

FEDERAL MARITIME COMMISSION

46 CFR Subchapter B

[Docket No. 22-04]

RIN: 3072-AC90

Demurrage and Detention Billing Requirements

AGENCY: Federal Maritime Commission.

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: The Federal Maritime Commission (Commission) is issuing this Advance Notice of Proposed Rulemaking (ANPRM) to seek comment on whether the Commission should require common carriers and marine terminal operators to include certain minimum information on or with demurrage and detention billings. Also, the Commission is interested in receiving comments on whether it should require common carriers and marine terminal operators to adhere to certain practices regarding the timing of demurrage and detention billings. These changes were recommended by the Fact Finding Officer in Commission Fact Finding 29: International Ocean Transportation Supply Chain Engagement.

DATES: Submit comments on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by Docket No. 22-04, by *e-mail at secretary@fmc.gov*. For comments, include in the subject line: “Docket No. 22-04, Comments on Demurrage and Detention Billing Requirements ANPRM.” Comments should be attached to the email as a Microsoft Word or text-searchable PDF document. Only non-confidential and public versions of confidential comments should be submitted by email.

Instructions: For detailed instructions on submitting comments, including requesting confidential treatment of comments, and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document. Note that all comments received will be posted without change to the Commission's website unless the commenter has requested confidential treatment.

Docket: For access to the docket to read background documents or comments received, go to the Commission's Electronic Reading Room at:
<https://www2.fmc.gov/readingroom/proceeding/22-04>

FOR FURTHER INFORMATION CONTACT: William Cody, Secretary; Phone: (202) 523-5725; Email: secretary@fmc.gov.

SUPPLEMENTARY INFORMATION:

I. PUBLIC PARTICIPATION

How do I prepare and submit comments?

Your comments must be written in English. To ensure that your comments are correctly filed in the docket, please include the docket number of this document in your comments.

You may submit your comments via email to the email address listed above under ADDRESSES. Please include the docket number associated with this notice and the subject matter in the subject line of the email. Comments should be attached to the email as a Microsoft Word or text-searchable PDF document. Only non-confidential and public versions of confidential comments should be submitted by email.

How do I submit confidential business information?

The Commission will provide confidential treatment for identified confidential information to the extent allowed by law. If your comments contain confidential information,

you must submit the following by e-mail to the address listed above under ADDRESSES:

- A transmittal letter requesting confidential treatment 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. You should submit the confidential copy to the Commission by mail.
- A public version of your comments with the confidential information excluded. The 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. You may submit the public version to the Commission by email or mail.

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 the Commission’s Electronic Reading Room or the Docket Activity Library at the addresses listed above under ADDRESSES.

II. 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. Demurrage and detention charges and policies should serve the primary purpose of incentivizing the movement of cargo and promoting freight fluidity.

On July 28, 2021, Commissioner Rebecca F. Dye, the Fact Finding Officer for Fact Finding 29, recommended, among other things, that the Commission “[i]ssue an ANPRM seeking industry views on whether the Commission should require common carriers and marine terminal operators 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.”¹ The Fact Finding Officer noted that although the Commission had declined to prescribe specific billing practices in the April 2020 interpretive rule on demurrage and detention, 46 C.F.R. 545.5, she remained concerned about demurrage and detention billing practices and about ensuring that it is clear to shippers “what is being billed by whom” so that they can understand the charges.² The Commission approved the Fact Finding 29 recommendation on September 15, 2021.³

In the development of its Interpretive Rule on Demurrage and Detention, the Commission discussed but did not adopt a particular billing model, or billing and invoice timeframes to incorporate into the analysis of what constitutes reasonable demurrage and detention policies.⁴ Since that time, the Commission has continued to receive complaints about billing practices and is now considering how and whether to address billing issues.

III. Discussion

¹ See Fact Finding Investigation No. 29, Interim Recommendations at 6 (July 28, 2021), <https://www2.fmc.gov/ReadingRoom/docs/FFno29/FF29%20Interim%20Recommendations.pdf/>

² Fact Finding Investigation No. 29, Interim Recommendations at 7, <https://www2.fmc.gov/ReadingRoom/docs/FFno29/FF29%20Interim%20Recommendations.pdf/>

³ Fed. Mar. Comm’n, Press Release, FMC to Issue Guidance on Complaint Proceedings and Seek Comments on Demurrage and Detention Billings (Sept. 15, 2021), <https://www.fmc.gov/fmc-to-issue-guidance-on-complaint-proceedings-and-seek-comments-on-demurrage-and-detention-billings/>

⁴ 85 FR 29638, 29662 (May 18, 2020).

A. Scope of ANPRM

The Commission is seeking industry views on whether it should regulate the demurrage and detention billing practices of common carriers and marine terminal operators (MTO). For the purposes of this ANPRM, the Commission defines the terms “demurrage and detention” broadly to include any charges assessed by common carriers and marine terminal operators related to the use of marine terminal space or shipping containers. Under this definition, for instance, charges assessed by common carriers for the use of containers outside a marine terminal would fall within the scope of this ANPRM regardless of whether the charges are called “detention” or “per diem.” Similarly, charges assessed because a container is taking up terminal space would fall within the scope of this ANPRM even if the charges are called something other than “demurrage.” Therefore, the scope of this advance notice is any charges having the purpose or effect of demurrage or detention regardless of the labels given to those charges.⁵

The Fact Finding 29 recommendation proposed regulating the billings and billing practices of both common carriers and marine terminal operators. There are two types of common carrier – vessel-operating common carriers (VOCCs) and non-vessel-operating common carriers (NVOCCs).⁶ As set forth below in Section IV, the Commission seeks comments on whether a proposed regulation on demurrage and detention billing should include NVOCCs as well as VOCCs, and to what extent any regulations should differ based on the type of entity involved.⁷

⁵ The scope of this ANPRM does not include ocean freight bills or bills for charges that do not have the purpose of demurrage and detention, such as charges related to chassis, bunker, and documentation.

⁶ 46 U.S.C. § 40102.

⁷ The Commission does not seek comment on the ocean freight forwarder bills, as ocean freight forwarders, although ocean transportation intermediaries, are not common carriers. 46 U.S.C. § 40102.

Additionally, although the Fact Finding 29 recommendation suggested regulating MTO demurrage and detention billings, MTOs often do not have direct contractual relationships with shippers.⁸ Rather, marine terminal operators usually have contractual relationships with VOCCs, such as via terminal services agreements.⁹ However, under Commission regulations, MTOs are entitled to separately assess demurrage as an implied contract in a court of law, provided that it is published as part of a MTO schedule. Further, in the Interpretive Rule on demurrage and detention, the Commission stated that its focus in that rulemaking was “on practices related to charges imposed by regulated entities on shippers, intermediaries, and truckers, and not the contractual relationships between ocean carriers and marine terminal operators.”¹⁰ There are some situations, however, where marine terminal operators do impose fees directly on shippers. The Commission thus seeks comments on where marine terminal operators impose fees directly on shippers, as well as whether and to what extent a proposed regulation on demurrage and detention billings should include MTOs.

The Commission is also aware that common carriers and marine terminal operators are subject to laws other than the Shipping Act, as well as private contractual arrangements such as the Uniform Intermodal Interchange Agreement (UIIA), which may implicate demurrage and detention billing. For instance, as the Commission noted in the Interpretive Rule, the standard UIIA agreement contains deadlines for equipment providers (e.g., VOCCs) to invoice truckers for containers and chassis.¹¹ The Commission seeks comment on any other laws, regulations, or

⁸ See 85 Fed. Reg. at 29662. Publicly available MTO schedules are, however, enforceable as implied contracts without proof of actual knowledge of the schedule’s provisions. 46 U.S.C. § 40501(f).

⁹ See 46 C.F.R. § 535.309.

¹⁰ 85 FR at 29650.

¹¹ See, e.g., 85 FR 29662 n. 388.

arrangements that may affect the regulation of demurrage and detention billing.

B. Minimum Billing Information

The Commission is considering a requirement that bills for demurrage and detention charges contain certain minimum information. Although much of the information required may currently be included on bills already, certain additional information may be useful to ensure the accuracy, clarity, and visibility of charges, including identifying whether the bill is being issued to the correct party, identifying the appropriate time period for which demurrage and detention charges are being assessed, providing more concise information in the event a bill is disputed, and including information on how to access the dispute resolution process. Requiring such information may ultimately lead to fewer disputed bills and therefore streamline the demurrage and detention billing process.

Accordingly, the Commission is requesting comments on what specific information it should require on demurrage and detention bills. In addition to information necessary to identify the shipment (bill of lading number, container number, etc.), the Commission is also requesting comments on whether bills should include information on how the charges are calculated. This could include, for example, 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. In addition, the Commission is requesting 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) which would justify stopping the clock on charges. Finally, since anecdotal reports indicate that bills may sometimes be sent to

multiple parties for the same shipments, the Commission is seeking comment on whether it would be appropriate to require bills to specify all parties receiving the bill as well as to identify why the party receiving the bill is the proper party-in-interest and to identify the source of the charge (i.e., by tariff, service contract or MTO schedule).

C. Billing Practices

The Commission is also considering requiring common carriers and MTOs to adhere to certain practices regarding the timing of demurrage and detention billings. The Commission is also interested in comments on whether similar requirements should be placed on the issuance of refunds.

The Commission has previously received concerns from stakeholders regarding a lack of clearly defined timeframes for the issuance of bills.¹² In response to the proposed rule on Interpretive Rule on Demurrage and Detention, the Commission received many comments asserting that ocean carriers and marine terminal operators should issue demurrage or detention bills within specific timeframes.¹³ In the Final Rule, the Commission determined not to take action, reserving the right to reconsider the issue on potential billing and invoice timeframes.¹⁴

However, the Commission has continued to receive anecdotal examples of delays in receiving demurrage or detention bills. The longer it takes to receive a demurrage or detention bill the more difficult it may be for a shipper to validate the accuracy of the charges. For example, if a shipper receives a demurrage or detention bill months after the occurrence of the

¹²See Fact Finding Investigation No. 28 Final Report, at 14
https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF-28_FR.pdf/.

¹³ 85 FR 29638 at 29662.

¹⁴ 85 FR 29638 at 29662.

charge, they may no longer possess the necessary materials to confirm the charges are correct or to access the information necessary to dispute the charges.

The Commission is asking for comments on a requirement that demurrage or detention bills be issued within 60 days of the occurrence of the charge. The UIIA currently requires that invoices be issued within 60 days.¹⁵ The Commission is interested in the effectiveness of that UIIA timeframe and if a longer or shorter timeline would be appropriate.

The Commission is also seeking comments on whether similar timing requirements in the context of refunds would be beneficial. Again, the Commission has received anecdotal examples of refunds of demurrage and detention billings taking several months to be issued. The Commission is seeking comments on whether it should regulate the timeframe for refunds and what the timeframe should be.

IV. Information Requested

Your responses to the following questions will help inform the Commission whether rulemaking or other Commission action is necessary. In responding to each question, please identify the question to which you are responding and explain your answer to each question. Additionally, please consider the type of information that VOCCs, NVOCCs, and MTOs currently provide with demurrage and detention bills, current demurrage and detention billing practices, and any relevant distinctions that should be made between VOCCs, NVOCCs, and MTOs with respect to billing information and practices. If your response to a question includes a

¹⁵ “Provider shall invoice Motor Carrier for Per Diem, Container Use, Chassis Use/Rental and/or Storage/Ocean Demurrage charges within sixty (60) days from the date on which Equipment was returned to Provider by Motor Carrier. If Motor Carrier is not invoiced within the established timeframe, the right of the Provider to recover such charges will be lost.” Uniform Intermodal Interchange and Facilities Access Agreement (“UIIA”) at Section E.6(c). <https://www.uiia.org/sites/default/files/documents/newuiia-Home.pdf>.

monetary or numerical figure, please provide sufficient information and data to explain how the figure was calculated. Comments may also include any supplemental information relevant to billing requirements.

A. Scope.

1. Should the Commission include both VOCCs and NVOCCs in a proposed regulation on demurrage and detention billing?
2. Should the Commission include MTOs in a proposed demurrage billing regulation?
3. Should a proposed demurrage billing regulation distinguish between the demurrage MTOs charge to shippers and the demurrage MTOs charge to VOCCs? That is, should the Commission regulate the format in which MTOs bill VOCCs?
4. What percentage of demurrage and detention bills contain inaccurate information, and which information is most often disputed?
5. How much does the type of information included on or with demurrage and detention billings vary among common carriers, among marine terminal operators, and between VOCCs and NVOCCs?

B. Minimum billing information.

6. What type of information should be required on billings. Should the Commission require certain essential information included on invoices such as:
 - a. Bill of lading number
 - b. Container number
 - c. Billing date

- d. Payment due date
- e. Start/end of free time
- f. Start/end of demurrage/detention/per diem clock
- g. Demurrage/detention/per diem rate schedule
- h. Location of the notice of the charge (i.e., tariff, service contract number and section or MTO schedule)
- i. For import shipments:
 - i. Vessel arrival date
 - ii. Container availability date
- j. For export shipments:
 - i. Earliest return date, including identifying any modifications to the earliest return date
- k. Any intervening clock-stopping events, for example:
 - i. Unavailability of container
 - ii. Unavailability of pickup or return locations
 - iii. Unavailability of appointments (where applicable)
 - iv. Restrictions on chassis accepted
 - v. Force majeure-related events
- l. Please note if any portion of the charge is a pass-through of charges levied by the MTO or Port.

C. Billing practices.

- 7. What information or timeframes should be required for VOCC and NVOCC demurrage and detention bills? Should the Commission require different types of

information or timeframes?

8. Do common carriers invoice multiple parties for demurrage and/or detention charges? If multiple parties are invoiced for charges, should the billing party be required to identify all such parties receiving an invoice for the charges at issue?
9. Should the billing party be required to identify the basis of why the invoiced party is the proper party in interest and therefore liable for the charges? (i.e., as shipper, consignee, beneficial cargo owner, motor carrier or an agent, or as a party acting on behalf of another party pursuant to the common carrier's merchant clause in its bill of lading.)
10. Should the Commission, for purposes of clarity and visibility of charges, require MTOs to bill demurrage directly to shippers (rather than billing VOCCs who then bill shippers for demurrage)? In that scenario, MTOs would bill shippers directly for demurrage, and carriers would continue to bill detention to shippers.
11. How long from the point of accrual of a demurrage or detention charge does it typically take to receive a demurrage or detention invoice or billing?
12. Should the Commission require demurrage and detention invoices to be issued within 60 days of date when the detention/demurrage/per diem stops accruing?
13. Should the Commission require specific information be included on the invoice regarding how to dispute a charge? If so, what information should be required? For example, should the Commission require invoices to include contact information for disputing charges, identify circumstances for when a charge may be waived, or identify the billing parties' evidentiary requirements sufficient to support a waiver of the charges?

14. How long from the point of dismissal of a charge does it typically take to receive a refund? Should the Commission require that refunds of demurrage or detention bills be issued within a certain time period and what should that timeframe be?
15. How would a regulation on demurrage and detention billing requirements impact, conflict with, or preempt any other applicable laws, regulations, or arrangements (such as the UIIA)?
16. Please provide any other views or data you believe would help inform the Commission's decision whether to pursue a proposed regulation on demurrage and detention billing information and practices.

By the Commission.

William Cody,
Secretary