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

1. Section 541.5 of the FMC Regulations state that failure to include any of the minimum invoice information eliminates the billed party's obligation to pay the applicable charge. Is the obligation to pay also eliminated when an invoice contains inaccurate information?

*Response:* Yes; a billed party is not obligated to pay an invoice that contains inaccurate information. Section 541.6 sets out the information required to be included in the invoice and requires that that information be accurate. Section 541.5 says that failure to include any of the required minimum information in this part in an invoice voids the billed party's obligation to pay. A billing party, however, has 30 calendar days from the date on which the charge was last incurred. So, if the billing party first issues an inaccurate invoice, but corrects the invoice within the 30-day timeframe, then the billing party has met the requirements of 46 CFR 541.7(a), and the billed party has an obligation to pay the corrected invoice.

2. From the Final Rule on Demurrage and Detention Billing Requirements, it appears that billing parties may cure invoices but shall not be provided additional time to cure. As such, billing parties must cure during the original 30 day period in which it must issue an invoice to the billed party. Is that understanding correct?

*Response:* Yes, that is correct.

a. When does the invoicing clock run for NVOCCs? For example, if an NVOCC receives an inaccurate or incomplete demurrage or detention invoice from the underlying ocean carrier and the ocean carrier reissues a corrected invoice days later, will the NVOCC have thirty (30) days from the date of the original or corrected invoice to dispute or issue an invoice to its customer?

*Response:* The final rule added 30 days for NVOCCs to issue an invoice if it receives an invoice from a VOCC. This 30-day period runs from the date on which the invoice to the NVOCC was issued. 89 FR 14330, 14348; 46 CFR 541.7(b). Thus, if a VOCC issues an incorrect bill, and then reissues a corrected bill several days later, the NVOCC's 30-day period will run from the date of the corrected bill.

3. Pursuant to section 541.8 of the FMC Regulations, what happens if the billing party does not resolve the request for mitigation, refund or waiver (i.e., the parties do not reach agreement)?

*Response:* The rule encourages billing parties and billed parties to work together to resolve disputes but does not impose consequences if they are unable to do so. Section 541.8

does not impact a party's right to file a Charge Complaint with the Commission. Parties interested in filing a Charge Complaint with the Commission may do so by following the Interim Procedures for Submitting "Charge Complaints" on FMC's website at <https://www.fmc.gov/osra-2022-implementation/charge-complaint-interim-procedure/>.

4. Does the FMC's Final Rule on Demurrage and Detention Billing Requirements apply to "extended dwell fees" imposed and assessed by U.S. ports and terminals?

*Response:* The rule applies to all fees that meet the definition of "demurrage and detention" in 46 CFR 541.3, which is: "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."

5. Many common carriers contain language in their bill of lading terms and conditions stating that a shipper and its agents are jointly and severally liable for charges connected to the bill of lading. Would this provision be in conflict with the FMC's Final Rule on Demurrage and Detention Billing Requirements, which defines "billed party"?

*Response:* Potentially, yes. The potential conflict with the rule, however, is not with the definition of "billed party" but with the requirements of 46 CFR 541.4, which sets out who may properly be issued a demurrage/detention invoice.

6. The Uniform Intermodal Interchange and Facility Access Agreement ("UIIA") provides for a 60-day timeframe for demurrage and detention payments and disputes for the trucking industry. How does the Final Rule on Demurrage and Detention Billing Requirements apply to UIIA contracts with respect to invoicing timeframes and prohibiting invoicing to certain parties?

*Response:* The Shipping Act and FMC regulations supersede any provision of the Uniform Intermodal Interchange and Facility Agreement where there is conflict between requirements.

7. Does the definition of "billed party" under section 541.4(a) of the FMC Regulations include motor carriers contracted to pick up and delivery containers? Many truckers currently receive D&D invoices as billed parties under the UIIA.

*Response:* The definition of "billed party" in 46 CFR 541.3 is very broad and essentially just means the person to whom a demurrage and detention invoice has been properly issued. We believe your question is better re-framed as whether the rule allows motor carriers to be billed demurrage and detention under 46 CFR 541.4. While motor carriers are not directly mentioned, section 541.4, should, in practice, prohibit most instances of demurrage and detention invoices being issued to motor carriers when such billing occurs under FMC's jurisdiction. In order to be issued a demurrage and detention invoice, in accordance with 46 CFR 541.4, the billing party would have needed to provide ocean transportation or storage of cargo to the motor carrier, in addition to being in contractual privity with one another.

8. How does the Final Rule on Demurrage and Detention Billing Requirements apply to scenarios where the contract of carriage terminates when the cargo is transported to the port of

delivery? In such cases, the NVOCC does not have control over or a contract with the trucker responsible for picking up the containers from the port. Would the UIIA agreement between the common carrier and trucker govern such situations?

*Response:* In order to be issued a demurrage and detention invoice in accordance with 46 CFR 541.4, the billing party would have needed to provide ocean transportation or storage of cargo to the motor carrier, in addition to being in contractual privity with one another. Thus, if an NVOCC does not have a contract with a trucker, the NVOCC's billing that trucker for detention and demurrage would be contrary to 46 CFR 541.4. A UIIA agreement between an NVOCC and a trucker for detention and demurrage, absent a contract for ocean common carriage, would therefore conflict with 46 CFR 541.4.

9. To clarify, NVOCCs must issue a demurrage or detention invoice to its customer thirty (30) days from the issuance date of the underlying ocean carrier's invoice. Does "issuance date" refer to the date on the invoice or the date when the NVOCC receives the invoice?

*Response:* This 30-day period runs from the date on which the invoice to the NVOCC was issued. 89 FR 14330, 14348; 46 CFR 541.7(b).

10. Pursuant to section 541.7(c) of the FMC Regulations, how does the additional thirty (30) calendar days apply? Do the additional days apply from the day the NVOCC notifies the underlying ocean carrier of its customer's dispute or from the date the NVOCC originally received the underlying ocean carrier invoice?

*Response:* Section 541.7(c) provides: "When an NVOCC is acting in both roles [i.e., as both a billing party and as a billed party], it can inform its billing party that the charge has been disputed by the NVOCC's billed party. The NVOCC's billing party must then provide an additional thirty (30) calendar days for the NVOCC to dispute the charge upon this notice." Thus, the additional days apply from the day the NVOCC notifies the underlying ocean carrier of its customer's dispute. The Commission added § 541.7(c) to require that when an NVOCC informs a VOCC that its customer has disputed its invoice, the VOCC must then allow the NVOCC additional time to dispute the invoice it received from the VOCC. 89 FR 14330, 14348.

11. Does the FMC plan to include additional data elements for demurrage and detention invoices outside of the original thirteen (13) established by the Ocean Shipping Reform Act of 2022 and the new data elements in section 541.6?

*Response:* FMC does not currently have plans to add additional data elements outside of those included in the final rule. However, the Commission reserves the right to add additional elements in the future if circumstances warrant.

12. Does the Final Rule on Demurrage and Detention Billing Requirements apply to rail storage charges? If not, what types of charges are regulated on through bills of lading.

*Response:* As noted in the final rule, one comment requested that the Commission add "storage" to the definition of "demurrage and detention," as well as including rail/inland depot space in the definition. The Commission declined to make these changes. The terms "detention" and "demurrage" are used extensively in the shipping industry, and they are not generally

defined within the industry to include “storage.” As such, the Commission noted that expanding the definition to include “storage” was beyond the scope of the rulemaking. 89 FR 14330, 14354.

13. Can a consignee buying on DAP or DDP Incoterms be held responsible for demurrage and detention charges even when the consignee is not involved in the contracting for final mile delivery?

*Response:* This is best determined on a case-by basis with the facts of the particular circumstance before the Commission.

14. Parties are often required to pay demurrage charges prior to cargo release. Given this industry practice, are billing parties required to issue compliant invoices on demand rather than up to thirty (30) calendar days later to enable recipients to make payments? Alternatively, would a notification of outstanding demurrage charges in advance of 30-day invoicing also be subject to the new FMC regulations?

*Response:* As per 46 CFR 541.7(a), a billing party must issue a demurrage or detention invoice within thirty (30) calendar days from the date on which the charge was last incurred. If the billing party does not issue a demurrage or detention invoice within thirty (30) calendar days from the date on which the charge was last incurred, then the billed party is not required to pay the charge. As such, the billing party must issue the invoice before the billed party is required to pay it. This 30-day time frame in which to issue an invoice does not force the billing party to wait the entire 30 days before issuing the invoice. It may issue the invoice at any time within the 30-day period, including a day or two after the charges were last incurred. If a billing party requires payment of detention and demurrage charges before releasing the cargo, it needs to issue the invoice before requiring payment. This final rule places the onus on the billing party to issue an invoice, rather than on the billed party to demand one.

15. Please confirm whether billed parties retain the risk to contest demurrage and detention charges or seek a refund if the billed party fails to dispute a demurrage or detention invoice within the thirty (30) day timeframe. From the Final Rule, it appears that billed parties are still able to pursue Charge Complaints, formal complaints and arbitration.

*Response:* The rule does not impact a party’s right to file a Charge Complaint, formal complaint, or arbitration. As discussed in the final rule, parties do not need to wait a certain period of time or for a triggering event to occur prior to filing a Charge Complaint. Parties interested in filing a Charge Complaint at the Commission may do so by following the steps outlined on the Commission’s website (<https://www.fmc.gov/industry-advisory-interim-procedures-for-submitting-charge-complaints/>).

16. The Commission revised section 541.8(a) of the FMC Regulations to make clear that billing parties must allow billed parties at least 30 calendar days from the invoice issuance date to request mitigation, refund, or waiver of fees. Correspondingly, the due date of an invoice must be on or after thirty (30) days after it is issued. Many billing parties currently require payment of demurrage and detention charges as a condition of releasing goods. Can carriers/MTOs still

condition the release of goods on payment of demurrage and detention charges if the demurrage and detention invoices are not yet due?

*Response:* The rule does not prohibit billing parties from conditioning the release of goods pending payment of demurrage and detention charges.

a. Relatedly, if billing parties can condition the release of goods on demurrage and detention charge payments before the invoices are due, can demurrage and detention continue to accrue while billed parties review and dispute the invoices/charges?

*Response:* Demurrage and detention charges can continue to accrue while billed parties review and dispute invoices/charges. However, 46 CFR part 541 applies the same to these new charges as to the original invoice (for example, the billing party must issue the invoice within 30 calendar days from the date on which the charge was last incurred; invoice must contain all elements listed in 46 CFR 541.6, etc.).

17. The Final Rule is very clear that “ocean cargo that is shipped under a through bill of lading to a final destination in the United States remains under Commission jurisdiction for any Shipping Act violations.” Moreover, the Final Rule states that “detention or demurrage invoices issued for cargo delivered on a through bill of lading under the Commission's jurisdiction are required under this rule to list all ports of discharge, ocean and inland.” Based on the foregoing, are demurrage charges incurred at interior ports for cargo moving under through bills of lading also subject to the Final Rule on Demurrage and Detention Billing Requirements?

*Response:* The rule applies to all demurrage and detention charges (as defined in the rule at 46 CFR 541.3) that are subject to FMC jurisdiction. As discussed in the final rule, ocean cargo that is shipped under a through bill of lading to a final destination in the United States remains under Commission jurisdiction for any Shipping Act violations. See the published final rule at page 14353 for a more detailed discussion.

a. Since marine terminal operators are not at the U.S. interior ports, are common carriers the only billing parties able to issue a demurrage or detention invoice for such cargo moving under through bills of lading?

*Response:* As noted in the final rule, the Commission received comments requesting clarification of demurrage and detention billing for the inland portion of a through bill of lading. In response, we noted both case law and legislative history that defined through bills of lading as maritime contracts issued by ocean common carriers for the carriage of goods primarily by sea to their final destination. 89 FR 14430, 14353–14354. In addition, as per the terms of 46 CFR 541.4, a billing party may only issue a detention and demurrage invoice to the party with whom it contracted for the transportation of the cargo (or the consignee).

18. Will the Commission provide commentary or guidance to industry on a reasonable standard for keeping billed parties informed of accruing charges to be invoiced? There have been instances when empty containers have not been returned for over one year with charges still accruing.

*Response:* The Commission does not currently have plans to issue supplemental guidance on the final rule. However, guidance is one alternative available to the agency if it determines additional action is necessary.

19. Shippers and consignees are encountering issues with marine terminal operators (“MTOs”) assessing demurrage. Prior to the Final Rule on Demurrage and Detention Billing Requirements, the motor carrier would pay the MTO demurrage charges and invoice the consignee. In light of the new regulations, an MTO cannot invoice a motor carrier and the motor carrier cannot pick up the box due to the outstanding charges.

a. Who is the proper party to be invoiced for the MTO demurrage charges in this scenario? Would the appropriate party be the vessel-operating common carrier that has contractual privity with the MTO?

*Response:* “Billing party” is defined as an ocean common carrier, marine terminal operator, or a non-vessel-operating common carrier in 46 CFR 541.3 and 46 CFR 541.4 sets out the requirements for who can be issued a demurrage/detention invoice.

b. Alternatively, may the motor carrier pay the MTO demurrage charges “on behalf of” the consignee even though the consignee does not have contractual privity with the MTO?

*Response:* As discussed in the final rule, the rule only mandates to whom the invoice can be issued and therefore who has legal liability to pay it. The rule is purposefully silent on third parties voluntarily paying an invoice—thus allowing the practice by declining to prohibit it (89 FR 14330, 14341). Note, however, that there is a distinction between a third party receiving a copy of an invoice (which the rule allows) and being issued an invoice (which is prohibited except as authorized under 46 CFR 541.4).