

TPM²⁴

by S&P Global

TPM24 Academy: OSRA 2022

Updates, Outcomes and Future Scenarios

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Ocean Shipping, A Regulated Industry

The Federal Maritime Commission:

*Our mission is to **ensure a competitive and reliable international ocean transportation supply system** that supports the U.S. economy and protects the public from unfair and deceptive practices*

Shipping Act of 1984

The Ocean Shipping Reform Act of 1998

The Ocean Shipping Reform Act of 2022

Ocean Shipping Reform Act of 2022

Enacted:



Defined Purpose

“...ensure an efficient, competitive, and economical transportation system in the ocean commerce of the United States” and “promote the growth and development of United States exports through a competitive and efficient system for the carriage of goods by water...and by placing a greater reliance on the marketplace.”

Shipping Exchange Registry

“Shipping Exchange means a platform (digital, over-the-counter, or otherwise) that connects shippers with common carriers for the purpose of entering into underlying agreements or contracts for the transport of cargo, by vessel or other modes of transportation.” and “No person may operate a shipping exchange... unless the shipping exchange is registered as a national shipping exchange under the terms and conditions provided in this section and the regulations issued pursuant to this section.”

Prohibition on Retaliation

A common carrier, MTO or OTI may not retaliate against a shipper or their agent, an OTI or a motor carrier by refusing or threatening to refuse otherwise-available cargo space and may not resort to any other unfair or unjustly discriminatory action for patronizing another carrier, filing a complaint or any other reason.

Ocean Shipping Reform Act of 2022

Enacted:

Assessment of Charges

“Common Carriers... shall not... assess a charge that is inconsistent with or does not comply with” all regulations including the obligation for “just and reasonable... practices in handling property” (Title 46 Section 41102 c) and “Interpretations and Statements of Policy” (Title 46 part 545).

Refund of Charges

A party in violation of the regulations is not only liable to civil penalty but also liable for the refund of a charge assessed in violation.

Charge Complaint Submission for FMC Investigation, Refund Order, Penalty Assessment

“The Commission shall promptly investigate” complaints submitted to them concerning “charges assessed by a common carrier”, who will then have the opportunity to submit additional information and will bear the burden of establishing the reasonableness of any D&D charges. “If the Commission determines that a charge does not comply with section 41104(a) or 41102, the Commission shall promptly order the refund of charges paid” and “a civil penalty... shall be applied”.

FMC Empowered to Initiate Investigations of Fees and Charges

“The Federal Maritime Commission, on complaint or its own motion, may investigate any... fee, or charge that the Commission believes may be in violation”



Ocean Shipping Reform Act of 2022

Enacted:



NVOCC Safe Harbor

Identifies the VOCC as the party responsible for refunds or penalties assessed as a result of any inaccuracies in the D&D invoice, provided that “the Commission finds that the non-vessel operating common carrier is not otherwise responsible for the charge”, thereby providing a “safe harbor” to the NVOCC.

Demurrage and Detention Invoicing Obligations

13 mandatory elements (“unless otherwise determined by a subsequent Commission rulemaking”) that each D&D invoice shall include, absence of which “shall eliminate any obligation...to pay.”

Prohibition on Unreasonable Refusals and Unjustly Discriminatory Methods or Practices

“Common Carriers... shall not... unreasonably refuse cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods” and “unreasonably refuse to deal or negotiate, including with respect to vessel space accommodations” and “for service pursuant to a service contract, engage in any unfair or unjustly discriminatory practice against any commodity group or type of shipment”

Various Studies and Reporting

Including Best Practice for Chassis Pools; Import/Export TEU volumes; Discrimination Against Hazardous Materials; Inland Port Usage for Storage and Transfer of Containers; Technology at US Ports; Dwell Time Statistics; Fact Finding No.29, International Ocean Transportation Supply Chain Engagement.

Ocean Shipping Reform Act of 2022 *Pending Rulemakings and Regulations:*



- Charge Complaints ***Interim Procedures in place***
 - Interim procedures were established to allow prompt action. A new permanent procedure would be completed through a formal rulemaking after notice and public comment.
- Shipping Exchange Registry
 - Not later than 3 years after enactment of OSRA 2022, the Commission shall issue regulations
- Service Contract Essential Terms
 - "Each Service Contract shall include and any other essential terms that the FMC determines necessary or appropriate through a rulemaking"
- Unfair or Unjustly Discriminatory Methods
 - Initiate not later than 60 days and issue final rule not later than 1 year after the enactment of OSRA 2022
- Demurrage or Detention ***Published Feb 26 2024 for Eff May 28 2024 (with exceptions)***
 - Initiate not later than 45 days after and issue final rule not later than 1 year after the enactment of OSRA 2022
- Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodations
 - Initiate not later than 30 days and issue final rule not later than 6 months after the enactment of OSRA 2022

Pending Rulemaking: **Unreasonable Refusals**

46 U.S. Code § 41104 – Common Carriers

(a) In General.—A common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not—:

(3) unreasonably refuse **cargo space accommodations** when available, or resort to other unfair or unjustly discriminatory methods;

(10) unreasonably refuse to deal or negotiate, including with respect to **vessel space accommodations** provided by an ocean common carrier;

FMC issued NPRM (Sep 2022) and SNPRM (Jun 2023)

Some key definitions, as proposed:

Cargo space accommodations means space which has been negotiated for... [including] the services necessary to access and load or unload cargo from a vessel

Vessel space accommodations means space available... [including] the services necessary to access or book vessel space accommodations.

Unreasonable means ocean common carrier conduct that unduly restricts the ability of shippers to meaningfully access ocean carriage services

Pending Rulemaking: Unreasonable Refusals

vessel space accommodations
at negotiation stage

cargo space accommodations
after a booking has been confirmed

Non-binding Considerations when evaluating unreasonable conduct, as proposed:

Whether carrier followed a documented export policy; Whether the refusal was based on legitimate transportation factors; Any other factors relevant
and:
Whether the carrier engaged in good-faith negotiations
Whether the ocean common carrier made a good faith effort to mitigate the impact of the refusal

Non-binding Examples of unreasonable conduct, as proposed:

- (1) Quoting rates that are so far above current market rates they cannot be considered a real offer or an attempt at engaging in good faith negotiations;
- (2) Categorically or systematically excluding exports in providing vessel space accommodations; and
- (3) Any other interactions or communications with the shipper or other conduct the Commission finds unreasonable.

- (1) Blank sailings or schedule changes with no advance notice or with insufficient advance notice;
- (2) Vessel capacity limitations not justified by legitimate transportation factors;
- (3) Failing to alert or notify shippers with confirmed bookings;
- (4) Scheduling insufficient time for vessel loading so that cargo is constructively refused;
- (5) Providing inaccurate or unreliable vessel information;
- (6) Categorically or systematically excluding exports in providing cargo space accommodations; or
- (7) Any other conduct the Commission finds unreasonable.

Published Rulemaking, eff May 28,2024 (*with exceptions*): **Demurrage or Detention**

FMC issued ANPRM (Feb 2022) and NPRM (Oct 2022) and Final Rule (Feb 2024)

Demurrage or Detention is defined broadly to include any charge assessed by VOCC's, NVOCC's, or MTO's related to the use of marine terminal space or shipping containers (regardless of location).

Billing Party can be a VOCC, NVOCC, or MTO

Billed Party is best described in § 541.4 "Properly issued invoices"

(a) A properly issued invoice is... issued... to:

(1) The person for whose account the billing party provided ocean transportation or storage of cargo and who contracted with the billing party for the ocean transportation or storage of cargo; or

(2) The consignee.

(b) If a billing party issues a demurrage or detention invoice to the person identified in paragraph (a)(1) of this section, it cannot also issue a demurrage or detention invoice to the person identified in paragraph (a)(2) of this section.

(c) A billing party cannot issue an invoice to any other person.

Published Rulemaking, eff May 28, 2024 (*with exceptions*): **Demurrage or Detention**

Unpacking the ***Billed Party*** provisions in relation to invoices from a VOCC or NVOCC:

- (1) *The person **for whose account** the billing party provided ocean transportation or storage of cargo **and who contracted with the billing party** for the ocean transportation or storage of cargo; or*
- (2) *The consignee. (defined as “the ultimate recipient of the cargo; the person to whom final delivery of the cargo is to be made”)*

However, the FMC stress that is the contractual privity between the billing party and the billed party that determines who may be billed, most clearly when they explain that “consignees may be billed... when the consignee is the party contracting for the shipping and is therefore in contractual privity with the carrier.” The FMC also clarifies that consignees need not “be listed on the bill of lading in order to be billed” because it is their “contractual privity with the shipper that determines if they can be billed” not “merely listing the consignee on the bill of lading.” Finally, the FMC encourages “advance written agreements between carriers and consignees regarding demurrage and detention billing.”

BCO’s will want to consider their purchasing and selling contracts with overseas parties.

US Exporters selling on “E” or “F” terms (Ex Works, FOB, etc) could implicate their overseas customer for origin detention or demurrage

US Importers buying on “C” or “D” terms may have difficulty to obtain an invoice for, or be able to dispute, destination detention or demurrage

BCO’s may want to consider how parties on MBL impacts billing, particularly when shipping with an NVOCC.

Published Rulemaking, eff May 28,2024 (*with exceptions*): **Demurrage or Detention**

Unpacking the ***Billed Party*** provisions in relation to invoices from an MTO:

- (1) *The person **for whose account** the billing party provided ocean transportation or storage of cargo **and who contracted with the billing party** for the ocean transportation or storage of cargo; or*
- (2) *The consignee.*

“...MTOs are entitled to separately assess demurrage as an implied contract provided that it is published as part of an MTO Schedule” “This rule does not prohibit or otherwise limit an MTO from maintaining the practice of issuing any party—including BCOs or Motor Carriers—an invoice based on a Terminal Schedule, including charges for detention or demurrage”

BCO's will want to consider how they are obligated by the Schedules of individual MTO's and what additional terms or charges they may become liable for. Take note that some VOCC's have already announced that some MTO's will start charging their Port Demurrage directly to the customers or the truckers appointed by customers. (*i.e. ONE notification, Nov 2023*)

Published Rulemaking, eff May 28,2024 (*with exceptions*): **Demurrage or Detention**

Unpacking the *Billed Party* provisions

(b) If a billing party issues a demurrage or detention invoice to the person identified in paragraph (a)(1) of this section, it cannot also issue a demurrage or detention invoice to the person identified in paragraph (a)(2) of this section.

BCO's will welcome this prohibition on the “shotgun” practice of multiple parties receiving invoices for the same incident.

(c) A billing party cannot issue an invoice to any other person.

BCO's will need to ensure solid agreements regarding performance and financial responsibility are in place with their drayage carriers as a result of this new prohibition on the historic practice of VOCC's billing drayage carriers for detention. **BCO's will need to be prepared** to refute or rebill detention charges incurred beyond their own causation, facts generally known best or only by their drayage carrier partners.

BCO's will also want consider how, if at all, this prohibition on the questionable occurrences of VOCC's billing Notify Parties, Customs Brokers etc for detention or demurrage impacts their operations.

Published Rulemaking, eff May 28,2024 (*with exceptions*): Demurrage or Detention

- **Timing of Invoices**

Invoices must be issued "...within 30 calendar days from the date on which the charge was last incurred*" else "the billed party is not required to pay the charge."

Note that failure does not "permanently eliminate" the obligation to pay since, for instance, nothing prevents "the carrier from reissuing the charges on an invoice/bill that does meet the statutory requirements." (Exception: invoices by NVOCC 's must be issued within 30 days from the issue date of the underlying VOCC/MTO invoice)

Invoice due dates must be not less than 30 days after issue date.

Unclear if this may impact the current practice of demurrage payment as a condition of cargo release, and noting separate statement that the rule "allows billing parties" to determine if demurrage and detention charges must be paid prior to releasing cargo.

Published Rulemaking, eff May 28,2024 (*with exceptions*): Demurrage or Detention

- **Requests for Mitigation, Refund or Waiver**

Billing party must allow at least 30 days invoice issuance date* after which, requests may be “rejected as untimely” (*exception for requests passed forward by NVOCC’s, which are allowed 30 days from notification of dispute)

Parties may agree to review even if after the 30 day window and nothing prevents a billed party from filing a complaint with the FMC even if the charge was not disputed within the 30-day timeframe.

Billing party must attempt to resolve the request within 30 days of request receipt, or later, as agreed

Published Rulemaking, eff May 28,2024 (*with exceptions*): Demurrage or Detention

- **Contents of Invoice – *effective date pending***
 - *Identifying* information (bill of lading number(s); container number(s); for imports, the port(s) of discharge; and the basis for why the invoiced party is the proper party of interest)
 - *Timing* information (invoice date; invoice due date; allowed free time in days; start date of free time; end date of free time; for imports, container availability date; for exports, the earliest return date; and specific date(s) for which demurrage and/or detention were charged)
 - *Rate* information (total amount due; applicable tariff rule, service contract, negotiated arrangement or terminal schedule on which the daily rate is based; and the specific rate or rates as applicable)
 - *Dispute* information (contact party and digital access information for questions or requests related to the invoice and details of the process to request fee mitigation, refund, or waiver including timing)
 - *Certifications* (statements from the billing party that charges are consistent with regulations and that the billing party's performance did not cause or contribute to the underlying invoiced charges.)

FMC Enforcement

- Charge Complaint Process
 - If you have received an invoice from a common carrier for a non-compliant charge
- Office of Consumer Affairs and Dispute Resolution Services (CADRS)
 - Assistance to bring about voluntary resolution
- Small Claims Complaint
 - \$50K or less, Informal Procedures handled by a settlement officer
- Filing a Formal Complaint
 - Formal Procedures heard by an Administrative Law Judge and reviewed by the Commission

www.fmc.gov

Questions and Discussion

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