# FMC Final Rule on Ocean Carrier Unreasonable Refusals to Provide Vessel Space

On July 23, the Federal Maritime Commission (FMC) published a final rule interpreting two provisions in the Ocean Shipping Reform Act of 2022 (OSRA 2022) that prohibit ocean carriers from "unreasonably refus[ing] cargo space accommodations when available" (46 U.S.C. § 41104(a)(3)) and "unreasonably refusing to deal or negotiate with respect to vessel space accommodations" (46 U.S.C. § 41104(a)(10)). The rule applies only to containerized cargo moving in international commerce and to the conduct of vessel-operating ocean carriers.

Congress adopted OSRA 2022 in response to significant supply chain disruptions and complaints about ocean carrier practices that peaked during the COVID-19 pandemic, including challenges U.S. exporters and importers faced securing adequate vessel space. In OSRA 2022, Congress directed the FMC to issue regulations defining ocean carriers' unreasonable refusals to deal or negotiate with respect to vessel space. This final rule is the culmination of the FMC's efforts to fulfill that congressional mandate. Congress also directed the FMC to issue regulations defining unfair or unjustly discriminatory methods under § 41104(a)(3). The FMC indicated in this final rule that it will complete a rulemaking to fulfill that mandate at a later time, but to promote administrative efficiency and clarity, it is also addressing vessel accommodation refusals under § 41104(a)(10).

Although "unreasonable refusals" as to vessel space governed by §§ 41104(a)(3) and 41104(a)(10) are distinct, the FMC concluded that they are sufficiently related to warrant a single rulemaking, which the agency contends will save shippers, carriers and the FMC time and resources in determining the differences between unreasonable refusals of cargo space accommodations and unreasonable refusals to deal or negotiate as to vessel space.

The FMC said that the primary distinction between these two provisions is timing. If the refusal occurs at the execution stage, i.e., after the ocean carrier and its customer have reached a deal and the carrier has issued a vessel booking confirmation, then § 41104(a)(3) applies. But § 41104(a)(10) applies if the refusal occurs earlier during negotiations for vessel space and before the carrier has issued a vessel booking confirmation.

The final rule establishes the elements a party must satisfy to demonstrate a violation of either § 41104(a)(3) or § 41104(a)(10). It also includes non-binding factors the FMC will use when evaluating the reasonableness of a carrier's refusal and non-binding examples of unreasonable conduct. These non-binding factors and examples will help shippers, carriers and the FMC distinguish violations of § 41104(a)(3) and § 41104(a)(10). The FMC also defines the term "unreasonable" as "ocean common carrier conduct that unduly restricts the ability of shippers to meaningfully access ocean carriage services from that ocean common carrier."

## Violations of § 41104(a)(3)

To establish a claim for unreasonable refusals under § 41104(a)(3), a party must show that the respondent is an ocean common carrier as defined in 46 U.S.C. § 40102, the carrier refused cargo space accommodations when available, and the carrier's conduct was unreasonable.

When determining the reasonableness of an ocean common carrier's refusal, the FMC will consider whether the carrier followed a policy to enable the efficient movement of export cargo, whether the carrier made a good faith effort to mitigate the impact of a refusal, whether the carrier's refusal was based on legitimate transportation factors, and other relevant factors or conduct.

The FMC provided examples of conduct that would exemplify unreasonable refusals of cargo space accommodations when available, including:

- Blank sailings or schedule changes with no or insufficient advance notice
- Vessel capacity limitations not justified by legitimate transportation factors
- Failing to alert shippers with confirmed bookings of any other changes to the sailing that will affect when their cargo arrives at its destination port
- Scheduling insufficient time for cargo tendering or vessel loading so that cargo is constructively refused
- Providing inaccurate or unreliable vessel information
- The de facto, absolute, or systematic exclusion of exports in providing cargo space accommodations

## Violations of § 41104(a)(10)

To show that a carrier unreasonably refused to deal or negotiate as to vessel space accommodations, a party must show that the respondent is an ocean common carrier as defined in 46 U.S.C. § 40102, the carrier refused cargo space accommodations when available, and the carrier's conduct was unreasonable.

The FMC will use the same non-binding considerations for evaluating the reasonableness of a carrier's vessel space refusal for violations of § 41104(a)(10) as it does for violations of § 41104(a)(3), except it will consider whether the carrier engaged in good faith negotiations for vessel space instead of whether it attempted to mitigate refusal impacts in good faith.

Examples of unreasonable conduct under § 41104(a)(10) include quoting rates so far above market that it cannot be considered a good faith attempt at engaging in negotiations, and the de facto, absolute, or systematic exclusion of exports in providing vessel space accommodations.

## Evaluating a Carrier's Refusal

The FMC will use multiple factors when evaluating the reasonableness of a carrier's conduct when it refuses cargo space accommodations or when it refuses to deal or negotiate. The first factor is whether the carrier followed a "documented export policy," which is a report, produced by an ocean common carrier that details its practices and procedures for U.S. outbound services. Under the rule, ocean carriers are required to file a documented export policy with the FMC at least once per year. Whether the carrier adheres to its export policy when it refuses cargo space accommodation or when it refuses to deal or negotiate will be a factor when determining if the refusal was unreasonable. However, export policies filed with the FMC will be confidential and the FMC is delaying the enactment of this requirement pending its approval by the Office of Management and Budget.

When evaluating the reasonableness of a carrier's refusal, the FMC will also consider "legitimate transportation factors," which are factors a carrier may use to justify a refusal as reasonable when it evaluates whether it can accommodate cargo for import or export. Examples include vessel safety and stability, weather-related scheduling considerations, or other unforeseeable factors outside the carrier's control that affect the carrier's operation of the vessel.

## Scope of Final Rule

There are two types of ocean carriers: vessel-operating common carriers (VOCCs) and non-vessel-operating common carriers (NVOCCs). Although both VOCCs and NVOCCs must comply with §§ 41104(a)(3) and 41104(a)(10), in general, the FMC's final rule only applies to VOCCs. NVOCCs still could be liable for violations of §§ 41104(a)(3) and 41104(a)(10) that relate to conduct other than vessel space refusals.

The final rule is limited to containerized cargo, but the final rule's framework could be applied to other cargo (e.g., roll-on/roll-off or bulk cargo) where there has been a refusal to deal by the ocean common carrier. Finally, because the prohibitions in §§ 41104(a)(3) and 41104(a)(10) do not distinguish between U.S. exports and imports, the rule applies to both.

The final rule is effective September 23, 2024, except for the export policy requirements, which will take effect once approved by the Office of Management and Budget.

## FOR MORE INFORMATION

Thompson Hine was significantly involved during the FMC's rulemaking process. If you have questions regarding this final rule or its impact on your business, please contact:

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