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TESTIMONY OF

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COMMISSIONER
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BEFORE THE
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
UNITED STATES SENATE

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Good morning, Chair Cantwell, Ranking Member Wicker, and Members of the Committee. Thank you for the opportunity to appear with my colleague Chairman Maffei and discuss issues relevant to the Ocean Shipping Reform Act of 2022, and ongoing actions at the Commission to address supply chain issues.

I also want to thank you for your strong support for the legislation establishing the Federal Maritime Commission's Shipper Advisory Committee. We have appointed a strong Advisory Committee of U.S. importers and exporters and they're hard at work.

Fact Finding 29 is the fourth major investigation I have conducted for the Federal Maritime Commission. During these investigations, my overall focus has been on how to improve the performance of our international ocean supply chain.

Following is a brief explanation of certain relevant issues and observations along these lines you may wish to consider in the context of S. 3580. Also, I will preview several of my final Fact Finding 29 recommendations.

<u>Demurrage and Detention Enforcement</u>

The Interpretative Rule issued by the Commission in May 2020, on Demurrage and Detention charges by ports, marine terminals, and ocean carriers is one of the biggest challenges the Commission has ever undertaken. Demurrage and Detention charges are internationally controversial. The United States is the first

nation to take steps to confine the charges to the purpose for which they are intended: to incentivize shippers to pick up cargo and return equipment during allotted time periods.

A major misunderstanding surrounds the nature of the Demurrage and Detention Interpretative Rule. The Interpretative Rule is not merely guidance. We have issued several "guidance statements" as part of Fact Finding 29, and they are useful regulatory tools. But the Interpretative Rule acts as the "interpretation" of demurrage and detention charges as potential "unreasonable practices" under section 41102(c)of title 46, United States Code. Currently, the Commission is investigating potential violations of section 41102(c) against ocean carriers for unreasonable practices regarding demurrage and detention.

Without the Interpretative Rule, it would take years of investigations and complaints for the Commission to develop a coherent approach to "unreasonable" demurrage and detention charges case-by-case. Based on the Interpretive Rule, the Commission has completely reoriented our resources to focus on demurrage and detention, including beginning a new program to reach out to ocean carriers and "audit" their demurrage and detention compliance. We have also suggested regulatory and statutory changes to respond to shipper concerns regarding retaliation which I am pleased to see has been embodied in proposed legislation.

One final point regarding a violation of any law or regulation: the Commission must be made aware of the facts surrounding a potential violation to pursue an investigation. Whether it is through a complaint or a notice to the Commission's Bureau of Enforcement, we need facts to pursue demurrage and detention violations. Stakeholders must be willing to come forward to assist the Commission in our enforcement efforts.

<u>Demurrage and Detention Billing</u>

The Commission recently moved forward on my last Fact Finding 29 Interim Recommendation by publishing an Advance Notice of Proposed Rulemaking (ANPRM) to respond to shipper concerns regarding demurrage and detention billing practices.

The ANPRM requests comments on five areas related to demurrage and detention billing and whether they should be subject to future regulation. These include what data should be included on bills, reasonable timeframes for billing and response, and whether other charges should be included in billing regulation. Again, I am pleased this recommendation has been embodied in proposed legislation.

The Commission is currently cooperating with the Port of Los Angeles in a 6-week experiment to determine if the information contained in the Port Optimizer would be useful to the Commission to enforce demurrage and detention. This project will also be important to develop the information important to demurrage and detention billing.

The ultimate goal of this effort is to provide ocean carriers with the information they need to change their billing systems and avoid billing shippers for unreasonable demurrage and detention charges.

Lack of Understanding and Commitment in Service Contracting

For some time, I have been concerned that many service contracts for carriage of cargo entered into between shippers and ocean carriers lack mutual commitment. This ambiguity about mutual enforceability in these so-called "contracts" may cause severe consequences to shippers during times of high demand for cargo space because they are not protected with binding contracts.

I do not recommend that the Commission "regulate" service contracting as it did prior to the 1984 Shipping Act and the 1998 amendments, because that would reduce the flexibility that contracting provides to shipper customers. Those deregulatory changes have benefitted ocean shipping tremendously for nearly 40 years. However, I do support the Commission's providing greater information to shippers on the value of mutuality of understanding and commitment in service contracting and the availability of shipper associations to leverage volume discounts for freight charges.

Fact Finding 29

My authority for Fact Finding 29 is contained in two Commission Orders. Neither of these Orders contains a termination date, due to the uncertainties surrounding

the COVID-19 pandemic. As we approach what we hope is the end of the pandemic, I am completing the last phase of Fact Finding 29.

I will continue to work with our stakeholders in FMC Supply Chain Innovation Teams with in-person meetings in Washington, especially with the FMC Memphis Supply Chain Innovation Team. The Commission will continue to focus enforcement resources on potential unreasonable demurrage and detention violations of section 4102(c) of title 46, United States Code.

My final Fact-Finding recommendations include:

Reinvigorating a "Rapid Response" program for emergencies facing agricultural exporters, in which all alliance Chief Executive Officers (America) have agreed to personally participate;

Requiring ocean carriers to appoint FMC Compliance Officers who report directly to their CEO America;

Beginning a new Commission program to provide education on maritime terminology, including prioritizing guidance to importers and exporters on "merchant haulage;"

Issuing an Advance Notice of Proposed Rulemaking concerning container return and earliest return date practice, based on discussions we have conducted in FMC Innovation Teams;

Beginning a full-time FMC International Ocean Supply Chain program with dedicated staff; and

Establishing an FMC Ports and Ocean Carrier Advisory Committee to meet directly with our existing FMC Shipper Advisory Committee.

Thank you, and again, I appreciate the opportunity to be here today.