September 15, 2023

VIA EMAIL (jmoran@fmc.gov)
The Honorable Rebecca F. Dye
Commissioner
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573

Re: Proposal on Empty Container Return, Early Return Date, and Container Pickup (Notice of Container Availability)

Dear Commissioner Dye:

The National Association of Waterfront Employers ("NAWE") hereby submits its comments on your proposed reforms to international supply chain practices regarding empty container return, early return date, and container pickup (collectively, the "Proposal"). For the reasons set forth below, NAWE opposes the Proposal and the manner in which it was submitted for public consideration. As detailed below, our members strongly believe that there are better means to explore these issues, consistent with your goal of facilitating focused engagement among industry leaders, rather than regulatory solutions, and we look forward to working with you to achieve this important objective.

Statement of Interest

NAWE is a non-profit trade association whose member companies are privately-owned stevedores, marine terminal operators ("MTOs"), and other U.S. waterfront employers. NAWE members engage in business at major U.S. ports on the Atlantic and Pacific coasts, the Gulf of Mexico, the Great Lakes, and Puerto Rico, including at the Ports of Los Angeles and Long Beach, and the Port of New York and New Jersey. Accordingly, NAWE's members operate the critical connection between global commerce and our Nation's economy and are committed to keeping America's international trade and commerce flowing. As such, NAWE's members would be directly affected by the Proposal and are uniquely positioned to advise you and the other Federal Maritime Commission ("FMC" or the "Commission") Commissioners on the operation of U.S. marine terminals and our members' continuous efforts to develop and implement operational efficiencies.

Comments on the Proposal

1) The Proposal is a regulatory action that does not meet the requirements of the Administrative Procedure Act.

The press release accompanying the Proposal states that Commissioner Dye's conviction that "focused engagement among industry leaders, rather than regulatory solutions, is a better way to develop commercial practices that address critical supply chain bottlenecks and improve the performance of the U.S. international ocean supply chain." It is therefore disappointing that the Proposal was developed with clear input from shipper interests acting through the National Shipper Advisory Committee ("NSAC"), but in the notable absence of engagement with MTO leaders. Instead, MTOs are forced to react to this shipper-developed Proposal through a written response in a vague regulatory process, instead of engaging in productive dialogue.

To be clear, there is no doubt that this is a regulatory action – essentially serving as an advanced notice of proposed rulemaking – without adhering to the requirements of the Administration Procedure Act ("APA"). The APA describes a "rulemaking" as the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). In turn, a "rule" is defined broadly by the APA to include any "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." *Id*. at § 551(4).

As you are of course aware, the Shipping Act prohibits common carriers, MTOs, and ocean transportation intermediaries from failing "to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). The Proposal is a clear regulatory action, proposing a series of actions with which MTOs at the Ports of Los Angeles and Long Beach and the Port of New York and New Jersey would be required to comply to meet the "reasonable practices" standard of 46 U.S.C. § 41102(c) with regard to container return, early return dates, and container pickup. As such, the Proposal is unequivocally a proposed agency statement designed to interpret what constitutes a "reasonable practice" under 46 U.S.C. § 41102(c) and is therefore subject to the APA's rulemaking requirements.

As a clear rulemaking action, the Proposal should undergo the appropriate legal analysis and be published in the *Federal Register*, providing interested parties with an opportunity not only to comment, but to review and understand the comments submitted by other interested parties. *See* 5 U.S.C. § 553. This process places all interested parties on an even playing field, providing transparency in the regulatory process. What has instead occurred here is an opportunity for shipper interests to provide input directly to the Commission in developing the Proposal, without

the requisite public transparency, and requiring other interested parties, such as NAWE, to react without a clear understanding of the process or what steps the Commission will take in response to these submitted comments. Of course, to even reach this step, in accordance with the APA, as a regulatory action the Proposal should have been brought to the full Commission in an open meeting and only should have been published for public comment by a majority vote. *See* 5 U.S.C. § 552b.

As such, while NAWE is commenting on the Proposal to protect the interests of its members, we nonetheless recommend that the Proposal be rescinded and that the Commission engage with the industry on this topic through other more productive means, as detailed below. To the extent that interest remains in pursuing this regulatory action, the Proposal should be brought to the full Commission for consideration in a public meeting and, if passed by a majority vote, published in the *Federal Register* as a proposed rule under an appropriate FMC docket.

2) The Proposal is Inconsistent with Interpretive Rule.

As noted above, the Proposal is essentially a series of proposed rules that would govern the FMC's consideration of what would be considered reasonable practices by MTOs with regard to container return, early return dates, and container pickup. As discussed in Section 4 below, these proposed rules have a direct impact on whether the Commission would consider MTO demurrage charges and ocean carrier detention and demurrage charges reasonable under the Shipping Act. As such, the Proposal is essentially an amendment to the Commission's Interpretive Rule on Demurrage and Detention. 85 Fed. Reg. 29638 (May 18, 2020) codified at 46 CFR § 545.5. However, by proposing bright line rules on container return, early return dates, and container pickup, the Proposal is inconsistent with the precepts of the Interpretive Rule. *See id.* at 29654 (in which the Commission declines to create bright line rules with regard to the imposition of demurrage of detention, noting "imposing bright line rules could inhibit the development of better solutions."). In addition, implementing the Proposal's bright line rules would also preclude the consideration of other factors underlying the imposition of detention and demurrage charges that may be inconsistent with such bright line rules. The Proposal therefore runs counter the "non-preclusion" language that was a critical element in the Interpretive Rule. *See id*. at 29652; 46 CFR § 545.5(f).

In addition, it is unclear why the Proposal is focused upon the Ports of Los Angeles and Long Beach and the Port of New York and New Jersey, other than presumably the involved shippers' specific focus with regard to these two locations. The Proposal makes vague reference to alleged practices at these locations that "create bottlenecks" but provides no factual information regarding such alleged bottlenecks. Without any further factual justification, NAWE believes that it is wholly inappropriate for the Commission to take targeted regional regulatory action. In addition, to the extent that "bottlenecks" occur at these locations, or elsewhere through the country,

resulting in the imposition of detention or demurrage charges, it is critical for the Commission to understand the full breadth of factors leading to such bottlenecks. For example, NAWE understands that the continued high cost of warehousing throughout the New York and New Jersey area continues to result in shipper interests improperly treating marine terminals as storage facilities, regardless of MTO practices regarding the issuance of container availability for pick up.

Because of these inconsistencies with the Interpretive Rule, NAWE again requests the rescission of the Proposal and that the Commission engage in more inclusive dialogue with the broader industry on these topics. If the Commission decides to move forward with the Proposal in accordance with the APA, the corresponding rulemaking must evaluate the Proposal's consistency with the Interpretive Rule.

3) To ensure the Commission is receiving accurate information, it should immediately establish a National Port Advisory Committee under its existing Federal Advisory Committee Act authority.

As stated above, one of NAWE's primary concerns with the Proposal is that it was developed solely with shipper input acting through the NSAC. This one-sided dialogue needs to come to an immediate end to ensure that the Commission is receiving a complete picture when evaluating necessary regulatory action to improve the efficiency of the international ocean supply chain. Indeed, MTOs operate the gateways to U.S. international trade and, as such, have unparalleled insight into the causes of – and solutions to – supply chain bottlenecks. Commissioner Dye recognized the importance of MTO advisory input, stating in her Fact Finding 29 Final Report (May 31, 2022):

> One of the recommendations of the Fact Finding 28 investigation was the development of a Commission shipper advisory committee. The charter for the National Shipper Advisory Committee (NSAC) was issued on June 7, 2021, and the committee has been meeting regularly since then. The Committee provides information, insight, and expertise pertaining to conditions in the ocean freight delivery system to the Commission. The Fact Finding Officer believes the Commission and the National Shipper Advisory Committee would equally benefit with the creation of an ocean carrier, seaport, and marine terminal advisory committee. This was identified early in the Fact Finding 29 investigation and could serve the Commission as it continues to deal with issues pertaining to the industry.

Notably, many Congressional members agree with the importance of creating a seaport and marine terminal advisory committee, resulting in the inclusion of Section 106 to the Ocean Shipping Reform Implement Act of 2023, H.R. 1836, which as amended directs the Commission to create a

"National Port Advisory Committee" comprised of five (5) MTO members, five (5) port authority members, and three (3) longshore and maritime members.

Notwithstanding the express Congressional authorization for NSAC, and the proposed authorization of the National Port Advisory Committee, no such Congressional authorization is required for the FMC to act. The FMC – along with all government agencies – is fully empowered under the Federal Advisory Committee Act, 5 U.S.C. §§ 1001, *et seq*., to establish any advisory committee that the Commission determines "to be in the public interest in connection with the performance of duties imposed on [the FMC] by law." 5 U.S.C. § 1008(a)(2). Creation of the National Port Advisory Committee merely takes a *Federal Register* notice and filing of an appropriate charter meeting the requirements of 5 U.S.C. § 1008(c). As noted above, Commissioner Dye has already determined that creating a National Port Advisory Committee would be in the public interest. Moreover, such a committee would better serve Commissioner Dye's stated intention of engaging in "focused engagement among industry leaders, rather than regulatory solutions."

NAWE is ready to assist the Commission in developing the appropriate *Federal Register* notice and charter to immediately establish the National Port Advisory Committee with the respective MTO, port authority, and labor representation recommended by the Ocean Shipping Reform Implement Act of 2023. The Committee can then provide impactful input to the Commission regarding empty container return, early return dates, and notice of availability, and work in lockstep with the Commission to develop further supply chain efficiencies.

4) The Proposal is substantively flawed and highlights the need for greater engagement by the Commission with MTOs.

I. Container Return Proposal

NAWE has serious concerns with two elements of the proposed container return proposal. First, the Proposal would require that containers must be returned to the terminal of original pickup. Quite simply, this is both impossible as a bright line rule, does not promote efficiency, and would not be in the best interest of all interested parties. For example, the ocean carrier – either directly or via a vessel sharing agreement – may have a vessel calling at a different terminal sooner than the original terminal, which can load the empty container for delivery where it is needed. As such, by returning the container to a different terminal, the container may be returned to the supply chain more quickly, rather than sitting idly at a different marine terminal. One of the key contributing elements to the supply chain congestion witnessed in 2021 and 2022 was a shortage of available containers. By arbitrarily requiring containers to be returned to the original pickup terminal, rather than being placed back into service in a more efficient manner by returning the container to a different terminal, this proposal may increase supply chain congestion.

In addition, from time-to-time MTOs may be required to restrict the return of empty containers to ensure the most efficient use of scarce terminal property and promote supply chain fluidity. Categorizing such action as unreasonable (seemingly forcing the MTO to affirmatively prove the reasonableness of such action) may deter MTOs from taking action that would actually serve to relieve bottlenecks, increasing supply chain congestion. Instead, MTOs must be free to operate under long-established procedures, which allow returned containers to be directed to alternative terminals to support supply chain efficiency.

Second, the Proposal would require the waiving of an appointment at an alternative terminal. For MTOs that employ appointment systems, this concept undermines the value of such systems, which work to ensure that volumes of cargo moving into and out of marine terminals at any given time remain at a sustainable level. For such terminals, allowing truckers to show up without an appointment would add significant chaos to the marine transportation system, increasing truck idling time (and resulting air emissions) while decreasing supply chain efficiency. From NAWE's perspective, this proposal merits no further consideration.

II. Early Return Date Proposal

The Proposal would mandate that the Earliest Return Date ("ERD") would be the one in effect at the time the empty container has been picked up from the marine terminal. While the intent is not exactly clear (as empty containers used for exports are not always picked up from the marine terminal from which the export will occur) the intention appears to be to create a static ERD. Again, this proposal is simply unworkable. ERDs must fluctuate to accommodate the changing arrival times of export vessels to ensure that export cargo is not stored on scarce terminal property for lengthy periods of time.

Imposing a static ERD would create a tremendous inefficiency in the use of terminal property, adding to supply chain congestion and reducing cargo fluidity. For example, MTOs routinely experience vessels arriving in a different order than was originally intended. As such, with a static ERD, an MTO may be forced to store export containers for an earlier-scheduled vessel that has been delayed, and may not have sufficient capacity for the export containers for a later-scheduled vessel that is actually arriving at the marine terminal. In such circumstances, the ERD for the delayed vessel must be revised to ensure sufficient terminal capacity exists for the next vessel that actually will be loaded at the terminal. Such action simply cannot be deemed unreasonable as it is a necessary and long-standing function of the international ocean supply chain, ensuring that the appropriate export cargo is at the terminal in a timely manner for loading.

III. Notice of Container Availability for Pickup Proposal

This proposal is perhaps the most concerning as it directly addresses matters handled by the Interpretive Rule, in which the Commission stated that it "is not requiring specific types of notices [of availability]." 86 Fed. Reg. at 29656. In reaching this conclusion, the Commission recognized its existing precedent that declined to require that free time start upon the issuance of a notice of availability. *Id.* at note 286, *quoting Free Time and Demurrage Charges at New York,* 3 U.S.M.C. 86, 105-106 (FMC 1948) ("The Commission noted that '[c]onsignees are universally apprised of the arrival of vessels' and reasoned that '[i]nsistence upon a notice of availability would subject the carriers to extra work and expense that would be largely futile and which appears quite unjustifiable.'). The Proposal apparently seeks to amend the Interpretive Rule and, apparently, overturn FMC precedent without any legal basis (or the appropriate APA action, as described above).

Substantively, the Proposal is unclear as it offers no definition for when "a container is accessible and available for pickup." NAWE reiterates its established position that free time should continue to run if the container is subject to a customs, freight, or other regulatory hold, which is beyond the control of the MTO and fully within the responsibility of the shipper or its importing agent. Demurrage imposed in such circumstances incentivizes the shipper to take appropriate actions to ensure that it has met its regulatory and administrative requirements *before* the container arrives at the marine terminal to reduce the length of time that the container remains in the terminal.

Moreover, NAWE continues to oppose the concept of free time stopping if a container becomes "non accessible and unavailable for pickup." As indicated above, because there is no agreed-upon definition of container availability, the impact of this aspect of the Proposal is unknown. Moreover, if a trucker has not made an appointment to retrieve a container, it is unclear why the container must be instantaneously accessible and ready for pick up for free time to continue. Placing a container for which no appointment has been made lower in the stack than containers for which an appointment has been made is simply an efficient use of terminal property.[1] Continuing to run free time during such period incentivizes the trucker to make a retrieval appointment, at which time stacks can be reconfigured to ensure that the container is available for pick up at the appropriate time.

Conclusion

For the foregoing reasons, NAWE encourages Commissioner Dye to:

1. Rescind the Proposal, with immediate effect;

[1] For those terminals using straddle carriers, every container is available at any time.

2. Take immediate action to establish the National Port Advisory Committee in accordance with the Federal Advisory Committee Act;
3. Engage in further discussions on the Proposal with industry leaders, including through the National Port Advisory Committee; and
4. Following such industry engagement, if advisable with a majority vote of the Commission, reintroduce an improved version of the Proposal as a proposed rulemaking in accordance with the APA and in consideration of the Interpretive Rule.

Thank you for your consideration of these submitted comments. We look forward to our continued engagement with you on this topic and please do not hesitate to contact the undersigned with any questions.

Sincerely,

Robert Murray
President