

April 22, 2024

Via Electronic Mail deng@fmc.gov

David Eng, Secretary
Federal Maritime Commission
800 North Capitol Street, N.W
Washington, D.C. 20573

RE: Industry's Questions on Demurrage and Detention Billing Requirements

Dear Mr. Eng:

Thank you for your leadership in the Federal Maritime Commission.

The National Customs Brokers & Forwarders Association of America, Inc. (“NCBFAA” or the “Association”) represents more than 1,300 member companies, consisting of the nation’s leading freight forwarders, customs brokers, ocean transportation intermediaries (“OTIs”), non-vessel operating common carriers (“NVOCCs”) and air cargo agents. NCBFAA members operate in the ocean shipping sector and frequently serve as intermediaries between shipper-customers and ocean carriers. The Association’s members are involved in nearly 90% of U.S. trade by ocean and are directly impacted by the FMC’s regulations and policies as OTIs.

Following the publication of the FMC’s Final Rule on Demurrage and Detention Billing Requirements published on February 26, 2024, the Association engaged other industry stakeholders to carefully review the new regulations and assess the potential impact on current business practices and operations. *See* 89 Fed. Reg. 14,330. The NCBFAA applauds the FMC for its continued efforts to level the playing field in ocean shipping and protect U.S. shipping interests in global trade. While this Final Rule is a positive milestone in maritime trade, the Association’s membership and other industry stakeholders raised several questions not addressed in the Commission’s Final Rule. As such, the Association respectfully submits the following questions commonly raised within the industry and requests guidance on how the Final Rule applies:

Industry-Wide Questions on Final Rule on Demurrage and Detention Billing Requirements

1. Section 541.5 of the FMC Regulations state that failure to include any of the minimum invoice information eliminates the billed party’s obligation to pay the applicable charge. Is the obligation to pay also eliminated when an invoice contains inaccurate information?
2. From the Final Rule on Demurrage and Detention Billing Requirements, it appears that billing parties may cure invoices but shall not be provided additional time to cure. As such, billing parties must cure during the original 30 day period in which it must issue an invoice to the billed party. Is that understanding correct?



- a. When does the invoicing clock run for NVOCCs? For example, if an NVOCC receives an inaccurate or incomplete demurrage or detention invoice from the underlying ocean carrier and the ocean carrier reissues a corrected invoice days later, will the NVOCC have thirty (30) days from the date of the original or corrected invoice to dispute or issue an invoice to its customer?
3. Pursuant to section 541.8 of the FMC Regulations, what happens if the billing party does not resolve the request for mitigation, refund or waiver (*i.e.*, the parties do not reach agreement)?
4. Does the FMC's Final Rule on Demurrage and Detention Billing Requirements apply to "extended dwell fees" imposed and assessed by U.S. ports and terminals?
5. Many common carriers contain language in their bill of lading terms and conditions stating that a shipper and its agents are jointly and severally liable for charges connected to the bill of lading. Would this provision be in conflict with the FMC's Final Rule on Demurrage and Detention Billing Requirements, which defines "billed party"?
6. The Uniform Intermodal Interchange and Facility Access Agreement ("UIIA") provides for a 60-day timeframe for demurrage and detention payments and disputes for the trucking industry. How does the Final Rule on Demurrage and Detention Billing Requirements apply to UIIA contracts with respect to invoicing timeframes and prohibiting invoicing to certain parties?
7. Does the definition of "billed party" under section 541.4(a) of the FMC Regulations include motor carriers contracted to pick up and delivery containers? Many truckers currently receive D&D invoices as billed parties under the UIIA.
8. How does the Final Rule on Demurrage and Detention Billing Requirements apply to scenarios where the contract of carriage terminates when the cargo is transported to the port of delivery? In such cases, the NVOCC does not have control over or a contract with the trucker responsible for picking up the containers from the port. Would the UIIA agreement between the common carrier and trucker govern such situations?
9. To clarify, NVOCCs must issue a demurrage or detention invoice to its customer thirty (30) days from the issuance date of the underlying ocean carrier's invoice. Does "issuance date" refer to the date on the invoice or the date when the NVOCC receives the invoice?
10. Pursuant to section 541.7(c) of the FMC Regulations, how does the additional thirty (30) calendar days apply? Do the additional days apply from the day the NVOCC notifies the underlying ocean carrier of its customer's dispute or from the date the NVOCC originally received the underlying ocean carrier invoice?

11. Does the FMC plan to include additional data elements for demurrage and detention invoices outside of the original thirteen (13) established by the Ocean Shipping Reform Act of 2022 and the new data elements in section 541.6?
12. Does the Final Rule on Demurrage and Detention Billing Requirements apply to rail storage charges? If not, what types of charges are regulated on through bills of lading.
13. Can a consignee buying on DAP or DDP Incoterms be held responsible for demurrage and detention charges even when the consignee is not involved in the contracting for final mile delivery?
14. Parties are often required to pay demurrage charges prior to cargo release. Given this industry practice, are billing parties required to issue compliant invoices on demand rather than up to thirty (30) calendar days later to enable recipients to make payments? Alternatively, would a notification of outstanding demurrage charges in advance of 30-day invoicing also be subject to the new FMC regulations?
15. Please confirm whether billed parties retain the risk to contest demurrage and detention charges or seek a refund if the billed party fails to dispute a demurrage or detention invoice within the thirty (30) day timeframe. From the Final Rule, it appears that billed parties are still able to pursue Charge Complaints, formal complaints and arbitration.
16. The Commission revised section 541.8(a) of the FMC Regulations to make clear that billing parties must allow billed parties at least 30 calendar days from the invoice issuance date to request mitigation, refund, or waiver of fees. Correspondingly, the due date of an invoice must be on or after thirty (30) days after it is issued. Many billing parties currently require payment of demurrage and detention charges as a condition of releasing goods. Can carriers/MTOs still condition the release of goods on payment of demurrage and detention charges if the demurrage and detention invoices are not yet due?
 - a. Relatedly, if billing parties can condition the release of goods on demurrage and detention charge payments before the invoices are due, can demurrage and detention continue to accrue while billed parties review and dispute the invoices/charges?
17. The Final Rule is very clear that “ocean cargo that is shipped under a through bill of lading to a final destination in the United States remains under Commission jurisdiction for any Shipping Act violations.” Moreover, the Final Rule states that “detention or demurrage invoices issued for cargo delivered on a through bill of lading under the Commission's jurisdiction are required under this rule to list all ports of discharge, ocean and inland.” Based on the foregoing, are demurrage charges

incurred at interior ports for cargo moving under through bills of lading also subject to the Final Rule on Demurrage and Detention Billing Requirements?

- a. Since marine terminal operators are not at the U.S. interior ports, are common carriers the only billing parties able to issue a demurrage or detention invoice for such cargo moving under through bills of lading?
18. Will the Commission provide commentary or guidance to industry on a reasonable standard for keeping billed parties informed of accruing charges to be invoiced? There have been instances when empty containers have not been returned for over one year with charges still accruing.
19. Shippers and consignees are encountering issues with marine terminal operators (“MTOs”) assessing demurrage. Prior to the Final Rule on Demurrage and Detention Billing Requirements, the motor carrier would pay the MTO demurrage charges and invoice the consignee. In light of the new regulations, an MTO cannot invoice a motor carrier and the motor carrier cannot pick up the box due to the outstanding charges.
- a. Who is the proper party to be invoiced for the MTO demurrage charges in this scenario? Would the appropriate party be the vessel-operating common carrier that has contractual privity with the MTO?
 - b. Alternatively, may the motor carrier pay the MTO demurrage charges “on behalf of” the consignee even though the consignee does not have contractual privity with the MTO?

The Association appreciates and commends the FMC’s ongoing efforts to address issues facing U.S. shippers and looks forward to continued collaboration with the Commission to promote freight fluidity, transparency, and fair competition in the ocean shipping industry. The NCBFAA thanks you for your consideration of its request for guidance and looks forward to engaging the Commission further on this matter. Please do not hesitate to contact the undersigned if there are any questions.

Respectfully submitted,



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CC:
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