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No. 24-1088

In the

United States Court of Appeals

for the

District of Columbia Circuit

WORLD SHIPPING COUNCIL,

Petitioner,

– v. –

FEDERAL MARITIME COMMISSION;
UNITED STATES OF AMERICA,

Respondents.

PETITION FOR REVIEW

Pursuant to 28 U.S.C. §§ 2342(3)(B), 2343, and 2344, and Rule 15(a) of the Federal Rules of Appellate Procedure, the World Shipping Council ("Petitioner"), hereby petitions the Court for judicial review of the following order and final rule issued by Respondent, the Federal Maritime Commission (the "Commission"):

> *Demurrage and Detention Billing Requirements*, 89 Fed. Reg. 14,330 (Feb. 26, 2024) (the "Final Rule").

A copy of the Final Rule is attached hereto as **Exhibit A**.

Petitioner challenges the Final Rule on grounds that it is contrary to statute—including that it exceeds the Commission's authority under

46 U.S.C. § 41102(c) and Section 7(b) of the Ocean Shipping Reform Act of 2022, 46 U.S.C. § 41102 Note—and that it is arbitrary, capricious, an abuse of discretion, and otherwise contrary to law. Petitioner seeks an order vacating and setting aside the Final Rule.

Venue is proper in this Court pursuant to 28 U.S.C. § 2343.

Dated: April 18, 2024

Respectfully submitted,

/s/ *Paul W. Hughes*

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FEDERAL MARITIME COMMISSION;
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Petitioner World Shipping Council hereby states that it has no parent company and no publicly held company has a 10% or greater ownership interest in it. The World Shipping Council is a trade association within the meaning of Circuit Rule 26.1(b).

Dated: April 18, 2024

Respectfully submitted,

/s/ *Paul W. Hughes*

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 15(c) and Circuit Rule 15(a), I hereby certify that that on April 18, 2024, I caused the foregoing Petition for Review to be served upon the Office of the General Counsel of the Federal Maritime Commission and on the Attorney General of the United States by email and U.S. mail at the addresses listed below:

Federal Maritime Commission, Office of the General Counsel
800 North Capitol Street, NW
Washington, DC 20573
generalcounsel@fmc.gov

Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dated: April 18, 2024 /s/ *Paul W. Hughes*

EXHIBIT A

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO
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FEDERAL MARITIME COMMISSION

46 CFR Part 541

[Docket No. FMC–2022–0066]

RIN 3072–AC90

Demurrage and Detention Billing Requirements

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: In accordance with the Ocean Shipping Reform Act of 2022, the Federal Maritime Commission (the Commission or FMC) is issuing regulations governing demurrage and detention billing requirements. This final rule requires common carriers and marine terminal operators to include specific minimum information on demurrage and detention invoices, outlines certain detention and demurrage billing practices, such as determination of which parties may appropriately be billed for demurrage or detention charges, and sets timeframes for issuing invoices, disputing charges with the billing party, and resolving such disputes. It adopts with changes the notice of proposed rulemaking published on October 14, 2022. Substantive changes allow consignees to be billed and clarify the timeframe for non-vessel-operating common carriers passing through demurrage and detention charges to issue their own invoices. Non-substantive changes improve clarity and remove drafting errors.

DATES: This final rule is effective on May 28, 2024, except for instruction 2 adding § 541.6, and instruction 3 adding § 541.99, which are delayed. The Commission will publish a document in the **Federal Register** announcing the effective date of these amendments.

ADDRESSES: To view background documents or comments received, you may use the Federal eRulemaking Portal at *www.regulations.gov* under Docket No. FMC–2022–0066.

FOR FURTHER INFORMATION CONTACT: David Eng, Secretary; Phone: (202) 523–5725; Email: *secretary@fmc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

As rising cargo volumes have increasingly put pressure on common carriers, port and terminal performance, demurrage and detention charges have for a variety of reasons substantially increased. For example, over a two-year period between 2020 and 2022, nine of the largest carriers serving the U.S. liner trades individually charged a total of approximately $8.9 billion in demurrage and detention charges and collected roughly $6.9 billion.[1] On July 28, 2021, Commissioner Rebecca F. Dye, the Fact Finding Officer for Fact Finding Investigation No. 29, International Ocean Transportation Supply Chain Engagement (Fact Finding No. 29), recommended, among other things, that the Commission ''[i]ssue an [Advance Notice of Proposed Rulemaking (ANPRM)] seeking industry input on whether the Commission should require common carriers [2] and marine terminal operators [3] to include certain minimum information on or with demurrage and detention billings and adhere to certain practices regarding the timing of demurrage and detention billings.'' [4] The Fact Finding Officer expressed concern about certain demurrage and detention billing practices and a need to ensure that it is clear to shippers ''what is being billed by whom'' so that they can understand the charges.[5] The Commission voted to move forward with this Fact Finding 29 recommendation on September 15, 2021.[6]

On February 15, 2022, the Commission issued an ANPRM to request industry views on potential demurrage and detention billing requirements.[7] Specifically, the Commission requested comments on:

- Whether a proposed regulation on demurrage and detention billing practices should apply to non-vessel-operating common carriers (NVOCCs) as well as vessel-operating common carriers (VOCCs);
- Whether the regulations should differ based on whether the billing party is an NVOCC or a VOCC; [8]
- Whether the proposed regulations on demurrage and detention billings should apply to marine terminal operators (MTOs); [9]
- What information should be required in demurrage and detention invoices; [10]
- Whether bills should include information on how the billing party calculated demurrage and detention charges.[11] For example, the Commission requested comments on whether it should require the billing party to include the following information:
  - Identifying clear and concise container availability dates in addition to vessel arrival dates for import shipments; and,
  - For export shipments, the earliest return dates (and any modifications to those dates) as well as the availability of return locations and appointments, where applicable; [12] and
- Whether the bills should include information on any events (*e.g.,* container unavailability, lack of return locations, appointments, or other force-majeure reasons) that would justify stopping the clock on charges.[13]

In the ANPRM, the Commission stated that it was considering whether it should require common carriers and MTOs to adhere to certain practices regarding the timing of demurrage and detention billings. The Commission sought comments on whether it should require billing parties to issue demurrage or detention invoices within 60 days after the charges stopped accruing.[14] The Commission stated that the Uniform Intermodal Interchange Agreement (UIIA) [15] currently stipulates that invoices be issued within 60 days and asked whether the 60-day timeframe was effective in addressing concerns raised by billed parties, or whether a longer or shorter time period would be more appropriate.[16] In addition, the Commission requested comments on whether it should regulate the timeframe for refunds and, if so, what would be an appropriate timeframe.[17]

On June 16, 2022, after the Commission issued the ANPRM and received comments, the Ocean Shipping Reform Act of 2022 (OSRA 2022) was

[1] Federal Maritime Commission, *Detention and Demurrage, https://www.fmc.gov/detention-and-demurrage/#:~:text=In%20dollar%20terms%2C%20the%20nine,over%20the%20two%2Dyear%20period* (last visited Oct. 11, 2023).

[2] There are two types of common carriers: (1) vessel-operating common carriers (VOCCs), also called ocean common carriers, and (2) non-vessel-operating common carriers (NVOCCs). 46 U.S.C. 40102(7), (17), (18).

[3] ''Marine terminal operator'' (MTO) is defined at 46 U.S.C. 40102(15).

[4] *See Fact Finding Investigation No. 29, Interim Recommendations* at 6 (July 28, 2021) (Fact Finding 29 Interim Recommendations), available at: *https://www2.fmc.gov/ReadingRoom/docs/FFno29/FF29%20Interim%20Recommendations.pdf/.*

[5] Fact Finding 29 Interim Recommendations at 7.

[6] Fed. Mar. Comm'n, Press Release, FMC to Issue Guidance on Complaint Proceedings and Seek Comments on Demurrage and Detention Billings (Sept. 15, 2021), *https://www.fmc.gov/fmc-to-issue-guidance-on-complaint-proceedings-and-seek-comments-on-demurrage-and-detention-billings/.*

[7] Advance Notice of Proposed Rulemaking on Demurrage and Detention Billing Requirements, 87 FR 8506 (Feb. 15, 2022). *See* Docket No. 22–04, Demurrage and Detention Billing Requirements.

[8] 87 FR at 8507, 8508–8509 (Questions 1 and 7).

[9] 87 FR at 8507, 8509 (Questions 2 and 3).

[10] 87 FR at 8508.

[11] *Id.*

[12] 87 FR at 8509 (Question 6).

[13] *Id.*

[14] 87 FR at 8508, 8509 (Question 12).

[15] The UIIA is a standard industry contract that provides rules for the interchange of equipment between motor carriers and equipment providers, such as VOCCs. Participation is voluntary.

[16] 87 FR at 8508.

[17] 87 FR at 8508, 8509 (Question 14).

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enacted into law.[18] In OSRA 2022, Congress amended various statutory provisions contained in part A of subtitle IV of title 46, U.S. Code. Specifically, OSRA 2022 prohibits common carriers from issuing an invoice for demurrage or detention charges unless the invoice includes specific information to show that the charges comply with part 545 of title 46, Code of Federal Regulations and applicable provisions and regulations.[19] OSRA 2022 then lists the minimum information that common carriers must include in a demurrage or detention invoice:

- date that container is made available;
- the port of discharge;
- the container number or numbers;
- for exported shipments, the earliest return date;
- the allowed free time in days;
- the start date of free time;
- the end date of free time;
- the applicable detention or demurrage rule on which the daily rate is based;
- the applicable rate or rates per the applicable rule;
- the total amount due;
- the email, telephone number, or other appropriate contact information for questions or requests for mitigation of fees;
- a statement that the charges are consistent with any of Federal Maritime Commission rules with respect to detention and demurrage; and
- a statement that the common carrier's performance did not cause or contribute to the underlying invoiced charges.[20]

Failure to include the required information on a demurrage or detention invoice eliminates any obligation of the billed party to pay the applicable charge.[21] In addition, OSRA 2022 authorizes the Commission to revise the minimum information that common carriers must include on demurrage or detention invoices in future rulemakings.

OSRA 2022 additionally requires the Commission to initiate a rulemaking further defining prohibited practices by common carriers, marine terminal operators, shippers, and OTIs regarding the assessment of demurrage or detention charges.[22] OSRA 2022 provides that such rulemaking must ''only seek to further clarify reasonable rules and practices *related* to the assessment of detention and demurrage charges to address the issues identified in the final rule published on May 18, 2020, entitled 'Interpretive Rule on Demurrage and Detention Under the Shipping Act' (or successor rule)[.]'' [23] Specifically, the Commission's rulemaking must clarify ''which parties may be appropriately billed for any demurrage, detention, or other similar per container charges.'' [24]

On October 14, 2022, the Commission published a notice of proposed rulemaking (NPRM) that would require common carriers and marine terminal operators to include specific minimum information on demurrage and detention invoices and outlined certain billing practices relevant to appropriate timeframes for issuing invoices, disputing charges with the billing party, and resolving such disputes.[25] The proposed rule addressed considerations identified in the Ocean Shipping Reform Act of 2022. The proposed rule sought comment on the adoption of minimum information that common carriers must include in a demurrage or detention invoice; the addition to this list of information that must be included in or with a demurrage or detention invoice; a proposed definition of prohibited practices clarifying which parties may be appropriately billed for demurrage or detention charges; and billing practices that billing parties must follow when invoicing for demurrage or detention charges.

II. Comments

In response to the NPRM published October 14, 2022, the Commission received 191 comments from interested parties. All major groups of interested persons were represented in the comments: vessel-operating common carriers (VOCCs), non-vessel-operating common carriers (NVOCCs), marine terminal operators (MTOs), motor carriers, beneficial cargo owners (BCOs), ocean transportation intermediaries (OTIs), third party logistics providers, customs brokers, bi-partisan groups of the U.S. House of Representatives, another Federal agency, and the National Shipping Advisory Committee (the Commission's federal advisory committee). Comments were submitted by individuals, large and small companies, and by national trade associations. All comments submitted on the NPRM are available at *https://www.regulations.gov/docket/FMC-2022-0066/comments.*

About 75 percent of commenters supported the rule, about 15 percent questioned the rule, and 10 percent did not specify. Motor carriers overwhelmingly support the entire rule. BCOs mostly support the rule but some object to prohibiting others from being billed. NVOCCs and OTIs generally supported the rule, but with many objecting to the inclusion of NVOCCs. VOCCs overwhelmingly questioned or did not support the rule. Nearly all VOCCs questioned the rule prohibiting billing other parties and the timing of billing requirements. About half of VOCCs questioned the required information from the ANPRM that the Commission added to the information specifically required by OSRA 2022. MTOs overwhelmingly questioned the rule, with most arguing these regulations should not apply to MTOs.

The top three issues addressed by commenters were: (1) concerns with the prohibition on billing other parties that are not contractually connected, (2) concerns with additional information the Commission proposed to require in addition to the OSRA 2022 mandated information, and (3) concerns with the time periods for billing.

These comments are addressed in the discussion that follows.

III. Discussion of Comments

A. § 541.1 Purpose

Issue: Two commenters requested that ''minimum'' be added to the second sentence before ''procedures'' to mirror the use of ''minimum'' before ''information'' in the first sentence.[26]

FMC response: FMC declines to make the proposed change. Neither commenter provided sufficient justification as to why such a change would provide additional clarity. The Commission has drafted § 541.1 to reflect the language of OSRA 2022.

B. § 541.2 Scope and Applicability

1. Regulation of MTO Demurrage and Detention Billing Practices

(a) FMC's Authority To Regulate

Issue: MTOs and MTO trade associations argued that MTOs should not fall within the scope of the rule.

MTOs offered many reasons why they should not be subject to the proposed regulations. The majority presented their interpretation of the effect that the legislative process leading to the

[18] Public Law 117–146, 136 Stat. 1272 (2022).

[19] Public Law 117–146 at Sec. 7(a)(1), 136 Stat. at 1274 (codified at 46 U.S.C. 41104(a)(15)).

[20] Public Law 117–146 at Sec. 7(a)(2), 136 Stat. at 1275 (codified at 46 U.S.C. 41104(d)(2)).

[21] Public Law 117–146 at Sec. 7(a)(2), 136 Stat. at 1275 (codified at 46 U.S.C. 41104(f)).

[22] Public Law 117–146 at Sec. 7(b)(1), 136 Stat. at 1275.

[23] Public Law 117–146 at Sec. 7(b)(2), 136 Stat. at 1275 (emphasis added).

[24] *Id.*

[25] 87 FR 62341.

[26] Bass Tech International (FMC–2022–0066–0230); National Industrial Transportation League (FMC–2022–0066–0230–0104).

enactment of OSRA 2022 should have, which they believe demonstrates that Congress intended to prohibit inclusion of MTOs in this rulemaking. MTOs pointed first to how Congress amended 46 U.S.C. 41104, which applies to common carriers, not MTOs.[27] MTOs argued that Congress deliberately chose not to amend 46 U.S.C. 41106 when it added invoicing requirements to 46 U.S.C. 41104, so that invoicing requirements would only apply to carriers, not to MTOs.[28] The National Association of Waterfront Employers (NAWE) and the Port of NY/NJ Sustainable Services Agreement (PONYNJSSA) also argued that Congress's choice not to add invoicing requirements to 46 U.S.C. 41102, which applies to both MTOs and carriers, precludes the Commission from including MTOs in the scope of this regulation.[29] Most commonly, these commenters pointed out that Congress, and specifically the House of Representative's version of OSRA 2021, originally included MTOs in the invoicing requirements.[30] The MTOs argue that Congress, late in the process, chose to exempt MTOs from compliance with demurrage and detention requirements in the enacted version of OSRA 2022.[31] Two members of Congress, Congressman Jake Auchincloss and Congressman Brian Babin, wrote jointly [August 17th Congressional Letter] to make this argument, and stated that including MTOs within the scope of the regulation would threaten stability and cargo fluidity at United States ports.[32]

NAWE also argued that the Commission cannot enforce 46 U.S.C. 41102(c) here without contravening the Commission's Interpretive Rule at 46 CFR 545.4(b). NAWE stated that the Commission's Interpretive Rule requires that an impermissible ''practice'' occur on a ''normal, customary, and continuing basis,'' while the proposed rule would penalize any isolated invoice omission. NAWE argued that taking action in a case alleging a single shipment violation is an implicit repeal of the agency's Interpretive Rule at § 545.4 without public notice and comment.

Other members of Congress submitted comments on the proposed rule as well, but in support of the inclusion of MTOs in this rule.[33] A letter from these members of Congress [January 2nd Congressional Letter] stated that since authoring OSRA 2022, they became aware that MTOs are invoicing their own demurrage and detention charges separate from VOCC charges. They pointed out that this invoicing practice directly contradicts the statements of NAWE to Congress during the drafting of OSRA 2022.[34] The letter stated that they support applying any demurrage and detention invoicing requirements that apply to VOCCs to MTOs as well, with reasonable exceptions for demurrage charges set by public port tariffs and where MTOs are acting only as a collections agent.[35]

FMC response: The Commission has the statutory authority to apply this rule to MTOs and declines to exclude them from the duties and responsibilities of issuing accurate demurrage and detention invoices. Commenters raised two major arguments against the Commission's proposed inclusion in the regulations of MTOs. Commenters argued that the Commission did not have authority to apply the regulations to MTOs [36] and that it should not apply regulations to MTOs for a variety of reasons addressed below individually.[37]

The Commission has clear statutory authority to regulate MTOs under section 41102(c). There is also a clear need, based on the record of this rulemaking, for these regulations to address MTOs demurrage and detention invoices sent to entities other than VOCCs.

Section 41102(c) of Title 46 prohibits common carriers, MTOs, and ocean transportation intermediaries from failing to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering property. The Commission has authority under 46 U.S.C. 46105(a) to prescribe regulations to carry out its duties and powers. The Commission has repeatedly explained that the issue of detention and demurrage charges falls within the prohibitions of 46 U.S.C. 41102(c).[38] Further, the plain language of 46 U.S.C. 41102(c) describes exactly the type of conduct this rule intends to regulate. This section prohibits an MTO from ''failing to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving . . . [or] storing property.'' This rule issued pursuant to the Commission's power to issue regulations [39] to define these prohibitions, as well as those found in OSRA 2022, interprets what constitutes just and reasonable practices on invoicing and charges related to the use of marine terminal space or shipping containers. The Commission concludes that this rule will help ensure that MTOs' demurrage and detention billing practices are just and reasonable pursuant to section 41102.

Arguments that the Commission lacks this authority because Congress chose to place detailed invoicing requirements in a section that only applies to carriers, or because Congress removed requirements that would expressly apply to MTOs during the statutory drafting process, do not address the Commission's pre-

[27] *E.g.,* Husky Terminal and Stevedoring, LLC (FMC–2022–0066–0248); Port Houston (FMC–2022–0066–0268).

[28] Husky Terminal and Stevedoring, LLC (FMC–2022–0066–0248).

[29] National Association of Waterfront Employers (FMC–2022–0066–0276); Port of NY/NJ Sustainable Services Agreement (FMC–2022–0066–0218). NAWE and PONYNJSSA also argued that: (1) the only way OSRA 2022 can be harmonized with 46 U.S.C. 41102(c) is by excluding MTOs from the proposed rule's substantive demurrage and detention billing requirements, and (2) if 46 U.S.C. 41102(c) and OSRA 2022 cannot be harmonized, the more specific statute, OSRA 2022, should control.

[30] Port Authority of New York & New Jersey (FMC–2022–0066–0226); Port Houston (FMC–2022–0066–0268); West Coast MTO Agreement (FMC–2022–0066–0229).

[31] Port Authority of New York & New Jersey (FMC–2022–0066–0226); American Association of Port Authorities (FMC–2022–0066–0255); West Coast MTO Agreement (FMC–2022–0066–0229).

[32] Letter from Jake Auchincloss and Brian Babin, U.S. House Representatives (Aug. 17, 2023) (FMC–2022–0066–0282). The Congressmen also took issue with a recent Commission decision finding the imposition of equipment charges on a holiday weekend at odds with the incentive principle. That issue is outside the scope of this rulemaking.

[33] Letter from John Garamendi, Dusty Johnson, Jim Costa, David Valado, Mike Thompson, and Jimmy Panetta, U.S. House Representatives (Jan. 2, 2023)(FMC–2022–0066–0279).

[34] *Id.* (''Since enactment of the Ocean Shipping Reform Act of 2022, we have heard reports of marine terminal operators invoicing their own charges for demurrage and detention separate from those charged by ocean carriers. This practice directly contradicts written comments by the National Association of Waterfront Employers—the trade association for marine terminal operators—on the House discussion draft and to the Committee on Transportation and Infrastructure in 2021.'')

[35] *Id.*

[36] National Association of Waterfront Employers (FMC–2022–066–0276).

[37] American Association of Port Authorities (FMC–2022–0066–0255); West Coast MTO Agreement (FMC–2022–0066–0229); Trapac, LLC (FMC–2022–0066–0136).

[38] Interpretive Rule on Demurrage and Detention Under the Shipping Act, 84 FR 48850, 48852 (Sep. 17, 2019); Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 FR 29638 (May 18, 2020); *Fact Finding Investigation No. 28, Final Report* (Dec. 3, 2018), available at: *https://www2.fmc.gov/readingroom/documents/20973;* Fact Finding Investigation No. 29, Final Report (May 31, 2022), available at: *https://www.fmc.gov/wp-content/uploads/2022/06/FactFinding29FinalReport.pdf; see also California* v. *United States,* 320 U.S. 577, 584–85 (1944) (interpreting the analogous provision in the Shipping Act of 1916 as applying to demurrage); *Am. Export-Isbrandtsen Lines, Inc.* v. *Fed. Mar. Comm'n,* 444 F.2d 824, 829 (D.C. Cir. 1970) (interpreting the analogous provision in the Shipping Act of 1916 as applying to detention).

[39] 46 U.S.C. 46105(a).

existing and continuing legal authority to issue demurrage and detention invoicing regulations that apply to MTOs even before OSRA 2022. The actual statutory text of 46 U.S.C. 41102(c) and Congress's direction to use 46 U.S.C. 41102(c) to define prohibited demurrage and detention practices for marine terminal operators is clear and does not necessitate resorting to the incomplete history of the legislative drafting process of OSRA 2022.[40] Moreover, Congress explicitly included in OSRA 2022 the direction that the Commission initiate a rulemaking to further define prohibited practices by MTOs, among others, under 46 U.S.C. 41102(c) regarding the assessment of detention and demurrage.[41] Thus, in OSRA 2022, Congress amplified the Commission's existing authority to issue regulations that govern the issuance of demurrage and detention invoices in section 41102(c) and added to that authority a mandate to further define prohibited practices. The identification of MTOs within section 7(b), entitled ''Common Carriers,'' does not support the view that Congress intended to limit the scope of its directive to the Commission to ensuring that invoices are accurate. Instead, the plain language of the statute shows an intent by Congress to address in a targeted manner the failures of the current invoicing process. Such a targeted approach requires ensuring that MTOs, as well as VOCCs and NVOCCs, issue accurate invoices.

The need to include MTOs in this rule is supported by the comments. Excluding MTOs from this rule is likely to create a regulatory loophole, significantly affecting the ability of the rule to effect change in the current invoicing process. The comments support a finding that MTOs are invoicing for their own demurrage and detention charges.[42] Common carriers, the usual contractual party, could simply have MTOs issue their demurrage and detention invoices to avoid the necessary invoicing requirements this rule puts into place, and invoices coming from MTOs would not be required to comply with either Congress's instructions at 46 U.S.C. 41104(d) or these regulations. Billed parties would receive a significant portion of invoices from MTOs with whatever information MTOs chose to provide, which may not include the critical information a billed party needs to ensure the bill is accurate. The MTO as the billing party would not be subject to the dispute resolution processes contained in these rules. Not including MTOs in the scope of this rule would meaningfully reduce the effectiveness of the rule and perpetuate current problematic invoicing practices. The Commission finds, as supported by the comments, that finalizing a rule that excluded MTOs would undermine Congress's intent as expressed through the plain language of OSRA 2022.[43]

The August 17th Congressional Letter and other commenters argued that it was not Congress's intent that these rules apply to MTOs.[44] The August 17th Congressional Letter urged the removal of MTOs from the rulemaking's substantive requirements because the legislative history shows that Congress intended to remove MTOs from demurrage and detention invoicing requirements and such requirements could potentially increase port congestion.[45] However, as noted above, the legislative history of OSRA 2022 cannot be read to prohibit agency action to address an issue the legislation itself identifies as in need of resolution.

Further, the January 2nd Congressional Letter urged the Commission to ensure the inclusion of MTOs in the Commission's final rule. Congressmen Garamendi, Johnson, Costa, Valado, Thompson, and Panetta wrote the January 2nd Congressional Letter.[46] The January 2nd Congressional Letter reported that comments submitted to Congress by NAWE in 2021 stated that MTOs do not invoice their own charges for detention and demurrage separate from those charged by ocean common carriers. Since then, the signatories of the January 2nd Congressional Letter state they have received reports of MTOs invoicing their own demurrage and detention charges separate from those of ocean common carriers. The January 2nd Congressional Letter concluded that all requirements in the final rule for invoicing demurrage and detention that cover ocean common carriers should apply to MTOs. The Commission finds the argument from the January 2nd Congressional Letter persuasive and consistent with the comments indicating that MTO invoicing is prevalent. It is critical to include MTOs in the final rule to ensure meaningful change to existing industry practice creating inefficiencies and confusion.

With respect to the specific information required in invoices, Congress and the President have already spoken on what they believe to be reasonable demurrage and detention invoicing requirements for billing parties, as evidenced by what they required of common carriers at 46 U.S.C. 41104(d). The Commission believes that these elements are appropriate to require in a demurrage and detention invoice sent to a billed party, regardless of whether the invoices come from an MTO or a common carrier, because these elements are mandated by Congress and supported by past agency investigation and review.[47] The need for consistency in demurrage and detention invoicing further supports requiring MTOs to comply with this rule, because billed parties should be able to expect a standardized set of information in a demurrage or detention invoice,[48] regardless of whether it comes from a carrier or an MTO.[49]

Requiring standardized practices from MTOs also addresses the confusion raised in comments about what actual role MTOs play in invoicing for demurrage and detention. Some MTOs

[40] The Commission notes that canons of construction, such as reviewing legislative drafting history, are most useful in evaluating an interpretation of an ambiguous statute or regulation. *See, e.g., Green* v. *Bock Laundry Mach. Co.,* 490 U.S. 504, 508–09 (1989)(''We begin by considering the extent to which the text of [the disputed provision] answers the question before us. Concluding that the text is ambiguous with respect to [that question], we then seek guidance from legislative history . . .''). But that is not why the commenters raised the legislative drafting history. The commenters would have the Commission affirmatively read into existence a prohibition on regulating MTO demurrage and detention invoices because some versions of legislation contemplated by Congress laid out statutory requirements and others did not. The absence of a statutory requirement is not proof of a prohibition on issuing regulations. If Congress wanted to prohibit the Commission from regulating MTO demurrage and detention invoices, it could have done so. The Commission does not agree that the legislative history prohibits inclusion of MTOs in these regulations.

[41] Public Law 117–146, 136 Stat. 1272, at 1275.

[42] Garamendi, Johnson, Costa, Valado, Thompson, and Panetta, *supra* note 33.

[43] *See* Balsam Brands (FMC–2022–0066–0095) (arguing that excluding MTOs potentially creates a loophole that would undermine the purposes and effectiveness of the regulation).

[44] Auchincloss and Babin, *supra* note 32.

[45] Many MTOs also made the argument that the legislative history of OSRA 2022 shows that Congress intended to exempt MTOs from demurrage and detention invoice requirements. American Association of Port Authorities (FMC–2022–0066–0255); West Coast MTO Agreement (FMC–2022–0066–0229); Fenix Marine Services, Ltd. (FMC–2022–0066–0186); Husky Terminal and Stevedoring, LLC (FMC–2022–0066–0248); Port of Houston (FMC–2022–0066–0268); Trapac, LLC (FMC–2022–0066–0136); National Association of Waterfront Employers (FMC–2022–0066–0276).

[46] Garamendi, Johnson, Costa, Valado, Thompson, and Panetta, *supra* note 33.

[47] ''[T]he intent of this rulemaking is to ensure that the person receiving the bill understands the charges, regardless of whether the billing party is a VOCC, NVOCC, or an MTO.'' *See* 87 FR at 62347.

[48] Harbor Trucking Association (FMC–2022–0066–0261).

[49] As noted above, demurrage and detention invoices between MTOs and VOCCs are not subject to this rule.

told Congress that they do not issue their own demurrage and detention invoices separate from carriers.[50] Some MTOs have told the Commission that they do not send traditional demurrage and detention invoices, but instead issue ''demurrage receipts'' or ''disclose charges.'' [51] One MTO contended to the Commission that it does not send demurrage and detention invoices to BCOs or truckers, and that it is VOCCs who charge BCOs demurrage and detention; but the same MTO also said that MTOs sometimes collect demurrage and detention on behalf of VOCCs.[52] Other MTOs said that they do send demurrage and detention invoices.[53] Yet, even if these MTOs agreed that they do send demurrage and detention invoices, they disagreed with the idea that these invoices should be subject to the same regulation as other billing parties.

These inconsistent statements by MTOs highlight the need for clear rules governing all demurrage and detention billing parties so that billed parties receive accurate information to facilitate faster payment and dispute resolution. Allowing MTOs to escape the basic requirements of this rule by artfully styling their demurrage and detention invoices as ''receipts'' or ''disclosures'' would undermine the statute, frustrate the Commission's expressed intention to simplify and clarify demurrage and detention invoicing for billed parties, and leave in place the confusing status quo that spurred Congress to pass OSRA 2022.

Further, the logic of the MTO argument against regulation is not persuasive. If, as some MTOs claim, they do not invoice shippers, BCOs, and truckers for demurrage and detention, the rule would not affect their practices in any event. If MTOs *do* send invoices, however, they should abide by the same rules as any other billing party. If they do have contractual privity, they should be able to obtain any information necessary to issue a compliant invoice through that contract. If MTOs do not have the information required to issue invoices consistent with these rules, they should not send invoices. If they still need to send these invoices, they should obtain all of the required information like any other billing party. If they cannot obtain that information and they still wish to collect a charge, they should forward the invoice to a billing party with whom they have a contractual relationship and that can comply with this rule, and collect the demurrage and detention charge after providing the billing party accurate information about the charge.

Some commenters further challenged the Commission's authority to regulate MTOs pursuant to 46 U.S.C. 41102. NAWE argued that the Commission lacks authority to regulate MTO invoicing through the general legal authority to regulate unjust and unfair practices at 46 U.S.C. 41102(c). NAWE argued that a more specific statutory provision controls over a more general provision, and that when two statutes cannot be harmonized, the later in time statute controls over the earlier. NAWE contended that 46 U.S.C. 41102(c) and OSRA 2022 can be harmonized, by simply omitting MTOs from the proposed rule. If, however, the authorities cannot be harmonized, it contends, the Commission must follow OSRA 2022 as it is the more specific and later-in-time statute.

As previously noted, the Commission has explained that it interprets 46 U.S.C. 41102(c) as governing the invoicing of demurrage and detention. Nothing in OSRA 2022 prohibited the Commission from regulating MTO demurrage and detention invoicing. Therefore, the Commission disagrees with NAWE's argument that the statutes cannot be harmonized.

(b) Burden on MTOs To Comply With the Rule and Security Concerns

Issue: MTOs argued that applying these rules to MTOs would force them to expend significant resources to overhaul their websites and create additional security measures.[54]

FMC response: MTOs did not submit estimates of or proposals for what work would be needed, or would cost, to modify their systems to comply with this rule. One MTO explained they have already invested significant resources to modify their system to incorporate the information from carriers required by OSRA 2022. This certainly suggests it is reasonable to expect MTOs to modify their systems to comply with this rule. It is not clear why MTOs could do this for their VOCC customers' invoices but not their own invoices.[55]

(c) Changes to Current MTO Practices

Issue: MTOs argued that this rule would upend settled practices and increase confusion and congestion at ports.[56]

FMC response: Current billing practices and the lack of transparency in those practices have raised concerns about whether current practices allow for a competitive and reliable American freight delivery system.[57] The changes to current practices this rule requires are meant to change the settled practices that do not ensure accuracy, clarity, and visibility of charges. This rule seeks to improve upon existing practices that do not provide adequate information for the efficient invoicing of charges. Further, these changes provide clarity on how billed parties access the dispute resolution process. Requiring targeted information may ultimately lead to fewer disputed bills and therefore streamline the demurrage and detention billing process. As discussed further in this preamble, the Commission is delaying implementation of the rule by 90 days. The Commission believes that this is sufficient time to allow MTOs and other regulated parties to make the necessary changes to their business operations in order to comply with the rule.

(d) Impacts on Common Law Lien Rights

Issue: MTOs argued that the rule would force MTOs to waive their common law lien rights. MTOs said they would have to choose between: (1) releasing cargo without demurrage or detention charges being paid (waiving their lien rights), or (2) refunding any collected charges if the invoice does not comply with this final rule.[58]

FMC response: This rule does not impact traditional cargo lien rights. This rule allows MTOs to make their own business decisions about whether or not they require demurrage and detention charges to be paid prior to releasing cargo. Contrary to the commenters' assertions, releasing cargo without payment of demurrage and detention charges does not automatically waive cargo lien rights. Cargo liens are lost upon delivery only if the cargo is delivered unconditionally.[59] It is well established law that a lien can survive delivery if the parties have contracted for such and the release has been

[50] Garamendi, Johnson, Costa, Valado, Thompson, and Panetta, *supra* note 33.

[51] Fenix Marine Services (FMC–2022–0066–0186); West Coast MTO Agreement (FMC–2022–0066–0229).

[52] Trapac, LLC (FMC–2022–0066–0136).

[53] Ports America/SSA Marine (FMC–2022–0066–0249).

[54] Fenix Marine Services, Ltd. (FMC–2022–0066–0186).

[55] Husky Terminal and Stevedoring, LLC (FMC–2022–0066–0248).

[56] American Association of Port Authorities (FMC–2022–0066–0255).

[57] *See, e.g.,* Order of Investigation, Fact Finding Investigation No 28.

[58] *See, e.g.,* American Association of Port Authorities (FMC–2022–0066–0255); West Coast MTO Agreement (FMC–2022–0066–0229).

[59] *E.g., Cross Equip. Ltd.* v. *Hyundai Merch. Marine (Am.) Inc.,* 214 F.3d 1349 (Table) (5th Cir. 2000)(2000 WL 633596)(citing *e.g., 4,885 Bags of Linseed,* 66 U.S. (1 Black) 108, 109 (1861)).

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conditioned.[60] In some circumstances releasing cargo conditionally might potentially carry additional administrative burden and risk, but it may be advantageous to a particular MTO in other circumstances. Alternatively, MTOs can require demurrage and detention charges be paid prior to releasing cargo. This option carries its own risks, however. As the commenter stated, if an MTO collects demurrage and detention charges and then those charges are later successfully contested by the billed party, the MTO must refund the incorrect charges. Under this rule, billed parties have 30 calendar days from the date the invoice is issued to contest demurrage and detention charges. This, however, should serve as an incentive for the invoices to be correct when issued. MTOs assert that issuing correct invoices will be difficult to impossible for them to do under the new rule because they do not know the end date of free time. The Commission is not convinced by this argument. MTOs have not presented evidence to the Commission that such information is unattainable by MTOs, only that they do not presently have it. The information needed to calculate this charge is knowable in advance of the release of cargo; it can be pulled from the bill of lading, tariff, terminal schedule, or other relevant transportation documents MTOs already have access to and billing formulas created that allow accurate invoices to be created quickly and accurately once an availability date is known (and projected outward for each day cargo pick-up is delayed).

(e) Impact on the Commission's Interpretive Rule Codified at 46 CFR 545.4

Issue: Commenters argued that the Commission's proposed rule amounts to an implicit repeal of the Commission's Interpretive Rule at 46 CFR 545.4 and therefore that the Commission's action violated the Administrative Procedure Act (APA).

FMC response: The Commission has solicited public comment in both an ANPRM and NPRM about whether the scope of this rule should cover MTO invoicing. The Commission stated unequivocally in the NPRM that MTOs would be subject to this rule. MTOs have had repeated and public notice that the Commission was considering this option, so the Commission disagrees with concerns that the rule lacked adequate time for public notice and comment. Any argument about what parts of the Interpretive Rule at 46 CFR 545.4 remains in force is inherently an argument about that guidance and not about whether the Commission's instant rule complies with the APA.

Some commenters argue the rule is inconsistent with the Interpretive Rule at 46 CFR 545.4. The Commission finds that OSRA 2022 specifically required the Commission to issue rules under 46 U.S.C. 41102(c) that further define the prohibited practices by common carriers, marine terminal operators, and shippers, regarding the assessment of detention or demurrage charges. The plain language of this directive and the plain language of 41104(d) do not require evidence of multiple violations. This view is further supported by 46 U.S.C. 41104(f) which functions to void an invoice if a single required element is not included, not when the complainant can show multiple instances of such behavior.[61] Thus, in the narrow context of demurrage and detention invoices issued by MTOs and common carriers, the Commission concludes that Congress dictated that evidence of a single violation is sufficient. To the extent that the commenters argue this narrowing by Congress repeals the Commission's entire Interpretive Rule codified at 46 CFR 545.4, the Commission disagrees.

(f) MTOs Collecting Demurrage and Detention on Behalf of Other Parties

Issue: Several MTOs have raised questions about how the rule does, and should, apply to them when they are collecting demurrage and detention charges on behalf of VOCCs, NVOCCs, and BCOs. For example, Maher Terminals said that the definition of "billing party" in the proposed rule does not clarify the identity of the billing party when an MTO bills and collects on behalf of a VOCC. (The rule would define "billing party" as "the ocean common carrier, marine terminal operator, or non-vessel-operating common carrier who issues a demurrage or detention invoice.") Maher Terminals proposed a revision to the definition that would have made clear that when an MTO bills on behalf of a VOCC/NVOCC/BCO that the VOCC/NVOCC/BCO is the billing party.

FMC response: In the scenario described above, it is assumed that the MTO would be acting as an agent of the VOCC/NVOCC/BCO. Whether an MTO must comply with the rule in this case depends upon the contractual duties of the MTO as an agent. Traditional rules of agency remain applicable under the Shipping Act.[62] According to the Restatement (Third) Of Agency § 1.01 (2006): "As defined by the common law, the concept of agency posits a consensual relationship in which one person, to one degree or another or respect or another, acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person. . . ." The principal has a right to control the actions of the agent, but "a principal's failure to exercise the right of control does not eliminate it." Restatement (Third) Of Agency § 1.01 (2006). The Restatement also notes that an enforceable contract, written or oral, does not need to exist for there to be a principal-agent relationship. Restatement (Third) Of Agency § 1.01 (2006).

While the circumstances of each case must be known to make any particular determination as to whether an agency relationship exists, it is fair to assume, based on the Restatement's description of agency that the majority of instances where MTOs collect demurrage and detention charges on behalf of another party likely create an agency relationship. Thus, except to the extent that a principal VOCC or NVOCC has not delegated their obligations under 46 U.S.C. 41104, the agent-MTO must assume those obligations when acting to collect demurrage and detention charges. Of course, the exact principal-agent relationship is open to negotiation between the principal and agent. An agent is free to negotiate the specific acts they will or will not undertake on behalf of the principal. It is possible that in a particular MTO-principal demurrage and detention billing relationship that the MTO is responsible for providing all of the invoice elements in 46 U.S.C. 41104(d)(2) while in another MTO-principal demurrage and detention billing relationship that the MTO complies with only certain elements of 46 U.S.C. 41104(d)(2) and that the invoice must be sent back to the principal for completion of the other elements before the invoice is issued to the billed party.

2. 46 U.S.C. 41104(e), NVOCC Safe Harbor

Issue: One commenter said that the proposed rule did "not address the safe harbor provision provided to NVOCCs at 46 U.S.C. 41104(e), which exempts NVOCCs from the demurrage and

[60] *Id.* (citing *e.g., The Bird of Paradise,* 72 U.S. 545, 555 (1866)).

[61] *See also* 46 U.S.C. 41310(b) (Charge complaints authority states that Commission is required to investigate compliance with section 41102 of "the charge" received and does not specify that multiple instances must be alleged for the Commission to investigate and order a refund and/or civil penalty).

[62] *E.g., Landstar Exp. Am., Inc.* v. *Fed. Mar. Comm'n,* 569 F.3d 493, 495 (D.C. Cir. 2009).

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detention invoice requirements and, importantly, liability for any invoice inaccuracies when the NVOCC passes through an underlying ocean common carrier's invoice.'' [63] The commenter requested that the rule be modified ''to ensure NVOCCs remain exempt from the demurrage and detention requirements when passing through the charges or invoice.''

FMC response: The commenter misinterprets the language of 46 U.S.C. 41104(e). The statute does not exempt NVOCCs from the demurrage and detention invoice requirements of 46 U.S.C. 41104(d)(2). It merely shifts responsibility for refunds or penalties under 46 U.S.C. 41104(d)(1) in the certain, specified scenario from the NVOCC to the ocean common carrier. The safe harbor provision is most applicable in a situation where an NVOCC receives an invoice from a VOCC and passes it on to its customers. In order for the safe harbor provision to apply, however, OSRA 2022 requires the Commission to make a finding that the non-vessel-operating common carrier is not otherwise responsible for the charge. The Commission declines to make a general finding as part of this rulemaking that all NVOCCs are ''not otherwise responsible'' for errors in invoices they pass through. Rather, this is a fact-based analysis that the Commission undertakes on a case-by-case basis. If the Commission finds in a particular matter that a violation of 46 U.S.C. 41104(d)(1) has occurred and also has made the relevant finding under 46 U.S.C. 41104(e) that the NVOCC is not otherwise liable, only then is the safe harbor provision applicable.

As discussed in the NPRM, there are important reasons for requiring NVOCCs to comply with detention and demurrage invoicing requirements: invoices that a BCO receives from an NVOCC may be their only notice of detention and demurrage charges and because of its contractual relationship with the BCO an NVOCC is often the only party in this transaction able to inform BCOs as to the nature of these charges.[64] The intent of this rulemaking is to ensure that the person receiving the bill understands the charges regardless of who the billing party is.

C. § 541.3 Definitions

1. ''Billing Dispute''

Issue: One commenter raised two concerns about the proposed definition of ''billing dispute.'' [65] First, the commenter was concerned that under the proposed definition, an MTO may not know when a ''mere billing inquiry is tantamount to a 'disagreement' with respect to a specific invoice.'' Second, the commenter was concerned that the word ''raised'' does not ''provide adequate guidance in this context as it suggests that a disagreement is being broached for discussion purposes rather than being clearly conveyed to the billing party as a disagreement.''

FMC response: The Commission has removed the term ''billing dispute'' from § 541.3 in the final rule. ''Billing dispute'' does not need to be defined because it is not a term used in §§ 541.4–541.99, in either the NPRM or final rule. ''Dispute'' is used in § 541.6(d), but only in the paragraph header and does not require further definition.

2. ''Billed Party'' and ''Billing Party''

(a) Responsibility for Payment

Issue: One commenter requested that the definition of ''billed party'' be amended by replacing ''is responsible for the payment of any incurred demurrage or detention charge'' with ''has contracted with the billing party for the ocean carriage or storage of good.'' [66] They were concerned that the language ''responsible for the payment'' ''reads as a legal conclusion'' and did not comport with the Commission's goal that demurrage and detention invoices be billed to persons having a contractual relationship with the billing party for the carriage or storage of goods. Another commenter requested that the Commission amend the definition of ''billed party'' to include motor carriers that control containers to account for situations where VOCCs enter directly into written contracts with motor carriers that use containers in the transportation of goods.[67]

FMC response: The Commission declines to make the requested changes. With respect to the first comment, the definition of ''billed party'' is simply to clarify the rights and responsibilities of the party receiving the bill. It is a fact-based definition centered on who the party is to whom the billing party issues the invoice. The definition is not the basis of an assessment of whether the billed party properly received the invoice, which is governed by § 541.4. Nothing in this rule prohibits third parties from receiving copies of invoices or voluntarily paying demurrage or detention charges on behalf of the shipper/consignee.

In regard to the second comment, there seems to be a misunderstanding on the commenter's part about the rule's applicability. As discussed in the NPRM, a primary purpose of this rule is to stop demurrage and detention invoices from being sent to parties who did not negotiate contract terms with the billing party. That concern is not present where a motor carrier has directly contracted with a VOCC. Nothing in this rule, either in the proposed or final version, prohibits a VOCC from issuing a demurrage or detention invoice to a motor carrier when a contractual relationship exists between the VOCC and the motor carrier for the motor carrier to provide carriage or storage of goods to the VOCC. The definition of ''billed party'' is intentionally broad to capture any party to whom a detention or demurrage invoice is issued. When a VOCC issues a detention or demurrage invoice to a motor carrier, the VOCC must comply with the requirements of part 541. The Commission has jurisdiction over common carriers, marine terminal operators (MTOs), and ocean transportation intermediaries (OTIs), including over through transportation. Without knowing the particulars of the hypothetical, in this situation, presumably the FMC's jurisdiction, and thus this rule, would apply only to cargo moved inland under a through bill of lading and contracts between a VOCC. A motor carrier not based on a through bill of lading would likely be outside the scope of this rule.

(b) Billing Party's Control of Assets

Issue: One commenter was concerned that the Commission's proposed definition of ''billing party'' ''is missing the requirement that the entity issuing the invoice has the right to do so'' and ''[t]he regulations should recognize that there is a distinction between a billing party in control of the assets and one that is not, *i.e.,* a non-vessel operating common carrier (NVOCC).'' [68] The commenter suggested that the definition be amended to read as follows: *Billing party* means the ocean common carrier, marine terminal operator, or non-vessel operating common carrier who issues a demurrage or detention invoice because they control the equipment and terminal space or are passing through the charges for collection.

[63] National Customs Brokers & Forwarders Association of America, Inc. (FMC–2022–0066–0180).

[64] 87 FR 62341, 62347.

[65] Maher Terminals, LLC (FMC–2022–0066–0269).

[66] Shippers Coalition (FMC–2022–0066–0160).

[67] Metro Group Maritime (FMC–2022–0066–0209).

[68] New York New Jersey Foreign Freight Forwarders & Brokers Association, Inc. (FMC–2022–0066–0247).

FMC response: The Commission declines to make the requested change. In this final rule, the Commission has added a 30-day period to § 541.7 for NVOCCs to issue an invoice when they pass through demurrage and detention charges. This is an acknowledgement that NVOCCs are not always in control of the assets and often receive an invoice from a VOCC. For more information, see *Timeframes for NVOCCs* in the discussion of comments regarding § 541.7.

(c) Who is a person?

Issue: Two comments expressed concern that the proposed definitions of ''billed party'' and ''billing party'' included the term ''person'' but did not provide further clarification on what ''person'' means for purposes of the rule.[69] The commenters recommended either adding a cross reference to § 515.2(n) in the definitions or defining ''person'' in § 541.3 consistent § 515.2(n).

FMC response: The Commission agrees that identifying a definition for the term ''person'' can be helpful. It has added a definition of ''person'' to § 541.3 that aligns with § 515.2(n).

(d) Consignees

The Commission specifically sought comments on the NPRM as to whether it would be appropriate to allow common carriers to bill consignees named on the bill of lading as an alternative to the shipper.[70] In response to commenters' support for including consignees as a party to whom an invoice can be properly billed, the Commission has revised the rule to incorporate this change. As part of this change, the Commission has added a definition of ''consignee'' to § 541.3 in this final rule. For a full analysis of comments concerning allowing consignees to be billed, see the discussion of consignees under § 541.4 concerning properly issued invoices.

(e) NVOCCs

Issue: One NVOCC commenter had concerns that the terms ''billed party'' and ''billing party'' ''do not clearly separate the position of the NVOCC,'' who, the commenter noted, can be both the billed party (when billed by the VOCC), and the billing party (when billing the BCO) on the same shipment.[71]

FMC response: The Commission acknowledges that there are circumstances when an NVOCC is both a billed party and a billing party on the same shipment. As explained in more detail below in the response to § 541.7(c), the Commission has amended the rule to allow an extra thirty (30) days for NVOCCs to issue an invoice when they are passing through the charges from a VOCC to a customer. The Commission has also added § 541.7(c) to require that when an NVOCC informs a VOCC that its customer has disputed its invoice, the VOCC must then allow the NVOCC additional time to dispute the invoice it received from the VOCC. NVOCCs must still follow the correct procedures for issuing an invoice when acting as a ''billing party'' and are entitled to the same protections as other ''billed parties'' when acting in that capacity.

3. Demurrage and Detention

(a) Separate Definitions of ''Demurrage'' and ''Detention''

Issue: Four comments requested that the rule separately define ''demurrage'' and ''detention.''[72] In support of this change, commenters generally made generic statements about how billing practices are frequently different for demurrage compared to detention.

FMC response: The Commission has made the determination not to split ''demurrage and detention'' into separately defined terms because part 541 and OSRA 2022 treat both charges equally. It may be true that practices differ when billing demurrage versus detention. None of the commenters, however, provided sufficient evidence to support what these specific differences are and how they would require changes to the rule. The Commission will continue to monitor the matter and retains the authority to separately define these terms in a future rulemaking for these or other regulations if circumstances warrant.

(b) Ports/MTO Demurrage Versus VOCC/NVOCC Demurrage

Issue: One commenter said that the rule needed to distinguish between demurrage and detention fees charged by ports and MTOs and those charged by VOCCs and NVOCCs because of the difference in underlying agreements and the fact that the charges serve different purposes.[73]

FMC response: The Commission declines to make the requested change. As noted in the NPRM, the definition of ''demurrage or detention'' in this rule is the same as the scope used in 46 CFR 545.5(b)—the goal is to encompass all charges having the purpose or effect of demurrage or detention.[74] The Commission has the same goal in this rule of ensuring all charges having the purpose or effect of demurrage or detention are covered and believes the definition proposed is the most accurate.

(c) Chassis and Other Special Equipment

Issue: One commenter requested that the Commission expand the proposed definition of ''demurrage and detention'' to include charges related to the use of chassis and other special equipment.[75]

FMC response: The Commission declines to make the requested change. As noted in the NPRM, the definition of ''demurrage or detention'' in this rule is the same as the scope used in 46 CFR 545.5(b).[76] Section 7, paragraph (b)(2) of OSRA 2022 directs that this rulemaking ''only seek to further clarify reasonable rules and practices related to the assessment of detention and demurrage charges to address the issues identified in [the 2020 Interpretive Rule].'' Expanding the scope of the definition of ''demurrage and detention'' in this rule beyond the term's definition in the 2020 Interpretive Rule would be contrary to statute because it would require us to address issues not identified in that Interpretive Rule.

(d) ''Marine Terminal Space''

Issue: The Commission received two comments related to the phrase ''marine terminal space'' in the definition of ''demurrage and detention.'' New York New Jersey Freight Forwarders & Brokers Association, Inc. requested clarification of what ''marine terminal space'' means in the ''demurrage or detention'' definition.[77] They asked whether ''marine terminal space'' includes when a through bill of lading is used to transport imported merchandise into an interior port or rail yard and suggested that specific language be added to the definition of ''detention and demurrage'' to clarify this. The other commenter, International Dairy Foods Association, requested that the Commission include a provision in the final rule indicating that container dwell fees are ''detention and demurrage charges'' since they are

[69] Meat Import Council of America, Inc./North American Meat Institute (FMC–2022–0066–0188); Tyson Foods, Inc. (FMC–2022–0066–0225).

[70] 87 FR 62341, 62350 (Oct. 14, 2022).

[71] CV International, Inc. (FMC–2022–0066–0217).

[72] BassTech International LLC (FMC–2022–0066–0230); National Retail Federation (FMC–2022–0066–0231); Pacific Merchant Shipping Association (FMC–2022–0066–0233); Ports America/SSA Marine (FMC–2022–0066–0249).

[73] American Association of Port Authorities (FMC–2022–0066–0255).

[74] 87 FR 62341, 62348.

[75] Consumer Technology Association (FMC–2022–0066–0228).

[76] 87 FR 62341, 62348.

[77] FMC–2022–0066–0247.

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''related to the use of marine terminal space.'' [78]

FMC response: The Commission declines to make these changes. As noted in Section I, regarding inland rail, the Commission has jurisdiction over cargo moved inland pursuant to a through bill of lading. This jurisdiction is clear pursuant to *Norfolk Southern Railway Co.* v. *Kirby,* 543 U.S. 14 (2004). As a result, the Commission does not see a need to add this language specifically into this regulation. In response to International Dairy Foods Association, the Commission notes that the common definition of ''container dwell fees'' is interchangeable with the definition of ''detention and demurrage.'' As a result, the Commission declines to add another provision stating that container dwell fees are included in the rule's definition.

4. Additional Comments

(a) ''Designated Agent''

Issue: Two comments requested that the Commission define in § 541.3 the term ''designed agent,'' which was used in § 541.2 in the notice of proposed rulemaking.[79]

FMC response: The Commission has not incorporated this request into the final rule. The term ''designated agent'' does not appear in any of the final regulatory text and thus including the term would not be useful or appropriate.

(b) ''Billable party for origin demurrage'', ''Billable party for destination demurrage'', and ''Billable party for detention''

Issue: One commenter requested that the terms ''billable party for origin demurrage'', ''billable party for destination demurrage'', and ''billable party for detention'' be added to § 541.3 to ''[define] the appropriately billable parties'' associated with demurrage and detention charges.[80]

FMC response: The Commission declines to make the proposed insertions. Just as the Commission determined not to split ''demurrage and detention'' into separate terms because the rule treats both charges equally, we also decline further delineations for origin demurrage, destination demurrage, and detention. The delineations are not required for the purposes of this rule.

D. § 541.4 Properly Issued Invoices

The Commission received many comments on proposed § 541.4, the ''Properly Issued Invoice'' provision. The majority of commenters, especially motor carriers and shippers, expressed support for the proposed rule. One commenter characterized this proposed provision as ''critical to accomplishing the Commission's objective in the rulemaking.'' [81]

Many commenters that supported the proposed provision noted that third parties do not have a contractual relationship with the ocean carrier.[82] Accordingly, it would be difficult for such third parties to dispute demurrage or detention invoices because they are not aware of the terms of the contract under which the container was shipped. Instead, commenters observed that the person that contracted for the carriage of goods or space to store cargo had the most knowledge about the shipment and are in the best position to understand the shipment invoice and to dispute the invoice if needed.[83] In addition, requiring that the billing party only invoice the person that contracted for carriage or storage of goods affirms that both the billing party and the billed party know the terms and conditions under which demurrage or detention may be charged.

Furthermore, several commenters asserted that because there is a contractual relationship between the billing and billed parties, there would be a greater incentive to provide timely and accurate invoices as well as a greater willingness to resolve disputes.[84]

Commenters stated that ''parties who are not party to the ocean transportation contract and had no financial interests in the cargo itself, should not be subjected to detention [or] demurrage invoices.'' [85] Commenters asserted that without a contractual relationship, third parties have little commercial leverage to dispute charges imposed upon them by common carriers.[86]

Additionally, several commenters noted that the proposed provision would improve the current demurrage and detention billing process because the invoice would be sent to the person with the most knowledge of the terms of the contract.[87] Because the invoice is going to the party who has this knowledge, one commenter asserted that this will streamline the entire billing process, reduce costs, and increase efficiency to the supply chain.[88]

Motor carriers and motor carrier trade organizations detailed several issues with the current system. For example, motor carriers frequently find themselves locked out from marine terminals for failure to pay detention charges as the motor carriers wait to receive payment from their customers.[89] Essentially, under the current system, motor carriers, who are threatened with being locked out of terminals, can be trapped in situations where they have no contractual leverage or negotiating power to fight back.[90] Such commenters stated that the current system does not adequately protect motor carriers from unfair billing practices.[91] In addition, motor carrier and motor carrier trade organizations frequently stated that the party responsible for demurrage or detention charges is simply not them.[92]

In addition, the proposed provision would reduce confusion with who is responsible for paying the invoice because it prohibits the billing party from invoicing more than one party.

[78] FMC–2022–0066–0244.

[79] Meat Import Council of America, Inc./North American Meat Institute (FMC–2022–0066–0188); Tyson Foods, Inc. (FMC–2022–0066–0225).

[80] BassTech International, LLC (FMC–2022–0066–0230).

[81] *E.g,* Harbor Trucking Association (FMC–2022–0066–0261).

[82] *See, e.g.,* Bipartisan House Comment (FMC–2022–0066–0279); T.G. Logistics, Inc. (FMC–2022–0066–0253); Retail Industry Leaders Association (FMC–2022–0066–0259); Meat Import Council of America, Inc./North American Meat Institute (FMC–2022–0066–0188); RPM Courier Systems (FMC–2022–0066–0120); Monica Rivera Beattie's Trucking Group (FMC–2022–0066–0115); Monk Transportation Ltd. (FMC–2022–0066–0117); Pacifica Trucks, LLC (FMC–2022–0066–0118); Harbor Freight Transport Corp. (FMC–2022–0066–0123); BBT Logistics, Inc. (FMC–2022–0066–0127); Golden State Logistics (FMC–2022–0066–0158); Dependable Highway Express (FMC–2022–0066–0164); Impact Transportation (FMC–2022–0066–0172); Tricon Transportation, Inc. (FMC–2022–0166–0174); RANTA Transport LLC (FMC–2022–0066–0175); Bridgeside Incorporated (FMC–2022–0066–0179); RED Trucking agents for Cowan Systems LLC (FMC–2022–0066–0181); FOX Intermodal Corp. (FMC–2022–0066–0185); Pacific Coast Container Inc. (FMC–2022–0066–0194); Bonelli Logistics, Inc. (FMC–2022–0066–0196); DELKA Trucking, Inc. (FMC–2022–0066–0221); A1 Dedicated Transport, LLC (FMC–2022–0066–0232); Mutual Express Company (FMC–2022–0066–0243); Dray Trucking, LLC (FMC–2022–0066–0258). Several commenters highlighted the importance of prohibiting common carriers from invoicing parties.

[83] American Chemistry Council (FMC–2022–0066–0184).

[84] *See, e.g.,* Eagle Systems, Inc. (FMC–2022–0066–0203); Association of Bi-State Motor Carriers (FMC–2022–0066–0212); Harbor Trucking Association (FMC–2022–0066–0090).

[85] Agriculture Transportation Coalition (FMC–2022–0066–0275).

[86] *Id.*

[87] Excargo Services Inc. (FMC–2022–0066–0151).

[88] Reliable Transportation Specialist, Inc. (FMC–2022–0066–0214).

[89] Association of Bi-State Motor Carriers (FMC–2022–0066–0212); Agriculture Transportation Coalition (FMC–2022–0066–0275); Intransit Container, Inc. (FMC–2022–0066–0227); Best Transportation (FMC–2022–0066–0090).

[90] Association of Bi-State Motor Carriers (FMC–2022–0066–0212).

[91] Andale Trucking (FMC–2022–0066–0146).

[92] *See, e.g.,* Cloud Trucking Inc. (FMC–2022–0066–0105).

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Although many commenters supported proposed § 541.4, a few commenters, especially ocean common carriers and MTOs, expressed concerns with the proposed regulation.

1. Alternative Approaches

Issue: A few commenters expressed concern with the Commission's analytical approach to the rule—using contractual relationships as the basis for establishing to whom demurrage and detention invoices should be sent. For example, Dole Ocean Cargo Express urged the Commission not to adopt a rule that ''categorically limits the entities to which ocean carriers may bill detention and/or demurrage charges.'' [93] NITL recommended that instead of a contractual relationship-based approach, the Commission's rule should instead focus on which party ''is best able to comply with a carrier's reasonable demurrage and detention rules, except when an alternative party requests and assumes this responsibility in a written agreement with the carrier other than the bill of lading contract.'' On the opposite end of the spectrum, the National Retail Federation said that instead the Commission should provide clear rules for who can be billed for detention or demurrage and provided example language based on who, in their opinion has influence over occurrences of these charges.[94] Hapag-Lloyd (America) LLC said that the rule's prohibition on issuing an invoice to any other person than the person for whose account the billing party provided ocean transportation or storage would slow down the release of cargo and complicate the process of properly assessing the lawfulness of a charge, particularly in the case of overseas shippers, and thus would not support cargo fluidity.[95]

FMC response: After careful analysis, the Commission has determined 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. If the billed party has firsthand knowledge of the terms of its contract, then they are in a better position to ensure that both they and the billing party are abiding by those terms. Although other parties may in some circumstances have more influence on whether demurrage or detention actually accrues, they are not the best party to understand the terms of the contract and dispute any charges. While there are benefits to bright-line rules such as the one suggested by the National Retail Federation, there are drawbacks as well. For example, the National Retail Federation's specific suggestion that drayage motor carriers potentially be the responsible billed party under certain conditions fails to account for situations where a motor carrier's delay is the result of no action of their own, but rather the result of the actions of others, such as MTOs cancelling appointments with little to no notice to the motor carrier. The Commission understands that some regulated parties will need to change their business practices in order to comply with this rule.

Finally, the Commission does not believe that shippers located outside of the United States will serve as a basis of significant delay in the movement of cargo. As discussed in the preamble to the Interpretive Rule, shippers have commercial incentives to get their cargo off terminal, and modern digital Information Technology systems allow for prompt communications between parties, regardless of potential vast geographical distances.[96]

2. Meaning of ''Contracted With''

Issue: The Commission received several comments requesting clarification about the proposed requirement that the party ''must have contracted'' for the carriage or storage of goods. BassTech International LLC asked if, given that both the shipper and the consignee are parties to the bill of lading (which is the contract of carriage), this meets the Commission's intended criteria.[97] BassTech also asked whether, alternatively, the regulatory language is meant to limit invoicing to a party that has entered into a Service Contract with the ocean carrier for the transportation of the cargo.[98] The National Customs Brokers & Forwarders Association of America, Inc. requested guidance on whether a consignee may be considered to have a contract with a common carrier when listed on a bill of lading.[99] Other comments on this issue raised questions about implied contracts. The Shippers Coalition was concerned about implied contracts being used as the basis for an invoice and suggested that the Commission require in the regulation that these contracts be in writing.[100] Finally, several MTOs requested clarification or acknowledgement by the Commission about their right to enforce a published Terminal Schedule as an implied contract against a BCO or trucker that enters the terminal.[101]

FMC response: ''Contract'' in this rule has its normal and ordinary legal meaning.[102] This can be reflected in a document such as a contract of affreightment, for example, or a bill of lading, which courts have held to be maritime contracts.[103] Because contracts (other than contracts implied by law) require a meeting of the minds, merely listing a party on a bill of lading, or other shipping transportation document, is not sufficient for them to become a billed party for purposes of part 541 if they played no role in contracting for the transportation of the cargo. Whether a meeting of the minds has occurred is something that can vary based on the specific circumstances of a given relationship. Because a contract can exist even if not memorialized in writing, the Commission declines to add a requirement that contracts need to be in writing for purposes of this rule. The Commission notes, however, that written contracts can provide important documentary evidence of agreement. In addition, the Commission notes that the term ''contracts'' for the purposes of § 541.4 is not limited to service contracts; the term is broader given its normal and ordinary legal meaning and a contractual relationship can exist without a written document or specific form.

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, if the Terminal Schedule includes such charges and the Schedule has been made available in accordance with 46 CFR 525.3. In fact, the practice of issuing invoices based on a Terminal Schedule that includes those charges continue to be permissible if they are just and reasonable as stated in 46 CFR 545.4. The consistent application of the Terminal Schedule charges to various customers is likely to be done on a normal, customary, and continuous

[93] FMC–2022–0066–0201.

[94] FMC–2022–0066–0231.

[95] FMC–2022–0066–0240.

[96] 85 FR 29638, 29652.

[97] FMC–2022–0066–0230.

[98] ''Service Contract'' is defined at 46 U.S.C. 40102(21).

[99] FMC–2022–0066–0180.

[100] FMC–2022–0066–0160.

[101] TraPac (FMC–2022–0066–0136); Fenix Marine Services (FMC–2022–0066–0186); West Coast MTO Agreement (FMC–2022–0066–0229). Furthermore, ''schedule'' is defined by FMC regulations at 46 CFR 525.1(c)(17).

[102] *See, e.g., Norfolk Southern Railway Co.* v. *Kirby,* 543 U.S. 14, 16 (2004) (''[C]ontracts for carriage of goods by sea must be construed like any other contracts: by their terms and consistent with the intent of the parties''); *Contract,* Black's Law Dictionary (11th ed. 2019).

[103] *E.g., Norfolk Southern Railway Co.* v. *Kirby,* 543 U.S. 14 (2004).

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basis, meeting that crucial element of the interpretive rule. Also, as noted by commenters, 46 U.S.C. 40501(f) and 46 CFR 525.2(a)(2) establish that such Schedules are enforceable as implied contracts. Under such a scenario, a Motor Carrier has a contractual relationship with the MTO and the terms of the contract (the Schedule) are known to the Motor Carrier in advance by operation of 46 CFR 523.3. This is a very different situation than where a Motor Carrier is billed for demurrage or detention and the Motor Carrier has no contractual relationship with the billing party and is not privy to the specifics of the contractual agreement (such as where a Motor Carrier is billed demurrage or detention based on an agreement between a shipper and a billing party).

This rule does require that when an MTO issues a bill for demurrage or detention for purposes of enforcing a Terminal Schedule, the billing must comply with part 541, including providing all the information required by § 541.6. The Commission recognizes that this may require MTOs to revise their current business practices. The Commission's primary concern with this rule is to ensure that billed parties understand the demurrage or detention invoices they receive.[104] Additional burdens on MTOs to be able to provide the necessary data, which the Commission does not believe to be unduly burdensome, is outweighed by the benefits of transparency, which will allow billed parties to verify the accuracy of demurrage and detention charges and with whom the charges originate (for example, the MTO itself or the VOCC). As discussed in the Commission's Order of Investigation for Fact Finding Investigation No. 28, the lack of visibility surrounding current MTO demurrage and detention billing practices ''have raised questions over whether the current practices allow for a competitive and reliable American freight delivery system.'' [105]

3. Consignees

Issue: Noting that there are a variety of shipping arrangements that allocate risks, obligations, and costs between the shipper and the consignee named on the bill of lading, the Commission sought comments in the NPRM on whether it would be appropriate to also include the consignee named on the bill of lading as another person who may receive a demurrage or detention invoice, thus allowing the common carrier to bill either the person who contracted for the shipment of the cargo or consignee named on the bill of lading.[106] The Commission received 29 comments in response. Three comments said that invoices should be sent to contractual parties only.[107] These commenters said consignees were not the party responsible for payment,[108] or that consignees typically do not have enough knowledge to determine whether the billing information is consistent with the terms of the underlying contract.[109] Two comments said that invoices should be sent only to consignees.[110] The International Tank Container Organisation (ITCO) opposed allowing charges to be sent back to the shipper, saying that it would ''further complicate an already complex supply chain and hinder both efficient operations and global trade.'' [111] ITCO asserted doing so ignores the INTERCOMS understanding and will put the United States in conflict with international trading terms.[112]

The vast majority of comments (24), however, were of the opinion that the rule should make allowances for sending invoices to the shipper or the consignee (in at least some scenarios).[113] Comments that supported allowing invoices to be sent to consignees generally said that consignees should be included because: (1) consignees are frequently the party best situated to mitigate against the accrual of demurrage and detention charges and (2) consignees frequently have the most knowledge about a shipment and therefore best able to dispute any charges. A few supporters put qualifiers on when they thought consignees should be allowed to be invoiced. For example, SM Line said that consignees should be included as a potential party to be billed but that the Commission should not limit billed parties according to how, and whether the party appears on a specific bill of lading.[114] In contrast, Shippers Coalition and the American Association of Exporters and Importers said that consignees should only be allowed to be invoiced if there is an advance written agreement between the carrier and consignee to do so.[115]

FMC response: In light of these comments, the Commission has made changes to this final rule to allow consignees to be billed as an alternative to the shipper when the consignee is the party contracting for the shipping and is therefore in contractual privity with the carrier. The Commission does not adopt the concept in the proposed rule's preamble that consignees should be required to be listed on the bill of lading in order to be billed. Rather, it is the consignee's contractual privity with the shipper that determines whether the consignee can be billed. Merely listing the consignee on the bill of lading is not sufficient to support billing the consignee. (Conversely, although presumably a less common scenario, it is possible to properly issue an invoice to a consignee that has not been listed on the bill of lading.) Corresponding to the changes in § 541.4 which allow consignees to be billed, the Commission has also added a definition of ''consignee'' to § 541.3. This definition comports with the definition of ''consignee'' that appears in § 520.2 so as to align this definition with the rest of the CFR, while containing language

[104] *E.g.,* 87 FR 62341, 62347.

[105] FMC Order of Investigation, Fact Finding Investigation No. 28, 2 (2018). The Order of Investigation and other materials related to Fact Finding 28 are available on the Commission's website at *https://www.fmc.gov/fact-finding-28/.*

[106] 87 FR 62341, 62349–62350.

[107] Meat Import Council of America, Inc./North American Meat Institute (FMC–2022–0066–0188); International Association of Movers (FMC–2022–0066–0222); and Consumer Technology Association (FMC–2022–0066–0228).

[108] International Association of Movers (FMC–2022–0066–0222).

[109] Consumer Technology Association (FMC–2022–0066–0228).

[110] International Tank Container Organisation (FMC–2022–0066–0096); Flexport, Inc. (FMC–2022–0066–0111).

[111] FMC–2022–0066–0096.

[112] INTERCOMS (International Commercial Terms) are a set of standardized trade terms published by the International Chamber of Commerce (ICC) that are commonly used in international trade contracts.

[113] Shippers Coalition (FMC–2022–0066–0160); FedEx Trade Networks Transport & Brokerage, Inc. (FMC–2022–0066–0165); American Association of Exporters and Importers (FMC–2022–0066–0168); National Customs Brokers & Forwarders Association of America, Inc. (FMC–2022–0066–0180); SM Line Corp. (FMC–2022–0066–0182); American Chemistry Council (FMC–2022–0066–0184); International Housewares Association (FMC–2022–0066–0187); A Customs Brokerage, Inc. (FMC–2022–0066–0200); Dole Ocean Cargo Express (FMC–2022–0066–0201) (would prefer no limits on who an invoice could be issued to but included statements that a consignee is sometimes the proper person to be billed); National Association of Chemical Distributors (FMC–2022–0066–0208); Metro Group Maritime (FMC–2022–0066–0209); Consumer Brands Association (FMC–2022–0066–0210); CV International (FMC–2022–0066–0217); Seafrigo USA Inc. (FMC–2022–0066–0223); West Coast MTO (FMC–2022–0066–0229); Bass Tech International LLC (FMC–2022–0066–0230); National Retail Federation (FMC–2022–0066–0231); Pacific Merchant Shipping Association (FMC–2022–0066–0233); Connection Chemical LP (FMC–2022–0066–0236); World Shipping Council (FMC–2022–0066–0242); Husky Terminal and Stevedoring LLC (FMC–2022–0066–0248); New York New Jersey Foreign Freight Forwarders and Brokers Association, Inc. (FMC–2022–0066–0247); Ocean Carrier Equipment Management Association, Inc. (FMC–2022–0066–0257); Cheese Importers Association of America (FMC–2022–0066–0265).

[114] FMC–2022–0066–0182.

[115] Shippers Coalition (FMC–2022–0066–0160); National Association of Exporters and Importers (FMC–2022–0066–0168).

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that further clarifies the consignee's place in the chain of shipping transactions for purposes of demurrage and detention billing practices. As such, and consistent with the comments, the rule finds a middle ground between acknowledging that a consignee may be the correctly billed party in some cases, but not all. The Commission encourages, but is not requiring, advance written agreements between carriers and consignees regarding demurrage and detention billing.

4. Payment by Third Parties Generally

Issue: The Commission received four comments regarding allowing payment of invoices by third parties.[116] The Agriculture Transportation Coalition and Pacific Coast Council of Customs Brokers and Freight Forwarders Association requested that the rule include a clear mandate that the delegation payment authority is allowed but must be based on actual acceptance of such responsibility by the third party, such as a written or digital signature evidencing acceptance. FedEx Trade Networks and John S. Connor, Inc. requested that the rule specify that third parties may only receive copies of invoices and pay them with the billed party's knowledge and consent (but did not say that such consent should be required to be in writing). FedEx Trade Networks and John S. Connor, Inc. also requested that the regulation contain an explicit statement that if a third party receives a copy of the invoice that the third party itself is not accountable for the payment.

FMC response: The Commission does not believe that the suggested changes are necessary. The rule is clear in its direction that, with a limited exception for consignees, demurrage and detention invoices must be issued to the person for whose account the billing party provided ocean transportation or storage and who contracted with the billing party for the carriage or storage of goods. This will often, but not always, be the shipper of record. Outside of the exception for consignees, billing parties must not send invoices to third parties. The rule only mandates to whom the invoice can be issued and therefore who has legal liability to pay it. It is purposefully silent on third parties voluntarily paying an invoice—thus allowing the practice by declining to prohibit it. The Commission does not believe it is necessary to require such agreements to be in writing or otherwise memorialized between the billed party and the third party. The Commission does not believe it is the agency's place to dictate a third party's business liability decision in this scenario. A third party will either: (1) pay the invoice on behalf of the billed party based on a previous guarantee by the billed party that they will be reimbursed; or (2) pay the invoice without such an agreement in place and assume the risk that they potentially may not be reimbursed.

E. § 541.5 Failure To Include Required Information

1. Invoice Attachments

Issue: Four commenters requested clarification whether a billing party may provide the required data elements as an attachment, addendum, additional pages, etc. to their invoice, for reasons of convenience or necessity because of the invoice's length.[117] FedEx Trade Networks asserted that when an NVOCC is merely passing through the VOCC's charges, it should be able to satisfy the requirements by attaching the ocean carrier's invoice.[118]

FMC response: The required information may be included as an attachment to the invoice, as the statute simply requires that invoices ''include'' this information. In addition, § 541.6 states that an invoice must ''contain'' that information. As such, it is the Commission's position that this information may be included as an attachment, or otherwise incorporated. An NVOCC passing through VOCC demurrage or detention charges can satisfy the requirements by merely attaching the ocean carrier's invoice if that invoice contains all the necessary information in § 541.6. If all the necessary information is not on the ocean carrier's invoice, the NVOCC must locate and amend the missing information prior to sending the invoice on.

2. Voiding of Invoice Too Extreme a Penalty

A few commenters asserted that the penalty of having a billed party not be required to pay an invoice if the invoice was not compliant is an extreme penalty for a single violation.[119] The National Association of Waterfront Employers (NAWE) additionally argued that such a stringent penalty is not consistent with the Commission's Interpretive Rule on 46 CFR 545.4, which requires more than a single instance to something that happens on a ''normal, customary, and continuous basis.'' [120]

FMC response: The elimination of the billed party's obligation to pay an invoice that lacks the required information is statutorily mandated under 46 U.S.C. 41104(f) for common carriers. As such, 46 CFR 541.5 merely states what the statute already requires and the Commission lacks discretion to eliminate or relax this requirement. Section 41104(f) does allow the elimination of payment obligation for ''an invoice'' that does not meet the contents of the invoice requirements. This language signals Congress' desire to not require that a common carrier repeat the error multiple instances for a shipper to be able to seek relief. Thus, in the demurrage and detention context, the statutory language of section 41104(f) is clear and unambiguous in requiring only a single instance to trigger the elimination of the obligation to pay the inaccurate invoice and supersedes the ''more than one instance'' interpretation of the ''normal, customary, and continuous basis'' language found in 46 CFR 545.4.

Similarly, pursuant to 46 U.S.C. 41102(c), it is a prohibited practice for an MTO to fail to include the required minimum information in a demurrage and detention invoice sent to a party other than a VOCC. Sending incomplete bills that do not contain sufficient information for shippers to verify if the bills received are accurate would not constitute having just and reasonable practices relating to or connected with receiving, handling, storing or delivering property. Extending the elimination of charge obligations provision at 46 U.S.C. 41104(f) to MTOs issuing demurrage and detention invoices would meet the statutory direction that the Commission must ''further define prohibited practices by . . . marine terminal operators, . . . under section 41102(c) of title 46, United States Code, regarding the assessment of demurrage or detention charges'' and ensure that all demurrage and detention bills sent to billed parties provide the necessary information for the bills to be paid or disputed quickly

[116] FedEx Trade Networks Transport & Brokerage, Inc (FMC–2022–0066–0165); Pacific Coast Council of Customs Brokers and Freight Forwarders Association (FMC–2022–0066–0224); John S. Connor, Inc. (FMC–2022–0066–0267); and Agriculture Transportation Coalition (FMC–2022–0066–0275).

[117] New York New Jersey Foreign Freight Forwarders & Brokers Association, Inc. (FMC–2022–0066–0247); CV International, Inc. (FMC–2022–0066–0217); National Customs Brokers & Forwarders Association of America, Inc. (FMC–2022–0066–0180); FedEx Trade Networks Transport & Brokerage, Inc. (FMC–2022–0066–0165).

[118] FMC–2022–0066–0165.

[119] *E.g.,* National Association of Waterfront Employers (FMC–2022–0066–0276); Ports America/SSA Marine (FMC–2022–0066–0249); Port Houston (FMC–2022–0066–0268).

[120] FMC–2022–0066–0202.

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thereby ensuring efficiency across the shipping system. Having the invoice content and elimination of charge obligations requirements for all billing parties be the same throughout the industry will ensure that there is more clarity and accuracy in invoicing throughout the shipping system.

F. § 541.6 Contents of Invoice

1. § 541.6(a), Identifying Information

(a) § 541.6(a)(1), Bill of Lading and § 541.6(a)(2), Container Number

Issue: The Commission did not receive any comments directly addressing the requirement that the invoice must list the container number—presumably because this is a data element listed in OSRA 2022. A few commenters, however, raised concerns that requiring the bill of lading number, especially in conjunction with the container number, would increase the risk of theft of the cargo and create security risks by allowing for false pick-up appointments.[121] Some of these comments further asserted that requiring bill of lading information to be included on the invoice would require significant and costly upgrades to their IT systems.

FMC response: The Commission disagrees with the commenters' assertion regarding potential security issues. The Commission previously addressed this concern when the issue was raised by the Ocean Carrier Equipment Management Association (OCEMA) in response to the ANPRM.[122] Here, we reiterate and expand upon that response. Bill of lading numbers are available through publicly accessible import and export data systems, such as the Journal of Commerce's Port Import/Export Reporting Services (PIERS) and are already frequently included on demurrage and detention invoices. Because bill of lading numbers are not confidential information, they are not a good basis for security measures. Container numbers are not protected information either. Container numbers are written on the outside of the container. Thus, like bill of lading numbers, they are not a good basis for security measures. Including an already publicly available number on an invoice does not increase security concerns. The commenters' claims also do not consider the multiple levels of security at the port that deter an incorrect party from taking the cargo. These security measures include basic security infrastructure such as perimeter fencing, security gates, monitoring equipment, and alarm systems, and other access control measures such as Port Security Plans and Transportation Worker Identification Credential (''TWIC'') requirements. Nor do their comments consider that the rule prohibits the billing party from issuing demurrage or detention invoices to a person other than the person for whose account the billing party provided ocean transportation or space to store goods.

The bill of lading number and container number provide valuable identifying information to the billed party such as determining which shipment is being charged and a means of verifying accuracy of charges. Therefore, the Commission is retaining the requirement that this information be included on the invoice. The Commission recognizes that some billing parties may need to revise operations, including software and website updates, such as those related to how they generate cargo pick-up numbers. However, the Commission has no evidence to support a finding nor received data from commenters showing that such revisions would be time intensive or costly. Billing parties could, for example, for minimal time and cost, replace that portion of a pick-up number currently based on bill of lading number/container number with a number produced by a random number generator and doing so would be more secure than current systems that incorporate bill of lading numbers/container numbers into the pick-up number.

(b) § 541.6(a)(3), Port(s) of Discharge

Issue: New York New Jersey Foreign Freight Forwarders and Brokers Association requested the Commission amend § 541.6(a)(3) to clarify that the port of discharge can be any U.S. port—ocean or interior—to address situations, for example, where cargo arrives at a West or East Coast port, or via Canada, and then moves by rail to the interior.[123] The commenter was concerned that without the suggested clarification to the regulation there is the risk that the billed party would not receive the proper billing information to assess the correctness of invoices issued for charges incurred at interior ports.

FMC response: The commenter is correct 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. The Commission believes that this requirement is sufficiently incorporated into the language we proposed in the NRPM and have adopted in this final rule. The regulation's use of ''port(s),'' as opposed to ''port'' accounts for situations where there are multiple ports of discharge.

(c) § 541.6(a)(4), Basis for Why the Billed Party Is the Proper Party of Interest

Issue: The Commission received several requests from commenters to clarify what level of detail is necessary to satisfy the requirement that the invoice include the basis for why billed party is the proper party of interest and thus liable for the charge.[124] Mediterranean Shipping Company specifically requested guidance as to whether the requirement would be satisfied with: (1) a reference to the applicable tariff rule supporting the billing; (2) specific reference needed to contractual provisions; or (3) a reference number to identify the contract at issue.[125]

FMC response: There is no specific or set of specific documents or reference(s) that would meet the requirement of § 541.6(a)(4). The purpose of the regulation is that billed parties must be able to identify why the billing party believes that they are responsible for paying the invoice and to refute that basis if they believe that they have been billed incorrectly. A reference to the applicable tariff rule supporting the billing, specific reference to contractual provisions, or a reference number to identify the contract at issue might all, or might all not, meet this standard depending on the specific circumstances of a particular invoice.

(d) Requests for Additional Identifying Information

Issue: The U.S. Department of Agriculture requested that the Commission also require billing parties include on the invoice transportation history information, such the date and time a container was loaded on or off a vessel, and the date and time the vessel left or arrived at the port.[126] The Meat

[121] TraPac, LLC (FMC–2022–0066–0136); Fenix Marine Services (FMC–2022–0066–0186); West Coast MTO Agreement (FMC–2022–0066–0229); National Association of Waterfront Employers (FMC–2022–0066–0276); Pacific Merchant Shipping Association (FMC–2022–0066–0233); Husky Terminal and Stevedoring, LLC (FMC–2022–0066–0248); Port Houston (FMC–2022–0066–0268).

[122] 87 FR 62341, 62350 (Oct. 14, 2022).

[123] FMC–2022–0066–0247.

[124] National Customs Brokers & Forwarders Association of America, Inc. (FMC–2022–0066–0180); Mediterranean Shipping Company (FMC–2022–0066–0143); FedEx Trade Networks Transport & Brokerage, Inc. (FMC–2022–0066–0165); U.S. Dairy Export Council/National Milk Producers Federation (FMC–2022–0066–0235).

[125] FMC–2022–0066–0143.

[126] FMC–2022–0066–0274.

Import Council of America, Inc. (MICA) and the North American Meat Institute proposed that the Commission should require billing parties to identify on the invoice the vessel(s) used to transport the cargo.[127] These commenters believe that these additional data elements on the invoice would increase transparency and help billed parties in verifying calculations of free time, availability, and earliest-return-date, and thus make it easier to identify and dispute excess charges.

FMC response: The Commission agrees that having this additional information may be helpful in some circumstances. The Commission, however, has not been presented with enough evidence to be convinced that the potential benefits to some billed parties on some invoices outweigh the burden to billing parties by requiring this information on all invoices. The Commission will continue to monitor detention and demurrage billing trends and retains the authority to revise non-statutorily mandated detention and demurrage invoice data elements in the future if it determines there is a need to do so.

(e) Billing Exceptions

Issue: The American Association of Exporters and Importers (AAEI) supported § 541.6 and the required contents of the invoice.[128] AAEI also stated that if demurrage and detention charges are incurred or removed due to terminal or vessel operating deficiencies, then the invoices should include the details with standardized categories of billing exceptions.

FMC response: The Commission declines to add a requirement for billing exceptions to § 541.6. Under OSRA 2022, the billing party has an obligation to ensure the accuracy of its invoices. In addition, § 541.8 specifies the procedures for disputing charges—these disputes can be initiated if the billed party feels they are not responsible for the charges. As a result, the Commission declines to proscribe that billing parties deduct certain charges, especially given that there could be disagreement over where the fault in the charges lies.

2. § 541.6(b), Timing Information

(a) § 541.6(b)(1), Invoice Date

Issue: The National Customs Brokers & Forwarders Association of America,[129] CV International,[130] and New York New Jersey Foreign Freight Forwarders and Brokers Association, Inc.[131] asked the Commission to clarify whether backdating of invoices is permissible under this rule, or whether the billing date on demurrage and detention invoices should reflect the actual date an invoice is mailed out or otherwise finalized. John S. Connor, Inc. agreed, saying that backdating is a common practice that must not be allowed.[132] National Industrial Transportation League raised related concerns about some carriers continuing to assess charges during the time spent to process payments after payment has been made by the billed party or its agent.[133]

FMC response: Billing parties have an obligation under 46 U.S.C. 41104(d)(2) to issue detention and demurrage invoices that contain accurate information concerning the statutorily specified data elements as well as any additional information determined necessary by the Commission. To solidify this point, the Commission has incorporated into § 541.6 the requirement for accurate information. Accuracy is an implied legal condition of any statutory or regulatory information collection imposed on regulated parties by Congress or agencies and is generally not specifically incorporated as a written requirement. However, based on these comments, it appears that such clarification in the regulatory text may be of use to regulated parties and its incorporation mirrors the use of the word in 46 U.S.C. 41104(d).

(b) § 541.6(b)(2), Invoice Due Date

Issue: Seafrigo USA urged the Commission to clarify the meaning of ''billing due date,'' and specifically asked whether it means the payment due date.[134] The Meat Import Council of America, Inc. and the North American Meat Institute, in a joint comment, suggested that billing parties must be prohibited from listing the payment due date as the same date the invoice is issued as billed parties should have the full 30 days after an invoice is received, not simply issued.[135] The U.S. Department of Agriculture recommended that the Commission specify in the regulation the timeframe for payment of an invoice, making certain that the regulation is clear that payment is not due until any disputes are resolved.[136] Fenix Marine Services stated that the proposed demurrage and detention invoice requirements are incompatible with traditional MTO billing practices, and changing their practice to conform to the FMC's rule would mean a major overhaul of many MTO's longstanding billing practices.[137]

FMC response: The billing due date (or ''invoice due date'' as worded in this final rule) is the date by which the billed party must pay the invoiced charges. The Commission has revised § 541.8(a) 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 30 days after it is issued. As discussed in the NPRM and elsewhere in this document, the Commission acknowledges that this rule may require some billing parties to change their billing information technology systems and practices.

(c) § 541.6(b)(3)–(5), Free Time

Issue: One commenter requested that ''end of free time'' in § 541.6(b)(5) be defined as ''the end of free time as determined by the ocean common carrier or marine terminal, whichever, is later'' because ocean common carriers and marine terminal may have disparate last free day dates.[138]

FMC response: The Commission declines to define ''end of free time'', ''start of free time'', or ''free time'' as part of this rulemaking for the reason noted by the commenter—their meaning can vary terminal to terminal.[139] The Commission does not have evidence at this time to support a finding that standardizing these terms is warranted.

(d) § 541.6(b)(6), Container Availability Date

Issue: Two NVOCCs requested clarification of the meaning of ''availability date'' in § 541.6(b)(6).[140] One of the commenters requested that FMC define the term in § 541.3.[141] A third commenter said that the term ''availability date'' creates too much ambiguity in that some shipments may be delayed in customs resulting from actions taken or not taken by the receivers and import customs brokers.[142] They argued that vessel arrival date should be used instead because actual time of arrival of the

[127] FMC–2022–0066–0188.
[128] FMC–2022–0066–0168.
[129] FMC–2022–0066–0180.
[130] FMC–2022–0066–0217.
[131] FMC–2022–0066–0247.
[132] FMC–2022–0066–0267.
[133] FMC–2022–0066–0277.
[134] FMC–2022–0066–0223.
[135] FMC–2022–0066–0188.
[136] FMC–2022–0066–0274.
[137] FMC–2022–0066–0186.
[138] FedEx Trade Networks Transport & Brokerage, Inc. (FMC–2022–0066–0165).
[139] *See* 85 FR 29638, 29654.
[140] Seafrigo USA (FMC–2022–0066–0223); DHL Global Forwarding (FMC–2022–0066–0219).
[141] Seafrigo USA (FMC–2022–0066–0223).
[142] International Tank Container Organisation (FMC–2022–0066–0096).

vessel is clearly defined and gives NVOCCs a clear date from which to start the clock.

FMC response: The Commission declines to incorporate the commenters' suggestions. First, the date of container availability is statutorily mandated by 46 U.S.C. 41104(d)(2)(A). Congressional action would be needed to change it to vessel arrival date. Second, the Commission declines to add a definition of ''availability date'' to § 541.3 for the same reason we declined to define it in our 2020 final Interpretive Rule on demurrage and detention—''availability'' can vary by port or marine terminal.[143] As we discussed there: ''Suffice it to say, availability at a minimum includes things such as the physical availability of a container: Whether it is discharged from the vessel, assigned a location, and in an open area (where applicable).'' [144] Additionally, as discussed in the Interpretive Rule's notice of proposed rulemaking: ''In this context, 'cargo availability' or 'accessibility' refers to the actual ability of a cargo interest or trucker to retrieve its cargo. Cargo is not available, for instance, if a cargo interest or trucker cannot pick it up because it is in a closed area of a terminal, or if the port is closed.'' [145] We adopt the meaning for these terms provided in the Interpretive Rule in this rule as well.

(e) § 541.6(b)(7), Earliest Return Date

A number of comments raised the issue of earliest return date. Intermodal Motor Carriers Conference urged the Commission to clarify OSRA 2022's earliest return date, and to require that date on the detention and demurrage invoice.[146] The International Tank Container Organisation (ITCO) noted that OSRA 2022 requires that the earliest return date be specified, while this rule does not require it on the invoice.[147] ITCO opined that the term ''availability date,'' which is currently used in the rule, creates too much ambiguity. Balsam Brands [148] and Harbor Trucking Association [149] said that the earliest return date should be listed for export shipments, and any modifications to this date should be identified. The New York New Jersey Foreign Freight Forwarders and Brokers Association, Inc. (NYNJFF&BA) stated that the requirement to provide the earliest return date for export shipment should be understood as meaning the first notice for receiving containers at ports, as this notice sets the rest of the process in motion for getting a container back on a vessel.[150] NYNJFF&BA states that if demurrage and detention can be charged in instances when cargo remains at the terminal beyond the free time as a result of VOCC decisions, then there is no incentive to improve the information and receiving window dates in the early return date (ERD) notices. When containers are delivered per ERD notices, the cargo waiting for a new vessel cannot be incentivized by the imposition of demurrage and detention to reduce time at the terminal.

To strengthen the rule's requirements, the National Association of Chemical Distributors [151] and Connection Chemical [152] suggested that the Commission add the term ''accurate'' before the earliest return date, to ensure that any changes to this date are reflected as conditions change. CV International stated that earliest return dates change frequently because of unreliable vessel schedules and congested terminals.[153] As a result, CV International suggested that when a container is in motion, the earliest advised return date should apply. John S. Connor, Inc. made similar comments.[154]

The Meat Import Council of America, Inc. (MICA) and the North American Meat Institute (NAMI) jointly argued that the final rule should not diminish the significance of intervening, clock-stopping events when a billed party disputes the charges.[155] MICA/NAMI suggests that the Commission requiring including earliest return date and changes to that date on detention and demurrage invoices would increase transparency and minimize billing disputes. Lastly, the National Customs Brokers and Forwarders Association of America requested clarification and Commission guidance on how billing parties should account for data elements in the minimum invoice information requirements where dates, such as the earliest return dates, change.[156]

FMC response: The Commission declines to make the commenters' changes requested regarding earliest return date in this rule. This is an issue that the Commission will continue to examine. For example, the Commission issued a Request for Information in August 2023 seeking comments on what shippers and BCOs can do to better predict container earliest return dates.[157]

In addition, Commissioner Rebecca Dye has proposed to reform three practices of ocean carriers and marine terminal operators at the Ports of Los Angeles and Long Beach, and the Port of New York and New Jersey that relate to earliest return date, container returns, and container pickup (notice of availability).[158] Commissioner Dye encourages reactions or questions regarding these proposals from the shipping public. More information on this project may be found on FMC's website.

(f) § 541.6(b)(8), Date(s) for Which Demurrage and/or Detention Were Charged

Issue: TraPac LLC stated that requiring billing parties to include the specific dates on which demurrage or detention is charged would, for MTOs, result in an unnecessary burden on terminals as MTOs would need to develop a reporting system to provide information regarding the container's status on a ''clock start'' and ''clock stop'' basis.[159] According to the commenter: (1) it is not reasonable or realistic to expect MTOs to transmit information in real time; and (2) if not in real time, it could result in significant delay. Consumer Technology Association said that the Commission should require disclosure of any relevant ''stop-the-clock'' events that toll the passage of free time—such as container availability, facility closures, port congestion, or lack of available appointment slots. They said that having this information would greatly facilitate the timely resolution of disputes but noted that this information is often only available to billing parties.[160] BassTech International LLC suggested that, for emphasis of the billing party's obligation for the accurate assessment of charges, the Commission change ''were charged'' to ''were incurred and charged.'' [161]

FMC response: As discussed in the NPRM, instead of requiring billing parties to identify specific ''clock-stopping'' events on demurrage and detention invoices, this rule requires the billing parties to identify the specific

[143] 85 FR 29638, 29654 (May 18, 2020) (internal citation omitted).

[144] *Id.*

[145] 84 FR 48850, 48852 (Sept. 17, 2019) (internal citation omitted).

[146] FMC–2022–0066–0189.

[147] FMC–2022–0066–0096.

[148] FMC–2022–0066–0095.

[149] FMC–2022–0066–0262.

[150] FMC–2022–0066–0247.

[151] FMC–2022–0066–0208.

[152] FMC–2022–0066–0236.

[153] FMC–2022–0066–0217.

[154] FMC–2022–0066–0267.

[155] FMC–2022–0066–0188.

[156] FMC–2022–0066–0180.

[157] 88 FR 55697, 55698 (Aug. 16, 2023) (Question 6).

[158] *https://www.fmc.gov/commissioner-dye-proposes-reforms-to-international-ocean-supply-chain-practices/* (July 26, 2023).

[159] FMC–2022–0066–0136.

[160] FMC–2022–0066–0228.

[161] FMC–2022–0066–0230.

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dates on which they charged demurrage or detention.[162] The rule permits billing parties to take into account any intervening events that affected the charges, if known, and enables billed parties to confirm or dispute the validity of charges on specific dates. The rule incorporates the intent of OSRA 2022 to shift the burden to billing parties to justify the demurrage or detention charges while allowing billing parties to correct invoices when the intervening events are not initially known to them.

(g) General Comments

Issue: One commenter said that any schedule data on invoices must include all previous revisions and not only the final dates.[163] The commenter said such information was necessary because issues on exports in demurrage and detention invoices are caused by last minute schedule changes over which the shipper has no control.

FMC response: The Commission declines at this time to mandate that billing parties include all previous revisions. We do not believe that enough evidence has been presented to the Commission at this time to justify the increased burden of such a requirement. However, we will continue to monitor the issue of demurrage and detention invoices and may consider this or other additional changes in the future if circumstances warrant.

3. § 541.6(c), Rate Information

The Commission did not receive comments regarding proposed § 541.6(c). It is adopting the proposed language from the NPRM in this final rule with minor, non-substantive, clarifying amendments. In paragraph (c), ''The invoice'' has been changed to ''A demurrage or detention invoice'' to reflect the language of § 541.3. Paragraph (c) has also been amended to clarify that these are minimum requirements. Paragraph (c)(2) has been amended by adding terminal schedule to the listed examples of documents, and ''i.e.,'' has been changed to ''e.g.,'' to reflect that this is not an exhaustive list of all possible documents.

4. § 541.6(d), Dispute Information

(a) § 541.6(d)(1)

One commenter suggested eliminating paragraphs (d)(2) and (3) and merging the necessary information into a single paragraph § 541.6(d) to read as follows: ''The invoice must contain sufficient information to enable the billed party to readily identify a contact to whom they may direct questions or concerns related to the invoice including the name, email, telephone number and mailing address of the responsible person to whom invoice questions or notifications of a billing dispute must be submitted.'' [164] According to the commenter, the proposed revision ''prevent[s] the imposition of potentially unreasonable or obstructive processes by the billing party'' and instead allows disputes to be handled following the standard business practice for similar events.

FMC response: The Commission declines to make the suggested changes. Subsection (d)(1) already accomplishes what the proposed changes seek. In addition, this rule makes dispute resolution simpler, more consistent, and transparent. These are the same goals that the Commission espoused in the Interpretive Rule, which the commenter acknowledges in their submission. In addition, the ''conventional manner'' in which these disputes have been handled ''in the normal course of business'' for which the commenter advocates have until now not always been successful and resulted in practices that resulted in OSRA 2022 and this rulemaking. Maintaining the existing model would fail to address the reasons behind the statute and this rulemaking.

(b) § 541.6(d)(2), Information on How To Request Fee Mitigation, Refund, or Waiver

Issue: The Commission received a number of comments regarding the proposed requirement in § 541.6(d)(2) that the URL address of a publicly accessible part of the billing party's website provide a detailed description of what the billed party must provide to request fee mitigation, refund or waver. Two commenters said that the proposed URL requirement would be too burdensome. One of these commenters urged the Commission to instead adopt a requirement that allows for any method of delivery of such information to the shipper so long as it includes a transparent description of the required information.[165] The other commenter said that the proposal could lead to burdensome procedures that are inconsistent with the shifting of the burden of proof regarding reasonableness of the charges from shippers to carriers that OSRA 2022 espouses.[166] Six commenters were in support of the URL requirement.[167] The International Dairy Foods Association stated that this requirement ''will help cargo owners easily find and understand what information they need to include in such requests. This will improve the efficiency of the dispute process and make it less likely that requests are denied on procedural grounds.'' [168]

Three additional commenters all said the rule would benefit from expanding the acceptable digital platforms beyond URLs to include QR codes or digital watermarks, for example, so that information regarding the dispute process can be retrieved to keep pace with evolving innovations and technologies.[169] The Meat Import Council of America, Inc. and the North American Meat Institute proposed replacing ''URL address'' with either ''[a] digital trigger (URL address, QR code, digital watermark or other similar digital triggers) to the publicly-accessible portion of the billing party's website that provides a detailed description of information or documentation that the billed party must provide to successfully request fee mitigation, refund, or waiver'' or ''[a] digital trigger to the publicly-accessible portion of the billing party's website that provides a detailed description of information or documentation that the billed party must provide to successfully request fee mitigation, refund, or waiver.'' [170]

FMC response: The Commission disagrees with the two commenters' assertion that the proposed requirement is too burdensome. While there may be some initial time/infrastructure requirements in order for some billing parties to comply, those will be minimal, and the benefits of transparency to billed parties greatly outweigh these minimal burdens. In response to commenters, the Commission has added language to § 541.6(d)(2) to expand this category from URLs to digital means more generally, including URLs, QR codes and other digital means that would allow this requirement to keep pace with technology.

[162] 87 FR 62341, 62351.

[163] Anonymous (FMC–2022–0066–0093).

[164] BassTech International LLC (FMC–2022–0066–0230).

[165] Seafrigo USA Inc. (FMC–2022–0066–0223).

[166] National Retail Federation (FMC–2022–0066–0231).

[167] International Tank Container Organisation (FMC–2022–0066–0096); International Dairy Foods Association (FMC–2022–0066–0244); and the Retail Industry Leaders Association (FMC–2022–0066–0259).

[168] FMC–2022–0066–0244.

[169] Meat Import Council of America, Inc. and the North American Meat Institute (FMC–2022–0066–0188); Tyson Foods Inc. (FMC–2022–0066–0225); and the Agriculture Transportation Coalition (FMC–2022–0066–0275).

[170] FMC–2022–0066–0188.

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(c) § 541.6(d)(3), Disclosure of Timeframe for Requesting a Fee Mitigation, Refund, or Waiver

The Commission did not receive comments regarding proposed § 541.6(d)(3) and is adopting the proposed language from the NPRM in this final rule.

5. § 541.6(e), Certifications

(a) § 541.6(e)(1), Certification of Compliance With FMC Demurrage and Detention Rules

Issue: The International Tank Container Organisation [171] and Maher Terminals LLC [172] argued that the certification of compliance is not necessary given that it is legally required for regulated parties to comply with Commission regulations. Maher Terminals also expressed concern that such a certification would require billing parties ''to state as a fact a matter that which is really a conclusion of law.'' [173]

FMC response: Certification that the billing party's charges are consistent with FMC detention and demurrage rules is required by 46 U.S.C. 41104(d)(2)(L). Accordingly, the Commission will include it in the rule.

(b) § 541.6(e)(2), Certification That Billing Party's Performance Did Not Cause or Contribute to the Underlying Invoiced Charges

Issue: One commenter said that the certification statement should reflect an NVOCC's more limited liability in instances where it is simply passing through the charges from a VOCC and, as with the other required elements on the invoice, is just a vehicle and not the responsible party.[174] They provided the following sample certification statement for the Commission's consideration: ''To the best of our knowledge the charges on this invoice are a direct pass through and compliant with the requirements of the Shipping [Act] of 1984 as amended by [OSRA 2022] and that our NVOCC did not cause, contribute, or mark up these underlying charges.''

FMC response: The Commission declines to change the proposed language and finalizes it in this rule. A billing party has a legal obligation to include accurate information on each of the invoice elements found in § 541.6. In accordance with 46 U.S.C. 41104, the Commission will make a determination if a particular self-certification is inaccurate or false only after an investigation following filing of a charge complaint.

(c) MTOs

Issue: Four commenters argued that MTOs do not have the information necessary to make these certifications and certifications should not be required of MTOs because of the burden it would impose on them to collect the necessary information, and further, such certification would not address the Commission's primary concern, which is having transparent and clear invoices for billed parties to clearly understand billed charges.[175] A fifth commenter asserted that imposing these certifications on MTOs is beyond OSRA 2022.[176]

FMC response: In instances where an MTO invoices a shipper, the Commission has determined that the MTO should be subject to the same regulations that apply to VOCCs and NVOCCs, including certification requirements. As discussed earlier in this preamble, the Commission has statutory authority to apply this rule to MTOs. Paragraph (c) of section 41102, title 46, United States Code, prohibits MTOs from failing to establish, observe, and enforce reasonable practices connected to the receiving, handling, storing, or delivering of property. This section provides clear and direct authority for the Commission to regulate MTO practices connected to the receiving, handling, storing, or delivery of cargo, including mandating certification requirements. In addition, OSRA 2022 explicitly instructed the Commission to issue a rule defining prohibited practices by common carriers, marine terminal operators, shippers, and ocean transportation intermediaries under 46 U.S.C. 41102(c) regarding the assessment of demurrage and detention charges. MTOs are not required to include the data elements listed in § 541.6 when they are issuing invoices to VOCCs.

(d) Additional Certification/Disclaimer

Issue: One comment said that the rule should include a requirement on the invoice or the accompanying website a note that reminds the billed party that if the information is incorrect or details are missing, then the shipper is not obligated to pay the invoice.[177]

FMC response: At this time, the Commission will not impose additional mandatory certifications/disclaimers on top of those found in OSRA 2022, as codified at 46 U.S.C. 41104(d)(2)(L) and (M). Nonetheless, the agency recognizes the potential benefits of such a statement and does not object to the voluntary adoption of this practice.

(e) Independent Assessment

Issue: One commenter posited that in addition to the self-certification requirements of OSRA 2022, the Commission should also consider requiring billing parties to utilize an independent third-party certification body, from an official roster of such bodies that is recognized by the Commission, to conduct an annual audit of billing party's detention and demurrage practices and provide an annual report to the FMC with its findings.[178] According to the commenter, the self-certification requirements of OSRA 2022 provide no benefit to billed parties as they do not prevent ''over-invoicing by carriers.'' According to the commenter, since the self-certification requirements took effect with the passage of OSRA 2022, their members ''have received detention and demurrage invoices that included such a statement, that were later refunded or waived by the carrier when disputed because the carrier issued the invoice after having rolled shippers' bookings for weeks on end.'' [179]

FMC response: The Commission declines to adopt this change at this time. The Commission will continue to monitor the situation following implementation of this final rule and may take additional action(s) in the future if circumstances warrant.

6. Contents of Invoice, Generally

(a) Machine-Readable Invoice Data

Issue: A few commenters indicated their support for the Commission to explore mandating that invoice data be provided in electronic, computer-readable format, such as spreadsheets. American Chemistry Council [180] and Consumer Brands Association,[181] for example, highlighted that providing computer-readable data invoices would allow for faster and more accurate analysis of demurrage charges and associated data. American Chemistry Council [182] and Agriculture

[171] FMC–2022–0066–0096.

[172] FMC–2022–0066–0269.

[173] *Id.*

[174] A Customs Brokerage, Inc. (FMC–2022–0066–0200).

[175] The National Association of Waterfront Employers (FMC–2022–0066–0276); Husky Terminal and Stevedoring, LLC (FMC–2022–0066–0248); and Ports America/SSA Marine (FMC–2022–0066–0249).

[176] Maher Terminals LLC (FMC–2022–0066–0269).

[177] The U.S Dairy Export Council/National Milk Producers Federation (FMC–2022–0066–0235).

[178] International Dairy Foods Association (FMC–2022–0066–0244).

[179] *Id.*

[180] FMC–2022–0066–0090.

[181] FMC–2022–0066–0210.

[182] FMC–2022–0066–0184.

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Transportation Coalition [183] both noted in their comment that U.S. Surface Transportation Board (STB) regulations require Class I railroads to provide machine-readable access to demurrage billing information.

FMC response: Electronic invoices have a number of benefits for billing parties and billed parties, and the Commission highly encourages billing parties to adopt computer-readable invoice formats into their standard operating procedures. The Commission, however, has chosen not to mandate usage at this time due to concerns about the current low rate of infiltration of electronic documentation processes within the industry. The Journal of Commerce, for example, recently reported that: ''[o]nly 2.1% of bills of lading and waybills in the container trade were electronic last year.'' [184] The Commission will continue to monitor the use of machine-readable invoices within the industry and may consider compulsory use in the future.

(b) MTOs

Issue: One comment asserted that if the Commission requires demurrage or detention invoices issued by MTOs to contain information in addition to those elements specifically enumerated in OSRA 2022, it should ''recognize the nature of MTO pass through charges and either afford MTO invoices a conceptually similar safe harbor, or not compel MTOs to provide such information.'' [185]

FMC response: While the most common practice is for MTOs to invoice the VOCC and the VOCC to send a combined invoice to the shipper, in some cases MTOs bill shippers directly. The Commission's primary concern with this rule is to ensure that billed parties understand the demurrage or detention invoices they receive. In instances where an MTO invoices a shipper, the MTO should be subject to the same regulations that apply to VOCCs and NVOCCS when they invoice shippers.

G. § 541.7 Issuance of Demurrage or Detention Invoices

1. § 541.7(a), Timeframe for Issuing an Invoice

Issue: The Commission received 109 comments on its proposal to require billing parties to issue detention and demurrage invoices within 30 days: one from another federal agency, 16 from BCOs, 66 from motor carriers, 10 from NVOCCs/OTIs/Customs Brokers/Third-party logistics (3PLs), 10 from individuals, and 6 from VOCCs/MTOs.

The U.S. Department of Agriculture supported the 30-day time limit.[186] Fifteen of the 16 BCOs supported the 30-day requirement. One BCO thought that 30 days was too long and that the deadline should be 10 days.[187] All of the motor carriers other than the Intermodal Association of North America (IANA), which administers the UIAA supported the 30-day time limit. The IANA advocated for the Commission to follow the UIAA standard of 60 days to issue demurrage and detention invoices (UIAA Section E.6).[188] All of the NVOCC/OTI/Customs Brokers/3PLs supported the 30-day deadline.

VOCCs/MTOs and their trade associations were mixed in their responses. Intransit Container fully supported a deadline of 30 days.[189] The World Shipping Council (WSC) [190] and the American Association of Port Authorities [191] supported a deadline but said that the deadline should align with the UIAA standard of 60 days. Port Houston [192] and the Ocean Carrier Equipment Management Association, Inc. (OCEMA) [193] were adamant that the Commission should not impose a deadline at all. OCEMA said that if a deadline was imposed, it should be no later than the UIAA standard. OCEMA acknowledged that the Commission based their deadline of 30 days on an understanding that billing parties are capable of issuing demurrage or detention invoices, on average, within 30 days. OCEMA, however, believes that justification was not adequately supported and potentially flawed. First, OCEMA said that the Commission did not explain how the average was derived, and it was therefore unclear how many of the transactions exceeded 30 days. Second, OCEMA asserted that in making its determination, the Commission did not consider the potential sources of delay for those invoices that take more than 30 days to be issued, such as delays in transmission of essential data by third parties, IT system capabilities and differing levels of automation regionally in the invoicing process, personnel and labor shortages, force majeure events, or cyber-attacks or system outages. Related to this point, OCEMA also asserts that the Commission did not take into consideration that under a free-contract system, parties sometimes come to an agreement for longer deadlines in light of the circumstances applicable to a particular shipment for a given shipper or consignee's product supply chain.

The VOCCs and their trade associations also complained that the proposal is unfair. Hapag-Lloyd (America) LLC argued that the proposal provides no consequences for failure to timely submit a dispute to an invoice, so it is unclear what incentive billed parties have to respond quickly.[194] WSC said that billed parties would face no consequences for failing to meet the deadline to dispute an invoice, while billing parties forfeit contractual rights by missing the deadline. WSC argued that fundamental fairness, equal protection, and due process dictate the Commission must add language to impose similar requirements on billed parties, namely that they forfeit the right to request fee mitigation, refund, or waiver by failing to submit that request within 30-days from receiving the invoice. OCEMA focused on the fact that the rule includes no flexibility for delays outside the billing parties' control, for instance caused by third parties, that prevent compliance with the 30-day deadline to issue invoices. Finally, OCEMA argued that the 30-day deadline could turn out to create a disincentive principle since shippers or truckers in possession of equipment will no longer feel compelled to return it quickly as the unavailability of data or other tools to delay billing will prevent billing parties from meeting the 30-day deadline.

BassTech International LLC stated that the proposed rule's invoicing requirements do not address the need for invoicing ''on demand'' in instances where payment is a prerequisite for cargo release, such as is customary for import demurrage charges.[195] As such, they suggested revising § 541.7(a) to read as follows: ''A billing party must issue a demurrage or detention invoice within thirty (30) days from the date on which the charge was last incurred *or, when payment of charges is a precondition for delivery of cargo or containers, on demand.* If the billing party does not issue demurrage or detention invoices within the required

[183] FMC–2022–0066–0275.

[184] Greg Knowler, *Key supply chain stakeholders commit to electronic bills of lading,* Journal of Commerce, Sept. 5, 2023 (*https://www.joc.com/article/key-supply-chain-stakeholders-commit-electronic-bills-lading_20230904.html*).

[185] Ports America/SSA Marine (FMC–2022–0066–0249).

[186] FMC–2022–0066–0274.

[187] National Fisheries Institute (FMC–2022–0066–0256).

[188] FMC–2022–0066–0157.

[189] FMC–2022–0066–0227.

[190] FMC–2022–0066–0242.

[191] FMC–2022–0066–0255.

[192] FMC–2022–0066–0268.

[193] FMC–2022–0066–0257.

[194] FMC–2022–0066–0240.

[195] FMC–2022–0066–0230.

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timeframe, then the billed party is not required to pay the charge.''

FMC response: The Commission will maintain the 30 days proposed in the NPRM. The Commission explained in the NPRM why a deadline of 30 days for issuing demurrage or detention invoices is reasonable.[196] WSC and OCEMA suggest the Commission should prove why other deadlines are unreasonable before proposing a deadline, but the Commission declines this invitation to try to prove a negative. WSC and OCEMA did not offer concrete examples of why billing parties could not comply with a 30-day deadline, and instead made reference to delays caused by third parties without offering specifics of the types of delays they routinely face or how long they take to resolve.[197] The Commission does not agree with the argument that the deadline in the rule is insufficiently supported.

Neither is the Commission persuaded by commenters stating that it should follow widely accepted and longstanding practices. The text of OSRA 2022 indicates it was written to help remedy dysfunctional, predatory, and unfair invoicing permitted by these accepted and longstanding practices.[198] The complaint that this proposal is unfair and inequitable to carriers misunderstands the regulation's approach to implementing OSRA. The rule provides a minimum time for the dispute of detention and demurrage invoices, after which billing parties are free to reject any further attempts at dispute as untimely. The rule does not lay out penalties for failure by a billed party to timely dispute an invoice, because it is up to the billing party to choose how to remedy that failure.

2. § 541.7(b), Invoices Sent to an Incorrect Party

Issue: The U.S. Department of Agriculture expressed concern about billed parties incurring additional costs of unexpected and harder-to-verify charges in situations where the invoice was originally sent to the wrong person.[199] USDA urged that the Commission remove from the rule the proposed grant of additional time to the billing party to issue an invoice to a billed party when the invoice was originally issued to an incorrect person (and that original recipient disputed the charges). USDA asserted that the carrier should, in all circumstances, have 30 days from the date charges stop accruing to bill the correct party.

Hapag-Lloyd (America) LLC noted that the rule provides no consequences for failing to timely dispute an invoice.[200] They asserted that, given the requirement that billing parties must issue corrected invoices within 60 days, the rule actively dissuades billed parties from timely settling disputes. The World Shipping Council pointed out that 46 CFR 541.7(b) sets a hard deadline of 60 days after the charges were last incurred by which the correct party must be invoiced but if a billing party uses 30 days to issue the invoice and the billed party takes 30 days to dispute the invoice, there is no time left to bill another party before the 60-day invoicing deadline.[201] WSC said that this would result in the correct party not having to pay the invoice and billed parties being incentivized to delay disputing invoices.

Another commenter requested that paragraph (b) be deleted from § 541.7 ''and to leave this exceptional circumstance to be handled through reasonable and conventional business practice . . . .''[202]

FMC response: The final rule removes the link between a billing party's ability to reissue an invoice with an incorrectly billed party's disputing of that invoice. With this reworded language, the billing party must reissue the invoice to the correct party within 30 calendar days of when the charges were last incurred. Otherwise, the billed party is not required to pay the charges. This penalty is consistent with the language and purposes of OSRA 2022. It also reflects the Commission's position that the billing party should only be issuing a demurrage and detention invoice to a billed party based on their contractual privity with that billed party, and that this invoice should be sent to the correct party in the first instance. Tying the issuance of the corrected invoice to when the demurrage and detention charges stop accruing is consistent with the incentive present in the rest of the rule. The burden of issuing a correct invoice should not rely on an incorrectly billed party to dispute the incorrect invoice. The change is also consistent with the comments received on the NPRM.

3. Timeframes for NVOCCs

Issue: The Commission solicited comments in the NPRM on whether different timeframes should apply to NVOCCs. Most commenters supported applying the same timelines to NVOCCs and VOCCs. However, when NVOCCs pass through demurrage or detention invoices assessed against their customers, it may be difficult for them to issue demurrage and detention invoices within the required timeframe if the NVOCC does not receive the initial invoice in a timely manner. Therefore, the Commission requested comments on how it could best reflect the application of the deadline to NVOCCs that pass through demurrage or detention charges. A number of NVOCCs commented that § 541.7's thirty (30) calendar-day timeframe for a billing party to issue an invoice did not allow time for an NVOCC to issue an invoice when it passes through the charges. Many of these comments supported adding additional time to § 541.7 for NVOCCs to issue an invoice. Some of the comments suggested specific extra time that ranged from 21 days to 60 days. Many suggested an extra 30 days because the initial billing party had 30 days to issue an invoice, and NVOCCs should be given the same amount of time. CMA CGM argued that it is vital that the deadline for resolution not be triggered until all the information required to support the dispute is submitted to the carrier and that the rule should emphasize, not undermine, the carriers' publicly available dispute resolution process.

FMC response: In response to these comments, the Commission has amended § 541.7 to state that NVOCCs have an additional thirty (30) calendar days in which to issue an invoice. This 30-day period runs from the date on which the invoice the NVOCC received was issued. In addition, the Commission recognizes the fact that an NVOCC can be both a billed party and a billing party with respect to the same transaction, and that in such a situation, the NVOCC may not be in a position to dispute an invoice with a VOCC until the NVOCC's customer has disputed the invoice with the NVOCC. As such, the Commission has added § 541.7(c) to require that when an NVOCC informs a VOCC that

[196] 87 FR 62341, 62354.

[197] FMC–2022–0066–0242; FMC–2022–0066–0257.

[198] *See* Testimony of Chairman Maffei before Congress: ''Review of Fiscal Year 2024 Budget Request for the Federal Maritime Transportation Programs, and Implementation of the Ocean Shipping Reform Act of 2022,'' March 23, 2023, available at *https://www.fmc.gov/testimony-of-chairman-maffei-before-congress-review-of-fy2024-budget/;* Statement by President Joe Biden on Congressional Passage of Ocean Shipping Reform Act, June 13, 2022, available *at https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/13/statement-by-president-joe-biden-on-congressional-passage-of-ocean-shipping-reform-act/#:~:text=Statement%20by%20President%20Joe%20Biden%20on%20Congressional%20Passage%20of%20Ocean%20Shipping%20Reform%20Act,-Home&text=Lowering%20prices%20for%20Americans%20is,American%20retailers%2C%20farmers%20and%20consumers.*

[199] FMC–2022–0066–0274.

[200] FMC–2022–0066–0240.

[201] FMC–2022–0066–0242.

[202] BassTech International LLC (FMC–2022–0066–0230).

its customer has disputed its invoice, the VOCC must then allow the NVOCC additional time to dispute the invoice it received from the VOCC.

4. Ability To Cure an Invoice Not in Compliance With § 541.6

Issue: A number of commenters requested the ability to correct an invoice that lacked certain information or contained incorrect data. FedEx Trade Networks, for example, stated that the ability to cure an invoice error is reasonable, especially given that a billed party is not required to pay the invoice in the face of any error.[203] Commenters also sought clarification on the timing of amendments, if amendments are allowable. FedEx Trade Networks stated that each billing party should have the same amount of time to correct the invoice, as an error that originates with the VOCC may need to be remedied by the ocean carrier and each subsequent billing party. CV International suggested that the billing party have two working days from the time the billed party communicates the error to make the corrections, during which time no additional demurrage and detention charges should accrue.[204] The New York New Jersey Foreign Freight Forwarders and Brokers Association, Inc. echoed these sentiments and also suggested that billed parties should be required to notify the billing party of any errors within a specific time frame, such as seven days.[205] John S. O'Connor Logistics made similar suggestions as well.[206] U.S. Dairy Export Council/ National Milk Producers Federation requested clarification regarding a carrier's submission of a corrected invoice, and whether that must that be completed within the 30-day timeframe, or whether it restarts the clock.[207] Connection Chemical requested similar clarification.[208]

FMC response: The Commission declines to add time for a billing party to correct its invoice. While billing parties have an obligation under 46 U.S.C. 41104(d)(2) to issue accurate invoices, issuing an invoice that does not comply with OSRA 2022's requirements does not permanently eliminate the billed party's obligation to pay those charges. In particular, 46 U.S.C. 41104(f) cancels the obligation to pay an invoice that does not conform to OSRA but does not prevent the carrier from reissuing the charges on an invoice/bill that *does* meet the statutory requirements. The correctly billed party has an obligation to pay charges billed via a compliant invoice. In addition, given the statutory obligation in 46 U.S.C. 41104(d)(2), the Commission also declines to add a requirement that billed parties inform billing parties of any inaccuracies.

5. § 541.7, General Comments

FedEx Trade Networks stated that the Commission should make clear that when a demurrage or detention charge is in dispute, the billing party should be prohibited from issuing further overdue statements.[209] In addition, FedEx Trade Networks recommended that the Commission explicitly state conditions under which the billing party may not charge demurrage and detention, such as when: the container has not arrived at the port; the container is not available within the terminal; the container cannot be released due to a hold by any government action; the container is in the terminal, but the ocean carrier fails to load it on the ocean vessel; the container is in a closed, blocked or inaccessible area; no appointments to pick-up freight are available; there is a ''dual transaction,'' in which a container cannot be picked up unless another piece of equipment is returned is required; and the equipment must be returned to a different location to be accepted.

FedEx Trade Networks also recommended that when demurrage and detention fees do have to be paid, the Commission should implement certain requirements to create greater efficiencies and serve the objective of demurrage and detention: demurrage bills should be separated from freight pick-up for credit-worthy customers; demurrage should be a standard amount per port and per day, with no tiered fees; more payment options, such as electronic funds transfers, credit cards (without fees), should be available, and credit should be universally accepted; charges should be fair and reasonable, with the goal of moving freight from the terminal; the amortized value of the equipment should be considered when setting detention rates; and the bill should be readily available, especially online.

FMC response: The Commission declines to make these changes to the final rule. The information required to be included in an invoice as per § 541.6 should discourage billing parties from issuing demurrage and detention invoices when charges have not yet accrued, such as when a vessel has not yet arrived in port, because an improperly issued invoice means that the billed party will not have to pay it under the terms of § 541.5. In addition, the rule contains a dispute resolution process that is designed to motivate the parties to a find a resolution within a short timeframe. This process should allow cargo to be released sooner, as well as discourage parties from repeated behaviors such as continuously issuing overdue invoices.

Furthermore, this rule provides the requirements for detention and demurrage invoices and is already designed to make the process more efficient. FedEx Trade Networks' suggestions are outside the process for demurrage and detention billing requirements. As such, they are outside the scope of this rulemaking.

H. § 541.8 Requests for Fee Mitigation, Refund, or Waiver

1. § 541.8(a), Request for Mitigation, Refund, or Waiver of Fees From the Billing Party

Issue: The Commission proposed giving billed parties 30 days to dispute demurrage and detention charges. Forty-five comments were submitted on this issue. Twenty-eight comments supported or supported with qualification the proposal (1 VOCC,[210] 5 NVOCCs/OTIs/3PLs,[211] 8 BCOs,[212] 13 Motor Carriers,[213] and 1 Federal agency[214]). One commenter that

[203] FMC–2022–0066–0165.

[204] FMC–2022–0066–0217.

[205] FMC–2022–0066–0247.

[206] FMC–2022–0066–0267.

[207] FMC–2022–0066–0235.

[208] FMC–2022–0066–0236.

[209] FMC–2022–0066–0165.

[210] American Association of Exporters and Importers (FMC–2022–0066–0168).

[211] International Tank Container Organisation (FMC–2022–0066–0096); Excargo Services Inc. (FMC–2022–0066–0151); Seafrigo USA Inc. (FMC–2022–0066–0223); APL Logistics Americas, Ltd (FMC–2022–0066–0271); New York New Jersey Foreign Freight Forwarders and Brokers Association, Inc. (FMC–2022–0066–0247).

[212] Northwest Horticultural Council (FMC–2022–0066–0178); American Chemistry Council (FMC–2022–0066–0184); International Housewares Association (FMC–2022–0066–0187); MICA/NAMI (FMC–2022–0066–0188); Tyson Foods, Inc. (FMC–2022–0066–0225); National Association of Beverage Importers, Inc. FMC–2022–0066–0238); International Dairy Foods Association (FMC–2022–0066–0244); Agriculture Transportation Coalition (FMC–2022–0066–0275).

[213] BW Mitchum Trucking Co. (FMC–2022–0066–0110); GBA Transport (FMC–2022–0066–0152); Triple G Express (FMC–2022–0066–0154); MacMillan-Piper, Inc. (FMC–2022–0066–0159); Bridgeside Inc. (FMC–2022–0066–0179); Intermodal Motor Carriers Conference (FMC–2022–0066–0189); Eagle Systems, Inc. (FMC–2022–0066–0203); Bi-State Motor Carriers (FMC–2022–0066–0212); California Trucking Association (FMC–2022–0066–0220); Maryland Motor Truck Association, Inc. (FMC–2022–0066–0241); Virginia Trucking Association (FMC–2022–0066–0260); Harbor Trucking Association (FMC–2022–0066–0261); California Trucking Association (FMC–2022–0066–0270).

[214] U.S. Department of Agriculture (FMC–2022–0066–0274).

supported the proposal said that the 30-day time limit "will incentivize billing parties to ensure the accuracy of their invoices from the start." [215] Fourteen comments were in clear opposition (11 BCOs [216] and 3 NVOCCs/3PLs [217]). Three additional commenters submitted comments on the matter that did not fall neatly into either support or opposition.[218]

As noted above, some of the commenters that supported the proposal, did so with qualification. The Agriculture Transportation Coalition said that 30 days is sufficient time for shippers to review invoices and submit requests for fee mitigation, refund, or waiver but that the clock should start once the shipper receives the invoice or after the invoice has been posted on-line in a location accessible to the shipper.[219] American Chemistry Council had similar views to Agriculture Transportation Coalition but said that the clock should not start until invoices are received by the billed party.[220] American Chemistry Council explained: "Carriers are increasingly moving to online systems where the billed party must search for new invoices. Because of resource constraints, small companies may track new invoices on a weekly basis, rather than daily." [221] To address this concern, American Chemistry Council proposed amending § 541.8 by adding at the end ". . . or within thirty-seven (37) days of the billing party making the invoice available online" to ensure that these companies have the full 30-day window to review invoices. The National Association of Beverage Importers, Inc. supported the 30-day timeframe but said that it should be subject to a one-time additional 30-day extension.[222]

Similarly, NYNJFF&BA supported a 30-day timeframe generally, but said the timeframe should be allowed to be extended if both parties agreed to the extension.[223] (NYNJFF&BA did not put a time limit on how far the deadline could be extended so long as both parties were in agreement.) NYNJFF&BA also said that the 30-day clock for a VOCC receipt of a dispute must be extended to accommodate the request if the dispute was raised within the proper timelines from the final party billed.

Billed parties, such as shippers and their trade associations, generally argued that 30 days is insufficient. They argued that they need more time because shippers do not have the administrative bandwidth to examine each invoice carefully within 30 days and to determine if a dispute should be filed, particularly considering that some charges have unique and complex scenarios that need to be investigated before they are disputed.[224] Commenters noted that low administrative bandwidth could be caused by a variety of factors, including: the billed party being a small business,[225] because of high transactional volume,[226] or because of the use of third-party auditors.[227] Some commenters pointed out that a billed party's primary business is not transportation, as opposed to billing parties, so shippers are at a disadvantage relative to carriers in validating and disputing invoices. Some expressed concern that a 30-day period for submitting invoice disputes could be construed as a legal "condition precedent" to filing a claim and essentially function to shorten the statute of limitations for claims brought before the Commission.[228] The National Retail Federation pointed out that while the Commission said in the NPRM that it was basing the 30-day deadline on the UIAA, that shippers have never been a party to the UIAA.[229] As an alternative, several of these commenters argued that a 60-day time period is more appropriate.[230] Other billed parties, however, argued that 30 days is insufficient without proposing an alternative timeframe,[231] or proposed eliminating the timeframe requirement entirely.[232]

VOCCs and their trade associations asserted the proposal is unfair. Hapag-Lloyd (America) LLC argued that the proposal provides no consequences for failure to timely submit a dispute to an invoice, so it is unclear what incentive billed parties have to respond quickly.[233] The World Shipping Council said that billed parties face no consequences for failing to meet the deadline to dispute an invoice, while billing parties forfeit contractual rights by missing the deadline.[234] WSC argued that fundamental fairness, equal protection, and due process dictate the Commission must add language to impose similar requirements on billed parties, namely that they forfeit the right to request fee mitigation, refund, or waiver by failing to submit that request within 30-days from receiving the invoice. The Ocean Carrier Equipment Management Association, Inc. focused on the fact that the rule includes no flexibility for delays outside the billing parties' control, for instance caused by third parties, that prevent compliance with the 30-day deadline to issue invoices.[235] Finally, OCEMA argued that the 30-day deadline could turn out to create a disincentive principle since shippers or truckers in possession of equipment will no longer feel compelled to return it quickly as the unavailability of data or other tools to delay billing will prevent billing parties from meeting the 30-day deadline.

Commenters also expressed concern about the Commission setting strict deadlines for billing parties that could result in forfeiting contractual rights, with billed parties potentially facing no consequences for failing to meet the rule's deadlines. For instance, WSC, OCEMA, and Hapag-Lloyd all argued that it is unfair that billed parties face no consequences for failing to timely submit a dispute to an invoice. The Pacific Merchant Shipping Association (PMSA) agreed with WSC that the lack of consequences for billed parties is

[215] Harbor Trucking Association (FMC–2022–0066–0261).

[216] Shippers Coalition (FMC–2022–0066–0160); National Association of Chemical Distributors (FMC–2022–0066–0208); Consumer Brands Association (FMC–2022–0066–0210); Consumer Technology Association (FMC–2022–0066–0228); BassTech International LLC (FMC–2022–0066–0230); National Retail Federation (FMC–2022–0066–0231); National Milk Producers Federation/ U.S. Diary Export Council (FMC–2022–0066–0235); Connection Chemical (FMC–2022–0066–0236); Retail Industry Leaders Association (FMC–2022–0066–0259); National Association of Manufacturers (FMC–2022–0066–0264); National Industrial Transportation League (FMC–2022–0066–0277).

[217] DHL Global Forwarding (FMC–2022–0066–0219); CVI International (FMC–2022–0066–0217); International Association of Movers (FMC–2022–0066–0222).

[218] Hapag-Lloyd (America) LLC (FMC–2022–0066–0240); World Shipping Council (FMC–2022–0066–0242); Maher Terminals LLC (FMC–2022–0066–0269).

[219] FMC–2022–0066–0275.

[220] FMC–2022–0066–0184.

[221] *Id.*

[222] FMC–2022–0066–0238.

[223] FMC–2022–0066–0247.

[224] *E.g.,* Connection Chemical (FMC–2022–0066–0236); National Association of Chemical Distributors (FMC–2022–0066–0208).

[225] National Association of Chemical Distributors (FMC–2022–0066–0208).

[226] *E.g.,* Consumer Technology Association (FMC–2022–0066–0228); Retail Industry Leaders Association (FMC–2022–0066–0259).

[227] *E.g.,* National Retail Federation (FMC–2022–0066–0231).

[228] National Association of Chemical Distributors (FMC–2022–0066–0208).

[229] *Id.*

[230] Shippers Coalition (FMC–2022–0066–0160); Consumer Brands Association (FMC–2022–0066–0210); International Association of Movers (FMC–2022–0066–0222); National Milk Producers Federation/U.S. Dairy Export Council (FMC–2022–0066–0235); Retail Industry Leaders Association (FMC–2022–0066–0259).

[231] *E.g.,* Connection Chemical (FMC–2022–0066–0236); National Retail Federation (FMC–2022–0066–0231).

[232] National Association of Chemical Distributors (FMC–2022–0066–0208); BassTech International LLC (FMC–2022–0066–0230); National Industrial Transportation League (FMC–2022–0066–0277).

[233] FMC–2022–0066–0240.

[234] FMC–2022–0066–0242.

[235] FMC–2022–0066–0257.

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unfairly incongruous and inconsistent.[236] PMSA argued that if the consequences of failing to meet the prescribed deadlines are not removed for billing parties, then the rule should require billed parties to pay the charge if they have not disputed it within the 30-day deadline.[237]

FMC response: The Commission must balance the benefits to billed parties against the detriment to billing parties of an extended timeline to dispute invoices. The longer billed parties take to investigate charges, validate them, and marshal evidence, the longer billing parties remain in limbo about whether the billed party intends to pay. Billed parties advocated for an extended timeframe but did not provide compelling evidence of how long each part of the dispute process takes, for instance investigating invoices or validating charges. Nor did they explain how an extended timeframe for billed parties to evaluate invoices helps facilitate the movement of cargo. The rule's new deadlines ensure billed parties are not scrambling to unearth ancient evidence to dispute stale invoices, and the Commission is not convinced by the evidence billed parties presented in support of extending the timeframe.

Further, the regulatory timeframe for disputes serves only as a minimum timeframe billed parties must permit dispute. The timeframes are not designed or intended to control in every dispute scenario. They are intended to ensure billing parties provide some minimum time for a billed party to dispute an invoice. The billing and billed parties can agree to extend the timeframe, or the billed party can file a complaint with the Commission at any time. Nothing in the final rule prevents a billed party from filing a complaint during the 30-day dispute deadline or prevents a billed party from filing a complaint with the Commission even though they did not dispute the charge with the billing party during the 30-day timeframe.

Based on this record, the Commission has removed the language from § 541.8(b) stating that a billed party was not required to pay an invoice if a billing party takes longer than 30 days to resolve a dispute. The Commission also added language to § 541.8(b) to allow the parties to agree to longer timeframes for the dispute resolution process. These changes better allow for the balancing of benefits that this process requires.

[236] FMC–2022–0066–0233.

[237] *Id.*

2. § 541.8(b), Resolution of Dispute

(a) 30-Day Timeframe

Issue: The Commission proposed giving parties 30 days to resolve a disputed demurrage or detention invoice charge. Thirty-nine comments were submitted on this issue. Thirty comments supported or supported with qualification the proposal (8 BCOs,[238] 5 NVOCCs/OTIs/Customs Brokers/3PLs,[239] 13 Motor Carriers,[240] 3 VOCCs/MTOs,[241] and 1 Federal agency [242]). Six comments were opposed (all BCOs).[243] The other three comments (all NVOCCs/OTIs/Customs Brokers/3PL) that were submitted neither clearly supported nor opposed the proposal.[244]

Consumer Technology Association was concerned that the process would be subject to abuse and potentially undermine incentives of demurrage and detention charges.[245] The commenter was particularly concerned with the possibility of parties overwhelming a carrier with requests for waivers/refunds with the express intent of making it impossible for the carrier to act within 30 days. They said the Commission should make clear that:

(1) carriers may adopt reasonable documentation requirements for claims for waivers/refunds, and that carriers do not waive their right to collect charges when they do not act on claims that fail to comply with reasonable documentation requirements;

(2) claims that are not submitted to carriers via the informal dispute process are presumed reasonable and the burden of proof as to the unreasonableness of such charges shifts back to the entity challenging the charge;

(3) Abuse of the informal dispute resolution process (*e.g.,* by submitting excessive or frivolous claims) may constitute a violation of 46 U.S.C. 41102(a). (Alternatively, that abuse of the system creates a presumption that the charge was reasonable that must be overcome by the party challenging same);

(4) At an absolute minimum, indicate that: billed parties have an obligation to act in good faith when disputing invoices, that submission of excessive and/or frivolous disputes does not constitute good faith, and that charges that are the subject of waiver/refund requests not submitted in good faith are to be presumed reasonable.

Other commenters who opposed the proposed regulation, generally said that they disagreed with it because it did not account for those instances when more than 30 days is required to investigate and reach a final resolution.[246] Some commenters who generally supported the regulation agreed with these concerns. (The dividing line between support and opposition generally came down to those that supported some type of alternative timeframe to the strict 30 days in the NPRM and those that would eliminate a specified timeframe entirely.) For example, the World Shipping Council generally supported the proposal but recommended that the 30-day period be subject to a single extension request of a second 30-day period.[247] Maher Terminals supported having a specific timeframe but said that instead of 30 days, the timeframe should be extended to 90–120 days.[248]

FMC response: The Commission has decided to maintain a 30-day dispute resolution timeframe, but in response to these comments has created an exception to allow for resolution beyond 30 days when a later date has been agreed to by both parties. The Commission has also clarified in the text that the 30-day deadline is 30

[238] Northwest Horticultural Council (FMC–2022–0066–0178); American Chemistry Council (FMC–2022–0066–0184); International Housewares Association (FMC–2022–0066–0187); MICA/NAMI (FMC–2022–0066–0188); Tyson Foods, Inc. (FMC–2022–0066–0225); National Association of Beverage Importers, Inc. (FMC–2022–0066–0238); International Dairy Foods Association (FMC–2022–0066–0244); Agriculture Transportation Coalition (FMC–2022–0066–0275).

[239] International Tank Container Organisation (FMC–2022–0066–0096); Excargo Services Inc. (FMC–2022–0066–0151); Seafrigo USA Inc. (FMC–2022–0066–0223); New York New Jersey Foreign Freight Forwarders and Brokers Association, Inc. (FMC–2022–0066–0247); APL Logistics, Ltd (FMC–2022–0066–0271).

[240] BW Mitchum Trucking Co. (FMC–2022–0066–0110); GBA Transport (FMC–2022–0066–0152); Triple G Express (FMC–2022–0066–0154); MacMillan-Piper, Inc. (FMC–2022–0066–0159); Bridgeside Inc.(FMC–2022–0066–0179); Intermodal Motor Carriers Conference (FMC–2022–0066–0189); Eagle Systems, Inc. (FMC–2022–0066–0203); Bi-State Motor Carriers (FMC–2022–0066–0212); California Trucking Association (FMC–2022–0066–0220); Maryland Motor Truck Association, Inc. (FMC–2022–0066–0241); Virginia Trucking Association (FMC–2022–0066–0260); Harbor Trucking Association (FMC–2022–0066–0261); California Trucking Association (FMC–2022–0066–0270).

[241] American Association of Exporters and Importers (FMC–2022–0066–0168); World Shipping Council (FMC–2022–0066–0242); Maher Terminals LLC (FMC–2022–0066–0269).

[242] U.S. Department of Agriculture (FMC–2022–0066–0274).

[243] Consumer Technology Association (FMC–2022–0066–0228); National Retail Federation (FMC–2022–0066–0231); National Milk Producers Federation/U.S. Diary Export Council (FMC–2022–0066–0235); Retail Industry Leaders Association (FMC–2022–0066–0259); National Association of Manufacturers (FMC–2022–0066–0264); National Industrial Transportation League (FMC–2022–0066–0277).

[244] CVI International (FMC–2022–0066–0217); DHL Global Forwarding (FMC–2022–0066–0219); International Association of Movers (FMC–2022–0066–0222).

[245] Consumer Technology Association (FMC–2022–0066–0228).

[246] *E.g.,* National Retail Federation (FMC–2022–0066–0231); Retail Industry Leaders Association (FMC–2022–0066–0259).

[247] FMC–2022–0066–0242.

[248] FMC–2022–0066–0269.

calendar days. The rule does not prescribe or prohibit the billing party from imposing reasonable consequences on the billed party for failing to dispute the charge during the 30-calendar-day period.

(b) What does ''resolve'' mean?

Issue: The Commission received several comments concerning what ''resolve'' means in the proposed regulation.[249] These commenters said it was unclear from the text of the proposed regulation whether a refund, if one were to be issued, or other final form of redress, needed to be completed within the 30-day deadline, or whether the parties merely needed to come to an agreement for resolution of the matter and final tender could be after the 30 day deadline. Two commenters, Mediterranean Shipping Company [250] and the World Shipping Council,[251] requested that the Commission formally define the term in the rule. American Chemistry Council had similar concerns, but instead of requesting that ''resolution'' be defined, they requested that the Commission codify into the regulation that final redress be completed within the 30-day limit.[252] Shippers Coalition expressed their concern that the proposed language would result in billing parties just saying ''no'' to a request for mitigation/refund/waiver, in order meet the 30-day deadline.[253] To address this concern, Shippers Coalition proposed amending § 541.8(b) to include an additional sentence such as: ''In considering a request for mitigation, refund, or waiver of fees, a common carrier shall consider that under 46 U.S.C. 41310(b) a common carrier shall bear the burden of establishing the reasonableness of any demurrage or detention charges.'' [254]

FMC response: The Commission has amended § 541.8(b) to: (1) require attempted resolution, rather than resolution, within 30 days; and (2) allow extension of the timeframe, if such a later date is agreed to by the parties. The Commission recognizes that this change will mean that the rule will no longer impose definite outer limits for closing out of a disputed transaction. These changes, however, further the goal of building better relationships in the demurrage and detention context between the billing and billed parties, the parties that know the most about the transaction. While parties can come to the Commission at any time during the process, the Commission wants to encourage to the fullest extent possible good-faith efforts for resolution between the parties when disagreements occur.

We decline to formally define ''resolution'' or ''attempted resolution'' because what these terms mean in any particular instance will be determined based upon mutual agreement of the involved parties. The Commission believes it is acceptable for some ambiguity, especially given that the Commission has removed the penalty of the billed party not having to pay the invoice if the parties do not come to a resolution. Applying the normal meaning of the word, resolution of a request includes payment by the billing party of any refund due to the billed party.

As noted above, § 541.8 does not impact a party's right to file a Charge Complaint with the Commission. Parties do not need to wait a certain period of time or for a triggering event to occur prior to filing a complaint under § 541.8. Parties interested in filing a Charge Complaints at the Commission may do so by following the *Interim Procedures for Submitting ''Charge Complaints.''* [255]

(c) Penalty

Pacific Merchant Shipping Association (PMSA) argued that voiding an invoice is a harsh result.[256] PMSA disagreed with the Commission's conclusion that voiding a charge in its entirety is the only potential remedy of consequence that the Commission could establish, or that this penalty is consistent the Commission's current practices or the Congressional mandates in OSRA 2022. PMSA stated that such a conclusion flies in the face of the Commission's charge compliant process and argued that even if this penalty were intended to be punitive, it exceeds the congressional direction and authority granted to the Commission in OSRA 2022. PMSA noted that OSRA 2022, at section 7(b), directs the Commission to conduct the present rulemaking in order to ''further clarify reasonable rules and practices'' regarding demurrage and detention, and to determine ''which parties may be appropriately billed for any demurrage, detention, or other similar per container charges.'' PMSA argued that Congress did not authorize the Commission to adopt new penalties whereby demurrage and detention charges would be eliminated as a punishment for violating a prohibited practice, and that the rule contravenes Congress' wishes in this regard.

Furthermore, PMSA argued that because the Charge Complaint process is available to any billed party, § 541.8(b) could have been set up in any number of more reasonable and less punitive ways to address a non-responsive billing party and still be within the scope of clarifying the process, such as introducing a rebuttable presumption against a non-responsive billing party or foreclosing certain defenses against a non-responsive billing party in the Complaint process.

FMC response: In consideration of these concerns, the Commission has removed the provision from § 541.8(b) that allows the billed party to avoid paying the invoice if the dispute is not resolved within 30 days. Although that provision had been added to speed up and incentivize the dispute resolution process, this was not a requirement that was mandated by OSRA 2022. By contrast, the rule keeps the requirement of 46 U.S.C. 41104(d)(1) and codified in 46 CFR 541.5, regarding voiding an invoice that does not include the necessary information, because this requirement was mandated by OSRA 2022.

(d) Release of Cargo During Dispute

Issue: The Commission received a few comments concerning the ability to hold cargo as a lien against demurrage and detention invoices when an invoice is disputed. Commenters were concerned not only about the cargo that is the subject of a dispute but also about the potential for lockouts of non-related cargo.

Mediterranean Shipping Company argued that cargo that is the subject of a disputed demurrage or detention invoice should be permitted to be maintained by the billing party pending payment.[257] FedEx Trade Networks argued, in contrast, that when a demurrage or detention charge is in dispute, the billing party should be required to release the cargo that is the subject of a disputed charge.[258]

[249] *E.g.,* International Tank Container Organisation (FMC–2022–0066–0096); Dole Ocean Cargo Express, LLC (FMC–2022–0066–0201); Mediterranean Shipping Company (FMC–2022–0066–0142); World Shipping Council (FMC–2022–0066–0242); American Chemistry Council (FMC–2022–0066–0184); Shippers Coalition (FMC–2022–0066–0160); New York New Jersey Foreign Freight Forwarders and Brokers Association, Inc. (FMC–2022–0066–0247).

[250] FMC–2022–0066–0142.

[251] FMC–2022–0066–0242.

[252] FMC–2022–0066–0184.

[253] FMC–2022–0066–0160.

[254] *Id.*

[255] *Industry Advisory—Interim Procedures for Submitting ''Charge Complaints'' Under 46 U.S.C. 41310*—Federal Maritime Commission—Federal Maritime Commission (*fmc.gov*) (posted July 14, 2022) (*https://www.fmc.gov/industry-advisory-interim-procedures-for-submitting-charge-complaints/*).

[256] FMC–2022–0066–0233.

[257] FMC–2022–0066–0143.

[258] FMC–2022–0066–0165.

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A third alternative was proposed by Consumer Technology Association.[259] CTA argued that during a dispute resolution period, the billing party should be required to release the billed party's property so long as the billed party pays the undisputed portion of an invoice.

The joint comment of the Meat Import Council of America and North America Meat Institute said that it is a common practice by VOCCs to hold additional, unrelated cargo from being released until all outstanding invoices are paid, even when the receiving party may be contesting the validity of those original invoices.[260]

MICA/NAMI said that when invoiced charges are contested by the receiving party, it is unacceptable for VOCCs to ''lock out'' that entity from all future business with the VOCC until those outstanding fees are paid. MICA/NAMI argued that the current practice does not comport with the tenets of the Incentive Principle, and that allowing it to continue would dissuade importers and exporters, as well as third party service providers, from availing themselves of any dispute settlement mechanisms that are available given the need to service other, unrelated loads with the VOCC.

The Retail Industry Leaders Association echoed similar concerns of MICA/NAMI, stating that a common complaint among its members is the practice of ocean common carriers and MTOs refusing to provide additional bookings to a BCO unless the BCO or another entity in the supply chain pays outstanding detention and demurrage charges that are under dispute.[261] According to RILA, this practice is often used as a way of forcing a BCO to abandon a dispute with the carrier or MTO and pay the charges due. The Association noted that this practice could take several forms, including a demand for payment upon receipt of an invoice. The Association expressed its concern that this practice could be used to circumvent the text and purpose of the rule and recommended that the Commission thus prohibit it.

FMC response: This rule does not impact traditional cargo lien rights. This rule allows billing parties to make their own business decisions about whether or not they require demurrage and detention charges to be paid prior to releasing cargo or whether or not to release cargo conditionally or unconditionally.

The Commission does not believe that leaving the issue of not allowing additional bookings unaddressed will result in circumvention of the rule. The main purpose of this rule is to provide clarity and transparency of invoices and the billing process. This rule also eliminates the practice of issuing invoices to multiple parties in the hopes that one of them will pay it, which was one of the concerns raised by RILA.

I. Rail

1. Through Bill of Lading

Issue: One NVOCC/OTI requested that the Commission explicitly state in § 541.2 whether the rule applies demurrage and detention billing originating from the rail for the rail leg of a through bill of lading.[262]

FMC response: 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, including violations occurring under OSRA 2022, and associated implementing regulations.[263] These cases are discussed in greater detail below.

2. Storage and Demurrage Fees for Shipments Moving on Through Bill of Lading

Issue: National Customs Brokers & Forwarders Association of America, Inc. requested guidance as to whether the proposed definition of ''demurrage and detention'' would cover certain storage or demurrage fees for shipments moving on through bills of lading.[264] Two other commenters, John S. Connor, Inc.[265] and CV International,[266] specifically requested that inland rail be included in the definition of ''demurrage and detention'' to account for storage at inland rail terminals.

FMC response: The Commission declines to make a specific addition to the definition of ''demurrage and detention'' to add inland rail. This is an issue that has been raised in the National Shipper Advisory Committee (NSAC) and continues to be examined by the Commission.[267] The Commission has direct jurisdiction over common carriers, marine terminal operators (MTOs), and ocean transportation intermediaries (OTIs).[268] This includes jurisdiction over ''through transportation,'' meaning continuous transportation between the origin and destination and is offered or performed by one or more carriers, at least one of which is a common carrier under the Shipping Act. As such, 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. The Commission has long held that its jurisdiction extends to ocean cargo that is shipped under a through bill of lading to a final destination in the United States. The Supreme Court addressed this issue in *Norfolk Southern Railway Co.* v. *Kirby,* 543 U.S. 14 (2004), which held that inland transportation pursuant to a through bill of lading does not change the fact that the bill of lading is a maritime contract. This case addressed the delivery of machinery from Australia to Huntsville, Alabama, on a through bill of lading. The machinery arrived in Savannah, Georgia, by way of an ocean vessel, where it was discharged and loaded onto a train whose ultimate destination was the inland port of Huntsville. The train derailed en route to Huntsville, causing damage to the machinery.[269] The Supreme Court decided *Norfolk Southern Railway Co.* under admiralty law even though the machinery's damage arose from the train crash because the inland rail portion was pursuant to through bills of lading, which the court noted were ''essentially, contracts'' for the transportation of the goods. These bills of lading were ''maritime contracts because their primary objective is to accomplish the transportation of goods by sea from Australia to the eastern coast of the United States.'' [270]

This principle has become settled in Commission case law decided under the Shipping Act. For example, in *Mitsui O.S.K. Lines Ltd.* v. *Global Link Logistics, Inc., Olympus Partners, Olympus Growth Fund III, L.P, Louis J. Mischianti, David Cadenas, Keith Heffernan, CJR World Enterprises, Inc. and Chad J. Rosenberg,* the Commission stated that the Shipping Act of 1984's legislative history specifically recognized intermodalism ''as an important component of ocean transportation, and the implications of intermodalism for ocean transportation

[259] FMC–2022–0066–0228.

[260] FMC–2022–0066–0188.

[261] FMC–2022–0066–0259.

[262] FedEx Trade Networks Transport & Brokerage, Inc. (FMC–2022–0066–0165).

[263] *See Norfolk Southern Railway Co.* v. *Kirby,* 543 U.S. 14; *see also Mitsui O.S.K. Lines Ltd.* v. *Global Link Logistics, Inc., Olympus Partners, Olympus Growth Fund III, L.P, Louis J. Mischianti, David Cadenas, Keith Heffernan, CJR World Enterprises, Inc. and Chad J. Rosenberg* (2011 WL 7144008 (F.M.C.) January 30, 2014).

[264] FMC–2022–0066–0180.

[265] FMC–2022–0066–0267.

[266] FMC–2022–0066–0217.

[267] *https://www.fmc.gov/industry-oversight/national-shipper-advisory-committee/.*

[268] *See* 46 U.S.C. 40901–40904, 41104, 41106.

[269] 543 U.S. at 18–19.

[270] *Id.* at 24 (internal citations omitted).

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were addressed.'' [271] In particular, the legislative history ''recognized that an ocean carrier's use of a single intermodal tariff could save shippers time and allow them to avoid having to arrange the transfer of cargo from one transportation mode to another.'' The legislative history further stated that ''when an ocean carrier offers an intermodal service, that carrier has the single responsibility for assuring the delivery of cargo from point to point, and only that carrier needs to be concerned with the arrangements for transferring the cargo between modes. Furthermore, this process involves a single bill-of-lading rather than multiple bills of lading.'' [272]

In *Mitsui,* the Commission also stated that ''the intermodal nature of ocean transportation was reflected in the [Shipping] Act's inclusion of definitions of 'through rate' and 'through transportation,' '' which were ''in recognition of the need to permit the employment of modern intermodalism concepts and practices in our foreign trade.'' [273] As such, the Commission concluded that ''given this legislative history, it appears that Congress intended to extend the Commission's jurisdiction to encompass through rates and through transportation. Congress specifically noted the use by ocean carriers of single intermodal bills of lading, such as those involved in this case, to cover shipments going to inland destinations or points.'' [274]

Given this discussion, it remains the Commission's position that it has jurisdiction over ocean cargo that is shipped under a through bill of lading to a final destination in the United States. This rulemaking does not change the Commission's authority over merchandise carried pursuant to a through bill of lading.

3. Amending the Definition of ''Demurrage and Detention''

Issue: One commenter requested that the Commission add ''storage'' to the definition of ''demurrage and detention,'' as well as including rail/inland depot space in the definition.[275] There, the commenter reasoned that on through bills of lading, the VOCC is responsible for transporting cargo inland via rail, and that the same demurrage and detention billing regulations should apply to rail storage/demurrage.

FMC response: The Commission declines to add storage to the definition of ''demurrage and detention.'' The terms ''detention and demurrage'' are used extensively in the shipping industry, and they are not generally defined within the industry to include ''storage.'' Expanding the definition to include ''storage'' is beyond the scope of this rulemaking.

J. Paperwork Reduction Act

Issue: One commenter asserted that the Commission violated the Paperwork Reduction Act of 1995 (PRA) because ''it does not appear that any effort was made to realistically assess the time or cost burdens imposed by the rule[.]'' [276]

FMC response: The Commission complied with PRA requirements. In accordance with 5 CFR 1320.11, in the NPRM, the Commission discussed costs associated with the information collection outlined in the proposed rule, and the bases for those costs.[277] The Commission requested comments on the information collection generally, and specifically requested comments on the accuracy of the burden estimate. Neither the commenter [278] nor anyone else submitted a comment on the proposed information collection. While some commenters on the NPRM, particularly MTOs, generally asserted concerns about potential burdens that the rule would impose on them, neither this particular commenter nor any other commenter provided data or information to the Commission that directly challenged the FMC's burden calculation or provided additional information to improve the calculation estimate.[279]

K. Miscellaneous Comments

1. Requests for Additional Regulations

Issue: While many commenters expressed support for this rulemaking, a number of them mentioned items they thought required further action by the Commission. In particular, the Cheese Importers Association of America (CIAA) noted that even with the regulation's change to billing practices, there are operational practices that are still harming food importers.[280] This included charging detention and demurrage even when parties cannot access their shipping containers, when the ship did not go to the proper port, and when the carrier failed to properly notify that the container was available for pick up. CIAA requested that the Commission develop a reasonable standard regarding delivery practices. Similarly, the Northwest Horticultural Council (NHC) stated that the Commission should take further action to clarify reasonable detention and demurrage practices and make sure shippers are not unreasonably charged in situations where delays are beyond their control, an issue that was echoed in a comment by an anonymous exporter.[281] This exporter also noted that a number of issues regarding earliest return dates could be ripe for Commission regulation.

Pacifica Trucks LLC stated that in addition to the invoicing rules that this regulation encompasses, the Commission should address ocean carriers' application of demurrage and detention fees in other situations that Pacifica Trucks considers unfair.[282] In particular, Pacifica Trucks opined that the Commission should ban ocean carriers from assessing demurrage and detention fees in the following situations: when the carrier's intermodal marine or terminal truck gate is closed; when the carrier's intermodal marine or terminal does not offer unrestricted appointments to pick up cargo; when the motor carrier documents an unsuccessful attempt to make an appointment for either a loaded or empty container and no other unrestricted appointments were available; when the intermodal marine container terminal diverts equipment from the original interchange location without 48 hours' notice to the motor carrier; when a loaded container is not available for pickup when the motor carrier arrives at the intermodal marine terminal, or the area containing the cargo is closed or inaccessible; when the intermodal marine terminal is too congested to accept the container and turns the motor carrier away; when the carrier's intermodal marine terminal unilaterally imposes transaction restrictions such as chassis matching or empty container requirements that prevent a transaction and fail to provide a return location or other conditions that impede the motor carrier's ability to pick up or return their containers.

In addition, the Harbor Trucking Association requested Commission action on the return of empty containers, as well as standardizing

[271] 2011 WL 7144008 (F.M.C.) January 30, 2014.

[272] *Id.* at 6, citing H.R. REP. NO. 98–53, pt. 1, at 13 (1983).

[273] *Id.* at 6, citing H.R. REP. NO. 98–53, pt. 1, at 29.

[274] *Id.* at 6.

[275] CV International, Inc. (FMC–2022–0066–0217).

[276] Ocean Carrier Equipment Management Association, Inc. (FMC–2022–0066–0257).

[277] 87 FR 62341, 62356.

[278] Ocean Carrier Equipment Management Association, Inc. (FMC–2022–0066–0257).

[279] *Regulations.gov,* Docket FMC–2022–0066 and *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202210-3072-001#* (last visited June 12, 2023).

[280] FMC–2022–0066–0265.

[281] FMC–2022–0066–0178.

[282] FMC–2022–0066–0118.

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payment practices such as payment centers having differing hours of operation, delays in payment processing and the need for consistency as to how free days are applied.[283] Other commenters raised similar issues.

FMC response: The Commission agrees that these are important issues but concludes that they are outside the scope of this rulemaking. The Commission thanks commenters for their thoughtful input on these issues.

2. APA Challenge

Issue: Three commenters asserted that the NPRM violates the Administrative Procedure Act (APA).[284]

The World Shipping Council argued that the proposed rule violates the APA ''because the Commission's replacement of the Interpretive Rule and the Incentive Principle with a series of bright-line rules represents a clear departure from its past precedent on detention and demurrage without any reasonable explanation.'' WSC elaborated, saying:

> [T]he Commission's proposed bright-line regulations on which parties can be billed cannot logically coexist with its current policies under the Interpretive Rule, which employs a case-by-case analytical tool and the Incentive Principle to determine if a carrier, MTO, or OTI's detention and demurrage billing practices are reasonable. The proposed rules and the Interpretive Rule cannot coexist because there are numerous instances when it is not only reasonable for carriers to take actions prohibited by this proposed regulation, but to do otherwise would disincentivize the fluid movement of freight through the supply chain. The predictable result is a proposal that is not only unworkable and unreasonable as a matter of policy, but per se arbitrary and capricious as a matter of law.

The National Association of Waterfront Employers and Port Houston said that in contravention of 46 CFR 545.4(b)'s requirement that an unjust and unreasonable practice must be something that occurs on a ''normal, customary, and continuous basis,'' this rule, as proposed would penalize MTOs for any isolated, one-off invoice omission, and apply the penalty to the entire invoice, including as to charges that may not be implicated by the mistake at issue. These commenters said that: ''In effect, this regulation would be an implicit repeal of the existing regulatory definition of ''unjust and unreasonable practices'' under 46 CFR 545.5 as it relates to MTO demurrage charges, without an opportunity for public comment on such repeal, as required by the APA.''

FMC response: The Commission disagrees with the commenters' characterization of this action and assertion of APA violations. The rule's provisions have been extensively explained by the agency, and the rule is implemented by the Commission in accordance with the APA's rulemaking procedures under 5 U.S.C. 553. As noted above, the Commission has twice solicited public input on the proposal to regulate MTO invoicing. The Commission stated unequivocally in the NPRM that MTOs would be subject to this rule. MTOs have had repeated public notice that the Commission was considering regulating MTO demurrage and detention invoicing, so the Commission disagrees with concerns that the rule lacked adequate public notice and comment.

As for concerns that this rule implicitly overrules the Commission's Interpretive Rule at 46 CFR 545.4, these concerns have also been previously addressed. Any argument about what parts of the Interpretive Rules at 46 CFR 545.4 and 545.5 remain in force is inherently an argument about that guidance and not about whether this rule complies with the APA. OSRA 2022 specifically required the Commission to issue rules under 46 U.S.C. 41102(c) that further define the prohibited practices by common carriers, marine terminal operators, and shippers, regarding the assessment of detention or demurrage charges. The plain language of this direction and the plain language of 41104(d) do not require evidence of multiple violations. This view is further supported by 46 U.S.C. 41104(f) which functions to void an invoice if a single required element is not included, not when the complainant can show multiple instances of such behavior.[285] To the extent that this rule requires a change in the narrow context of the Commission's guidance on how it will apply 46 U.S.C. 41102(c) to MTO demurrage and detention invoicing, this rule merely implements changes made by Congress.

In response to NAWE and Port Houston, the Commission has amended § 541.5 to read ''applicable charge'' rather than ''applicable invoice.'' This change mirrors the statutory language of 46 U.S.C. 41104(f). It was not the Commission's intent to imply that a failure to include the mandatory invoice requirements related to detention and demurrage charges would void non-detention or demurrage charges that might appear on the same invoice.

3. Extended Implementation Time Period

Issue: The Commission received four requests for delayed implementation of the final rule. Two MTOs requested an implementation date of no less than 120 days from publication of any final rule.[286] The Intermodal Association of North America (IANA) requested no less than 90 days, saying that would be the minimum amount of time needed they would need to make necessary changes to the UIAA associated with implementation of § 541.7(a).[287] The third MTO requested delayed implementation but did not propose a specific timeframe.[288]

FMC response: The agency is delaying the general effective date of this rule 90 days from publication in the **Federal Register** and § 541.6's implementation is delayed pending approval of the associated Collection of Information by the Office of Management and Budget. The Commission believes that the additional days of general implementation together with any additional waiting period for OMB approval of the Information Collection will provide industry with sufficient time to implement all changes required by this rule.

4. Requests for Hearing and Additional Public Comment Period

Issue: The Commission received two requests for a hearing so that the Commission could further hear from stakeholders about impacts and potential unintended consequences of implementing the rule.[289]

FMC response: After careful consideration, the Commission declines to establish another round of public comments or to hold the requested hearings. The Commission has already issued an ANPRM and an NPRM on this subject. As such, there have been two opportunities for public comments on these matters. As demonstrated by the number and quality of the comments received, the Commission believes that the ANPRM and the NPRM have

[283] FMC–2022–0066–0261.

[284] World Shipping Council (FMC–2022–0066–0242); National Association of Waterfront Employers (FMC–2022–0066–0276); Port Houston (FMC–2022–0066–0268).

[285] *See also* 46 U.S.C. 41310(b) (Charge complaints authority states that Commission is required to investigate compliance with section 41102 of ''the charge'' received and does not specify that multiple instances must be alleged for the Commission to investigate and order a refund and/or civil penalty).

[286] West Coast MTO Agreement (FMC–2022–0066–0229); Fenix Marine Services, Ltd. (FMC–2022–0066–0186).

[287] West Coast MTO Agreement (FMC–2022–0066–0229).

[288] CMA CGM (America) LLC (FMC–2022–0066–0183).

[289] National Retail Federation (FMC–2022–0066–0231); National Industrial Transportation League (FMC–2022–0066–0277).

provided the public and interested parties with sufficient opportunity to comment on the underlying issues. As such, the Commission believes that a hearing or additional opportunity for public comment is unnecessary. In addition, the Commission is not making significant changes to the final regulations such that a Supplementary Notice of Proposed Rulemaking (SNPRM) would be warranted.

5. Costs and Benefits Analysis

Issue: Three commenters asserted that the Commission did not adequately assess costs and benefits of the proposed rule in the NPRM and that the Commission violated Executive Order 13579.[290]

FMC response: The Commission provided an estimate of the costs for regulated entities to implement the proposed rule to be between $6.3 and $12.7 million.[291] As discussed above with regards to comments concerning the Paperwork Reduction Act, the Commission did not receive information from these, or any other commenters, to support changing that estimate. The Commission highlights for the awareness of these commenters that, as an independent agency, the Commission is not subject to the same cost benefit analysis requirements as non-independent agencies. Executive Order 13579 was written taking into account the unique nature of independent agencies. The Executive Order does not require independent agencies to take specific actions, nor does it impose mandates on independent agencies to comply with Executive Order 12866, Executive Order 13563, or any other Executive order.

IV. Summary of Final Rule and Changes From the NPRM

§ 541.1 Purpose

There are no changes from the text proposed in the NPRM.

§ 541.2 Scope and Applicability

This final rule makes minor changes to the text proposed in the NPRM. In paragraph (a), ''to a billed party or their designated agent'' has been removed. ''To a billed party'' has been removed because part 541 also covers demurrage or detention invoices that are sent to persons who are not a ''billed party'' as defined in § 541.3. ''Or their designated agent'' has been removed as the text is unnecessary. Traditional rules of agency remain applicable under the Shipping Act.[292] In paragraph (b), ''regulation'' has been replaced with ''part.'' ''Regulation'' was a scrivener's error in the proposed text. While ''regulation'' is sometimes used to describe a rule in totality, it more frequently is used to describe a single section or subsection of the Code of Federal Regulations. ''Part'' is more precise and, most importantly, aligns with the Code of Federal Regulation's organizational taxonomy.

Part 541 governs any invoice issued by an ocean common carrier or non-vessel-operating common carrier for the collection of demurrage or detention charges. Part 541 does not govern the billing relationships among and between ocean common carriers and marine terminal operators. The Commission has not received information about the relationships or interactions between VOCCs and MTOs that warrants regulating the format used by MTOs to bill VOCCs. At the present time, the Commission is confident that the strong commercial relationships between the parties is enough to ensure that the proper information is shared and that the party who ultimately receives the invoice is receiving accurate information. Part 541 does apply to all other demurrage and detention invoices issued by MTOs. MTOs often do not have direct contractual relationships with shippers. However, MTOs are entitled to separately assess demurrage as an implied contract provided that it is published as part of an MTO Schedule and there are some situations where marine terminal operators impose fees directly on shippers and NVOCCs. A primary concern of the Commission is to ensure billed parties understand the demurrage or detention invoices they receive. Therefore, in those cases where an MTO charges any party other than a VOCC detention or demurrage charges, the Commission finds that MTOs should be subject to the same regulations that apply to VOCCs and NVOCCs.

§ 541.3 Definitions

This final rule makes three changes from the text proposed in the NPRM. ''Billing dispute'' has been removed and ''consignee'' and ''person'' have been added as defined terms. ''Billing dispute'' does not need to be defined because it is not a term used in §§ 541.4–541.99, in either the NPRM or final rule.

Billed party. For purposes of part 541, ''billed party'' means the person receiving the demurrage or detention invoice and who is responsible for payment of any incurred demurrage or detention charge.

Billing party. For purposes of part 541, ''billing party'' means the VOCC, NVOCC, or MTO who issues a demurrage or detention invoice. While in most cases, the billing party will be a VOCC, this term is defined broadly to incorporate the occasions when an MTO or an NVOCC may issue a demurrage or detention invoice.

Consignee. The definition of ''consignee'' that has been added to § 541.3 comports with the definition of ''consignee'' that appears in § 520.2.

Demurrage or detention. ''Demurrage or detention'' includes any charge assessed by common carriers and marine terminal operators related to the use of marine terminal space or shipping containers. The scope of the term in § 541.3 is the same as the scope of ''demurrage or detention'' in § 545.5(b). It encompasses all charges having the purpose or effect of demurrage or detention regardless of what those charges may be called by the billing party. The definition excludes charges related to equipment other than containers, such as chassis, because depending on the context, ''per diem'' can refer to containers, chassis, or both.

Demurrage or detention invoice. For purposes of part 541, ''demurrage or detention invoice'' means any statement, printed, written, or accessible online, that documents an assessment of demurrage or detention charges. This broad definition includes all currently existing methods of invoicing shipping (*e.g.,* email and online portal), as well as those that may be developed in the future.

Person. The definition of ''person'' that has been added to § 541.4 aligns with § 515.2(n).

§ 541.4 Properly Issued Invoices

This final rule makes changes to the proposed § 541.4 text to allow consignees to be issued demurrage and detention invoices as an alternative billed party. The revised regulation makes clear that the consignee is an alternative billed party, and the same invoice may be not issued to both the shipper and the consignee. Additionally, the Commission has made minor, non-substantive changes that aid in clarity.

If the billed party has firsthand knowledge of the terms of a service contract with a common carrier, then they are in a better position to ensure that both they and the carrier are abiding by those terms. When demurrage or detention invoice disputes

[290] TraPac, LLC (FMC–2022–0066–0136); National Association of Waterfront Employers (FMC–2022–0066–0276); Port Houston (FMC–2022–0066–0268).

[291] 87 FR 62342, 62356 (Oct. 14, 2022).

[292] *E.g., Landstar Exp. Am., Inc.* v. *Fed. Mar. Comm'n,* 569 F.3d 493, 495 (D.C. Cir. 2009).

do arise, the billed party is in a better position than third parties such as truckers and customs brokers to analyze the accuracy of the charge. Further, when the billed party disputes a charge, they have an existing commercial relationship with the billing party and are in a better position to resolve the dispute. Therefore, under this final rule, a properly issued invoice is an invoice that is issued to: (1) the person that has contracted with the billing party for the ocean transportation or storage of cargo, or (2) the consignee (when in contractual privity with the carrier).

In the final rule, the Commission has changed the word ''goods'' to ''cargo'' in § 541.4(a)(1). ''Cargo'' is a broader term that puts the focus on the container, rather than the items inside it. As such, this comports with the rule's focus on the container, as demurrage and detention charges are levied on the container rather than the items inside it.

''Contract'' in this rule has its normal and ordinary legal meaning.[293] Because contracts (other than contracts implied by law) require a meeting of the minds, merely listing a party on a bill of lading, or contract of affreightment, will not be sufficient for them to become a billed party for purposes of part 541 if they played no role in contracting for the ocean transportation or storage of cargo. Whether a meeting of the minds has occurred is something that can vary based on the specific circumstances of a given relationship. Because a contract can exist even if not memorialized in writing, the Commission declines to add a requirement that contracts need to be in writing for purposes of this rule. The Commission notes, however, that written contracts can provide important documentary evidence of agreement.

Consignees may be billed as an alternative to the shipper when the consignee is the party contracting for the shipping and is therefore in contractual privity with the carrier. Merely listing the consignee on the bill of lading is not sufficient to support billing the consignee. (Conversely, although rarer, it is possible to properly issue an invoice to a consignee that has not been listed on the bill of lading.)

This rule does not prohibit or otherwise limit an MTO from issuing any party—including BCOs or Motor Carriers—an invoice based on a Terminal Schedule, including charges for detention or demurrage, if the Terminal Schedule includes such charges and the Schedule has been made available in accordance with 46 CFR 525.3. As noted by the commenters, 46 U.S.C. 40501(f) and 46 CFR 525.2(a)(2) establish that such Schedules are enforceable as implied contracts. Under such a scenario, a Motor Carrier has a contractual relationship with the MTO and the terms of the contract (the Schedule) are known to the Motor Carrier in advance by operation of 46 CFR 525.3. This is a very different situation than where a Motor Carrier is billed for demurrage or detention and the Motor Carrier has no contractual relationship with the billing party and is not privy to the specifics of the contractual agreement (such as where a Motor Carrier is billed demurrage or detention based on an agreement between a shipper and a billing party).

This rule does require that when an MTO issues a bill for demurrage or detention for purposes of enforcing a Terminal Schedule, the billing must comply with part 541, including providing all the information required by § 541.6. The Commission recognizes that this may require MTOs to revise their current business practices. As discussed in the NPRM, the Commission's primary concern with this rule is to ensure that billed parties understand the demurrage or detention invoices they receive.[294] Any additional burden on MTOs to be able to provide the necessary data, which the Commission does not believe will be unduly burdensome, is outweighed by the benefits of transparency.

The Commission notes that other MTO billing relationships are also subject to part 541. For example, an MTO issuing a demurrage or detention invoice in order to collect on behalf of a VOCC or issuing a demurrage or detention invoice to an NVOCC must comply with part 541. However, MTOs sometimes require BCOs or their agents to pay freight charges prior to removal of cargo and those freight charges are excluded from the definition of ''demurrage and detention'' in § 541.3.

§ 541.5 Failure To Include Required Information

Under 46 U.S.C. 41104(f), failure to include any of the required minimum information in 46 U.S.C. 41104(d) eliminates the obligation of the charged party to pay the applicable charge. Section 541.5 is intended to mirror this requirement. To clarify that intent, the Commission has changed the paragraph from ''applicable invoice'' in the NPRM to ''applicable charge'' in this final rule. It was not the agency's intent to imply that non-demurrage or detention charges could be voided by failure to include the information in § 541.6.

Similarly, pursuant to 46 U.S.C. 41102(c), it is a prohibited practice for an MTO to fail to include the required minimum information in a demurrage and detention invoice sent to a party other than a VOCC. Sending incomplete bills that do not contain sufficient information for shippers to verify if the bills received are accurate would not constitute having just and reasonable practices relating to or connected with receiving, handling, storing or delivering property. Extending the elimination of charge obligations provision at 46 U.S.C. 41104(f) to MTOs issuing demurrage and detention invoices would enforce Congress' intent to have the Commission ''further define prohibited practices by . . . marine terminal operators, . . . under section 41102(c) of title 46, United States Code, regarding the assessment of demurrage or detention charges'' and ensure that all demurrage and detention bills sent to billed parties provide the necessary information for the bills to be paid or disputed quickly thereby ensuring efficiency across the shipping system.

§ 541.6 Contents of Invoice

This final rule makes minor changes to the proposed requirements regarding digital notification of how a billed party can request fee mitigation, refund, or waiver as well as minor, non-substantive changes to align language with OSRA 2022 and the defined terms in § 541.3.

The Commission has made changes throughout the regulation to align the text to the defined terms in § 541.3. ''Invoice'' has been replaced with ''demurrage or detention invoice.'' ''Billing date'' and ''billing due date'' have been changed to ''invoice date'' and ''invoice due date.'' Finally, ''invoiced party'' has been changed to ''billed party.''

In response to comments, the Commission has added language that clearly specifies that the information submitted on the invoice must be accurate. Inclusion of the language aligns with the language used in 46 U.S.C. 41104(d)(2).

The Commission has amended the introductory sentences of paragraphs (a), (b), and (c) to make clear that these are minimum information elements. Billing parties may include additional information on the invoices and are encouraged to do so if they believe that such information will be useful to billed parties in verifying the validity of demurrage and detention charges.

[293] *See, e.g., Norfolk Southern Railway Co.* v. *Kirby,* 543 U.S. 14, 16 (2004) (''[C]ontracts for carriage of goods by sea must be construed like any other contracts: by their terms and consistent with the intent of the parties''); *Contract,* Black's Law Dictionary (11th ed. 2019).

[294] *E.g.,* 87 FR 62341, 62347.

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The Commission has amended paragraph (c)(2) by adding terminal schedule to the listed examples of documents, and changing ''*i.e.,*'' to ''*e.g.,*'' to reflect that this is not an exhaustive list of all possible documents.

The Commission has amended paragraph (d)(2) to expand the means of digital notification to billed parties of what they need to do to successfully submit a fee mitigation, refund, or waiver request. The language in the proposed rule required that the invoice contain a URL address that directs the billed party to a publicly accessible website that provides the necessary information. This final rule has expanded that to any digital means, including QR codes, or digital watermarks.

§ 541.7 Issuance of Demurrage and Detention Invoices

This rule requires detention and demurrage invoices to be issued within specified timeframes. As the proposed timeframe language was ambiguous, in this final rule the Commission has clarified that all ''days'' in the regulation are calendar days.

The Commission is retaining the requirement as proposed in the NPRM that, generally, all demurrage and detention invoices must be issued in 30 days. The Commission has removed the language ''required timeframe'' from the version of § 541.7(a) that appeared in the NPRM in order to make this subsection clearer. The Commission has revised this subsection to more explicitly dictate the required timing for purposes of clarity.

In response to comments received during the NPRM, the Commission has revised § 541.7 to allow an exception for NVOCCs. That exception is located in paragraph (b) in this final rule. NVOCCs must issue demurrage and detention invoices within 30 days from the issuance date of the demurrage or detention invoice it received. If a billing party does not issue a demurrage or detention invoice within the required timeframe, then the billed party is not required to pay the charge. Paragraph (c) has been added to reflect situations where an NVOCC is acting as both a billing and billed party in relation to the same charge, and allows the NVOCC to inform its billing party that the charge has been disputed by the NVOCC's billed party. In that circumstance, the NVOCC must provide an additional 30 days for the NVOCC to dispute the charge upon notice.

The final language of § 541.7(d) has removed the link between a billing party reissuing an invoice with an incorrectly billed party's disputing of that invoice. This is consistent with the incentive present in the rest of the rule. The burden of issuing a correct invoice should not rely on an incorrectly billed party to dispute the incorrect invoice. Removing this link is also consistent with several comments that requested removing the 60-day requirement from § 541.7(d), which applied to bills sent to a correctly billed party following the billing of an incorrect party. Section 541.7(d) now gives a billing party 30 calendar days to issue a corrected invoice, which is consistent with the rule's purpose of a swift timeline for demurrage and detention billing.

The NPRM's linking a billing party's ability to reissue an invoice with an incorrectly billed party's disputing that invoice also caused confusion as to whether there was any interplay between § 541.7 and § 541.8. The changes to the rule text adopted in this final rule make clear that § 541.7 spells out the rules for issuing an invoice to the correctly billed party. By contrast, § 541.8 speaks to a process that assumes the invoice was sent to the correct party, as the term ''billed party'' encompasses the fact that it is the correct party.

§ 541.8 Requests for Fee Mitigation, Refund, or Waiver

This rule requires billing parties to allow at least 30 days for billed parties to submit a fee mitigation, refund, or waiver request. The Commission has retained the NRPM's proposal that if such a request is submitted by the billed party, the billing party must resolve the request within 30 days. However, based on public comments, the Commission has allowed an exception. A request for fee mitigation, refund, or waiver may be resolved later than 30 days if both parties agree to the later date. The Commission has added language to clarify that the timeframes in the regulation are calendar days. Also based on public comment, the Commission has removed the penalty provision proposed in the NPRM that if the billing party fails to resolve the fee mitigation, refund, or waiver request within the 30-day deadline, the billed party is not required to pay the charge at issue. This proposed penalty provision is not a requirement of OSRA 2022.

Section 541.8 does not impact a party's right to file a Charge Complaint with the Commission. Parties do not need to wait a certain period of time or for a triggering event to occur prior to filing a complaint. Parties interested in filing a Charge Complaints at the Commission may do so by following the steps outlined on the Commission's website.[295]

When the Commission receives sufficient information, it will promptly initiate an investigation.[296]

TABLE 1—CHANGES FROM NRPM TO FINAL RULE

Section	Paragraph	Change from NPRM	Reason
541.2 Scope and applicability	(a)	Removes "to a billed party or their designated agent".	Language unnecessary.
	(b)	Changes "regulation" to "part"	Correction of scrivener's error.
541.3 Definitions	"Billing dispute"	Definition removed	Language unnecessary. Correction of scrivener's error. Term not used in §§ 541.4–541.99.
	"Consignee"	Definition added	Final Rule allows consignees to be an alternative billed party.
	"Person"	Definition added	Clarification.
541.4 Properly issued invoices	(a)	Paragraph divided into subparagraphs (a)(1) and (2); consignees listed as an alternative billed party.	Final Rule allows consignees to be an alternative billed party.

[295] *Industry Advisory—Interim Procedures for Submitting ''Charge Complaints'' Under 46 U.S.C. 41310*—Federal Maritime Commission—Federal Maritime Commission (*fmc.gov*) (posted July 14, 2022) (*https://www.fmc.gov/industry-advisory-interim-procedures-for-submitting-charge-complaints/*).

[296] *Id.*

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TABLE 1—CHANGES FROM NRPM TO FINAL RULE—Continued

Section	Paragraph	Change from NPRM	Reason
		"provided ocean transportation or storage" changed to "provided ocean transportation or storage of cargo".	The term "cargo" was added to put the focus on the storage of the container rather than the merchandise inside of it and to be consistent with the addition of the term in the second clause.
		"for the carriage or storage of goods" changed to "for the ocean transportation or storage of cargo".	The term "goods" was changed to "cargo" for a broader term that put the focus on the container rather than the merchandise inside it.
	(b)	Language added stating that invoices cannot be issued to more than one party.	Clarification.
	(c)	Formerly paragraph (b)	Conforming amendment.
541.5 Failure to include required information		"invoice" changed to "charge"	Conforms regulatory language to statutory language.
541.6 Contents of invoice	Introductory paragraph.	removed	Information incorporated into other paragraphs.
	(a)	"The invoice" changed to "A demurrage or detention invoice".	Correction of scrivener's error.
		"including" changed to "and at a minimum must include".	Clarification.
		In (a)(4), "invoiced party" changed to "billed party".	Correction of scrivener's error.
		"must be accurate" added	Clarification.
	(b)	"The invoice" changed to "A demurrage or detention invoice".	Correction of scrivener's error.
		"including" changed to "and at a minimum must include".	Clarification.
		"must be accurate" added	Clarification.
		In (b)(1) and (2) "billing date" changed to "invoice date".	Conforming change; elsewhere in the regulatory text "invoice" is used.
	(c)	"The invoice" changed to "A demurrage or detention invoice".	Correction of scrivener's error.
		"including" changed to "and at a minimum must include".	Clarification.
		"must be accurate" added	Clarification.
		In (c)(2) "(*i.e.,* the tariff name and rule number, applicable service contract number and section, or applicable negotiated arrangement)" changed to "*e.g.,* the tariff name and rule number, terminal schedule, applicable service contract number and section, or applicable negotiated arrangement)".	Clarification/Correction of scrivener's error. Adds terminal schedule to the list of examples and clarifies that this is a non-exhaustive set of examples.
	(d)	"The invoice" changed to "A demurrage or detention invoice".	Correction of scrivener's error.
		"including" changed to "and at a minimum must include".	Clarification.
		In (d)(2), "The URL address" changed to "Digital means, such as a URL address, QR code, or digital watermark, that directs the billed party to"; "portion of the billing party's website" removed.	Expands the means of digital notification.
	(e)	"The invoice" changed to "A demurrage or detention invoice".	Correction of scrivener's error.
		"must be accurate" added	Clarification.
541.7 Issuance of demurrage and detention invoice.	(a)	"30 days" changed to "thirty (30) calendar days".	Clarification.
		"demurrage or detention invoices" changed to "a demurrage or detention invoice".	Correction of scrivener's error.
		In the second sentence "the required timeframe" changed to "thirty (30) calendar days from the date on which the charge was last incurred".	Clarification.

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TABLE 1—CHANGES FROM NRPM TO FINAL RULE—Continued

Section	Paragraph	Change from NPRM	Reason
	(b)	New paragraph added	Clarifies timeframe for NVOCCs passing through demurrage and detention charges to issue their own invoices.
	(c)	New paragraph added	Clarifies timeframe for NVOCCs when acting as both a billing and billed party in relation to the same charge.
	(d)	Formerly paragraph (b)	Conforming amendment.
		In the first sentence "the incorrect party" changed to "an incorrect person".	Correction of scrivener's error and clarification to further distinguish an incorrectly issued invoice.
		"days" changed to "calendar days"	Clarification.
		In the NPRM, the correct billed party had to receive the invoice within 30 days from the date of the dispute, but no later than 60 days after the charges were last incurred. The final rule instead imposes a strict 30-calendar-day deadline from when the charges were last incurred for the issuance of an invoice to a correct billed party, regardless of whether or not there may have been an invoice previously issued to an incorrect party.	Shifts burden to the billing party to issue accurate invoices.
541.8 Requests for fee mitigation, refund, or waiver.	(a)	Paragraph reworded	Clarification. The paragraph has been re-worked for clarity. No substantive change from the NPRM; billing parties must still allow billed parties 30 days from when an invoice is issued to request mitigation, refund or waiver. Clarification that the timeframe is in calendar days.
	(b)	"must resolve" changed to "must attempt to resolve".	Change promotes good-faith efforts of billing and billed parties to work resolve disputes.
		"30 days" changed to "thirty (30) calendar days".	Clarification.
		added "or at a later date as agreed upon by both parties" to the end of the first sentence.	Clarification.
		"If the billing party fails to resolve the fee mitigation, refund, or waiver request within the 30-day deadline, the billed party is not required to pay the charge at issue." removed.	Removes non-statutory penalty.

V. Rulemaking Analyses and Notices

A. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, provides that whenever an agency is required to publish a notice of proposed rulemaking under the Administrative Procedure Act (APA), 5 U.S.C. 553, the agency must prepare and make available for public comment an initial regulatory flexibility analysis (IRFA) describing the impact of the proposed rule on small entities, unless the head of the agency certifies that the rulemaking will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 605.

This final rule requires VOCCs, NVOCCs, and MTOs to include minimum billing information on detention and demurrage invoices. The rulemaking additionally requires billing parties that issue demurrage and detention invoices to follow certain billing practices; specifically, billing parties must issue demurrage and detention invoices within 30 calendar days from when charges stop accruing. *See* 87 FR at 27975–27976.

The Commission presumes that VOCCs and MTOs generally do not qualify as small entities under the guidelines of the Small Business Administration (SBA). The Commission previously stated that VOCCs and MTOs generally are large companies that exceed the employee (500) and/or annual revenue ($21.5 million) thresholds to be considered small business entities. However, the Commission presumes that NVOCCs are small business entities.

There are likely two types of costs imposed by the proposed rulemaking on the affected businesses. The imposition of a 30-calendar day deadline to issue an invoice from when demurrage and detention charges stop accruing could result in a loss of revenue to the billing

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party. In addition, the minimum billing information requirements imposed by the proposed rule may require the billing party to collect additional information and change its billing information technology system to include all the required information on invoices.

Most of the costs of the rulemaking will be borne by VOCCs and MTOs as they generally assess demurrage and detention charges, and not NVOCCs. As discussed above, in most cases, NVOCCs pass through detention and demurrage charges billed to them on invoices generated by VOCCs or MTOs. Accordingly, NVOCCs should receive the minimum billing information required by the proposed rule from either the VOCC or MTO issuing the invoice.

For these reasons, the Chairman of the Federal Maritime Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities.

B. Congressional Review Act

The rule is not a ''major rule'' as defined by the Congressional Review Act (5 U.S.C. 801 et seq). The rule will not result in: (1) An annual effect on the economy of $100,000,000 or more; (2) a major increase in costs or prices; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign based companies. 5 U.S.C. 804(2).

C. National Environmental Policy Act

The National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4347) requires Federal agencies to consider the environmental impacts of proposed major Federal actions significantly affecting the quality of the human environment, as well as the impacts of alternatives to the proposed action. When a Federal agency prepares an environmental assessment, the Council on Environmental Quality (CEQ) NEPA implementing regulations (40 CFR parts 1500–1508) require it to ''include brief discussions of the need for the proposal, of alternatives [. . .], of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.'' 40 CFR 1508.9(b). After an environmental assessment, the Commission issued a Finding of No Significant Impact (''FONSI''), 87 FR 73278 (Nov. 29, 2022), and explained that the FONSI would become final 10 days after publication unless a petition for review was filed with FMC by Dec. 9, 2022. (The World Shipping Council and Pacific Merchant Shipping Association jointly filed a petition for review on December 9, 2022.[297] FMC denied the petition on January 6, 2023.[298]). The FONSI and environmental assessment, as well as the petition and the Commission's denial of the petition are available for inspection in the docket at *www.regulations.gov.*

D. Paperwork Reduction Act

This final rule calls for a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). As defined in 5 CFR 1320.3(c), ''Collection of Information'' comprises reporting, recordkeeping, monitoring, posting, labeling, and other, similar actions. In compliance with the PRA, the Commission submitted the proposed information collection to the Office of Management and Budget. Notice of the information collections was published in the **Federal Register** and public comments were invited. 87 FR 62341, 62356 (Oct. 14, 2022). Neither the Commission nor OMB received any comments that impacted the FMC's burden calculation or provided additional information to improve the calculation estimate.

The title and description of the information collections, a description of those who must collect the information, and an estimate of the total annual burden follow. The estimate covers the time for reviewing instructions, searching existing sources of data, gathering and maintaining the data needed, and completing and reviewing the collection.

Title: 46 CFR Part 541—Demurrage and Detention Billing Requirements

Summary of the Collection of Information: Title 46 U.S.C. 41104(a)(15) and (d)(2), as well as 46 CFR part 541 subpart A, require demurrage and detention invoices to contain certain additional information to increase transparency so that billed parties can identify the containers at issue, the applicable rate, dates for which charges accrued, and how to dispute charges. Further, 46 U.S.C. 41104(d)(2) and 46 CFR part 541 also require demurrage and detention invoices to certify that the charges comply with applicable regulatory provisions and that the invoicing party's behavior did not contribute to the charges.

Need for Information: The Commission identifies information that entities must include on demurrage and detention invoices to ensure compliance with the Shipping Act of 1984, as amended. Specifically, 46 CFR part 541 subpart A implements the billing information requirements contained in 46 U.S.C. 41104(d)(2) and adds additional minimum information that billing parties must include on demurrage and detention invoices.

Frequency: The frequency of demurrage and detention invoices is determined by the billing party. It is the billing entity's responsibility to ensure that their demurrage and detention charges comply with applicable statutory and regulatory provisions. The Commission estimates that between five and ten percent of all containers moving in U.S.-foreign trade will receive a demurrage and/or detention invoice or an estimated range of 1,135,000 and 2,270,000 invoices annually.

Type of Respondents: VOCCs, MTOs, and NVOCCs are required to include specific information on their demurrage and detention invoices sent to billed parties.

Number of Annual Respondents: The Commission anticipates an annual respondent universe of 354 VOCCs and MTOs. The Commission did not include NVOCCs in its annual respondent universe because in most, if not all cases, NVOCCs pass through the demurrage and detention charges it receives to their customers. Because NVOCCs are passing through the charges, they are not collecting the required minimum information themselves.

Estimated Time per Response: The Commission estimates a one-time burden of an estimated 25 hours per respondent to integrate the required billing information elements into their existing invoicing system. After this initial burden, the Commission anticipates that the estimated time to create and retain each demurrage or detention invoice to be six minutes or 0.1 hours.

Total Annual Burden: The Commission estimates a one-time burden for respondents to integrate the additional billing information elements, required by OSRA 2022 and by the proposed rule, into their existing invoicing system to be 8,850 person-hours and $882,522. After this initial integration, the Commission estimates the total annual burden to provide demurrage and detention invoices and to ensure accuracy to be 113,500–227,000 person-hours and $6,339,020–$12,678,040.

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), we have submitted a copy of this rule to the Office of Management

[297] FMC–2022–0066–0162.

[298] FMC–2022–0066–0278.

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and Budget (OMB) for its review of the collection of information. Before the Commission may enforce the collection of information requirements in this rule, OMB must approve FMC's request to collect this information. You need not respond to a collection of information unless it displays a currently valid control number from OMB.

E. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards in E.O. 12988, ''Civil Justice Reform,'' (61 FR 4729, Feb. 7, 1996) to minimize litigation, eliminate ambiguity, and reduce burden.

List of Subjects in 46 CFR Part 541

Demurrage and detention; Common carriers; Exports; Imports; Marine terminal operators.

For the reasons set forth in the preamble, the Federal Maritime Commission amends title 46 of the CFR by adding part 541 to read as follows:

■ 1. Add part 541 to read as follows:

PART 541—DEMURRAGE AND DETENTION

Sec.

Subpart A—Billing Requirements and Practices

541.1 Purpose.
541.2 Scope and applicability.
541.3 Definitions.
541.4 Properly issued invoice.
541.5 Failure to include required information.
541.6 [Reserved]
541.7 Issuance of demurrage and detention invoice.
541.8 Requests for fee mitigation, refund, or waiver.
541.9–541.99 [Reserved]

Subpart B [Reserved]

Authority: 5 U.S.C. 553; 46 U.S.C. 40101, 40102, 40307, 40501–40503, 41101–41106, 40901–40904, and 46105; and 46 CFR 515.23.

Subpart A—Billing Requirements and Practices

§ 541.1 Purpose.

This part establishes the minimum information that must be included on or with demurrage and detention invoices. It also establishes procedures that must be adhered to when invoicing for demurrage or detention.

§ 541.2 Scope and applicability.

(a) This part sets forth regulations governing any invoice issued by an ocean common carrier, marine terminal operator, or non-vessel-operating common carrier for the collection of demurrage or detention charges.

(b) This part does not govern the billing relationships among and between ocean common carriers and marine terminal operators.

§ 541.3 Definitions.

In addition to the definitions set forth in 46 U.S.C. 40102, when used in this part:

Billed party means the person receiving the demurrage or detention invoice and who is responsible for the payment of any incurred demurrage or detention charge.

Billing party means the ocean common carrier, marine terminal operator, or non-vessel-operating common carrier who issues a demurrage or detention invoice.

Consignee means the ultimate recipient of the cargo; the person to whom final delivery of the cargo is to be made.

Demurrage or detention mean 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.

Demurrage or detention invoice means any statement of charges printed, written, or accessible online that documents an assessment of demurrage or detention charges.

Person means an individual, corporation, or company, including a limited liability company, association, firm, partnership, society, or joint stock company existing under or authorized by the laws of the United States or of a foreign country.

§ 541.4 Properly issued invoices.

(a) A properly issued invoice is a demurrage or detention invoice issued by a billing party 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.

§ 541.5 Failure to include required information.

Failure to include any of the required minimum information in this part in a demurrage or detention invoice eliminates any obligation of the billed party to pay the applicable charge.

§ 541.6 [Reserved]

§ 541.7 Issuance of demurrage and detention invoices.

(a) A billing party must issue a demurrage or detention invoice within thirty (30) calendar days from the date on which the charge was last incurred. If the billing party does not issue a demurrage or detention invoice within thirty (30) calendar days from the date on which the charge was last incurred, then the billed party is not required to pay the charge.

(b) If the billing party is a non-vessel-operating common carrier, then it must issue a demurrage or detention invoice within thirty (30) calendar days from the issuance date of the demurrage or detention invoice it received. If such a billing party does not issue a demurrage or detention invoice within thirty (30) calendar days from the issuance date of the demurrage or detention invoice it received, then the billed party is not required to pay the charge.

(c) A non-vessel-operating common carrier (NVOCC) can be both a billing and billed party in relation to the same charge. When an NVOCC is acting in both roles, it can inform its billing party that the charge has been disputed by the NVOCC's billed party. The NVOCC's billing party must then provide an additional thirty (30) calendar days for the NVOCC to dispute the charge upon this notice.

(d) If the billing party invoices an incorrect person, the billing party may issue an invoice to the correct billed party provided that such issuance is within thirty (30) calendar days from the date on which the charge was last incurred. If the billing party does not issue this corrected demurrage or detention invoice within thirty (30) calendar days from the date on which the charge was last incurred, then the billed party is not required to pay the charge.

§ 541.8 Requests for fee mitigation, refund, or waiver.

(a) The billing party must allow the billed party at least thirty (30) calendar days from the invoice issuance date to request mitigation, refund, or waiver of fees from the billing party.

(b) If a billing party receives a fee mitigation, refund, or waiver request from a billed party, the billing party must attempt to resolve the request within thirty (30) calendar days of receiving such a request or at a later date as agreed upon by both parties.

§ 541.9–541.99 [Reserved]

■ 2. Delayed indefinitely, add § 541.6 to read as follows:

§ 541.6 Contents of invoice.

(a) *Identifying information.* A demurrage or detention invoice must be accurate and contain sufficient information to enable the billed party to identify the container(s) to which the charges apply and at a minimum must include:

(1) The Bill of Lading number(s);

(2) The container number(s);

(3) For imports, the port(s) of discharge; and

(4) The basis for why the billed party is the proper party of interest and thus liable for the charge.

(b) *Timing information.* A demurrage or detention invoice must be accurate and contain sufficient information to enable the billed party to identify the relevant time for which the charges apply and the applicable due date for invoiced charges and at a minimum must include:

(1) The invoice date;

(2) The invoice due date;

(3) The allowed free time in days;

(4) The start date of free time;

(5) The end date of free time;

(6) For imports, the container availability date;

(7) For exports, the earliest return date; and

(8) The specific date(s) for which demurrage and/or detention were charged.

(c) *Rate information.* A demurrage or detention invoice must be accurate and contain sufficient information to enable the billed party to identify the amount due and readily ascertain how that amount was calculated and must include at a minimum:

(1) The total amount due;

(2) The applicable detention or demurrage rule (*e.g.,* the tariff name and rule number, terminal schedule, applicable service contract number and section, or applicable negotiated arrangement) on which the daily rate is based; and

(3) The specific rate or rates per the applicable tariff rule or service contract.

(d) *Dispute information.* A demurrage or detention invoice must be accurate and contain 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, and at a minimum must include:

(1) The email, telephone number, or other appropriate contact information for questions or request for fee mitigation, refund, or waiver;

(2) 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; and

(3) Defined timeframes that comply with the billing practices in this part, during which the billed party must request a fee mitigation, refund, or waiver and within which the billing party will resolve such requests.

(e) *Certifications.* A demurrage or detention invoice must be accurate and contain statements from the billing party that:

(1) The charges are consistent with any of the Federal Maritime Commission's rules related to demurrage and detention, including, but not limited to, this part and 46 CFR 545.5; and

(2) The billing party's performance did not cause or contribute to the underlying invoiced charges.

■ 3. Delayed indefinitely, add § 541.99 to read as follows:

§ 541.99 OMB control number assigned pursuant to the Paperwork Reduction Act.

The Commission has received Office of Management and Budget approval for this collection of information pursuant to the Paperwork Reduction Act of 1995, as amended. The valid control number for this collection of information is 3072–XXXX.

Subpart B [Reserved]

By the Commission.

David Eng,

Secretary.

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