



## FEDERAL MARITIME COMMISSION

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February 9, 2023

Mr. Michael Symonanis  
Acting Chair, National Shipper Advisory Committee

Dear Acting Chair Symonanis:

On behalf of the Federal Maritime Commission (Commission), this letter responds to the Recommendation of the National Shipper Advisory Committee (NSAC) submitted to the Commission within the statutorily mandated 60-day period for the Commission to respond in writing to NSAC recommendations.

On December 12, 2022, you sent the below recommendation to the Commission on behalf of NSAC.

NSAC Recommendation:

**We, as the unified National Shipper Advisory Committee, hereby recommend that the Federal Maritime Commission codify a regulation that requires fees related to random Government inspections be charged on a reduced scale to shippers. We recommend that the following structure be the foundation for such action:**

- **Terminals and/or Vessel-Operating Common Carriers (VOCCs) agree to invoice, and shippers agree to pay, up to 25 percent of the contracted or published [demurrage and detention] amount for any storage days required by government holds and/or inspections. No dwell fees or tiered structure [should be] allowed. Alternatively, a universal flat fee for government hold demurrage or detention, could be considered.**
- **If the government hold is released within the initial free time, and the container is removed within that period, then no [demurrage and detention] charges should apply. Once the government hold is released, contractual free time will commence.**

NSAC stated that the recommendation seeks to apply the incentive principle of the interpretive rule to all containers that are subject to any type of government hold. It explained that one aspect of international shipping is the chance that containers will be held by the U.S. Government, specifically U.S. Customs and Border Protection for inspection. The recommendation states that, in extreme cases, government holds for reasons outside the control of all other parties continue for weeks or months and could result in millions of dollars in demurrage or detention charges. NSAC stated that the interpretive rule does not directly address who should bear the costs associated under such circumstances.

## Commission Response:

The imposition of any demurrage or detention charge, regardless of cause, is subject to the general prohibition contained in 46 U.S.C. § 41102(c) against failure “to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” This includes charges resulting from government holds.

In 2020, the Commission issued an interpretive rule clarifying what it may consider when assessing whether a demurrage or detention practice is unjust or unreasonable under 46 U.S.C. § 41102(c). *Interpretive Rule on Demurrage and Detention Under the Shipping Act*, 85 Fed. Reg. 29638 (May 18, 2020) (codified at 46 C.F.R. § 545.5). As NSAC noted in its recommendation, the focus of the interpretive rule is the “incentive principle,” which is based on the well-established precedent that a regulation or practice must be tailored to meet its intended purposes for it to be considered reasonable under 46 U.S.C. § 41102(c). *See Distribution Services, Ltd. v. Trans-Pac. Freight Conference of Japan and Its Member Lines*, 24 S.R.R. 714, 722 (FMC 1988). Because the purpose of demurrage and detention is to incentivize cargo movement, when “assessing the reasonableness of demurrage and detention practices and regulations [under section 41102(c)], the Commission will consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity.” 46 C.F.R. § 545.5(c)(1); *see* 85 Fed. Reg. at 29651.

The reasonableness of a demurrage or detention charge, including a charge that has its origins in a government hold, is evaluated against the standard in 46 U.S.C. § 41102(c) and the interpretive rule. The Commission will evaluate the reasonableness of demurrage or detention practice against the practice’s ability to serve the primary purpose as a financial incentive to promote freight fluidity.

The interpretive rule specifically addresses the application of the incentive principle to demurrage and detention charges for containers held for government inspection. The rule makes clear that the Commission will apply the incentive principle in the context of government inspections as it would in any other context. 46 C.F.R. § 545.5(c)(2)(iv). In addition, the interpretive rule states that the Commission will also consider any extenuating circumstances when assessing the reasonableness of demurrage or detention practice (*e.g.*, shippers not complying with their obligations to complete their paperwork, properly loading and securing their cargo in containers, and carefully verifying the nature, quantity, safety, or labelling of its cargo). *Id.*; *see* 84 Fed. Reg. at 48858-59.

Your recommendation proposes a new regulation that either limits the amount charged to 25 percent of the contracted or published rate, or the application of a universal flat fee for government hold demurrage or detention, and no charge if the container is released during the initial free time. The Commission thanks the NSAC for this recommendation and will take it into consideration, including as part of the implementation of the Ocean Shipping Reform Act of 2022. Similar approaches were considered during the interpretive rule’s rulemaking proceeding. These approaches included, in the government hold context, prohibiting the escalation of demurrage or detention, requiring some level of mitigation, or requiring a cap on the amount that may be imposed while cargo is undergoing an inspection. *Id.* at 29657. At that time, the

Commission chose not to adopt any of these approaches, but instead reiterated that the Commission may consider the incentive principle in the government inspection context as it would in any other context. *Id.* at 29659.

Significantly, we note that there are recently filed complaints pending before the Commission related to these types of charges that, once resolved, may be instructive in further interpreting the Commission's interpretive rule as it applies to government holds. (e.g., Docket No. 22-32, *Doka U.S.A. Ltd. v. MSC Mediterranean Shipping Company (USA) Inc.*; Docket No. 22-33, *CCMA, LLC v. Mediterranean Shipping Company S.A. and Mediterranean Shipping Company (USA) Inc.*). Additional information related to these proceedings can be found in the FMC Reading Room at <https://www2.fmc.gov/readingroom/ProceedingSearch>.

Thank you again for sharing this recommendation. Per the requirements set forth in the legislation establishing the NSAC, these recommendations will be published on the Commission website and will be submitted to the appropriate Congressional committees. Please direct any questions regarding this response to the NSAC Designated Federal Officer.

Sincerely,

William Cody  
Secretary