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A Whole New World: FMC Issues Final Rule on Demurrage and Detention Billing Requirements

FEBRUARY 27, 2024

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On February 26, 2024, the Federal Maritime Commission ("FMC") published its long-awaited final rule (the "Final Rule") establishing various regulations governing the imposition of demurrage and detention. The Final Rule will be effective on May 28, 2024. The Final Rule is intended to address concerns about the manner in which ocean carriers, marine terminal operators, and non-vessel-operating common carriers (each "a Billing Party") invoice and collect demurrage or detention from others (each "a Billed Party"). This development flows from rulemaking requirements contained in the Ocean Shipping Reform Act of 2022 ("OSRA 2022").

Here is a quick summary of the impact including changes that will be effective on May 28, 2024:

General Billing Requirements and Practices

- Failure to include the minimum information in an invoice as outlined in this Part eliminates the Billed Party's obligation to pay the applicable charges. (46 CFR 541.5)
- A Billing Party can only issue invoices for demurrage or detention to either (1) the person for whose account the Billing Party provided ocean transportation or storage of cargo; or (2) the consignee. (46 CFR 541.4) A Billing Party may not issue invoices for the same charges to both the consignee and the contracting party.
- A Billing Party must issue a demurrage or detention invoice within thirty (30) calendar days from the date of the last incurred charge. (46 CFR 541.7(a))
- A Billing Party may reissue an invoice originally misdirected to an incorrect person as long as such issuance remains within thirty (30) calendar days from the date of the last incurred charge. (46 CFR 541.7(d))

NVOCC-Specific Billing Requirements

- Non-vessel-operating common carriers ("NVOCCs") must issue a demurrage or detention invoice within thirty (30) calendar days from the date the NVOCC receives the invoice from another party. (46 CFR 541.7(b))

- When an NVOCC is acting as both a Billing Party and Billed Party in relation to the same charge, due to its intermediary role, it can communicate disputed charges to its Billing Party on behalf of its Billed Party. (46 CFR 541.7(c)) The underlying Billing Party must provide an additional thirty (30) calendar days for the NVOCC to dispute the charge.

Fee Mitigation, Refund, or Waiver

- The Billing Party must give the Billed Party at least thirty (30) calendar days from the invoice issuance date to request mitigation, refund, or waiver of fees. (46 CFR 541.8(a))

- The Billing Party must attempt to resolve a request for mitigation, refund, or waiver of fees within thirty (30) calendar days after receiving any such challenge from its Billed Party. (46 CFR 541.8(b))

Delayed Implementation of Invoicing Requirements Beyond OSRA 2022

The FMC has delayed the implementation of 46 CFR 541.6 stating that the invoicing requirements under this part are "pending approval of the associated Collection of Information by the Office of Management and Budget." The FMC will publish a notice when the approval is granted, upon which time 46 CFR 541.6 shall become effective and enforceable, including the following additional elements that were not in OSRA 2022:

- Invoices must include additional information identifying the respective container(s), such as Bill of Lading numbers and the basis for why the Billed Party is liable for the charges. (46 CFR 541.6(a)(1, 4))
- The Billing Party must provide additional timing information including the invoice date, invoice due date, the specific date(s) for detention or demurrage charges, and the basis for why the Billed Party is the proper party of interest. (46 CFR 541.6(b)(1-2, 8))
- An invoice may include digital means (i.e., a URL address, QR code, or digital watermark) to readily identify a contact to whom the Billed Party may direct invoice-related questions or concerns as well as the process to request fee mitigation, refund, or waiver. (46 CFR 541.6(d)(3))

Practical Take Away

This Final Rule endeavors to provide clarity regarding the FMC's position on detention and demurrage invoicing and collection processes. All stakeholders, including beneficial cargo owners, will benefit from quickly digesting the Final Rule and evaluating the impact that it may have on longstanding, existing business practices relating to the billing and collection of demurrage and detention. Indeed, the FMC expressly acknowledged in its comments that it was declining to follow various widely accepted and longstanding practices. In short, all stakeholders in the intermodal industry will need to adapt over the next ninety (90) days to the new world ushered in by the publication of the Final Rule. Additional rulemaking on other ocean-related topics is expected if the FMC's charge from the U.S. Congress is to be met under OSRA 2022. Therefore, while the FMC has attempted to create further clarity and consistency with respect to detention and demurrage practices in the Final Rule, industry stakeholders should be prepared for more to come on other subjects from the FMC.

Benesch's Transportation & Logistics Practice Group has a history of counseling and representing all participants in the global ocean shipping market. Our team is available to assist all stakeholders with developing practical approaches to address the business and regulatory impact of the FMC's demurrage and detention billing requirements including as appropriate resolving disputes that emerge.

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