RETAIL INDUSTRY LEADERS ASSOCIATION

99 M Street, SE
Suite 700
Washington, DC 20003

www.rila.org

October 21, 2022

Via Email Submission
Federal Maritime Commission
Attn: William Cody, Secretary
800 North Capitol Street, N.W.
Washington, D.C. 20573
secretary@fmc.gov

RE: Docket No. 22-24, Definition of Unreasonable Refusal to Deal or Negotiate.

Dear Secretary Cody,

The Retail Industry Leaders Association (RILA), on behalf of its members, is pleased to respond to the Federal Maritime Commission's (FMC) request for public comment on its September 21, 2022 Notice of Proposed Rulemaking (the Notice) arising from the Ocean Shipping Reform Act of 2022's (OSRA) provision prohibiting ocean common carriers from unreasonably refusing to deal or negotiate with respect to vessel space accommodations, including in particular the FMC's proposal to define the elements necessary to establish a violation and the criteria it will consider in assessing reasonableness. RILA broadly supports the definitions, burden-shifting, and criteria detailed in the FMC's proposed rule, and writes to:

- provide the FMC with additional perspective from the vantage point of major U.S. importers regarding relevant criteria for assessing reasonableness;

- urge the FMC to strengthen the language of its proposed rule, including in particular its applicability to conduct occurring in the context of an existing service contract relationship, to ensure that it addresses the concerns and real-world experiences of both U.S. importers and U.S. exporters; and

- urge the FMC to conform the burden-shifting framework in the proposed rule more closely to OSRA's burden-shifting framework for complaints about charges assessed by common carriers.

RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than $1.5 trillion in annual sales, millions of American jobs, and more than 200,000 stores, manufacturing facilities, and distribution centers domestically and abroad. RILA's membership includes 9 of the 15 largest importers in the United States.

Perspective from Major U.S. Importers

As RILA noted in its recent comments in response to the FMC's request for public comment on the issuance of an emergency order, FMC Docket No. 22-19, the COVID-19 pandemic brought unprecedented global disruption and exposed weaknesses in America's supply chain networks, and retail supply chains remain strained and saddled with continuing unplanned costs and delays. As has been widely reported, the pandemic also brought with it unexpected challenges for U.S. importers in dealing with their freight logistics partners, including in particular the vessel-operating common carriers (VOCCs) responsible for the vast majority of containerized transoceanic freight.

RILA recognizes, and does not seek to minimize, the challenges that U.S. exporters have faced during this difficult period, and RILA appreciates the reasons for Congress's focus on export-related issues in some portions of OSRA and the FMC's similar focus in the Notice. However, as the Notice emphasizes, "[t]he common carrier prohibitions in 46 U.S.C. 41104 do not distinguish between U.S. exports or imports" and "[i]f adopted, this proposed rule would apply to both." Accordingly, any discussion of the circumstances in which this prohibition would come into play, and the criteria used to determine the reasonableness of a VOCC's conduct in such circumstances, must also include the circumstances and criteria relevant to U.S. ***importers*** and their "lived experience" during the disruptions of the past 2.5 years.

Near the outset of the pandemic, many U.S. importers that had planned for their shipping needs in advance by entering into service contracts with VOCCs found those plans thwarted when their VOCC contract partners abruptly stopped providing the space for which they had previously contracted. Importers were instead forced to resort to purchasing ocean freight service on the "spot market"—in some instances directly or indirectly from the very same VOCCs that were shirking on their service contracts—at prices that quickly skyrocketed to unprecedented multiples of historical rates.

As the pandemic wore on from shipping year to shipping year and U.S. importers sought to continue planning in advance for their ocean freight needs, many were met with new and onerous requirements for service contracts, such as multi-year terms, highly punitive and one-sided liquidated damages provisions, or conditioning the provision of ocean freight service on acceptance of broader, end-to-end contracts including services, such as customs clearance, that historically were available on an "a la carte" basis or provided by third-party service providers. Other U.S. importers found themselves, for the first time, unable to negotiate or procure new service contracts

sufficient to cover their ocean freight needs even after contacting numerous carriers, including carriers with which they had long-standing commercial relationships, forcing them once again to turn to the astronomically high-priced "spot market" or into service arrangements with non-vessel-operating common carriers (NVOCCs). (As noted in the Notice, although NVOCCs are already subject to the prohibitions of 46 U.S. Code Section 41104, including Section 41104(a)(10), they are not the focus of the new clause of that section added by OSRA, see Notice fn. 4, and accordingly are not addressed in these comments.)

Unreasonable Refusals to Deal or Negotiate Can Arise at Any Point in Parties' Dealings

The "lived experience" of U.S. importers during the COVID-19 pandemic has demonstrated that unreasonable refusals to deal or negotiate can arise not only in the context of negotiating (or refusing to negotiate) the terms of a service contract *before* it is entered into, or of booking (or seeking to book) carriage pursuant to the common carrier's published tariff *before* cargo is tendered, but also *during* the term of a service contract and even *after* the provision of (or failure to provide) the services contemplated. RILA appreciates the FMC's explanation in the Notice that "[t]he phrase 'refusal to deal or negotiate' does not lend itself to a general definition" and that "reasonableness is necessarily a case-by-case determination, and the Commission will continue to adhere to that principle." Consistent with that explanation, however, RILA urges the FMC to state more clearly in connection with its final rule that unreasonable refusals to deal or negotiate within the meaning of 46 U.S. Code Section 41104(a)(10) can arise at any point in parties' dealings with each other.

Such a statement would help to address a significant concern raised in the FMC's Final Report on Fact Finding Investigation 29. There, Commissioner Rebecca F. Dye emphasized that "[f]or some time, [she] has been concerned that the contracts negotiated by many U.S. importers and exporters lack . . . mutuality of understanding and obligation and are not enforceable. Without enforceable contracts, shippers are unable to protect themselves from volatile shipping rates and ocean carriers have few forecasting tools to provide the shipping capacity necessary to serve their customers."[1] An explicit confirmation from the FMC that refusals to deal or negotiate within the context of a service contract relationship can and do implicate 46 U.S.C. Section 41104(a)(10) and would reinforce the FMC's regulatory authority over VOCCs—an authority (and responsibility) that is not abridged, circumvented, or eliminated by the existence of a service contract between a VOCC and its customer. It also would reinforce the express purpose of the Shipping Act to provide not only the FMC itself, but also aggrieved shippers, with avenues of legal recourse for unreasonable conduct by VOCCs.

[1] FMC, Fact Finding Investigation 29 Final Report at 7, *available at* https://www.fmc.gov/wp-content/uploads/2022/06/FactFinding29FinalReport.pdf.

Burden-Shifting for Unreasonable Refusals to Deal or Negotiate Should More Closely Track OSRA's Charge Complaint Procedure

RILA appreciates and agrees with the Notice's stated purpose of "Shifting Burden From Complainant to Ocean Common Carrier". Such burden-shifting is particularly appropriate in the context of unreasonable refusals to negotiate or deal because a VOCC's reasons for its conduct and the full context for its decisions are often known only to the VOCC itself. Moreover, information concerning vessel space accommodations often is largely, if not exclusively, in the hands of VOCCs, their agents, and non-party intermediaries located outside the United States. Consequently, procuring discovery of such information from such entities can be subject to a host of legal, procedural, and practical challenges and roadblocks.

For these reasons, RILA urges the FMC to strengthen its proposed burden-shifting framework for claims relating to alleged unreasonable refusals to deal or negotiate by conforming it more closely to OSRA's procedure for investigating and resolving complaints about charges assessed by a common carrier, now codified at 46 U.S. Code Section 41310. That procedure provides a straightforward and appropriate template that could be adapted readily to address complaints about unreasonable refusals to deal or negotiate.

Under that procedure, aggrieved persons could file a complaint setting forth the *prima facie* elements of the alleged unreasonable refusal to deal or negotiate as described in the Notice. In the course of the FMC's investigation of the complaint pursuant to 46 U.S. Code Sections 41301 *et seq.*, the common carrier respondent would be provided an opportunity to submit additional information and seek to establish the reasonableness of its conduct, after which the FMC would make an appropriate order, potentially ordering reparations under 46 U.S. Code Section 41305 or other relief. Such a procedure would comport with due process while alleviating the burden on shippers to pursue the foreign discovery often critical to proving the unreasonableness of the common carrier's conduct.

Summary and Proposed Language

In summary, RILA urges the FMC to (1) make more explicit in its final rule that 46 U.S. Code Section 41104(a)(10) applies to common carrier conduct at any point in parties' dealings with each other, including during the term of a service contract, and (2) amend its final rule to conform its burden-shifting framework more closely to the framework set forth in 46 U.S. Code Section 41310. These changes will address more directly the experiences and concerns of U.S. importers regarding the provision of ocean freight services.

With respect to point (1), RILA urges the FMC to amend the proposed 46 C.F.R. Section 542.1(c)(2) as follows:

(2) **at any time during the course of dealings or negotiations between complainant and respondent, including without limitation during the negotiation or term of any service contract between complainant and respondent,** [**T**]**t**he respondent refuses to deal or negotiate, including with respect to vessel space accommodations;

With respect to point (2), RILA urges the FMC to strengthen the burden-shifting scheme contemplated by 46 C.F.R. Section 542.1(d) by replacing the language of that proposed section with language substantively tracking 46 U.S. Code Sections 41310(a) and (b).

Thank you for your consideration.

Sincerely,

Sarah Gilmore
Director, Government Affairs
Retail Industry Leaders Association

cc: Chairman Daniel B. Maffei
Commissioner Rebecca F. Dye
Commissioner Louis E. Sola
Commissioner Carl W. Bentzel
Commissioner Max Vekich