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Informal FMC Charge Complaint Process Available

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A number of developments in international ocean shipping have emerged following the enactment of the Ocean Shipping Reform Act of 2022 (OSRA) last year. The U.S. Congress sought to arm the Federal Maritime Commission (FMC) with the authority that it needed to address certain ocean transportation vulnerabilities acutely experienced by beneficial cargo owners during the height of the COVID-19 pandemic. One of the tools that has emerged and is now being used by enterprise shippers is the right to submit a Charge Complaint to the FMC pursuant to 46 U.S.C. § 41310. The FMC implemented its Interim Procedure for Processing Charge Complaints in December 2022. This article provides a quick summary of the informal Charge Complaint process.

Charge Complaints. A Charge Complaint must be based on OSRA violations, which may include claims against a carrier for false billing, a failure to provide services in accordance with tariff or service contract rates, technical invoice noncompliance for D&D charges, or practices that are retaliatory, unfair, or discriminatory. [46 U.S.C. §§ 41102 and 41104(a)] Charge Complaints must include the following minimum information: (i) identification of the carrier; (ii) a description of how the charge or fee violated 46 U.S.C. §§ 41102 or 41104(a); and (iii) supporting documentation such as bills of lading, invoices, proof of payment, and the like. Once a Charge Complaint is filed pursuant to 46 U.S.C. § 41310(a), the FMC will begin an initial investigation in accordance with its Charge Complaint Interim Procedure (CCIP). Under the CCIP, the carrier can at any time prior to a final decision voluntarily elect to refund or waive any payment that forms the basis of a Charge Complaint, which will result in the matter being closed.

Initial Investigation. Charge Complaints must be submitted to the FMC via email. Initial review of the submission involves a determination of whether there is sufficient evidence of a carrier violation under OSRA. If there is not, the FMC will close the matter without prejudice and provide the shipper with its rationale in support of the finding (the shipper can resubmit a Charge Complaint and a new matter will be opened if additional information becomes available). If the FMC finds the carrier failed to comply with OSRA then the matter will proceed similar to an enforcement action, and the carrier has the burden of proof to establish the reasonableness of its charges in accordance with 46 C.F.R. § 545.5. Upon completion of its initial investigation, the FMC will notify both the shipper and carrier that the matter will be: (i) closed if the carrier is found to have complied with OSRA; or (ii) referred to the Office of Enforcement for further adjudication if the carrier failed to comply with OSRA.

Office of Enforcement. If a Charge Complaint is referred to the Office of Enforcement, it may recommend the FMC to issue an Order to Show Cause under 46 C.F.R. § 502.91. The matter will then be adjudicated in an administrative proceeding before an Administrative Law Judge (ALJ). The carrier will be required to “show cause” as to reasonableness of the charges and why it should not be required to refund or waive those charges. During this process, the shipper may provide any additional information it has in support of its Charge Complaint, although the shipper is not expected or required to testify or otherwise participate in the administrative proceeding. Upon completion of the

administrative proceeding, the ALJ may dismiss the matter or order the carrier to issue a refund to the shipper in addition to any civil penalties that are enforced pursuant to a separate proceeding under 46 U.S.C. §§ 41104(a), 41102, or 41107.

Changes to Charge Complaint Procedures. In its notice of proposed rulemaking issued in October 2022 (NPRM), the FMC proposed several items that may become required practice when invoicing for D&D charges, including: (i) the formal adoption of a list of minimum information carriers must include in D&D invoices pursuant to OSRA; (ii) additional information to be included in or with a D&D invoice; (iii) defining prohibited practices and clarifying which parties may be billed for D&D charges; and (iv) establishing practices that the billing parties must follow when invoicing for D&D charges.

The team at Benesch knows from experience that many shippers continue to struggle with ocean shipping charges that arose during the pandemic while at the same time trying to determine a strategic path forward for ocean shipping procurement. We are available to assist in developing pragmatic approaches to address D&D charges and other OSRA-related issues as well as negotiating ocean shipping service contracts and resolving disputes.

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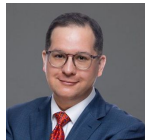
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