its initial burden of producing evidence sufficient to make out a prima facie case of a violation, the burden then shifts to the respondent to produce evidence sufficient to rebut the complainant's prima facie case (Step 2)**. But the ultimate burden of persuading the Commission always remains with the complainant (Step 3). See 46 CFR 502.203; 5 U.S.C. §§ 551–559. (emphasis added).[26]

In order to make the final rule consistent with the Commission's intent and with the header in section 542.1(k) ("Shifting the burden of production."), we request that the Commission insert the words "of production" in 542.1(k)(2) between "burden" and "shifts."

[26] *See* 88 FR at 38799.

18. Repositioning of Equipment, Including the Use of Sweeper Vessels.

In the preamble language, the Commission acknowledges the need to reposition empty containers, and that the use of sweeper vessels is a legitimate practice that is critical to the efficiency of the transportation system. However, the Commission then specifies in section 542.1(b)(3) that a sweeper vessel must be one "exclusively designated to load and move empty containers from a U.S. port . . ." Presumably, this requirement to move only empty containers is designed to prevent a carrier from designating a vessel as a sweeper to avoid certain shipments. WSC questions why the FMC would want to prevent sweeper vessels that have available vessel space from also transporting laden U.S. export containers. It would seem reasonable and in the best interest of all parties if a designated sweeper vessel that had additional space available could collect and transport U.S. export cargo to the same destination it was destined to discharge the empty containers. This would allow sweepers to reduce port congestion and facilitate the U.S. export market.

To make clear that sweeper vessels that have additional vessel space capacity are also permitted to load export cargo, WSC proposes that 542.1(b)(3)'s definition of a Sweeper vessel be expanded as follows:

> **542.1(b)(3)** *Sweeper vessel* means a vessel designated to load and move empty containers from a U.S. port for the purpose of repositioning them to another location. Nothing in this part precludes ocean carriers from using designated sweeper vessels that have additional vessel space to load laden exports.

There is a related point regarding equipment repositioning that WSC urges the Commission to address in the final rule. In the preamble, the Commission appropriately states that "nothing in the previous proposed rule or in this SNPRM is meant to restrict the ability of ocean common carriers to reposition empty containers."[27] As the Commission is aware, it is only in the most imbalanced situations that carriers must resort to sweeper vessels to reposition equipment and re-balance the network for the benefit of all customers. Most repositioning occurs on regularly scheduled vessels, with empty and laden containers sharing the same ships in the proportions necessary for safety and to get equipment where shipper demand dictates.

[27] *See* 88 FR 38789 at 38790.

Accordingly, WSC proposes that 542.1(i) be amended to reflect the Commission's statement from page 38790 of the SNPRM preamble that ocean carriers are permitted to reposition empty containers, and to make clear that designated sweeper vessels with extra capacity are also permitted to load laden U.S. export containers as follows:

> **542.1(i)** Repositioning of empty containers.
>
> Repositioning generally. Nothing in this part is meant to restrict the ability of ocean common carriers to reposition empty containers, to include the use of sweeper vessels.

19. The Commission has impermissibly exempted NVOCCs from the application of 46 U.S.C § 41104(a)(3). In so doing, the FMC has given NVOCCs a competitive advantage over VOCCs and created a situation that is detrimental to commerce by depriving NVOCC customers of any meaningful remedy for unreasonable denial of cargo space accommodations when available.

The Commission states in the preamble that the proposed regulation applies only to vessel operating common carriers (VOCCs or "ocean common carriers" in the language of the Shipping Act) and not to non-vessel-operating common carriers (NVOCCs).[28] That application only to VOCCs is reflected in the language of the proposed regulation, which states that obligations apply to "ocean common carriers." This approach of covering VOCCs but not NVOCCs raises several practical and legal questions – at least with respect to the application of 46 U.S.C. § 41104(a)(3) – on which WSC requests clarification and correction by the Commission.

46 U.S.C. § 41104(a)(10) arguably applies only to VOCCs by virtue of the qualifying phrase "by an ocean common carrier" at the end of that subsection. Subsection 41104(a)(3) contains no such limitation to only VOCCs, and (a)(3) therefore applies to all common carriers, including NVOCCs. The statutory mechanism for exempting a covered entity from a given provision of the Shipping Act is through an administrative exemption under 46 U.S.C. § 40103. Subsection 40103(a) sets forth the substantive standard for such an exemption, and the procedural requirements at 40103(b) include "an opportunity for a hearing to interested persons and departments and agencies of the United States Government." Because the Commission has not invoked or addressed the provisions of 40103 or provided an opportunity for a hearing to exempt NVOCCs from the application of 41104(a)(3), it is not within the Commission's authority to so exempt NVOCCs through this rulemaking.

[28] *See Id.* at 38801-2.

Turning from the legal to the practical aspects of not applying 41104(a)(3) to NVOCCs, the Commission's proposed exclusion appears to be based on the following statement, "The Commission agrees that NVOCCs, unlike ocean common carriers, do not control vessel space accommodations... Thus, like the proposed rule, this SNPRM only applies to ocean common carriers."[29] WSC understands that 41104(a)(3) applies to "cargo space accommodations when available," as defined in the proposed regulatory text; however, the Commission appears to use this same rationale to exclude NVOCCs from the scope of the regulation for both "vessel space accommodations" and "cargo space accommodations when available" within the proposed regulation. The problem is that the assertion that the NVOCCs do not control cargo space accommodations when available is factually inaccurate. Although it is true that VOCCs physically provide all vessel capacity, it is not true that NVOCCs do not control space accommodations. Like VOCCs, NVOCCs can face situations in which the space available to them is exceeded by customer demand or is limited by safety, weight, stability, or other operational factors. For example, an NVOCC could have negotiated for an allocation of 100 slots from a VOCC on a given vessel, but that NVOCC's customers may in the aggregate request 120 slots for that sailing. The NVOCC will in that case have to decide which of its customers' containers are booked to that vessel and which are not. In this way, contrary to the Commission's statement in the preamble, NVOCCs very much control space accommodations.

WSC members' most pressing concern with excluding NVOCCs from coverage under the regulatory sections implementing 41104(a)(3) is that, if NVOCCs are relieved of responsibility for space decisions that they make, an NVOCC's customer might bring a complaint against the VOCC for perceived violations even though the VOCC has no commercial relationship with the NVOCC's customer. Indeed, WSC members have anecdotally advised that they have been contacted by the Commission about this very scenario. It would violate due process and any recognizable definition of "reasonableness" to hold a VOCC liable for the actions of its NVOCC customer with respect to a complaint by the NVOCC's customer. But, if the Commission by regulation bars claims against the NVOCC, then the only party to which the NVOCC's customer can look for redress is the VOCC.

In addition to being fundamentally unfair, such a situation would violate the standard in 46 U.S.C. § 40103(a) that an administrative exemption may only be granted "if the Commission finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce." If the Commission were to immunize NVOCCs from subsection 41104(a)(3) claims

[29] *See* 88 FR 38789 at 38798; *see also Id.* at 38801, "NCBFAA emphasized that NVOCCs, unlike ocean common carriers, do not control vessel space accommodations. NCBFAA at 2–3. ***This SNPRM continues to restrict its application to VOCCs and does not include NVOCCs at this time***. The Commission agrees that NVOCCs, unlike ocean common carriers, do not control vessel space accommodations."

and thereby shift responsibility for such claims to VOCCs, that would competitively advantage NVOCCs and competitively disadvantage VOCCs in contravention of the first 40103(a) exemption test. Moreover, because a VOCC should prevail in any such litigation because it should not be held liable for the actions of its NVOCC customer, barring claims against the NVOCC would be "detrimental to commerce" under the second exemption test by denying the NVOCC's customer a meaningful remedy for an NVOCC's violation of 41104(a)(3).

For all of these reasons, those portions of the regulation that implement 46 U.S.C. § 41104(a)(3) must apply to NVOCCs.

20. Conclusion.

WSC appreciates the opportunity to comment on the Commission's proposed rule to define unreasonable refusal to deal or negotiate with respect to vessel space accommodations and its interpretation of unreasonable refusal to provide cargo space accommodation when available. We urge the Commission to make the suggested changes necessary to bring the final regulation into conformity with the governing statute and to better align the regulatory choices with the Commission's legitimate regulatory objectives.

# # #

Appendix.

(1) WSC Comments to FMC Docket No. 22-24, NPRM, Definition of Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodations Provided by an Ocean Carrier, Oct. 21, 2022, Docket Entry No. 21. Available at https://www2.fmc.gov/readingroom/docs/22-24/22-24%20Comments%20of%20World%20Shipping%20Council.pdf/.