

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: Notice of proposed rulemaking.

SUMMARY: The Federal Maritime Commission (Commission) is seeking public comment on a proposed rule that requires common carriers and marine terminal operators to include specific minimum information on demurrage and detention invoices and outlines certain billing practices relevant to appropriate timeframes for issuing invoices, disputing charges with the billing party, and resolving such disputes. The proposed rule addresses considerations identified in the Ocean Shipping Reform Act of 2022. The proposed rule would (1) adopt minimum information that common carriers must include in a demurrage or detention invoice that is listed in 46 U.S.C. 41104(d)(2); (2) add to this list additional information that must be included in or with a demurrage or detention invoice; (3) further define prohibited practices by clarifying which parties may be appropriately billed for demurrage or detention charges; and (4) establish billing practices that billing parties must follow when invoicing for demurrage or detention charges.

DATES: Submit comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by using the Federal eRulemaking Portal at www.regulations.gov, under Docket No. FMC-2022-0066, Demurrage and Detention Billing Requirements. Please refer to the “Public Participation” heading under the **SUPPLEMENTARY**

INFORMATION section of this notice for detailed instructions on how to submit comments, including instructions on how to request confidential treatment and additional information on the rulemaking process.

FOR FURTHER INFORMATION CONTACT: William Cody, Secretary; Phone: (202) 523-5908; Email: secretary@fmc.gov.

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I. INTRODUCTION AND BACKGROUND

As rising cargo volumes have increasingly put pressure on common carrier, 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 carriers² and marine terminal operators (MTOs) 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.”³ 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.⁴ The Commission approved this Fact Finding 29 recommendation on September 15, 2021.⁵

On February 15, 2022, the Commission issued an ANPRM to request industry views on potential demurrage and detention billing requirements.⁶ 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), and whether the regulations should differ based on whether the billing party is a NVOCC or a VOCC.⁷ The Commission also requested comments on whether proposed

¹ Fed. Mar. Comm’n, Detention and Demurrage (accessed on September 8, 2022), <https://www.fmc.gov/detention-and-demurrage/#:~:text=In%20dollar%20terms%2C%20the%20nine,over%20the%20two%2Dyear%20period.>

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

³ 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/>.

⁴ Fact Finding 29 Interim Recommendations at 7.

⁵ 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-ondemurrage-and-detention-billings/>.

⁶ 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.

⁷ 87 FR at 8507, 8508-8509 (Questions 1 and 7).

regulations on demurrage and detention billings should apply to MTOs.⁸

In addition to requesting comments regarding the applicability of demurrage and detention billing requirements to parties such as NVOCCs and MTOs, the Commission also requested comments on what information should be required in demurrage and detention invoices.⁹ In addition to information necessary to identify the shipment (bill of lading number, container number, etc.), the Commission asked whether bills should include information on how the billing party calculated demurrage and detention charges.¹⁰ 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.¹¹ The Commission also requested comments on 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.¹²

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 the Commission should require billing parties to issue demurrage or detention invoices within 60 days after the charges stopped accruing.¹³ The Commission stated that the Uniform Intermodal Interchange Agreement

⁸ 87 FR at 8507, 8509 (Questions 2 and 3).

⁹ 87 FR at 8508.

¹⁰ 87 FR at 8508.

¹¹ 87 FR at 8509 (Question 6).

¹² 87 FR at 8509 (Question 6).

¹³ 87 FR at 8508, 8509 (Question 12).

(UIIA)¹⁴ on which the industry relies currently requires that invoices be issued within 60 days and asked whether the 60-day timeframe was effective in addressing concerns raised by billing parties, or whether a longer or shorter time period would be more appropriate.¹⁵ In addition, the Commission requested comments on whether it should regulate the timeframe for refunds and, if so, what would be an appropriate timeframe.¹⁶

II. SUMMARY OF COMMENTS

A. General Summary

The Commission received 82 comments in response to the ANPRM from 81 commenters.¹⁷ The commenters represent the following interest groups: VOCCs; MTOs; NVOCCs, freight forwarders, and customs brokers; motor carriers; and beneficial cargo owners (BCOs). The Commission also received comments from five entities with unknown affiliations, and three other commenters that did not fit into the above categories.¹⁸ Comments from these eight entities were consistent with other commenter categories and are captured in the discussions below. All comments are identified below and are available on the docket at <https://www.regulations.gov> by their document number (Doc. No.). They are also available in the Commission's Reading Room, at: <https://www2.fmc.gov/readingroom/proceeding/22-04/>.

B. VOCCs

¹⁴ 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.

¹⁵ 87 FR at 8508.

¹⁶ 87 FR at 8508, 8509 (Question 14).

¹⁷ The Commission received two comments from the Los Angeles Customs Brokers and Freight Forwarders Association (LACBFFA) filed on April 15, 2022 and April 22, 2022. The comments filed on April 22, 2022, incorporated a new section, "5. Multiple Parties and Invoiced Party Identity," into the comments that LACBFFA filed on April 15, 2022. *Compare* Comments of the Los Angeles Customs Brokers and Freight Forwarders Association (Doc. No. 57) at 3 *with* Comments of the Los Angeles Customs Brokers and Freight Forwarders Association (Doc. No. 83) at 3-4.

¹⁸ Comments of Ellen Baicher-Armstrong (Doc. No 39); Comments of RPM Warehouse and Transportation (Doc. No 32); Comments of J. Peter Hinge (Doc. No. 9); Comments of Ocean Logistics (Doc. No. 27); Comments of Naomi Hime (Doc. No. 18); Comments of the International Warehouse Logistics Association (Doc. No. 81); Comments of Veconinter USA LLC (Doc. No. 63); Comments of Weber Distribution LLC (Doc. No. 17).

The Commission received comments from an individual VOCC and from two trade organizations that represent most of the largest VOCCs operating in U.S.-foreign ocean trade (collectively VOCC commenters).¹⁹ In general, VOCC commenters cautioned the Commission against pursuing regulation in this area. There was an overall concern that such a regulation could overreach and ultimately create more harm than good. For example, WSC warned the Commission to “focus on preventing what is unreasonable as opposed to seeking to re-make the waterfront in the image that it believes is most desirable.”²⁰

VOCC commenters noted the existing commercial relationships and how solutions to issues and innovation best develop through these natural relationships without outside parties, such as the Commission.²¹ The existence of commercial relationships meant issues could be resolved in contractual relations and that regulations were generally unnecessary. VOCC commenters expressed concern about the Commission creating an environment where the Commission would create an unbalanced negotiation sphere.²²

VOCC commenters asserted that the existence of commercial relationships lends itself to innovation. These commenters expressed concern that regulation in this area could stifle innovation. For example, WSC stated, “a fixed form and process for invoices could stifle digital innovation to include initiatives to do business electronically, including automated invoices, use

¹⁹ Comments of Crowley Lain America Services, LLC (Doc. No. 25); Comments of the Ocean Carrier Equipment Management Association, Inc. (Doc. No. 78); Comments of the World Shipping Council (Doc. No. 61). Ocean Carrier Equipment Management Association (OCEMA) and the World Shipping Council (WSC) represent 22 VOCCs, including: APL, CMA-CGM, COSCO, Evergreen, Hamburg Sud, Hapag Lloyd, HMM, Maersk, MSC, ONE, Wan Hai, and Zim.

²⁰ Doc. No. 61 at 2.

²¹ *See e.g.*, Doc. No. 61 at 2 (“To the extent disagreements do arise, all parties are best served if those disagreements can be resolved promptly and amicably by the parties involved without the need for an outside adjudicator such as the FMC or an arbitrator.”).

²² *See e.g.*, Doc. No. 78 at 2 (“the FMC should not seek to right every perceived wrong or to balance every unfavorable commercial term in a contract by placing its thumb on the scales to balance the results of legitimate commercial negotiations.”).

of block chain technology, and more broadly efforts to digitize the supply chain.”²³

Finally, VOCC commenters also stressed that implementation of these changes may prove difficult. These commenters noted that they have developed their own billing systems and because these systems must exchange information, any required changes would be significantly difficult.²⁴ OCEMA noted that it is important for “the FMC to first consider technological feasibility, the scope and required time for systems development work that would be required to support any new requirements, and whether the proposed change would burden the ability to resolve items as part of a pre-pay process rather than a post-pay transaction.”²⁵

C. MTOs

The Commission received comments from an MTO and from three MTO trade organizations (collectively MTO commenters).²⁶ Like VOCC commenters, MTO commenters generally argued against any new regulation, particularly if such regulation would apply to MTOs.²⁷ One commenter observed that the Commission may already consider billing in evaluating demurrage and detention practices and so additional regulation was unnecessary.²⁸ Commenters claimed that current Commission regulations adequately protect the industry.

²³ Doc. No. 61 at 3.

²⁴ *See e.g.*, Doc. No. 61 at 3 (“Every carrier and every MTO has its own systems, and to the extent that those systems must exchange information (as would be the case for many of the data elements/scenarios described in question 6 below), the complexity is multiplied by the required interactions between systems. Many of the billing systems involved are global systems, adding complexity to any required changes.”).

²⁵ Doc. No. 78 at 1-2.

²⁶ Comments of the American Association of Port Authorities (Doc. No. 52); Comments of Maher Terminals LLC (Doc. No. 49); Comments of National Association of Waterfront Employers (Doc. No. 26); Comments of the Port of NY/NJ Sustainable Services Agreement (Doc. No. 68).

²⁷ *See e.g.*, Doc. No. 49 at 2. (“Maher believes that the Shipping Act of 1984, as amended . . . , and the Commission’s regulations thereunder, particularly 46 U.S.C. 41102(c) and 46 CFR 545.4 and 545.5, provide a sufficient and flexible legal framework for determining the reasonableness of MTO demurrage billing practices.”)

²⁸ Doc. No. 26 at 2 (noted that the Interpretive Rule expressly recognizes the multitude of varying factors that influence the reasonableness of demurrage and detention charges. *See* 46 CFR 545.5(f) (“Nothing in this rule precludes the Commission from considering factors, arguments, and evidence in addition to those specifically listed in this rule.”)).

MTO commenters also noted the unique aspects of individual terminals. MTO commenters expressed concern about applying a “one size fits all” approach and cautioned the Commission about the unintended consequences and technological difficulties of pursuing this type of regulation.²⁹ For example, the National Association of Waterfront Employees (NAWE) expressed concern that establishing billing requirements “will inevitably disrupt existing commercial relationships and could impact the competitiveness of MTOs that continue to face competition from neighboring foreign ports.”³⁰ Other MTO commenters shared this view and asserted that compliance with any changes would create administrative burdens that could worsen current supply chain issues.³¹ MTO commenters argued the costs of any new regulation would outweigh any benefits and cited technological limitations, international competition, and security concerns as reasons why the Commission should limit any regulation it decides to adopt.³²

D. NVOCCs, Freight Forwarders, and Customs Brokers

The Commission received comments from ten NVOCCs, freight forwarders, and customs brokers, and five trade organizations that represent such entities (collectively ocean transportation intermediary (OTI) commenters).³³ OTI commenters supported the Commission

²⁹ See e.g., Doc. No. 26 at 2.

³⁰ Doc. No. 26 at 2.

³¹ See e.g., Doc. No. 52 at 6-7 (“Additional information may be attainable, but would demand ports engage in costly, administrative data collection. These efforts would significantly undermine streamlined operations at ports and terminals and in turn, generate substantial congestion and backlogs.”).

³² See e.g., Doc. No. 52 at 10 (If ports are required to include extensive and detailed information on every billing, there is a national security risk that the aggregated data can be exploited by bad actors or competitors. Further, information regarding ports and terminal pricing, dwell times, and maritime practices risks the disclosure of business-sensitive proprietary information.).

³³ Comments of Combined Freight International KAM (Doc. No. 16); Comments of Lance Sales, Inc. (Doc. No. 20); Comments of A Custom Brokerage, Inc. (Doc. No. 70); Comments of the International Association of Movers (Doc. No. 74); Comments of J & K Fresh LLC (Doc. No. 29); Comments of the Los Angeles Customs Brokers and Freight Forwarders Association (Doc. No 83); Comments of Mode Transportation, LLC (Doc. No. 13); Comments of the National Customs Brokers & Forwarders Association of America, Inc. (Doc. No. 62); Comments of the New York New Jersey Foreign Freight Forwarders and Brokers Association, Inc. (Doc. No. 76); Comments of the Pacific

pursuing this regulation, but NVOCC commenters did not uniformly support applying any adopted regulation to NVOCCs.³⁴ Most NVOCCs argued that the regulation should not apply to NVOCCs because NVOCCs do not determine demurrage or detention rates.³⁵ Two NVOCCs indicated that the demurrage and detention billing requirements should apply to NVOCCs, but did not provide further explanation. However, one of these commenters stated that any new requirements that would apply to NVOCCs should differ from those that would apply to VOCCs because NVOCCs serve as an intermediary between the VOCCs and shippers.³⁶ In contrast, freight forwarders and customs brokers indicated that any proposed demurrage and detention billing requirements should apply to VOCCs and NVOCCs equally as they both charge demurrage and detention fees.³⁷

OTI commenters generally agreed on other questions posed in the ANPRM. For example, OTI commenters responded that the proposed regulations should apply to MTOs because they issue demurrage and detention charges.³⁸ In addition, these commenters supported requiring billing parties to provide all information identified in Question 6 of the ANPRM as well as information on how to dispute charges to the billing party.³⁹ Some OTI commenters stated that

Coast Council of Customs Brokers and Freight Forwarders (Doc. No. 82); Comments of Page International (Doc. No. 19); Comments of Mohawk Global Logistics Corporation (Doc. No. 69); Comments of Thunder Bolt Logistics, LLC (Doc. No. 77); Comments of the Transportation Intermediaries Association (Doc. No. 48); Comments of John S. Connor Global Logistics (Doc. No. 75).

³⁴ One commenter did not support demurrage and detention billing requirements regulations to address the issues, but instead favored an industry solution. Doc. No. 20 at 1.

³⁵ Doc. No. 16 at 1; Doc. No. 13 at 3; Doc. No. 69 at 3; Doc. No. 70 at 2; Doc. No. 75; Doc. No. 75 at 2; Doc. No. 76 at 2; Doc. No. 77 at 2. *See* Doc. No. 62 and Doc. No. 83 (both discuss the regulations as applying to VOCCs and MTOs as the billing parties). Some of these commenters stated that the regulations should apply to NVOCCs if they “mark up” the charge. Doc. No. 13 at 3; Doc. No. 69 at 3; Doc. No. 75 at 2; Doc. No. 76 at 2; Doc. No. 77 at 2.

³⁶ Doc. No. 19 at 1; Doc. No. 48 at 3.

³⁷ Doc. No. 29 at 1; Doc. No. 74 at 1.

³⁸ Doc. No. 29 at 1; Doc. No. 74 at 1; Doc. No. 16 at 1; Doc. No. 13 at 4; Doc. No. 69 at 1; Doc. No. 70 at 2; Doc. No. 75 at 1; Doc. No. 62 at 4; Doc. No. 76 at 2; Doc. No. 19 at 1; Doc. No. 77 at 3; Doc. No. 48 at 3.

³⁹ Doc. No. 29 at 2-3; Doc. No. 74 at 1; Doc. No. 82 at 1; Doc. No. 16 at 2-3; Doc. No. 13 at 5, 7; Doc. No. 69 at 5, 7-8; Doc. No. 70 at 3, 5; Doc. No. 75 at 3-4; Doc. No. 83 at 2; Doc. No. 62 at 4; Doc. No. 76 at 4-5; Doc. No. 19 at 2-3; Doc. No. 77 at 5, 7; Doc. No. 48 at 4-7. Question 6 requested comments on whether billing parties should be required to provide the following information on demurrage and detention invoices: Bill of lading number; container

the Commission should also require billing parties to certify that the charges comply with the Shipping Act of 1984, as amended.⁴⁰ These commenters were generally supportive of requiring billing parties to issue invoices within a specific timeframe (with most agreeing that the timeframe should be 30 days or less) and requiring billing parties to issue refunds within a specified timeframe.⁴¹

These commenters also stated that if the billing party invoices multiple parties, that the invoice should identify all billed parties and the basis for billing each. Furthermore, several commenters, especially customs brokers, asserted that they should not receive demurrage and detention invoices. For example, Los Angeles Customs Brokers and Freight Forwarders Association (LACBFFA) observed that shippers often name the customs broker as the “notify party” for customs purposes, and, as a result, custom brokers may receive demurrage or detention invoices.⁴² Such commenters argued that customs brokers should not receive invoices because they have no part in the transportation, negotiation, handling, or inland transport, and that the Commission should prohibit common carriers and MTOs from billing parties only shown as a notify party on the Bills of Lading.⁴³

E. BCOs

number; billing date; payment due date; start/end of free time; start/end of demurrage/detention/per diem clock; demurrage/detention/per diem rate schedule; location of the notice of the charge (i.e., tariff, service contract number and section, or MTO schedule); container availability dates and vessel arrival dates for import shipments; for export shipments, the earliest return dates (and any modifications to those dates); any intervening clock-stopping events, and whether the charge is a pass-through of charges levied by the MTO or port. 87 FR at 8509.

⁴⁰ See Doc. No. 77 at 5; Doc. No. 69 at 5; Doc. No. 75 at 3.

⁴¹ Doc. No. 29 at 3; Doc. No. 19 at 3; Doc. No. 77 at 7; Doc. No. 48 at 6; Doc. No. 82 at 2; Doc. No. 83 at 2; Doc. No. 62 at 5; Doc. No. 70 at 5; Doc. No. 69 at 7; Doc. No. 75 at 4; Doc. No. 16 at 3; Doc. No. 13 at 7.

⁴² Doc. No. 83 at 3.

⁴³ Doc. No. 83 at 3; Doc. No. 82 at 2-3.

The Commission received comments from 26 BCOs and 15 trade organizations that represent these entities (collectively BCO commenters).⁴⁴ BCO commenters generally agreed on issues raised in the ANPRM. For example, BCO commenters responded that the regulations should apply to VOCCs, NVOCCs, and MTOs equally. The majority of BCO commenters stated that if the entity issued demurrage or detention charges, then the regulation should apply.⁴⁵ BCO commenters cited the need for uniform requirements to apply to all demurrage and detention invoices they receive, regardless of whether the billing party is a VOCC, NVOCC, or MTO. However, many of these BCOs preferred not to receive invoices from MTOs because they have no contractual relationship with the MTO.⁴⁶ Several BCO commenters expressed the opposite

⁴⁴ Comments of the Agriculture Transportation Coalition (Doc. No. 84); Comments of the American Association of Exporters and Importers (Doc. No. 65); Comments of the American Chemistry Council (Doc. No. 54); Comments of the American Coffee Corporation (Doc. No. 73); Comments of Association of California Recycling Industries (Doc. No. 21); Comments of the Auto Care Association (Doc. No. 79); Comments of Bostock North America (Doc. No. 30); Comments of BassTech International (Doc. No. 72); Comments of Calpine Containers, Inc. (Doc. No. 50); Comments of Jean-Luc Carriere (Doc. No. 5); Comments of the Consumer Technology Association (Doc. No. 67); Comments of Lani Ellingsworth (Doc. No. 11); Comments of Flooring One Source (Doc. No. 3); Comments of Braun Export (Doc. No. 14); Comments of The Grape Company (Doc. No. 42); Comments of LG Electronics USA, Inc. (Doc. No. 44); Comments of The Meadows Group, LLC (Doc. No. 22); Comments of the Meat Import Council of America, North American Meat Institute, and U.S. Meat Export Federation (Doc. No. 64); Comments of National Association of Chemical Distributors (Doc. No. 58); Comments of National Association of Manufacturers (Doc. No. 55); Comments of the National Industrial Transportation League (Doc. No. 60); Comments of National Milk Producers Federation and U.S. Dairy Export Council (Doc. No. 43); Comments of the National Retail Federation (Doc. No. 53); Comments of the North American Home Furnishings Association (Doc. No. 80); Comments of David Oppenheimer and Company, I, LLC (Doc. No. 40); Comments of Pacific Trellis Fruit (Doc. No. 71); Comments of Pinnacle Fresh USA, LLC (Doc. No. 31); Comments of TBC Corporation (Doc. No. 6); Comments of Potential Industries, Inc. (Doc. No. 4); Comments of Sbrocco International, Inc. (Doc. No. 66); Comments of Sony Electronics Inc. (Doc. No. 37); Comments of Streamlight, Inc. (Doc. No. 35); Comments of Suntreat Packing & Shipping Co. (Doc. No. 38); Comments of The Toy Association (Doc. No. 41); Comments of Trelleborg Wheel Systems Americas, Inc. (Doc. No. 34); Comments of USA Rice (Doc. No. 28); Comments of Vivion, Inc. (Doc. No. 8); Comments of Westco Chemicals, Inc. (Doc. No. 36); Comments of Green Fresh Imports (Doc. No. 85); Comments of United Furniture Industries, Inc./ Lane Home Furnishing (Doc. No. 86).

⁴⁵ See e.g., Doc. No. 67 at 2 (“[Consumer Technology Association] encourages the Commission to impose the same requirements as to minimum billing information on VOCCs, NVOCCs, and MTOs to facilitate industry-wide transparency.”); Doc. No. 58 at 2 (“[VOCCs, NVOCCs, and MTOs] all charge detention and demurrage fees, and [the National Association of Chemical Distributors] strongly recommends that each be included in any proposed detention and demurrage billing regulation.”); Doc. No. 55 at 1-2 (“These requirements should apply to all parties that may be involved in submitting demurrage and detention bills to shippers and BCOs, including VOCCs, NVOCCs, and MTOs.”).

⁴⁶ See e.g., Doc. No. 65 at 5 (“Without a contractual connection between the MTO and the shipper, [American Association of Exporters and Importers] members don’t see how this would work, and forcing shippers to have a contractual agreement with an MTO is not a good idea.”); Doc. No. 54 at 4 (“Without a contractual connection

view and supported a requirement that MTOs bill the BCO directly to avoid additional fees from VOCCs when they pass through such charges.⁴⁷

BCO commenters generally supported requiring billing parties to provide all information identified in Question 6 of the ANPRM and information on how to dispute charges to the billing party. Specifically, BCO commenters cited that requiring such information would put the burden to support the charge on the carrier and would, hopefully, limit the need to dispute charges.⁴⁸ They noted that the most helpful data to address disputed charges would be information related to stop-the-clock events, free time or charges applied when containers are not available for pickup, or when BCOs are unable to drop off containers at a terminal.⁴⁹ BCO commenters asserted that having access to the type of information listed in the ANPRM would help them verify the charges.⁵⁰ Some BCO commenters stated that the Commission should also require billing parties to certify that the charges comply with the Shipping Act of 1984, as amended.⁵¹ In

between the MTO and the shipper, such a requirement would be unworkable.”). Some BCO commenters noted, however, the invoice carriers send to shippers should identify the demurrage charges levied by the MTO to the carrier. *See e.g.*, Doc. No. 84 at 5; Doc. No. 64 at 6.

⁴⁷ *See e.g.*, Doc. No. 41 at 4 (its members pay demurrage to MTOs and detention to the carriers); Doc. No. 53 at 4 (supported this practice because it would help avoid VOCCs charging more than MTOs charge); Doc. No. 28 at 3 (over half of its survey respondents supported MTOs charging demurrage directly to shippers).

⁴⁸ *See e.g.*, Doc. No. 64 at 5 (the minimum requirements would put “the burden on the common carrier to ensure more accurate, timely billing, which should, in theory, minimize superfluous charges and improve business practices.”); Doc. No. 67 at 2 (minimum billing requirements “will promote transparency for all parties involved in shipping transactions, help ensure accountability, and deter unfair business practices[.]”); Doc. No. 58 at 2 (“A requirements for all relevant information . . . would hold billing parties more accountable. It would prevent the VOCCs, NVOCCs, and MTOs from charging erroneous fees that shippers have little or no opportunities to contest.”); Doc. No. 43 at 4 (“Shippers need a full set of details about the containers subject to detention or demurrage charges to effectively assure they are properly assessed charges.”).

⁴⁹ Commenters report that most disputed charges include when free time starts and stops; countable days and whether the “clock stopping” events, such as there were no appointments, container was unavailable, terminal equipment, such as chassis, was unavailable, etc., should reduce the charges.

⁵⁰ *See e.g.*, Doc. No. 60 at 5 (including clock stopping events will “facilitate the carrier to fulfill their responsibility to bill demurrage and detention charges to meet the incentivizing principle[.]”); Doc. No. 22 at 2-3 (omission of event that should stop the clock from invoices “makes it impossible for shippers to verify whether they are actually accounted for when the final total is calculated.”); Doc. No. 8 at 2 (omission of minimum information “makes it extremely difficult for shippers to be able to verify the amount charged are correct.”). *See also* Doc. No. 3 at 2; Doc. No. 44 at 2; Doc. No. 40 at 2; Doc. No. 35 at 2; Doc. No. 34 at 2; Doc. No. 64 at 5; Doc. No. 58 at 2; Doc. No. 55 at 2; Doc. No. 43 at 4.

⁵¹ *See e.g.*, Doc. No. 65 at 4; Doc. No. 84 at 4; Doc. No. 43 at 5.

addition, they also supported the requirement that if the billing party invoices more than one party, then the invoice must identify all billed parties and the basis for billing each party.

BCO commenters were generally supportive of requiring billing parties to include specific information regarding how the billed party may dispute a charge. Specifically, they supported requiring billing parties to provide contact information for disputes and instructions on how to file disputes or information applicable to the dispute process, such as when a charge may be waived or what documentation the billed party must submit with its request.⁵²

Many BCO commenters supported requiring billing parties to issue demurrage or detention invoices within 60 days of when the charges stop accruing; many commenters supported a timeframe of 30 days or less.⁵³ As discussed below, BCO commenters supported a shorter timeframe for issuing demurrage and detention invoices because it is more likely that billed parties will have the information and documents necessary to verify the charges. They also complained that demurrage and detention invoices arrive months after the charges accrued and that billed parties lacked the documentation necessary to verify the charge due to passage of time.

F. Motor Carriers

The Commission received comments from six motor carriers and four motor carrier trade organizations (collectively Motor Carrier commenters).⁵⁴ For the most part, the Motor Carrier

⁵² See e.g., Doc. No. 60 at 8; Doc. No. 28 at 3; Doc. No. 53 at 5; Doc. No. 43 at 5; Doc. No. 64 at 7; Doc. No. 67 at 6; Doc. No. 84 at 5; Doc. No. 21 at 4; Doc. No. 54 at 5; Doc. No. 79 at 5.

⁵³ A more detailed discussion of the timeframes supported by specific commenters is found in section IV.C.1, which discusses the proposed timeframe for billing parties to issue demurrage and detention invoices.

⁵⁴ Comments of Association of Bi-State Motor Carriers (Doc. No. 51); Comments of Harbor Trucking Association (Doc. No. 33); Comments of MTI, Inc. (Doc. No. 46); Comments of Golden State Logistics (Doc. No. 59); Comments of IMC Companies (Doc. No. 7); Comments of Intermodal Association of North America (Doc. No. 24); Comments of Intermodal Motor Carriers Conference (Doc. No. 47); Comments of William H. Kopke Jr. Inc. (Doc. No. 56); Comments of Marine Container Services LLC (Doc. No. 45); Comments of 1634, A Florida LLC (Doc. No. 15).

commenters expressed similar views as the BCO commenters. For example, the Motor Carrier commenters generally supported applying the demurrage and detention billing requirements to VOCCs, NVOCCs, and MTOs; requiring billing parties to provide all information listed in the ANPRM; requiring billing parties to identify all billed parties and the basis for each billed party; and requiring billing parties to issue invoices within a specific timeframe.

In addition, the Motor Carrier commenters expressed concern that billing parties frequently invoiced motor carriers, who have no contractual relationship with the billing parties. For example, the Association of Bi-State Motor Carriers (Bi-State) argued that “motor carriers are not privy to the specifics of the contractual agreements between the shipper and billing parties, and should not be dragged into billing disputes.”⁵⁵ However, Bi-State noted that billing parties sometimes threatened to prevent motor carriers from picking up or dropping off containers due to disputes with one of the motor carrier’s customers.⁵⁶ As a result, Motor Carrier commenters alleged that they must cover the disputed charges in order to serve their other customers.⁵⁷ Accordingly, the Motor Carrier commenters encouraged the Commission to adopt an approach that would require the billing party to bill the customers (BCOs or shippers) directly, as they are the parties who have a contractual relationship with the billing parties.⁵⁸ As a result they said, motor carriers would no longer be responsible to pay such charges or risk business relationships with their other customers if one customer disputes those charges.

III. OCEAN SHIPPING REFORM ACT OF 2022

After the Commission issued the ANPRM and received comments, on June 16, 2022, the

⁵⁵ Doc. No. 51 at 2.

⁵⁶ Doc. No. 51 at 2.

⁵⁷ Doc. No. 51 at 2; Doc. No. 47 at 2, 3.

⁵⁸ *See e.g.*, Doc. No. 51 at 1 (VOCCs should bill shippers directly); Doc. No. 47 at 2 (supported MTOs billing shippers directly because motor carriers “are not aware of separate contractual arrangements.”); Doc. No. 33 at 8 (their members indicated that demurrage and detention should be billed directly to contracting party).

President signed the Ocean Shipping Reform Act of 2022 (OSRA 2022) into law.⁵⁹ 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.⁶⁰ OSRA 2022 then lists the minimum information that common carriers must include in a demurrage or detention invoice:

- (A) date that container is made available.
- (B) the port of discharge.
- (C) the container number or numbers.
- (D) for exported shipments, the earliest return date.
- (E) the allowed free time in days.
- (F) the start date of free time.
- (G) the end date of free time.
- (H) the applicable detention or demurrage rule on which the daily rate is based.
- (I) the applicable rate or rates per the applicable rule.
- (J) the total amount due.
- (K) the email, telephone number, or other appropriate contact information for questions or requests for mitigation of fees.
- (L) a statement that the charges are consistent with any of Federal Maritime Commission rules with respect to detention and demurrage.
- (M) a statement that the common carrier's performance did not cause or contribute to the underlying invoiced charges.⁶¹

Failure to include the required information on a demurrage or detention invoice eliminates any obligation of the billed party to pay the applicable charge.⁶² In addition, OSRA 2022 also authorizes the Commission to revise the minimum information that common carriers must include on demurrage or detention invoices in future rulemakings. The Commission addresses this minimum information in this proposed rule.⁶³

⁵⁹ Pub. L. 117-146, 136 Stat. 1272 (2022).

⁶⁰ Pub. L. 117-146 at Sec. 7(a)(1), 136 Stat. at 1274 (codified at 46 U.S.C. 41104(a)(15)).

⁶¹ Pub. L. 117-146 at Sec. 7(a)(2), 136 Stat. at 1275 (codified at 46 U.S.C. 41104(d)(2)).

⁶² Pub. L. 117-146 at Sec. 7(a)(2), 136 Stat. at 1275 (codified at 46 U.S.C. 41104(f)).

⁶³ Pub. L. 117-146 at Sec. 7(a)(2), 136 Stat. at 1275 (codified at 46 U.S.C. 41104(d)(2)).

OSRA 2022 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.⁶⁴ OSRA 2022 also 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)[.]”⁶⁵ Specifically, the Commission’s rulemaking must clarify “which parties may be appropriately billed for any demurrage, detention, or other similar per container charges.”⁶⁶ The Commission offers that clarification in this proposed rule.

IV. DISCUSSION OF PROPOSED RULE

A. General Provisions

1. Purpose of Rule

This proposed rule would (1) adopt minimum information that common carriers must include in a demurrage or detention invoice that is listed in 46 U.S.C. 41104(d)(2); (2) add to this list additional information that must be included in or with a demurrage or detention invoice; (3) further define prohibited practices by clarifying which parties may be appropriately billed for demurrage or detention charges; and (4) establish billing practices that billing parties must follow when invoicing for demurrage or detention charges.

2. Scope and Applicability

This subpart sets forth regulations governing any invoice issued by an ocean common carrier, MTO, or NVOCC to a billed party or their designated agent for the collection of

⁶⁴ Pub. L. 117-146 at Sec. 7(b)(1), 136 Stat. at 1275.

⁶⁵ Pub. L. 117-146 at Sec. 7(b)(2), 136 Stat. at 1275 (emphasis added).

⁶⁶ Pub. L. 117-146 at Sec. 7(b)(2), 136 Stat. at 1275.

demurrage or detention charges. This regulation does not govern the billing relationships among and between ocean common carriers and MTOs.

As a preliminary matter, the Commission sought comment on to whom this rule should apply. Specifically, the Commission asked whether NVOCCs and MTOs should be bound by the requirements of the rule. The majority of commenters supported applying the rule to both NVOCCs and MTOs. The Commission has determined that the proposed rule would apply to MTOs and NVOCCs, as well as VOCCs, but will not regulate the billing arrangements between VOCCs and MTOs for the reasons discussed below.

a. Inclusion of NVOCCs

Fact Finding No. 29 recommended that the Commission regulate the demurrage and detention billings and billing practices of both common carriers and MTOs.⁶⁷ In its opening question to the ANPRM’s list of requested information, the Commission asked if both NVOCCs and VOCCs should be included in the regulation.⁶⁸ Most commenters supported applying the regulations to NVOCCs. Generally, these commenters noted the importance of consistency across the industry and the need for everyone to adhere to uniform standards.⁶⁹ As described by the WSC, “[t]he need for predictable and clear billing does not change on the basis of whether the billing entity does or does not operate ships – the distinction between VOCCs and NVOCCs. The customer benefits of transparent and timely billing apply equally in both instances[.]”⁷⁰

Few commenters opposed applying any proposed billing requirements to NVOCCs. The most common objection was that NVOCCs do not control any physical assets (*i.e.*, equipment or

⁶⁷ Fact Finding No. 29 Interim Report at 6.

⁶⁸ 87 FR at 8509.

⁶⁹ *See e.g.*, Doc. No. 29 at 1 (stressed that “there must be uniformity (One rule for demurrage and detention billing, no matter who bills it.)”); Doc. No. 60 at 3 (“[BCOs] are entitled to receive timely, accurate and explanatory billing from their contracted carrier whether the carriage is contracted pursuant to a bill of lading issued by an NVOCC or by a VOCC.”).

⁷⁰ Doc. No. 61 at 4.

land) to be subject to the rule and that usually NVOCCs treat demurrage and detention charges as a pass-through cost.⁷¹ One commenter noted that because a NVOCC has to pay a VOCC or MTO for these types of charges, an NVOCC has no reason to hold back sending an invoice to a BCO because that will leave the NVOCC with outstanding charges to the carrier.⁷²

Although most NVOCCs are only passing through charges to BCOs, that does not change the fact that some NVOCCs invoice BCOs for demurrage and detention.⁷³ BCOs employing an NVOCC generally do not interact with VOCCs and, as a result, the demurrage or detention invoice BCOs receive from an NVOCC may be their only notice about the origin and breakout of these charges. Additionally, 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. Furthermore, there is a greater need for transparency when the NVOCCs markup demurrage or detention charges assessed by VOCCs or MTOs or when NVOCCs charge demurrage or detention based on their own tariff rules or negotiated agreements.

Ultimately, this regulation is an outgrowth of the work done in Fact Finding No. 29. As noted in the Final Report, “[t]hroughout the Fact Finding, industry members reported confusion about the information contained in invoices.”⁷⁴ As discussed below, the intent of this rulemaking

⁷¹ See e.g., Doc. No. 69 at 3 (“NVOCCs do not generally file [demurrage and detention] schedules in their tariffs and do not generate [demurrage and detention] charges on their own. Instead, [these] charges originate with VOCCs and MTOs, and are merely passed through by NVOCCs as facilitators of the transaction.”).

⁷² Doc. No. 13 at 4 (“there is no logic in the NVOCC unreasonably delaying billing or notifying the customer. The NVOCC is the party who is being billed by the carrier/terminal and will have the outstanding payables due to the carrier, so clearly, there is no general logic that encourages them to delay billing to their end customer.”).

⁷³ NVOCCs may also issue invoices that charge demurrage or detention based on their own tariff rules or negotiated rates. In addition, NVOCCs may also mark-up the demurrage or detention charge assessed by a VOCC or MTO.

⁷⁴ *Fact Finding Investigation 29: Final Report* at 51 (May 31, 2022) (Fact Finding 29 Final Report), available at: <https://www.fmc.gov/wp-content/uploads/2022/06/FactFinding29FinalReport.pdf>.

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.⁷⁵

b. Inclusion of MTOs

MTOs often do not have direct contractual relationships with shippers. Instead, MTOs usually have contractual relationships with VOCCs, such as through terminal services agreements.⁷⁶ However, an MTO may separately assess demurrage as an implied contract in a court of law, provided that demurrage rates are published as part of the MTO's rate schedule.⁷⁷

Commenters overwhelmingly argued that the proposed rule should apply to MTOs. Again, while the most common practice is for the MTO to invoice the VOCC and the VOCC to send a combined invoice to the shipper, several commenters also noted that in some cases MTOs bill shippers directly.⁷⁸ MTOs were generally opposed to the proposed regulations, citing that traditionally they do not invoice shippers directly, but instead work with VOCCs.⁷⁹

The Commission's primary concern with this proposed regulation is to ensure billed parties understand the demurrage or detention invoices they receive. Although, at least under the traditional process, it appears that MTOs rarely interact with anyone other than the VOCC, in those cases where an MTO invoices a shipper, the MTO should be subject to the same regulations that apply to VOCCs and NVOCCs.

c. MTO and VOCC Relationships

This proposed regulation does not govern the billing relationships among and between VOCCs and MTOs. As noted earlier, the purpose of the proposed rule is to identify the minimum

⁷⁵ See Fact Finding 29 Interim Recommendations at 6 (recommending a rulemaking on demurrage and detention billing requirements so that the person receiving the bill understands "what is being billed and by whom.").

⁷⁶ See 46 CFR 535.309.

⁷⁷ 46 U.S.C. 40501(f); 46 CFR 525.2.

⁷⁸ See e.g., Doc. No. 61 at 4 ("MTOs can and do bill for demurrage, and there are multiple business models at ports around the country under which carriers bill on behalf of MTOs and vice versa.")

⁷⁹ See e.g., Doc. No. 49 at 2; Doc. No. 26 at 3.

information billing parties must include on demurrage and detention invoices, and to improve the invoices' clarity. Although the Fact Finding No. 29 Final Report noted that shippers reported confusion about information contained in demurrage and detention invoices, the Fact-Finding Officer did not receive similar concerns from VOCCs about invoices they were receiving from MTOs.⁸⁰

The ANPRM specifically asked whether the proposed regulation should apply to the format in which MTOs bill VOCCs.⁸¹ Most OTI, BCO, and Motor Carrier commenters answered this question by discussing invoices they receive from carriers and the need to have charges originating from an MTO and charges originating from a VOCC distinguished.⁸² This fact suggests that the primary concern that needs to be addressed in this proposed regulation is not the billing interactions between MTOs and VOCCs, but rather transparency and clarity on invoices issued to OTIs, shippers, and motor carriers.

Further, many MTOs and MTO trade organizations also argued that regulations in this realm were not warranted. For example, the NAWA explained, “[t]he unique commercial relationships negotiated between VOCCs and MTOs have not been the source of demurrage

⁸⁰ Fact Finding 29 Final Report at 51. *See e.g.*, Coalition for Fair Port Practices Petition for Rulemaking, FMC Docket No. P4-16, (Dec. 7, 2016); *Fact Finding Investigation No. 28: Final Report*, (Sep. 4, 2018), available at: https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF28_int_rpt2.pdf/.

⁸¹ 87 FR at 8509.

⁸² *See e.g.*, Doc. No. 37 at 2 (noted that “charges should be properly distinguished and identified so that by reviewing a bill the invoiced party can determine which charges are being passed along by VOCCs and which charges are being billed directly to the invoiced party in the first instance.”).

complaints.”⁸³ Other commenters cited the close commercial relationship shared by MTOs and VOCCs, which, they argued, made additional regulation unnecessary.⁸⁴

The Commission received a few comments from VOCCs who favored extending regulations to cover the invoicing from MTOs to VOCCs. These comments were generally about maintaining accurate information throughout the process.⁸⁵ VOCC commenters stressed the importance of applying consistent information requirements at each stage in the supply chain.⁸⁶

Notwithstanding the comments from OCEMA and WSC, the Commission has not received comments responding to the ANPRM or elsewhere that expressed concerns about the relationships or interactions between VOCCs and MTOs that warrant regulating the format used by MTOs to bill VOCCs. The Commission notes the strong commercial relationships between MTOs and VOCCs and is confident that these current contractual relationships will continue to ensure that the proper information is shared and that the party who ultimately receives the invoice is receiving accurate information. Thus, the Commission concludes that at this time it is not necessary to impose minimum billing information requirements for MTO invoices issued to VOCCs.

⁸³ Doc. No. 26 at 3. *See* Doc. No. 60 at 3 (“the assessment of the terms and charges by [MTOs] on [VOCCs] has not so far been a part of the scope of Fact Finding Investigation 28”); Doc. No. 49 at 3 (“Maher has not received any feedback from its carrier customers and other Terminal users that its free time and demurrage policies and practices are unclear or confusing, or that further regulations are necessary to improve clarity with respect to such policies and practices.”).

⁸⁴ Doc. No. 49 at 3 (“The Commission should not adopt a demurrage billing regulation that includes MTOs, let alone one that regulates the format in which MTOs charge demurrage to VOCCs. To the extent that Maher charges demurrage directly to its VOCC customers, as opposed to other Terminal users, those arrangements are set forth in privately negotiated, arms-length terminal service agreements, which are subject to tailored governing law and dispute resolution provisions.”).

⁸⁵ Doc. No. 61 at 4 (“It would be impractical if charges originating with MTOs, but potentially collected by common carriers, were not subject to the same minimum standards regarding included information. To the extent that a charge may be handled by multiple parties – whether on an agency basis or as a pass-through – it is critical that the relevant information be available to all parties in the chain.”).

⁸⁶ *See e.g.*, Doc. No. 78 at 3 (“OCEMA has no position on this issue at this time. However, OCEMA stresses the importance of consistency and transparency throughout the supply chain with respect to any information requirements imposed on VOCCs.”).

3. Definitions

a. Demurrage or Detention

For purposes of this proposed rule, the Commission defines the terms “demurrage or detention” broadly to include any charge assessed by common carriers and marine terminal operators related to the use of marine terminal space or shipping containers. This proposed definition 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 regardless of the labels given to those charges. Under this definition, for instance, a charge assessed by a common carrier for the use of containers outside a marine terminal would fall within the scope of this rule regardless of whether the charge was called “detention” or “per diem.” Similarly, a charge assessed because a container is taking up terminal space would fall within the scope of this rule even if the billing party called the charge something other than “demurrage.” Like the scope denoted in 46 CFR 545.5, the proposed rule specifically limits these definitions to “shipping containers” and excludes charges related to other equipment, such as chassis, because depending on the context, “per diem” can refer to containers, chassis, or both.

As previously expressed during the Commission’s interpretive rulemaking at 46 CFR 545.5, the Commission supports defining demurrage and detention charges based on what asset is the source of the charge (land or container) as opposed to the location of a container (inside or outside a terminal).⁸⁷ In that prior rulemaking, the Commission discouraged use of terms such as “storage” and “per diem” as synonyms for demurrage and detention because these terms add additional complexity. The Commission reiterates those statements here and notes that, despite

⁸⁷ Interpretive Rule on Demurrage and Detention Under the Shipping Act Final Rule, 85 FR 29638, 29666 (May 18, 2020) (codified at 46 CFR 545.5).

how it may be used in the industry, to ensure clarity the Commission generally favors using the term “per diem” to refer to the use of chassis.

b. Demurrage or Detention Invoice

The Commission proposes to broadly defining the term “demurrage or detention invoice” as meaning any statement, printed, written, or accessible online, that documents an assessment of demurrage or detention charges. By proposing a broad definition, the Commission intends the definition to include the existing variety of methods employed by common carriers and MTOs to invoice shippers, and to leave room for improvement of existing systems or adopting of any new, innovative invoicing methods.

The Commission received a few comments asking it to institute requirements on how invoices are displayed or presented to shippers.⁸⁸ Although there are a variety of existing methods to display and deliver this information, the Commission does not perceive a problem necessitating a regulatory solution at this time. The Commission intends the proposed definition to encompass the many existing and potential future methods that a bill might be presented and does not indicate a preference or requirement.

c. Billed Party

The Commission is proposing to define “billed party” as meaning the person receiving the demurrage or detention invoice and who is responsible for the payment of any incurred demurrage or detention charge. In the Commission’s view, this proposed definition would best capture the intended scope of this term and eliminate any potential ambiguity as to its coverage.

d. Billing Party

⁸⁸ See *e.g.*, Doc. No. 62 at 4-5 (“One way to make invoices more accessible is to provide recipients with a digital copy of the invoice (for example, through an electronic portal or online source) rather than solely by hardcopy.”); Doc. No. 81 at 2 (“Invoices should be readily available (*i.e.* online) so NVOCCs can provide statements to their customers.”).

This proposed rule would define the term “billing party” as meaning the VOCC, NVOCC, or MTO who issues a demurrage or detention invoice. The Commission acknowledges that, currently, in most circumstances the billing party will be a VOCC. For purposes of this proposed rule, this term is defined broadly to incorporate the occasions when an MTO or an NVOCC may issue a demurrage or detention invoice.

e. Billing Dispute

The term “billing dispute” would mean any disagreement with respect to the validity of the charges, or the method of their invoicing raised by the billed party or their agent to the billing party. This proposed definition, and more generally, this proposed rule, does not indicate a preference or requirement for the format in which a dispute may be raised. Instead, the Commission proposes a broad definition that incorporates all types of disputes raised by a billed party upon receiving a demurrage or detention invoice.

4. Properly Issued Invoices

OSRA 2022 directs the Commission to initiate a rulemaking that seeks to “further clarify reasonable rules and practices related to the assessment of detention and demurrage charges[.]”⁸⁹ Specifically, OSRA 2022 instructs the Commission to address “which parties may be appropriately billed for any demurrage, detention, or other similar per container charge.”⁹⁰ Under the proposed rule, a properly issued invoice is an invoice that is only issued to the person that has contracted with the billing party for the carriage of goods or space to store cargo, and is therefore the person responsible for the payment of any incurred demurrage or detention charge. This is often the shipper of record. The proposed rule would prohibit billing parties from issuing

⁸⁹ OSRA 2022, Section 7(b)(2).

⁹⁰ OSRA 2022, Section 7(b)(2).

demurrage and detention invoices to persons other than the person for whose account the billing party provided ocean transportation or storage.

As a result of anecdotal reports indicating that billing parties sometimes sent invoices to multiple parties for the same shipments, the Commission asked whether this practice occurred regularly.⁹¹ Many commenters described a current, wide-spread practice where the billing party sends the invoice to multiple parties, most of whom are not the recipient of the service giving rise to the invoiced charge.⁹² The current system, in which parties who did not negotiate contract terms with the billing party are nonetheless bound by them, creates additional confusion and hardship and exacerbates problems in the supply chain. For example, one commenter noted that this practice often results in disputes among the parties.⁹³ Other commenters noted that invoicing multiple parties results in duplicative payments, which further complicates resolving invoice disputes.⁹⁴

Although the Commission did not specifically request comments on prohibiting billing parties from invoicing anyone except the party who contracted for the service (usually the shipper), the Commission received many comments urging it to adopt such regulations.⁹⁵ Commenters expressed frustration at the practice of billing demurrage and detention charges to

⁹¹ 87 FR at 8508-8509.

⁹² *See e.g.*, Doc. No. 44 at 3; Doc. No. 37 at 2; Doc. No. 19 at 2; Doc. No. 15 at 3; Doc. No. 13 at 5-6; Doc. No. 8 at 3; Doc. No. 47 at 6; Doc. No. 48 at 5.

⁹³ Doc. No. 53 at 4.

⁹⁴ Doc. No. 28 at 2 (“According to most survey respondents, common carriers invoice multiple parties for demurrage and/or detention charges sometimes resulting in duplicative payments”); Doc. No. 13 at 6 (“We also see invoices being sent on the same container to multiple parties, and at times, it is paid more than once[.]”).

⁹⁵ *See e.g.*, Doc. No. 82 at 4; Doc. No. 56 at 3; Doc. No. 33 at 3; Doc. No. 51 at 1.

parties who have not agreed to the charges or are not otherwise liable.⁹⁶ Other commenters suggested that common carriers bill third parties to shield customer relationships.⁹⁷

Commenters who supported such a regulation generally agreed with the concept that only the parties to the contract (usually the shipper and common carrier), have insight into the contractual agreements between the shipper and common carrier.⁹⁸ Because third parties lack direct involvement and information, most would not be privy to the demurrage and detention terms negotiated by the parties to the original contractual agreement, and therefore are at a disadvantage if pulled into a dispute over such charges. One specific instance where not being a party to the contract is a disadvantage is in determining free time. As one commenter explained:

“Motor carriers are not a party to contracts and may not be aware of contractual allowances for free time. Yet motor carriers receive these invoices and are then responsible for working with ocean carriers and shippers to determine which contract the shipment was under and whether it allowed for additional free time beyond what has been billed.”⁹⁹

Other commenters also described the difficulty of verifying the accuracy of charges when they were not party to the agreements that determine the allotted free time.¹⁰⁰

⁹⁶ See e.g., Doc. No. 84 at 5 (“The carrier may not invoice a party merely because the carrier has expanded the list of parties which it includes as a merchant in its B/L”).

⁹⁷ See Doc. No. 82 at 4 (“The carriers are billing the party of least resistance. It appears the first and easiest choice under the “Merchant Clause” is to bill the US customs broker on import shipments as there would be minimal effort on the carrier’s part (since the carrier’s shipper may be based overseas), and the carrier prefers to avoid imposing detention/demurrage on a current or future customer BCO. Instead, the carrier lawyers pursue a small US customs broker with whom the carrier has not had, and likely will never have, any commercial relationship.”).

⁹⁸ Doc. No. 51 at 1 (“Members feel strongly that the VOCC should bill the customers directly, as they are the parties who formed the agreement. This would remove the drayage carrier from the equation, reduce confusion, and keep the business relationships clear.”).

⁹⁹ Doc. No. 47 at 2.

¹⁰⁰ See Doc. No. 33 at 3 (“If a motor carrier is paying demurrage, it is impossible to know if the billing is accurate since the motor carrier is not party to the contractual arrangements and agreed upon free time. On detention and per diem, since Motor Carriers are in possession of the containers under the interchange, they are constantly surveying the restrictions that exist for return of the container. However, motor carriers are still not party to the contract and subsequent free time agreements and therefore must work with shippers to determine which contract the shipment was under and if there was additional free time available from what was billed. This is another reason why only billing between contracting parties should be allowed. Motor carriers are not party to these contracts and therefore should not be billed.”).

The Commission understands the concerns with invoices being sent to those individuals without a contractual relationship and acknowledges that this practice exacerbates dispute resolution and efficient movement of cargo. As was pointed out in the Final Report of the Supply Chain Innovation Team Initiative, the “United States international supply chain is a complex, dynamic ecosystem” and the “lack of direct customer relationships between actors in this system (such as shippers and terminals) impedes cooperative problem-solving, exacerbates disruptions . . . and makes recovering from disruptions more difficult[.]”¹⁰¹ This is exactly the case here where motor carriers, custom brokers, and others who do not have customer relationships with common carriers are being asked to resolve disputes.

Many commenters also acknowledged the value of commercial relationships within the system. For example, many commenters opposed requiring MTOs to bill shippers directly because of a lack of direct commercial relationship.¹⁰² Other commenters cited the value of the existing relationships between MTOs and VOCCs and the benefit it brings to the supply chain. For example, the National Industrial Transportation League noted, “[t]he commercial relationship between [VOCCs] and their MTO partners should be valued for its ability to bring benefit to the ocean delivery system and, by extension, to the shipping public in a way that the transactional relationship between [BCOs] and [MTOs] cannot.”¹⁰³ Parties involved in a continuous commercial relationship have made an investment in that relationship and are highly motivated to timely and effectively resolve problems as they arise in order to maintain a mutually beneficial, ongoing relationship.

¹⁰¹ *Supply Chain Innovation Initiative: Final Report* at 3 (Dec. 5, 2017), available at: <https://www.fmc.gov/assets/1/Page/SCITFinalReport-reduced.pdf>.

¹⁰² See e.g., Doc. No. 52 at 8 (“Ports and MTOs do not bill directly to shippers or cargo owners; their strongest relationship lies with ocean carriers, whom they enter into contracts and interface with daily.”); Doc. No. 54 at 4 (“Without a contractual connection between the MTO and the shipper, such a requirement would be unworkable.”).

¹⁰³ Doc. No. 60 at 6. See Doc. No. 72 at 6.

The Commission believes that prohibiting billing parties from issuing demurrage and detention invoices to persons with whom they do not have a genuine commercial relationship will similarly benefit the supply chain. If the billed party has firsthand knowledge of the terms of its 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 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.

Practically, the proposed rule would prohibit billing parties from invoicing motor carriers or customs brokers. If adopted, the proposed rule would not prevent motor carriers from paying on behalf of the billed party. Although a motor carrier could pay on behalf of a billed party, the motor carrier would not be liable for these charges and could not be penalized for nonpayment of charges. Although this arrangement is different from many of the billing systems currently employed, it would not be unprecedented. During Fact Finding Investigation No. 28, the Commission sought information on how contractual relationships, policies, and practices regarding demurrage and detention in the United States differ from those in other maritime nations. The Commission received information that, in other nations, VOCCs collect demurrage and detention charges (often combined), directly from shippers rather than motor carriers.¹⁰⁴

Under the proposed rule, only the person who contracted with the common carrier for the carriage or storage of goods may be issued an invoice. The Commission is aware that there are a variety of shipping arrangements that allocate risks, obligations, and costs between the shipper

¹⁰⁴ Fact Finding Investigation No. 28 Final Report at 3, Fed. Mar. Comm'n (Sep. 4, 2018), available at: https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF28_int_rpt2.pdf/.

and the consignee named on the bill of lading. Considering these arrangements, the Commission is specifically seeking comment 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. Including the consignee named on the bill of lading as an appropriately billed party for demurrage or detention charges in the Commission's proposed rule would memorialize an existing industry practice and allow the common carrier to bill either the person who contracted for the shipment of the cargo or consignee named on the bill of lading.

In sum, the proposed rule should simplify the current system and ensure that only the person with the most knowledge about the shipment and who is in the best position to understand and dispute the charge receives a demurrage or detention invoice. The Commission views the practice of sending an invoice to multiple parties involved in the shipping transaction rather than sending an invoice for demurrage or detention charges to only the person that has contracted with the billing party for the carriage or storage of goods as untenable. Therefore, the proposed rule would prohibit such a practice and require that only the person that has contracted with the billing party for the carriage or storage of goods receive an invoice for incurred demurrage or detention charges.

B. Required Billing Information

In the ANPRM, the Commission requested comment on the minimum information that should be required on billings.¹⁰⁵ Specifically, the ANPRM requested comment on whether it should require demurrage and detention invoices to include information necessary to identify the shipment (bill of lading number, container number, etc.); information on how the chargers were calculated (container availability date, vessel arrival dates for import shipments and earliest

¹⁰⁵ 87 FR at 8508-8509.

return date for export shipments, etc.); and information on events that justify stopping the clock on charges (*e.g.*, container unavailability, lack of return locations, lack of appointments, other force majeure reasons).¹⁰⁶ An overwhelming number of commenters supported the Commission requiring all of the information listed under Question 6 of the ANPRM. However, a small number of commenters opposed such a requirement. For example, NAWA, American Association of Port Authorities, and Port of NY/NJ Sustainable Services Agreement commented that some information listed in the ANPRM may be extremely burdensome or impossible to provide.¹⁰⁷ In addition, Maher believed that marine terminals should provide basic information on demurrage charges but did not support requiring one-size-fits-all billing information.¹⁰⁸

OSRA 2022 requires common carriers to include the following information on demurrage and detention invoices: the date that the 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.¹⁰⁹

The proposed rule would require common carriers and MTOs to include all the information required in 46 U.S.C. 41104(d)(2), listed above on demurrage or detention invoices.

¹⁰⁶ 87 FR at 8508. *See* Question 6, 87 FR at 8509.

¹⁰⁷ Doc. No. 26 at 5; Doc. No. 52 at 7; Doc. No. 68 at 1.

¹⁰⁸ Doc. No. 49 at 3.

¹⁰⁹ Pub. L. 117-146 at Sec. 7(a)(2), 136 Stat. at 1275 (codified at 46 U.S.C. 41104(d)(2)).

The proposed rule also would require billing parties to include minimum information in addition to the information listed in 46 U.S.C. 41104(d)(2) to include specific identifying, timing, rate, and dispute resolution information, discussed in detail below. The Commission requests comments on whether it should require billing parties to include all the proposed information in demurrage and detention invoices. If the commenter opposes any of the proposed requirements, they should identify the information and the obstacles or burden to including such information on demurrage or detention invoices. If the commenter supports the proposed required information, they should explain how the specific information will assist them in verifying the accuracy of the charge or ascertaining how the charge was calculated.

1. Identifying Information

Under the proposed rule, the invoice must contain sufficient information to enable the billed party to identify the container(s) to which the charges apply, including: the bill of lading number(s); the container number(s); for imports, the port(s) of discharge; and the basis for why the invoiced party is the proper party of interest and thus liable for the charge. OSRA 2022 requires that invoices include the port of discharge and the container number.¹¹⁰ The proposed rule clarifies that billing parties must only include ports of discharge for import shipments because providing the port of discharge on a demurrage or detention invoice would be less useful in the context of export shipments. The proposed rule would also require billing parties to include the bill of lading number and the basis for why the billed party was invoiced. Commenters expressed support for requiring billing parties to include the container number, bill of lading number, and basis for why the billed party is the proper party in interest. The ANPRM

¹¹⁰ 46 U.S.C. 41104(d)(2)(B) and (C).

did not request comments on whether the invoice should include the port of discharge for import shipments.

a. Bill of lading number

The Commission received many comments in favor of including the bill of lading number as required information. Several commenters noted that without the bill of lading number it would be difficult to determine which shipment is being charged and to verify the accuracy of the charge.¹¹¹ However, the Commission received one comment that opposed such a requirement. OCEMA stated that the bill of lading number is not provided to billed parties that are not party to the transportation contract because disclosure may present a risk of violating legal or contractual non-disclosure requirements.¹¹² In response to this comment, the Commission notes that bill of lading numbers are available through publicly accessible import and export data systems, such as PIERS. In addition, the proposed rule would prohibit 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. Further, commenters observed that demurrage and detention invoices already include bill of lading numbers.¹¹³ Because the bill of lading number provides valuable identifying information to the billed party, the Commission proposes requiring this information on demurrage and detention invoices.

b. Basis for why party was invoiced

The Commission received numerous comments asserting that billing parties issue invoices to multiple parties for the same charges and this sometimes results in duplicative

¹¹¹ See e.g., Doc. No. 22 at 2.

¹¹² Doc. No. 78 at 4.

¹¹³ Doc. No. 52 at 7; Doc. No. 49 at 4.

payments.¹¹⁴ Many commenters supported requiring billing parties to include the basis for why a party has been invoiced and is thus liable for the charge. Requiring billing parties to identify the basis for why billed parties are liable for the charge would enable billed parties to confirm that they are correctly billed the invoiced charges. The proposed rule is consistent with proposed §541.4 that would prohibit billing parties from issuing demurrage and detention invoices to persons other than the person for whose account the billing party provided ocean transportation or space to store goods. Because the invoice would identify the basis for why the billed party is liable for the charge, they would be able to confirm that the billing party could issue an invoice to them under proposed §541.4.

2. Timing Information

The invoice must contain sufficient information to enable the billed party to identify the relevant time for which the charges apply and the applicable due date for the invoiced charges, including: the billing date; the billing due date; the allowed free time in days; the start date of free time; the end date of free time; for imports, the container availability date; for exports, the earliest return date; and the specific date(s) for which demurrage or detention were charged. OSRA 2022 requires that invoices include the date the container is made available; for exported shipments, the earliest return date; the allowed free time in days; the start date of free time; and the end date of free time.¹¹⁵ The proposed rule clarifies that the billing parties must only provide container availability date for import shipments. The proposed rule would also require billing parties to specify the dates for which demurrage and/or detention charges accrued, the billing date, and the billing due date.

¹¹⁴ See e.g., Doc. No. 13 at 5-6; Doc. No. 15 at 3; Doc. No. 18 at 2; Doc. No. 19 at 2; Doc. No. 37 at 2; Doc. No. 28 at 2.

¹¹⁵ 46 U.S.C. 41104(d)(2)(A), (E)-(G).

a. Dates demurrage or detention charges accrued

The Commission received numerous comments in response to the ANPRM that indicated that invoices should reflect any “clock-stopping” events that would prevent the return of equipment, such as container unavailability or lack of return locations or appointment times.¹¹⁶ OCEMA, however, opposed such a requirement and stated that this type of information is not always known at the time of invoicing and would therefore pose a risk of delaying the payment process and disrupt the flow of cargo.¹¹⁷ Further, OCEMA asserted that information such as container and appointment availability are sourced from third party systems and therefore the timing and feasibility of providing this information is unknown.¹¹⁸ WSC noted that carriers do not have visibility to such “clock-stopping” events and that shippers or motor carriers are more aware of challenges to container pick-up and drop-off.¹¹⁹ Maher also commented that it does not provide “clock-stopping events” on their invoices because of the cost and administrative burden to providing such information.¹²⁰

Instead of requiring billing parties to identify specific “clock-stopping” events on demurrage and detention invoices, the proposed rule would require the billing party to identify the specific dates on which they charged demurrage or detention. The proposed 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 proposed rule incorporates the intent of OSRA 2022 to shift the burden to billing parties to

¹¹⁶ See e.g., Doc. No. 13 at 5; Doc. No. 14 at 2; Doc. No. 15 at 2; Doc. No. 16 at 2; Doc. No. 17 at 2; Doc. No. 18 at 2; Doc. No. 19 at 2; Doc. No. 21 at 3; Doc. No. 29 at 2; Doc. No. 30 at 1; Doc. No. 44 at 2; Doc. No. 83 at 2.

¹¹⁷ Doc. No. 78 at 5.

¹¹⁸ Doc. No. 78 at 5.

¹¹⁹ Doc. No. 61 at 7.

¹²⁰ Doc. No. 49 at 4.

justify the demurrage or detention charges while allowing billing parties to correct invoices when the intervening events are not initially known to them.

b. Billing date and payment due date

The proposed rule would require the billing party to include the invoice billing date and payment due date. The proposed requirement to include the billing date and the payment due date will enable the billed party and the Commission to confirm that the billing parties are adhering to the proposed billing practices outlined in proposed §541.7. If the billed party has the billing date information, they can confirm that the billed party issued the invoice within 30 days from when the charge was last incurred. In addition, providing the payment due date would notify the billed party of when they must pay the invoiced charges.

3. Rate Information

The invoice must contain sufficient information to enable the billed party to identify the amount due and readily ascertain how that amount was calculated, including: the total amount due; the applicable detention or demurrage rule (*i.e.*, the tariff name and rule number or applicable service contract number and section) on which the daily rate is based; and the specific rate or rates per the applicable tariff rule or service contract. The proposed rule incorporates the rate information requirements contained in OSRA 2022.¹²¹ It also clarifies that when billing parties provide the applicable detention or demurrage rule on which the daily rate is based, the billing party should provide sufficient detail so that the billed party is able to locate the specific rate that should apply and confirm that the invoice includes the correct rate. Under the proposed rule, demurrage and detention invoices would include information necessary to ascertain the rate that the billing party applied, grounds for applying that rate, dates for which the billing party

¹²¹ 46 U.S.C. 41104(d)(2)(H)-(J).

charged the rate, and the total amount due. This enhanced transparency will enable billed parties to efficiently confirm the charges and decide whether to dispute the invoiced charges.

A commenter expressed concern that providing the applicable detention or demurrage rule on which the daily rate is based could “undermine service contract confidentiality.”¹²² However, because the proposed rule would prohibit billing parties from issuing a demurrage or detention invoice to a person other than the person for whose account the billing party provided ocean transportation or space to store goods, the billed party is already privy to the confidential contract or negotiated terms, including the specific agreed upon rate.

4. Dispute Information

Under the proposed rule, 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 and understand the process to request fee mitigation, refund, or waiver. The proposed rule would require the invoice to include: an email, telephone number, or other appropriate contact information for questions or request for fee mitigation, refund, or waiver; an URL address of a 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; and defined timeframes that comply with the billing practices in this part, during which the billed party must request fee mitigation, refunds, or waivers and within which the billing party will resolve such requests. OSRA 2022 requires that the invoice include contact information for questions or requests for mitigation of fees.¹²³ The proposed rule would also require that the invoice include the URL address where billed parties can obtain a detailed description of the information or documentation that must be provided with

¹²² Doc. No. 61 at 5.

¹²³ 46 U.S.C. § 41104(d)(2)(K).

a request for fee mitigation, refunds, or waivers. In addition, the proposed rule would require that the invoice provide defined timeframes by which the billed party must request fee mitigation, refunds, or waivers, and the timeframe by which the billing party would resolve such requests.

a. Website address that describes information required for dispute resolution

The proposed regulation would require the invoice to provide the URL address of a publicly-accessible portion of the billing party's website that describes the information that the billed party must provide to successfully request fee mitigation, refund, or waiver. Commenters indicated that shippers lack awareness regarding what information they should include when they request fee mitigation, refunds, or waivers.¹²⁴ Knowing what information or documentation must be filed with requests for fee mitigation, refunds, and waivers, will improve efficiency within the dispute process. Parties will not need to exchange communications that inform billed parties what information to include with their requests, notify billed parties that they did not file all the required information, or supplement pending requests with additional information. In addition, awareness of what information must be provided with any request for fee mitigation, refund, or waiver, will enable billed parties to collect the necessary information and decrease the number of requests denied on technicalities.

The Commission acknowledges that a billing party should require the same information to be submitted with requests for fee mitigation, refund, or waiver, regardless of which billed party is making the request. Thus, it is not necessary to include a detailed description of information or documents that the billed party must provide to successfully request a fee mitigation, refund, or waiver on each individual demurrage or detention invoice. However, it is

¹²⁴ See e.g., Doc. No. 8 at 3; Doc. No. 13 at 7; Doc. No. 41 at 4; Doc. No. 43 at 5; Doc. No. 53 at 5; Doc. No. 65 at 5; Doc. No. 61 at 10; Doc. No. 63 at 4; Doc. No. 64 at 7; Doc. No. 67 at 6.

important that billed parties can easily locate this information. To ensure that billed parties are able to find this vital information, the proposed rule would require the invoice to include the URL address for a publicly-accessible portion of the billing party's website that describes the required information. The Commission encourages billing parties to provide a URL address that is specific (*i.e.*, providing the billing party's homepage when there is no clear indication where this information can be found would be insufficient).

b. Defined timeframes

The proposed rule would also require the invoice to include specific timeframes within which the billed party must submit a fee mitigation, refund, or waiver request and for when the billing party will resolve such requests. This proposed rule would require the timeframes to comply with the proposed billing practices in §§541.7 and 541.8. As a result, demurrage or detention invoices would notify the billed party of these key timeframes and required billing practices and the billed party would not need to be familiar with the Commission's regulations to know these key dates.

5. Certifications

Under the proposed rule, the invoice must contain a statement from the billing party that the demurrage or detention charge is consistent with any of the Commission's rules related to demurrage and detention, including the proposed rule and 46 CFR 545.5.¹²⁵ In addition, the proposed rule would require the invoice to include a statement from the billing party that their performance did not cause or contribute to the underlying invoiced charges. OSRA 2022 requires billing parties to include both statements on demurrage and detention invoices.¹²⁶ The proposed rule would incorporate these required statements. In addition, the proposed rule clarifies that the

¹²⁵ 46 U.S.C. 41104(d)(2)(L).

¹²⁶ 46 U.S.C. 41104(d)(2)(M).

Commission's rules related to demurrage and detention include the proposed rule and the interpretive rule on demurrage and detention at 46 CFR 545.5. Although the ANPRM did not request comments on whether billing parties include such statements on demurrage and detention invoices, several commenters supported requiring such statements or similar statements.¹²⁷

C. Billing Practices

1. 30-Day Timeframe to Issue Demurrage or Detention Invoices

In the ANPRM, the Commission noted concerns from stakeholders regarding the lack of clearly defined timeframes for the issuance of demurrage or detention invoices.¹²⁸ In Docket No. 19-05, several commenters asserted that billing parties should issue demurrage or detention invoices within specific timeframes.¹²⁹ When issuing the Interpretive Rule in May 2020, the Commission determined not to take action regarding deadlines for demurrage or detention invoices but stated that it reserved the right to address the issue at a later date.¹³⁰

In the ANPRM, the Commission stated that it continued to receive reports of delays in receiving demurrage or detention invoices and the difficulties in validating the accuracy of the charges contained in invoices received months after the occurrence of the charges.¹³¹ The Commission requested comments on whether it should require billing parties issue demurrage or detention invoices within 60 days of the occurrence of the charge, noting that this approach would align with the UIIA.¹³² Specifically, the Commission stated that it was interested in whether the UIIA timeframe is effective and whether a longer or shorter deadline would be appropriate.¹³³

¹²⁷ See e.g., Doc. No. 75 at 3; Doc. No. 43 at 5; Doc. No. 77 at 5; Doc. No. 69 at 5; Doc. No. 84 at 4.

¹²⁸ 87 FR at 8508.

¹²⁹ 85 FR at 29662.

¹³⁰ 85 FR at 29662.

¹³¹ 87 FR at 8508.

¹³² 87 FR at 8508.

¹³³ 87 FR at 8508.

Many commenters responded to the question of whether the Commission should require that billing parties issue demurrage or detention invoices within 60 days of when the charge stops accruing. Four commenters opposed requiring billing parties issue a demurrage or detention invoice within a specified timeframe.¹³⁴ Two commenters, WSC and OCEMA, asserted that the Commission should not regulate when billing parties issue demurrage or detention invoices because these timeframes should be set by contractual terms or commercial negotiations.¹³⁵ If, however, the Commission decides to require billing parties to issue demurrage or detention invoices within a specific timeframe, WSC and OCEMA stated the timeframe should be no shorter than 60 days.¹³⁶ In addition, both WSC and OCEMA noted that any such timeframe for issuing demurrage or detention invoices should allow for nuanced application of the deadline.¹³⁷ For example, both parties raised questions regarding how the deadline would apply to third-parties that pass through demurrage and detention charges.¹³⁸

NAWE asserted that it is unnecessary for the Commission to regulate timeframes for billing parties, especially MTOs, to issue demurrage or detention invoices.¹³⁹ Specifically, NAWA observed that most MTOs use electronic data interchanges and electronic payment methods and are able to “invoice” demurrage or detention charges immediately after these charges stop accruing.¹⁴⁰ Because there are no delays for such MTOs in issuing demurrage or

¹³⁴ Doc. No. 61 at 9-10; Doc. No. 26 at 7; Doc. No. 68 at 1 (incorporates NAWA Comments); Doc. No. 78 at 6-7. WSC and OCEMA are associations that represent ocean common carriers. *See* Doc. No. 78 at 1. NAWA and PONYNJSSA are associations that represent marine terminal operators. Doc. No. 26 at 1; Doc. No. 68 at 1

¹³⁵ Doc. No. 61 at 9-10; Doc. No. 78 at 6-7

¹³⁶ Doc. No. 61 at 10; Doc. No. 78 at 7.

¹³⁷ Doc. No. 61 at 10; Doc. No. 78 at 7.

¹³⁸ Doc. No. 61 at 10; Doc. No. 78 at 7.

¹³⁹ Doc. No. 26 at 7.

¹⁴⁰ Doc. No. 26 at 7.

detention invoices, NAWE commented that there is no need for such regulations with regard to MTOs.¹⁴¹

The remaining commenters supported mandating a deadline within which a billing party must issue a demurrage or detention invoice. These include comments submitted by a customs broker; 10 motor carriers and motor carrier organizations;¹⁴² 14 OTI and OTI organizations;¹⁴³ 31 BCOs and BCO trade organizations;¹⁴⁴ and five with unknown affiliations.¹⁴⁵

These commenters cited several reasons in support of an invoice deadline. For example, several commenters asserted that having a deadline will provide billed parties with predictability and transparency regarding when they will receive their invoices.¹⁴⁶ In the ANPRM, the Commission requested information on how long it typically takes to receive a demurrage or detention invoice.¹⁴⁷ Responses to this question vary greatly. For example, some commenters stated that billed parties receive demurrage or detention invoices within several days after the charges stop accruing.¹⁴⁸ Other commenters claimed that it may take between 2-4 weeks to receive demurrage or detention invoices.¹⁴⁹ Most commenters however, stated that the time varies greatly and could range from 30 days to 24 months.¹⁵⁰ For example, the Meadows Group

¹⁴¹ Doc. No. 26 at 7.

¹⁴² See Doc. No. 51; Doc. No. 56; Doc. No. 46; Doc. No. 56; Doc. No. 7; Doc. No. 15; Doc. No. 24; Doc. No. 33; Doc. No. 47; Doc. No. 17.

¹⁴³ See Doc. No. 13; Doc. No. 75; Doc. No. 70; Doc. No. 82; Doc. No. 69; Doc. No. 83; Doc. No. 60; Doc. No. 62; Doc. No. 19; Doc. No. 77; Doc. No. 48; Doc. No. 76; Doc. No. 63; Doc. No. 81.

¹⁴⁴ See Doc. No. 79; Doc. No. 3; Doc. No. 67; Doc. No. 6; Doc. No. 14; Doc. No. 8; Doc. No. 30; Doc. No. 38; Doc. No. 34; Doc. No. 22; Doc. No. 40; Doc. No. 42; Doc. No. 66; Doc. No. 37; Doc. No. 72; Doc. No. 71; Doc. No. 44; Doc. No. 21; Doc. No. 28; Doc. No. 41; Doc. No. 43; Doc. No. 64; Doc. No. 33; Doc. No. 53; Doc. No. 54; Doc. No. 65; Doc. No. 55; Doc. No. 58; Doc. No. 73; Doc. No. 35; Doc. No. 84.

¹⁴⁵ See Doc. No. 9; Doc. No. 18; Doc. No. 27; Doc.; Doc. No. 32.

¹⁴⁶ Doc. No. 67 at 5; Doc. No. 24 at 4; Doc. No. 83 at 3; Doc. No. 62 at 5; Doc. No. 8 at 2-3;

¹⁴⁷ 87 FR at 8509.

¹⁴⁸ Doc. No. 19 at 3; Doc. No. 37 at 3; Doc. No. 26 at 4; Doc. No. 49 at 5

¹⁴⁹ Doc. No. 18 at 3; Doc. No. 25 at 2; Doc. No. 32 at 3; Doc. No. 44 at 4; Doc. No. 14 at 3.

¹⁵⁰ Doc. No. 17 at 3 (3-6 months); Doc. No. 22 at 3 (120-day average, but have received invoices 24 months after); Doc. No. 33 at 9 (average is 30-60 days, but sometimes up to six months); Doc. No. 28 at 3 (average of 30-60 days but sometimes up to six months); Doc. No. 48 at 6 (members received invoices 180 days after a transaction took place); Doc. No. 54 at 4 (takes up to 6 months to receive an invoice); Doc. No. 55 at 2 (up to 24 months); Doc. No.

reported that it received demurrage and detention invoices an average of 120 days after the charge accrued, but that it also received invoices 24 months after the fact.¹⁵¹ In addition, National Association of Manufacturers (NAM) stated that its members report a wide range of invoice delivery times, from as short as 30 days to as long as nearly 24 months.¹⁵² In addition, commenters noted that the time it takes for a billing party to issue a demurrage or detention invoice varies on the charges assessed. For example, one commenter stated that billing parties invoice import demurrage before releasing containers, but that billing parties may take as long as 30 days to invoice export demurrage charges and 60 days to invoice import and export detention charges.¹⁵³

In addition to providing transparency and predictability for when billing parties must issue demurrage or detention invoices, commenters noted that an invoicing deadline will ensure that billed parties will have the information readily available to verify the accuracy of the charges.¹⁵⁴ Similarly, many commenters claimed that timely billing will reduce costly and time-consuming research to verify charges, particularly when received months after the fact.¹⁵⁵ NAM explains that shippers and BCOs regularly receive costly bills months after the fact and that responding to such bills require diverting staff hours and attention away from cargo delivery and efficient logistics operations.¹⁵⁶ Furthermore, NAM asserted that instituting an invoice deadline

53 at 5 (averages 60-90 days, but as long as 8 months); Doc. No. 67 at 2, 5 (typically receive billings within 30 days, but sometimes 60 days or more); Doc. No. 3 at 3 (averaging 6-12 months). *See* Doc. No. 27 at 3; Doc. No. 46 at 2; Doc. No. 41 at 4.

¹⁵¹ Doc. No. 22 at 3

¹⁵² Doc. No. 55 at 2.

¹⁵³ Doc. No. 9 at 3; *see* Doc. No. 39 at 2; Doc. No. 56 at 2; Doc. No. 67 at 3; Doc. No. 60 at 8; Doc. No. 65 at 5; Doc. No. 64 at 6

¹⁵⁴ Doc. No. 67 at 5; Doc. No. 58 at 3; Doc. No. 22 at 3; Doc. No. 84 at 4-5; Doc. No. 28 at 3.

¹⁵⁵ Doc. No. 13 at 7; Doc. No. 3 at 2; Doc. No. 54 at 5; Doc. No. 58 at 3; Doc. No. 55 at 2; Doc. No. 53 at 5; Doc. No. 65 at 4; Doc. No. 79 at 4.

¹⁵⁶ Doc. No. 55 at 2.

will “ensure that shippers and BCOs will be able to accurately maintain shipping information and records to validate any demurrage or detention bills[.]”¹⁵⁷

Most commenters agreed that billing parties should issue demurrage or detention invoices within a specific timeframe but disagreed on what that timeframe should be. Three commenters did not indicate a specific deadline in their comments but stressed the need for a timeliness standard.¹⁵⁸ Among the remaining commenters, 23 commenters supported a 60-day timeframe;¹⁵⁹ 25 commenters supported a 30-day timeframe;¹⁶⁰ and 11 commenters favored shorter timeframes ranging from five to twenty-one days.¹⁶¹

Two commenters who supported the 60-day timeframe stated that this timeframe is reasonable and aligns with the UIIA timeframe.¹⁶² For example, Intermodal Association of North America (IANA) asserted that the 60-day timeframe provided in the UIIA represents an industry standard because this requirement has been in effect for over 25 years.¹⁶³ Additionally, IANA opined that adopting the 60-day timeframe “will reinforce, rather than disrupt, long-standing

¹⁵⁷ Doc. No. 55 at 2.

¹⁵⁸ Doc. No. 51 at 2; Doc. No. 34 at 2; Doc. No. 35 at 2.

¹⁵⁹ Doc. No. 76 7; Doc. No. 65 at 5; Doc. No. 54 at 4; Doc. No. 39 at 2; Doc. No. 46 at 2; Doc. No. 32 at 2; Doc. No. 33 at 9; Doc. No. 9 at 3; Doc. No. 24 at 4; Doc. No. 81 at 4; Doc. No. 44 at 4; Doc. No. 58 at 3; Doc. No. 55 at 2; Doc. No. 43 at 5; Doc. No. 56 at 2; Doc. No. 53 at 5; Doc. No. 22 at 3; Doc. No. 37 at 3; Doc. No. 48 at 6; Doc. No. 28 at 3; Doc. No. 63 at 4; Doc. No. 8 at 3; Doc. No. 17 at 4.

¹⁶⁰ Doc. No. 3 at 2-3; Doc. No. 6 at 2; Doc. No. 7 at 4; Doc. No. 13 at 7; Doc. No. 14 at 4; Doc. No. 15 at 3; Doc. No. 29 at 3; Doc. No. 30 at 2; Doc. No. 40 at 3; Doc. No. 42 at 1 (citing Doc. No. 29); Doc. No. 47 at 3; Doc. No. 67 at 3; Doc. No. 66 at 1 (citing Doc. No. 29); Doc. No. 83 at 5; Doc. No. 60 at 8; Doc. No. 62 at 5; Doc. No. 64 at 6; Doc. No. 67 at 4-5; Doc. No. 72 at 7; Doc. No. 71 at 1 (citing Doc. No. 29); Doc. No. 75 at 3, 4; Doc. No. 70 at 5; Doc. No. 84 at 5; Doc. No. 82 at 2. Many of these commenters supported shorter timeframes as well. *See* Doc. No. 70 (supported 7 days); Doc. No. 60 at 8 (supported 5-15 days); Doc. No. 72 at 7 (supported 5-15 days); Doc. No. 64 at 6 (supported 14 days); Doc. No. 75 at 4 (supported 15 days); Doc. No. 82 at 2 (supported 21 days).

¹⁶¹ Doc. No. 27 at 3 (5-10 days); Doc. No. 38 at 4 (10 days); Doc. No. 73 at 3-4 (10 days); Doc. No. 41 at 4 (10 days); Doc. No. 18 at 3 (10 days); Doc. No. 79 at 4 (10-14 days); Doc. No. 56 at 2-3 (14 days); Doc. No. 69 at 5, 7 (14 days); Doc. No. 77 at 7 (14-21 days); Doc. No. 21 at 3-4 (15 days); Doc. No. 19 at 3 (21 days).

¹⁶² Doc. No. 43 at 5; Doc. No. 24 at 3.

¹⁶³ Doc. No. 24 at 3.

industry practices.”¹⁶⁴ However, many commenters who supported the 60-day timeframe also urged the Commission to consider shorter timeframes.¹⁶⁵

Many commenters also supported an invoice deadline shorter than 60 days for a variety of reasons. For example, commenters asserted that 60 days is too long and that, with billing parties using automated systems, 30 days is more than adequate time for billing parties to issue demurrage or detention invoices.¹⁶⁶ Moreover, commenters observed that several billing parties currently issue invoices within 30 days after the charges stop accruing.¹⁶⁷ In addition, OTI commenters stated that receiving demurrage and detention invoices from VOCCs and MTOs in a timely manner will allow OTIs to bill their clients within a reasonable timeframe which will hopefully facilitate collection of these charges.¹⁶⁸

The Commission is proposing to require billing parties to issue demurrage or detention invoices to billed parties within 30 days from the date charges stop accruing. Although the proposed 30-day timeframe is shorter than the 60-day timeframe contained in the UIIA, commenters reported that demurrage or detention invoices generally arrive within the 30-day timeframe.¹⁶⁹ For example, MTOs indicated that, because of customer portals and electronic payment systems, invoices are available immediately when the charges stop accruing.¹⁷⁰ Because it appears that billing parties are capable of issuing demurrage or detention invoices, on average,

¹⁶⁴ Doc. No. 24 at 4.

¹⁶⁵ Doc. No. 65 at 5; Doc. No. 54 at 4; Doc. No. 81 at 4; Doc. No. 28 at 3.

¹⁶⁶ Doc. No. 29 at 2; Doc. No. 30 at 2; Doc. No. 38 at 4; Doc. No. 67 at 3; Doc. No. 73 at 4; Doc. No. 40 at 3; Doc. No. 56 at 3. *See* Doc. No. 60 at 8.

¹⁶⁷ *See* Doc. No. 29 at 2-3 (immediate billing is an industry standard for the perishable produce industry). *See also* Doc. No. 67 at 5; Doc. No. 30 at 2; Doc. No. 40 at 3; Doc. No. 38 at 4. Commenters report that they receive demurrage or detention invoices several days to one month after charges stop accruing. Doc. No. 19 at 3; Doc. No. 37 at 3; Doc. No. 26 at 4; Doc. No. 49 at 5; Doc. No. 18 at 3; Doc. No. 25 at 2; Doc. No. 32 at 3; Doc. No. 44 at 4; Doc. No. 14 at 3.

¹⁶⁸ Doc. No. 32 at 3; Doc. No. 69 at 5; Doc. No. 70 at 3, 5; Doc. No. 76 at 7; Doc. No. 77 at 5.

¹⁶⁹ Doc. No. 29 at 2-3; Doc. No. 67 at 5; Doc. No. 30 at 2; Doc. No. 40 at 3; Doc. No. 38 at 4; Doc. No. 19 at 3; Doc. No. 37 at 3; Doc. No. 26 at 4; Doc. No. 49 at 5; Doc. No. 18 at 3; Doc. No. 25 at 2; Doc. No. 32 at 3; Doc. No. 44 at 4; Doc. No. 14 at 3.

¹⁷⁰ Doc. No. 26 at 7; Doc. No. 49 at 4.

within 30 days, applying this timeframe does not appear to be unreasonable. In addition, a 30-day deadline, which provides billing parties sufficient time to prepare an invoice, will also permit billed parties to verify the charges more efficiently. As commenters noted, the more time that passes between when the charges stop accruing and when the billed party receives an invoice, it is more difficult for the billed party to verify the charge because it is less likely that they have the necessary information or documentation to confirm a charge.

The Commission also proposes to excuse billed parties from paying assessed charges contained in invoices issued after the 30-day timeframe. If a billing party does not issue a demurrage or detention invoice within the required timeframe, then the charge would be void and the billed party would not be required to pay. Without such a provision, there would be no consequence for not meeting the 30-day timeframe. In addition, this proposed rule is consistent with the UIIA and supported by commenters.¹⁷¹

The 30-day timeframe would apply to VOCCs, MTOs, and NVOCCs. In the ANPRM, the Commission requested comments on whether the Commission should require different timeframes for VOCC and NVOCC demurrage and detention invoices.¹⁷² Most commenters responded that the same timelines should apply to VOCCs and NVOCCs.¹⁷³ However, when NVOCCs pass through demurrage or detention charges assessed against them to their customers, it may be difficult for NVOCCs to issue a demurrage or detention invoice within the required timeframe if it does not receive the initial invoice in a timely manner.¹⁷⁴ In addition, OCEMA suggested that the invoice deadlines should “allow nuance in the application of the deadline for

¹⁷¹ UIIA at E.6.c; Doc. No. 84 at 5; Doc. No. 77 at 7; Doc. No. 69 at 5, 7; Doc. 75 at 4; Doc. No. 43 at 5.

¹⁷² 87 FR at 8509.

¹⁷³ Doc. No. 3 at 2; Doc. No. 41 at 3; Doc. No. 64 at 5; Doc. No. 28 at 2; Doc. No. 43 at 4; Doc. No. 53 at 4; Doc. No. 51 at 2; Doc. No. 80 at 1; Doc. No. 61 at 8; Doc. No. 15 at 2; Doc. No. 22 at 3; Doc. No. 46 at 2.

¹⁷⁴ See Doc. No. 32 at 3; Doc. No. 69 at 5; Doc. No. 70 at 3, 5; Doc. No. 76 at 7; Doc. No. 77 at 5.

factors that may justify delay[.]”¹⁷⁵ The Commission requests comments discussing how it can best reflect the application of the deadline to NVOCCs that pass through demurrage or detention charges.

2. Timeframes for Disputing Charges and Resolving Disputes

The Commission proposes that billed parties submit any requests for fee mitigation, refund, or waiver to billing parties within 30 days of receiving a demurrage or detention invoice.¹⁷⁶ The proposed rule would provide billed parties 30 days to verify the invoiced charges; decide whether they would like to request fee mitigation, refund, or waiver; and collect the documentation to support its request. The proposed timeframe protects billed parties against unreasonable deadlines that billing parties may impose upon their customers. At the same time, the 30-day dispute timeframe would notify billed parties that, if they plan to request fee mitigation, refund, or waiver, they have a limited amount of time within which they must submit such a request and it would protect billing parties from untimely requests.

The 30-day timeframe for disputing charges is consistent with the timeframe for billed parties to dispute charges in the UIIA and is supported by commenters.¹⁷⁷ One commenter suggested extending the current dispute deadline from 30 to 60 days to allow carriers more time to audit and pay per diem invoices accordingly.¹⁷⁸ The Commission is proposing this timeframe in conjunction with its proposed 30-day timeframe for billing parties to issue demurrage or detention invoices. Because the proposed rules would require billing parties to issue invoices in a timelier manner, one anticipated benefit is that billed parties would be able to more quickly

¹⁷⁵ Doc. No. 78 at 7. *See* Doc. No. 13 at 4; Doc. No. 61 at 10.

¹⁷⁶ The proposed 30-day deadline would apply to requests for fee mitigation, refunds, or waivers submitted by the billed party to the billing party through the billing parties’ dispute process. The proposed rule does not apply to “charge complaints” authorized by section 10 of OSRA 2022 (codified in 46 U.S.C. 41310).

¹⁷⁷ UIIA at E.6.f; Doc. No. 84 at 4; Doc. No. 64 at 7; Doc. No. 43 at 5.

¹⁷⁸ Doc. No. 59 at 2.

verify the charges as the documents necessary to confirm the charges would be more readily available. Accordingly, in the Commission’s view, the 30-day timeframe is a reasonable one that permits billed parties to review the charges and request fee mitigation, refund, or waiver as necessary that they can meet readily.

The Commission proposes that, after receiving a fee mitigation, refund, or waiver request, a billing party must resolve the request within 30 days. This proposed deadline is consistent with the response deadline contained in the UIIA and supported by several commenters.¹⁷⁹ The proposed rule would require a billing party, after receiving a request to mitigate, refund, or waive a charge on a demurrage or detention invoice, to determine whether to grant or deny the request within 30 days of receiving the request. Resolution of a request also includes billing parties to mitigate, refund, or waive a charge, if appropriate, within the 30-day timeframe. If the billing party does not resolve the fee mitigation, refund, or waiver request within 30 days, then the charge at issue must be mitigated, refunded, or waived.

The proposed deadline would provide billed parties with certainty that it will receive a response to its fee mitigation, refund, or waiver request within a specific timeframe. Like receiving demurrage or detention invoices, commenters reported that the time it takes for billed parties to receive a refund varies greatly. For example, one commenter claimed that “[r]efunds are paid when the carrier or terminal operator wants to do it” and that it can take up to six months to receive a refund.¹⁸⁰ Commenters generally supported having a deadline for resolving requests

¹⁷⁹ UIIA at H.1; Doc. No. 63 at 4; Doc. No. 43 at 5; Doc. No. 64 at 7; Doc. No. 41 at 4; Doc. No. 54 at 5; Doc. No. 33 at 11; Doc. No. 74 at 5. *See* Doc. No. 25, Attachment at 1 (states that the company aspires to address disputes within 30 days). Several commenters supported shorter timeframes; however, it appears that these commenters were discussing timeframes for when billing parties should issue refunds *after* they dismiss the charges at issue. *See* Doc. No. 39 at 3; Doc. No. 69 at 8; Doc. No. 46 at 3; Doc. No. 84 at 5; Doc. No. 75 at 5; Doc. No. 79 at 4; Doc. No. 3 at 3; Doc. No. 72 at 8; Doc. No. 60 at 9; Doc. No. 28 at 3; Doc. No. 21 at 4.

¹⁸⁰ Doc. No. 77 at 8. *See* Doc. No. 33 at 11; *see also* Doc. No. 22 at 4 (typically takes six months to receive a refund, may take as long as two years).

for fee mitigation, refund, or waiver. As one commenter succinctly stated, “just as bills must be paid within a certain amount of time, it seems only fair that refunds should be issued within a set time frame.”¹⁸¹ In that vein, proposing to require billing parties to resolve requests for fee mitigation, refunds, or waivers within 30 days of receipt ensures that such requests are not pending for an indefinite period of time.

V. PUBLIC PARTICIPATION

How do I prepare and submit comments?

You may submit comments by using the Federal eRulemaking Portal at www.regulations.gov, under Docket No. 2022-0066, Demurrage and Detention Billing Requirements. Please follow the instructions provided on the Federal eRulemaking Portal to submit comments.

How do I submit confidential business information?

The Commission will provide confidential treatment for identified confidential information to the extent allowed by law. If you would like to request confidential treatment, pursuant to 46 CFR 502.5, you must submit the following, by email, to secretary@fmc.gov:

- A transmittal letter that identifies the specific information in the comments for which protection is sought and demonstrates that the information is a trade secret or other confidential research, development, or commercial information.
- A confidential copy of your comments, consisting of the complete filing with a cover page marked “Confidential-Restricted,” and the confidential material clearly marked on each page.
- A public version of your comments with the confidential information excluded. The

¹⁸¹ Doc. No. 51 at 4. *See* Doc. No. 44 at 4 (“[r]efunds should be issued in a timely manner, certainly within a specified number of days”).

public version must state “Public Version—confidential materials excluded” on the cover page and on each affected page and must clearly indicate any information withheld.

Will the Commission consider late comments?

The Commission will consider all comments received before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments received after that date.

How can I read comments submitted by other people?

You may read the comments received by the Commission at www.regulations.gov, under Docket No. 2022-0066, Demurrage and Detention Billing Requirements.

VI. RULEMAKING ANALYSES

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.

The proposed rule would require VOCCs, NVOCCs, and MTOs to including 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, billed parties must issue demurrage and detention invoices within 30 days from when charges stop accruing.

The Commission presumes that VOCCs and MTOs generally do not qualify as small entities under the guidelines of the Small Business Administration (SBA).¹⁸² 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-day deadline to issue an invoice from when demurrage and detention charges stop accruing could result in a loss of revenue to the billing 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 if this rule is promulgated, it would not have a significant economic impact on a substantial number of small entities.

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

¹⁸² FMC Policy and Procedures regarding Proper Consideration of Small Entities in Rulemakings (Feb. 7, 2003), available at: https://www.fmc.gov/wp-content/uploads/2018/10/SBREFA_Guidelines_2003.pdf.

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 through 1508) require the Federal agency 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). This section serves as the Commission's Draft Environmental Assessment (Draft EA) for the proposed changes to 46 CFR part 541.

Upon completion of an environmental assessment, it was determined that the proposed rule will not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq., and that preparation of an environmental impact statement is not required. This Finding of No Significant Impact (“FONSI”) will become final within 10 days of publication of this notice in the Federal Register unless a petition for review is filed by any of the methods described in the ADDRESSES section of the document. The FONSI and environmental assessment are available for inspection on the docket at <https://www.regulations.gov>.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521) (PRA) requires an agency to seek and receive approval from the Office of Management and Budget (OMB) before collecting information from the public. The agency must submit collections of information in proposed rules to OMB in conjunction with the publication of the notice of proposed rulemaking. In compliance with the PRA, the Commission has submitted the proposed information collection to the Office of Management and Budget and is requesting comment on the proposed revision.

With the proposed addition of 46 CFR part 541, the Commission has identified specific billing information required on demurrage and detention invoices. Although some entities issue demurrage and detention invoices that contain most of the required information, many entities will likely need to revise their practices to include the required information. The Commission believes that the addition of 46 CFR part 541 will likely increase the overall industry burden, but that it will not have a significant impact on members of the shipping public.

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

OMB Control Number: 3072-XXXX.

Abstract: 46 U.S.C. 41104(a)(15) and (d)(2) and 46 CFR part 541 subpart A, if adopted, 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, if adopted, 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.

Current Action: The proposed rule implements statutory text that identifies the minimum information that billing parties must include on demurrage and detention invoices, identifies additional information that billing parties must include on demurrage and detention invoices, and clarifies which entities may receive demurrage and detention invoices.

Type of Request: Approve information collection.

Needs and Uses: 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, proposed 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.

Comments are invited on:

- Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
- Whether the Commission's estimate for the burden of the information collection is accurate;
- Ways to enhance the quality, utility, and clarity of the information to be collected;
- Ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Please submit any comments, identified by the docket number in the heading of this document, by the methods described in the ADDRESSES section of this document.

Executive Order 12988 (Civil Justice Reform)

This proposed rule meets the applicable standards in E.O. 12988 titled, "Civil Justice Reform," to minimize litigation, eliminate ambiguity, and reduce burden.

Regulation Identifier Number

The Commission assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda). The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to

find this action in the Unified Agenda, available at
<https://www.reginfo.gov/public/do/eAgendaMain>.

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 proposes to add 46 CFR part 541 as follows:

Part 541 - Demurrage and Detention

Subpart A—Demurrage and Detention Billing Requirements

Sec.

541.1 Purpose

541.2 Scope and Applicability

541.3 Definitions

541.4 Properly Issued Invoices

541.5 Failure to Include Required Information

541.6 Contents of Invoice

541.7 Issuance of Demurrage and Detention Invoices

541.8 Requests for Fee Mitigation, Refund, or Waiver

541.9-.98 [Reserved]

541.99 OMB control number assigned pursuant to the Paperwork Reduction Act

Subpart B [Reserved]

AUTHORITY: 5 U.S.C. 553; 46 U.S.C. 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 to a billed party or their designated agent for the collection of demurrage or detention charges.

(b) This regulation 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:

Billing dispute means any disagreement with respect to the validity of the charges, or the method of invoicing raised by the billed party or its agent to the billing party.

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.

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.

§ 541.4 Properly Issued Invoices

A properly issued invoice is a demurrage or detention invoice issued by a billing party to the person for whose account the billing party provided ocean transportation or storage.

(a) This person must have contracted with the billing party for the carriage or storage of goods and is therefore responsible for the payment of any incurred demurrage or detention charge.

(b) 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 invoice.

§ 541.6 Contents of Invoice.

At a minimum, an invoice for demurrage or detention charges must include the following information:

(a) *Identifying information.* The invoice must contain sufficient information to enable the billed party to identify the container(s) to which the charges apply, including:

- (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 invoiced party is the proper party of interest and thus liable for the charge.

(b) *Timing information.* The invoice must 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, including:

- (1) The billing date;
- (2) The billing 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.* The invoice must contain sufficient information to enable the billed party to identify the amount due and readily ascertain how that amount was calculated, including:

- (1) The total amount due;
- (2) The applicable detention or demurrage rule (*i.e.*, the tariff name and rule number, 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.* 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 and understand the process to request fee mitigation, refund, or waiver, including:

- (1) The email, telephone number, or other appropriate contact information for questions or request for fee mitigation, refund, or waiver;
- (2) The URL address of a 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; 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.* The invoice must 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.

§ 541.7 Issuance of demurrage and detention invoices.

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

(b) If the billing party invoices the incorrect party, the correct billed party must receive an invoice within thirty (30) days from the date the incorrect party disputes the charges with the billing party. An invoice to the correct billed party must be issued within sixty (60) days after the charges were last incurred. If the billed party does not receive demurrage or detention invoices within the required timeframe, then it is not required to pay the charge.

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

(a) If a billed party requests mitigation, refund, or waiver of fees from the billing party, it must submit the request within thirty (30) days of receiving the invoice.

(b) If a billing party receives a fee mitigation, refund, or waiver request from a billed party, the billing party must resolve the request within thirty (30) days of receiving such a request. 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.

§ 541.9-.98 [Reserved]

§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. In accordance with that Act, agencies are required to display a currently valid control number. In this regard, the valid control number for this collection of information is 3072-XXXX.

Subpart B—Reserved

By the Commission.

William Cody
Secretary