



March 19, 2020

The Honorable Michael Khouri, Chairman  
Federal Maritime Commission  
800 North Capitol Street  
Washington, DC 20573

Dear Chairman Khouri:

I write in response to the letter that was sent to you by a group of interested parties on March 16, 2020, regarding the Commission's pending rulemaking on detention and demurrage practices.

Throughout this proceeding, the World Shipping Council and its members have supported the Commission's objective of providing helpful and appropriate guidance to all supply chain parties about detention and demurrage practices. At the same time, we have been candid with the Commission about the numerous legal and practical problems with the rule as proposed in Docket No. 19-05. The letter that you received on March 16 encourages the Commission to adopt that flawed rule as proposed. The World Shipping Council urges you to take a different approach.

Proponents of the rule as proposed have over-simplified the issues to the point of unworkability. Specifically, the "incentive principle" that is at the core of the proposed rule is flawed. It is simply incorrect that the only relevant factor for deciding the reasonableness of a detention or demurrage practice under the Shipping Act is whether the charge directly incentivizes the movement of a particular shipment. There are other factors that must be considered, as we have detailed in our multiple submissions to the Commission.

Many of the signatories to the March 16 letter were also parties to Petition P4-16, which began the Commission's inquiry and formed the basis for the proposed rule. There, those parties properly recognized that detention and demurrage serve multiple purposes. The original petition stated at page 5 that: "The goals of detention are: (1) to induce timely return of equipment, and (2) to compensate for detaining equipment beyond the required return period." The Petitioners cited Commission precedent that has been the law for over fifty years on this point. The Commission cannot simply ignore its own precedent and reduce the question of what is permissible to only one criterion. The Commission must grapple with the fact that detention and demurrage serve more than one purpose, and that those multiple purposes require flexibility that is not reflected in the sweeping new standards prescribed in the proposed rule.

The issue of what criteria to consider in evaluating detention and demurrage practices is not an arcane legal point. Looking at the right factors is fundamental to a proper understanding of how the pieces of the international ocean transportation system fit together. If the Commission issues a final rule that does not reflect the realities of how shippers, carriers, truckers, and marine terminal operators interact in moving cargo and containers, the rule will backfire and induce the very port and supply chain congestion that it ostensibly seeks to avoid.

There is no good time to make such a mistake, but right now - with supply chains grappling with uncertainty and disruptions resulting from the Coronavirus outbreak - would be the worst possible time. America needs goods to flow as freely as possible through our ports right now in order to support consumers, businesses, and our economy as a whole. The signatories to the March 16 letter are asking you to make a quick decision. WSC urges you to make the right decision, and that means taking a hard look at the record evidence, the issues raised by all commenters, and the fundamental flaws with the rule as drafted before it is finalized.

While reliance on the "incentive principle" is probably the single most fundamental flaw of the new rule as drafted, there are other significant problems with the rule that must be addressed. These include, for example, shifting financial responsibility to carriers for equipment that is detained because of customs inspections. The Commission's predecessor long ago rejected that notion, for good reason. It is the cargo that drives customs inspections, not the container. To

place these costs on the carrier has no basis in the Shipping Act. Similarly, placing all responsibility for weather events on the carrier or the marine terminal operator ignores the reality that the weather is the “fault” of no party, but is instead a risk to be allocated through commercial negotiations, not by government fiat. WSC has provided a detailed list of the vague and confusing conclusions in the proposed rule that lack explanation, each of which creates more questions than answers. The Commission must take its time to address these issues in order to provide lawful and meaningful guidance that will help promote fluidity and reduce confusion.

As we have said before, we welcome Commission guidance that fits within both the law and the realities of moving cargo into and out of the United States through an international ocean transportation system that is made up of complex relationships among multiple service providers. We urge the Commission to ensure that this rule, when finalized, is consistent with the law and that it recognizes the complexities of that system and the proper place of the free market in allocating risks within that system.

Sincerely,

A handwritten signature in black ink that reads "John W. Butler". The signature is written in a cursive style and is positioned above a horizontal line.

John W. Butler  
President and CEO  
The World Shipping Council

cc: Commissioner Rebecca Dye  
Commissioner Daniel Maffei  
Commissioner Louis Sola  
Commissioner Carl Bentzel