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HPCLC Legal & Regulatory Update

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Oct. 18, 2022

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Topics



The Ocean Shipping Reform Act of 2022

- + Factors Leading to OSRA 2022
- + Key Provisions
- + FMC Actions and Implementation



Issues to Watch

Market Constraints

- Covid impacts—economic lockdowns.
- Supply/demand imbalance.
- Worker shortages.
- Skyrocketing spot rates.
- High cost / poor service.



Disruption to Cargo Delivery Network

- Systemic port congestion
- Cancelled vessel bookings
- Equipment imbalance
- Rising detention and demurrage charges
- Cancelled service contracts
- **Business interruption**



Lack of Commercial Options

- Ocean carriers unwilling to honor contract commitments or negotiate solutions.



Industry Action Leads to OSRA '22

- Shipping Act of 1984, as amended by OSRA 1998, regulates international ocean transportation services.
- Industry groups developed legislative reforms to address ocean carrier business practices.
- Large coalition of importers, exporters, draymen lobbied for legislative change.
- Bi-partisan bills in the House and Senate resulted in passage of **OSRA 2022**, signed into law on **June 16**.



OSRA '22: Self Executing

- OSRA is “self-executing” meaning its requirements took effect upon its signing on **June 16**.
- OSRA '22 addresses **ocean carrier operating practices involving transportation to/from US ports** and increases FMC authority and oversight.
- OSRA '22 is **not** a fix for port congestion and all supply chain disruptions.

OSRA '22: Key Provisions

- Purposes
- Demurrage & Detention
- Charge Complaints
- Prohibited Acts
- Retaliation
- Other Requirements
- FMC Actions and Rulemakings



OSRA '22: Purposes

Ensure

Ensure an **efficient, competitive and economical transportation system.**

Encourage

Encourage development of an economically sound and efficient liner fleet of vessels of the U.S. capable of...**supporting commerce.**

Promote

Promote growth of U.S. exports through a competitive and efficient system for the carriage of goods by water...and by placing a greater reliance on the marketplace

Demurrage & Detention Legal Framework



- Shipping Act prohibits **unreasonable practices** and regulations related to **receiving, handling, storing or delivering property** (46 USC 41102(c)).
- Statute interpreted to include demurrage and detention tariff rules and practices.

OSRA '22: Demurrage/Detention (D&D)



- Common carriers (VOCCs and NVOCCs) shall **not**:
 - Assess a charge that fails to comply with all requirements, including 41102(c) or the FMC's D&D Interpretive Rule, and all successor regulations.
 - Invoice any party for demurrage/detention unless the invoice includes the information required by OSRA 2022.

OSRA '22: D&D Invoices

- An invoice for demurrage or detention shall include accurate information on:
 - (1) Date container is available
 - (2) Port of discharge
 - (3) Container No.(s)
 - (4) For exports, earliest return date
 - (5) Free time (in days)
 - (6) Free time start date
 - (7) Free time end date
 - (8) Rule providing applicable daily rate(s), and the calculated charge(s)
 - (9) Contact info. (email, phone) for questions and mitigation requests
 - (10) Statements that charges are consistent with FMC rules and carrier's performance did not cause or contribute to the charges

OSRA '22: Non-Compliance with D&D Invoice Requirements

- Failure to include minimum info. in D&D invoice shall **eliminate any obligation to pay the charges.**
- If FMC determines after investigation of a **Charge Complaint** that D&D invoice was false or inaccurate, **penalties and/or refunds** shall be applied.



REJECTED

OSRA '22: NVOCC Safe-Harbor (D&D)



- If: (i) an NVOCC passes through to shipper a demurrage/detention invoice from the VOCC, and

(ii) the FMC finds the NVOCC is not otherwise responsible for the charge(s), then

(iii) the VOCC shall be responsible for any refunds or penalties.

OSRA '22: FMC D&D Rulemaking



- FMC shall initiate a rulemaking further defining prohibited practices by carriers, MTOs, shippers and OTIs regarding D&D charges within 45 days. **Final rule to be issued within 1 year.**
- Rule shall be limited to the issues identified in the FMC's May 2020 interpretive rule, including which parties can be billed for D&D and **other similar per container charges.**

Existing FMC D&D Rule

- FMC Interpretive Rule on Unreasonable D&D issued in **May 2020**:
 - **Incentive Principle:** To be “reasonable” demurrage/ detention must incentivize efficient cargo movement.
 - **Cargo Availability Principle:** Demurrage rules should be tied to physical cargo availability and reasonable notice.
 - Requires **reasonable billing and dispute resolution practices.**

FMC Rulemaking on D&D Billing

Response to shipper complaints & OSRA '22

Scope: VOCCs, NVOCCs, MTOs

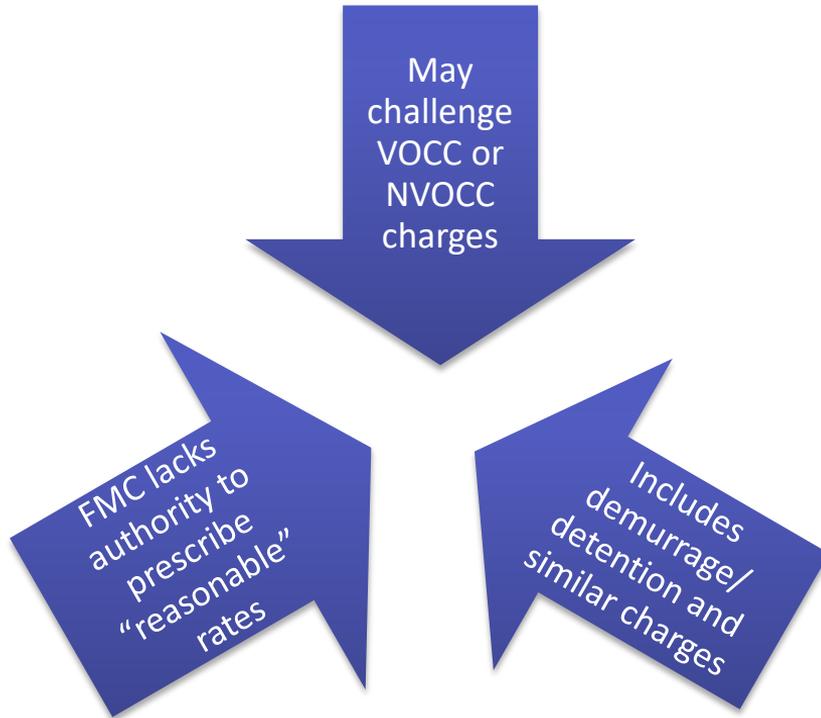
Purpose: accuracy, clarity, validation of charges

- Identification of minimum data elements.
- Limits parties to be billed.
- Timing for billing & disputes.
- Comments due **Dec. 13.**

Implications for Shippers

- OSRA increases D&D protections and enforcement.
 - Shippers should review D&D invoices and **reject non-compliant invoices or pay under protest** until FMC rule finalized.
 - Understand rights / remedies under existing and forthcoming FMC D&D rules.
 - Develop contract terms and processes consistent with OSRA protections against unreasonable D&D.

FMC Charge Complaints



- Complaints should include minimum shipment information, such as:
 - Identity of carrier.
 - Alleged violation of the Act.
 - Supporting documentation, such as invoices, BOL nos., payment evidence.

FMC Charge Complaints

- Complaints may be submitted via email: chargecomplaints@fmc.gov
- FMC shall investigate.
- VOCC or NVOCC can provide info. in response.



**VOCC OR NVOCC
BEARS THE BURDEN
OF PROOF**



**FMC SHALL ORDER
REFUNDS AND/OR
PENALTIES FOR NON-
COMPLIANT CHARGES**

Implications for Shippers

Benefits:

- New expedited process for challenging D&D and potentially other charges.
- Shifts burden of proof to carriers.
- FMC responsible for investigation, reducing burden and costs on the complainant.

Risks:

- Complainant has less control over process.
- Lack of discovery accessible to complainant.
- FMC has limited resources and may receive numerous complaints.

Prohibited Acts: Vessel Space



- Common carriers shall **not**:
 - *Unreasonably refuse cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods.*
- FMC shall initiate a rulemaking defining **unfair or unjustly discriminatory methods** under § 41104(a)(3) within 60 days. Final rule to be issued within 1 year.

Prohibited Acts: Vessel Space

- Common carriers shall **not**:
 - Unreasonably refuse to deal or negotiate, *including with respect to vessel space accommodations provided by an ocean common carrier.*
- FMC rulemaking on this prohibition now issued w/ **comments due on Oct. 21. Final rule to be issued by Dec. 2022.** FMC to consult with US Coast Guard.



FMC NPRM: Unreasonable Refusals to Deal/Negotiate as to Vessel Space

Elements

- Ocean carrier subject to FMC jurisdiction.
- Carrier refuses to deal or negotiate as to vessel space.
- Refusal is **unreasonable**:
 - ***Not a legitimate business decision (profitability) or motivated by legitimate transportation factors (i.e. characteristics of cargo or vessel, safety, infrastructure, effect of blank sailings)***

Considerations

- Refusals to deal or negotiate are fact-specific inquiries.
- Need more than one communication by shipper.
- Carriers cannot ignore requests—must give good faith consideration.
- Carriers may certify conduct was “reasonable”/evidence accurate.
- Comments due on **Oct. 21**.

Prohibited Acts: Service Contracts

Common carriers shall **not** for service under **service contracts**:

Unjustly discriminate ***against any commodity group or type of shipment*** or in the matter of rates or charges with respect to any port.

Give any unreasonable preference or impose any unreasonable disadvantage ***against any commodity group or type of shipment***.

Added to address concerns by shippers of hazardous materials.

Intent is to address broader industry-wide discrimination.

Implications for Shippers

OSRA adds protections against **unreasonable** refusals to provide vessel space and **unjust** discrimination.

- Rulemakings needed to clarify types of conduct that falls under new vessel space prohibitions.
- Space must be “available” to be denied.
- Complaints must be filed with FMC to adjudicate whether violations have occurred.

Carriers may not **unjustly** discriminate against hazmats or other commodities or shipment types in service contracts.

- Higher handling costs for hazmats is likely okay.
- BUT refusing vessel space when hazmats are tendered in accordance with dangerous goods regulations is a questionable practice.

Retaliation

- OSRA '22 expands the **retaliation** prohibition to cover actions by common carriers, MTOs, and OTIs against a shipper, motor carrier, or OTI, including:
 - Refusing or threatening to refuse available cargo space;
 - Resorting to any unjust discrimination for (i) selecting another carrier; or (ii) filing a complaint; or
 - Any other reason.

Service Contract Rulemaking



- FMC shall initiate a rulemaking to establish any additional “necessary and appropriate essential terms.”

Import/Export Data Collection



- FMC to publish quarterly data for total import/export tonnage and total loaded and empty TEU units for each vessel calling US ports.
 - Relevant to vessel space allocations.

Import/Export Data Collection



FMC is requesting comments on its intent to collect import/export data monthly.



Report to apply to each VOCC transporting 1500 or more TEUs per month.



Comments filed with FMC on **Oct. 7.**

Emergency Orders



- FMC to request comments on whether:
 - congestion has created an emergency creating a **substantial adverse effect on reliability and competitiveness of int'l ocean supply chain**.
 - temporary order would alleviate the emergency.
- Orders not to exceed 60 days unless renewed unanimously by FMC.
- Authority terminates in Dec. 2023.

Emergency Orders

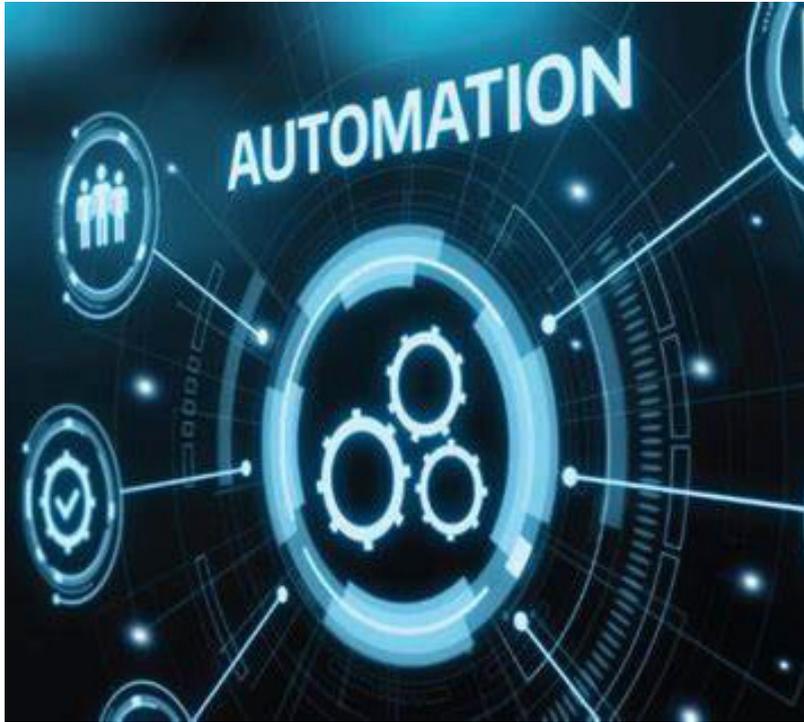
- Focus on whether ocean carriers and MTOs can share information with shippers, railroads, motor carriers and others to improve congestion and supply chain disruption.
 - efficient transportation, loading and unloading of cargo to/from inland destination or origin, vessel, or any terminal.
 - scope in duration and geography.
- FMC collected comments on Emergency Orders **Sept. 14.**

Chassis Pools

- Transportation Research Board to study and develop best practices for chassis pools to optimize supply chain efficiency.
- **FMC to publish best practices by April 1, 2024.**



OSRA '22: Other Requirements



- **Inland Storage.** Meeting between DOT, MARAD, FMC to discuss strategies for identifying land for storage and transfer of containers to alleviate congestion, and shall report to Congress.
- **Technology.** GAO shall submit a report to Congress comparing technology at US vs. foreign ports, w/in 1 yr.
- **FMC Appropriations.** Increases for FYs 2022, 2023, 2024, 2025.

OSRA '22: FMC Implementation

- OSRA Implementation Webpage created: www.fmc.gov/osra2022-implementation
- **INDUSTRY ADVISORIES**
 - [Industry Advisory – Demurrage & Detention Billing Practices](#)
Posted: July 22, 2022
 - [Industry Advisory – Interim Procedures for Submitting “Charge Complaints” Under 46 U.S.C. § 41310](#)
Posted: July 14, 2022
 - [Industry Advisory – Applicability of Provisions Contained in PL 117-146](#)
Posted: June 24, 2022

OSRA '22: FMC Implementation

■ OSRA RULEMAKING ACTIVITY

- [FMC Seeks Comments on Benefits of Issuing Emergency Order Requiring Information Sharing](#)
- [FMC Unveils Plan for Data Collection Initiative Mandated by OSRA](#)
- [Unreasonable Refusal to Deal Proposed Rule](#)
- [Demurrage and Detention Billing Requirements Proposed Rule](#)

Issues to Watch

- **Election Year:** highly politicized environment
- **Supply Chain:** remains in focus across gov't
- **Labor Challenges:**
 - Rail strike (?)
 - ILWU/PMA contract
 - DOL proposed rule impacting independent contractors

QUESTIONS



Thank you!

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