

The FMC's Final Rule on Detention and Demurrage Billing Requirements Takes Effect Despite Pending Litigation

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On February 26, 2024, the FMC issued its final rule on detention and demurrage billing requirements. On February 27, 2024, our team outlined the practical impact that the Final Rule will have in the article: “A Whole New World: FMC Issues Final Rule on Demurrage and Detention Billing Requirements.” As the May 28, 2024, effective date of the Final Rule fast approaches, industry stakeholders should take note of several recent and important developments with respect to the Final Rule.

Contents of Invoices

When it first published the Final Rule in February 2024, the FMC indicated that it was indefinitely postponing the effective date of the portion of the Final Rule that requires invoices for detention or demurrage to contain specific types of new information relative to identification, timing, rates, and disputes (along with specific mandatory certifications). This indefinite postponement was set to allow the Office of Management and Budget (“OMB”) to complete its own review of the Final Rule.

Last week, on May 13, 2024, the FMC announced that the OMB had completed its review of the Final Rule and that the OMB had approved the Final Rule. Therefore, *all* provisions of the Final Rule—including those requiring that invoices now include specific, additional information and certifications—will be effective on May 28, 2024.

World Shipping Council's Challenge

On April 18, 2024, the World Shipping Council (“WSC”) filed a petition in the United States Court of Appeals for the District of Columbia Circuit requesting review of the Final Rule on the grounds that: (1) the Final Rule is contrary to the Ocean Shipping Reform Act of 2022 (“OSRA 2022”); (2) the FMC exceeded its authority in promulgating the Final Rule; and (3) the Final Rule is arbitrary, capricious, and an abuse of discretion. *World Shipping Council v. F.M.C., No. 24-1088 (D.C. Cir. filed Apr. 18, 2024)*.

In general, the WSC seeks clarity from the Court on whether the Final Rule achieves the OSRA 2022 mandate for the FMC to implement reasonable rules and practices that ocean carriers, marine terminal operators, beneficial cargo owners, and ocean transportation intermediaries may use when assessing detention and demurrage charges. However, WSC’s public statements signal that the WSC is particularly concerned about what it characterizes as an internal contradiction between the preamble accompanying the Final Rule and the text of the Final Rule itself.

Notably, despite its challenge to the Final Rule, the WSC has *not*

sought to stay the effective date of the Final Rule.

“Correction” to the Final Rule

On May 9, 2024, in response to several recent inquiries (and, presumably, in response to the WSC’s litigation), the FMC also published a “correction” to the Final Rule wherein it replaces certain language in the preamble to the Final Rule. Specifically, the FMC acknowledges that certain language in the original preamble created ambiguity. The FMC states the purpose of the “correction” is to address that ambiguity by clarifying that the Final Rule “only addresses carrier-trucker relationships on through bills of lading.” The FMC further states that it presumes its own jurisdiction would apply only to cargo moved inland under a through bill of lading, and that contracts between an ocean carrier and a motor carrier “not based on a through bill of lading” would *likely* be outside of the scope of the Final Rule. The “correction” was effective immediately.

The WSC has not yet stated publicly whether the FMC’s “correction” sufficiently allays the WSC’s concerns with the Final Rule or whether the WSC will continue with its litigation challenging the Final Rule.

Practical Next Steps

The OMB has now approved the Final Rule, and the filing of the WSC litigation does not itself stay the effective date of the Final Rule by operation of law. As a result, all industry stakeholders should continue to adapt and prepare to comply with the Final Rule by May 28, 2024. Compliance risk is very real for operational practices despite apparent uncertainty about certain aspects of the Final Rule. Until the WSC litigation concludes, industry stakeholders will need to remain flexible and operate under the Final Rule while awaiting any further guidance from the court or from the FMC itself.

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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