

On February 23, 2024 the Federal Maritime Commission (FMC) [announced the publication of its final Demurrage and Detention Billing Requirements rule \(Final Rule\).](#)<sup>1</sup>

This rule represents yet another of the ongoing impacts of the Ocean Shipping Reform Act of 2022 (OSRA 22), and its goal of promoting supply chain fluidity. The Final Rule applies to common carriers, which includes both vessel operating common carriers (VOCCs) and non-vessel-operating common carriers (NVOCCs), as well as marine terminal operators (MTOs). The Final Rule addresses demurrage and detention (D&D)<sup>2</sup> billing practices and includes provisions governing: (1) specific minimum information on D&D invoices, (2) which parties may appropriately be billed for D&D charges, and (3) deadlines for issuing invoices, disputing charges and resolving disputes. The Final Rules goes into effect on May 28, 2024 except for certain invoicing requirements set forth in Section 541.6<sup>3</sup>.

**Background**

The Final Rule’s origin is the FMC’s Fact-Finding Investigation No. 29: International Ocean Transportation Supply Chain Engagement (Fact Finding No. 29) issued on July 28, 2021. Fact Finding 29 recommended that the FMC should issue an Advance Notice of Proposed Rulemaking (ANPR) seeking comments as to whether common carriers and MTOs should be required to include certain minimum information on D&D invoices and adhere to certain practices for D&D billings. On February 15, 2022, the FMC issued an ANPRM requesting comments on various D&D issues. On June 16, 2022, after the FMC issued the ANPRM and received comments, OSRA 22 was enacted into law. The FMC issued a Notice of Proposed Rule Making (NPRM) on October 14, 2022, which addressed additional issues outlined in OSRA 22. The Final Rule is part of the FMC’s on-going rulemaking requirements under OSRA 22. The Final Rule will be codified at 46 C.F.R. Part 546.

Prior to the issuance of the Final Rule, the FMC received 192 comments from various supply chain stakeholders, including common carriers, MTOs, shippers and cargo interest’s ocean transportation intermediaries (OTIs), and bi-partisan groups of members from the U.S. House of Representatives. Needless to say, the Final Rule garnered significant industry and political attention.

**The Final Rule**

The Final Rule applies to how a “Billing Party” (a common carrier or MTO) invoices and collects D&D from the “Billed Party” who is the party that receives the D&D invoice and is responsible for paying the D&D invoice. Significantly, a Billed Party can include a consignee, which is a change from the NPRM. The FMC included consignee as part of the Final Rule reasoning that in certain circumstances, the consignee is in a position to assess and dispute D&D charges.

However, a Billing Party cannot invoice both a party who is in contractual privity with the Billing Party and the consignee. The FMC focus is on the party – whether the shipper or consignee- who has contractual privity with the Billing Party and who should be the only party that is potentially liable for D&D charges. Under the Final Rule, simply listing the consignee on the bill of lading is not sufficient to support billing the consignee. The FMC’s focus on contractual privity is designed to limit the number of parties who are potentially liable for D&D charges as the FMC found that “that prohibiting billing parties from issuing demurrage and detention invoices to persons with whom they do not have a contractual relationship will best benefit the supply chain.”<sup>4</sup>

The sentiment on Capitol Hill with regard to past practices among carriers was most evident at a recent hearing of the Senate’s Commerce, Science and Transportation Committee during a hearing into the renominations of FMC Chairman Daniel Maffei and Commissioner Rebecca Dye. Chair Maria Cantwell (Democrat, Washington) made the following [statement](#) about detention and demurrage: “Between 2020 and 2022, nine of the largest carriers charged approximately \$8.9 billion in demurrage and detention fees. . . These are fees above the cost of shipping. These are exorbitant fees passed on to the consumers and we can’t afford that.”

The Final Rule also imposes stricter requirements on the Billing Party. If the Billing Party fails to include certain required minimum information in an invoice, the Billed Party does not have to pay the charges. A Billing Party must issue a demurrage or detention invoice within thirty (30) calendar days from the date of the last incurred charge. 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.

1 89 Federal Register 14330.

2 The Final Rule defines D&D as any “charges, including ‘per diem’ charges, assessed by ocean common carriers, marine terminal operators, or non-vessel-operating common carriers related to the use of marine terminal space (e.g., land) or shipping containers, but not including freight charges.”

3 The invoicing requirements set forth in Section 541.6 await approval from the Office of Management and Budget. If approved by the OMB, the FMC will issue a subsequent Final Rule.

4 89 Federal Register at 14339.

The Final Rules also addresses NVOCC D&D practices. NVOCC must invoice D&D within thirty (30) calendar days from the date the NVOCC receives the invoice from another party. In instances 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. The underlying Billing Party must provide an additional thirty (30) calendar days for the NVOCC to dispute the charge.

The Final Rules provides for at least a thirty (30) day period from the date that the D&D invoice was issued for a Billed Party to request mitigation, refund, or waiver of the charges. The Billing Party is required to resolve such a request within thirty (30) calendar days after receipt.

While not taking effect on May 28, 2024, the Final Rule also sets forth required detailed information that must appear on a D&D invoice. It is worth noting that these proposed requirements include:

- The D&D invoice date.
- Information that identifies the specific bill of lading or container number
- The basis for why the Billed Party is the proper party of interest and thus liable for the charge.
- The basis for the D&D calculation which would include timing, dates and rate information and the total amount due.
- The email, telephone number, or other appropriate contact information for questions or request for fee mitigation, refund, or waiver
- Sufficient information to enable the Billed Party to readily identify a contact to whom they may direct questions or concerns related to the invoice and understand the process to request fee mitigation, refund, or waiver.
- Digital means, such as a URL address, QR code, or digital watermark, that directs the billed party to a publicly accessible website that provides a detailed description of information or documentation that the billed party must provide to successfully request fee mitigation, refund, or waiver.
- Significantly, the D&D invoice must include the Billing Party's certification that the invoice is accurate and is in compliance with the FMC's rules and The Billing Party's performance did not cause or contribute to the underlying invoiced charges.

## Takeaways

OSRA 22 has and will continue to have significant impact on the maritime supply chain, especially as economic and national security issues continue to merger as evidenced by the Coast Guard's recent proposed marine cyber security [rule](#). The Final Rule's goal is to provide clarity to D&D by standardizing billing practices, which garnered significant attention during the pandemic. As is often the case with new regulations, there will be a learning curve for both the Billing Party and Billed Party. This could potentially lead to additional litigation before the FMC. Given the relatively short window before the May 28, 2024 effective date, both Billing Parties and Billed Parties will have to quickly come to grasp with the Final Rule.

The shipping public should also be aware that this final rule is the latest action from the FMC that has significant Congressional interest. Policymakers remain keenly interested in the business of the Commission and are openly calling for it to insert itself in ways it previously had shown restraint. This is exhibited succinctly by last week's comments from Chair Cantwell (D-WA) who said ... "we want to see a more aggressive FMC." A such, Counsel directed compliance training and policy analysis will greatly aid in navigating the changing sea state of shipping regulation.

## Contacts

### Michael J. Wray

Of Counsel, Houston  
T +1 713 546 3330  
E michael.wray@squirepb.com

### D. Michael Kaye

Partner, Washington DC  
T +1 202 457 6545  
E michael.kaye@squirepb.com

### Darien Flowers

Principal, Washington DC  
T +1 202 457 5336  
E darien.flowers@squirepb.com

### John P. Flynn

Principal, Washington DC  
T +1 202 457 5141  
E john.flynn@squirepb.com