

**Advent eModal
CLIENT BRIEFING**

**2022 Regulatory & Legislative Compliance for
Ocean Carrier and Marine Terminal Operators**

28 November 2022

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I. Background Overview

In 2022, federal, state, and local regulatory and legislative activities greatly impacted the demurrage and detention (D&D) billing practices for Ocean carriers (Lines) and Marine terminal operators (MTOs). Specifically, the 16 June 2022 passage of the Ocean Shipping Reform Act of 2022 (“OSRA 2022”), its follow-on rulemakings and California Assembly Bill numbered 2406 created industry havoc. The following digest is intended to guide compliance activities across Advent eModal customers and stakeholders.

- [CA AB 2406](#)
- [POLA / POLB Container Dwell Fee](#)
- [OSRA 2022 & related FMC NPRM, 14 October 2022](#)

a. California Assembly Bill 2406

[CA AB 2406](#), approved into CA law on 20 September 2022, effective 01 January 2023, provides MTO and Intermodal Marine Container Provider restrictions on the billing practices for equipment per diem, demurrage, extended dwell, and other similar charges. A summary of the ruling includes:

- The law prohibits MTOs and Intermodal Marine Container Providers from imposing per diem, D&D under certain circumstances including when the MTO decides to divert equipment on less than (48) hour notice.
- Ruling goes further to include extended dwell fees, starting or continuing free time under certain circumstances.
- Prohibits the above Parties from terminating, suspending, or restricting equipment interchange rights of the Motor Carrier and from charging back, deducting or offsetting per diem from the Motor Carrier freight bill.
- Prohibits Intermodal Marine Container Provider from commencing or continuing free time if cargo is unavailable and timely notice of availability has not been provided.

b. POLA / POLB Container Dwell Fee

Effective 01 November 2021, the Ports of Los Angeles and Long Beach, in coordination with the Biden-Harris Supply Chain Disruptions Task Force and USDOT, instituted a [Container Dwell Fee](#) for Ocean Carriers of \$100 per container per day for dwelling containers, trucks over 9 days and rail over 3 days. The fee is currently delayed until 16 December 2022 and the program has extended through 24 January 2023. Fee implementation has been postponed by both ports since the start of the program.

c. Ocean Shipping Reform Act of 2022

On June 16, 2022, President Biden signed into law S. 3580, the “Ocean Shipping Reform Act of 2022,” which authorizes appropriations for the Federal Maritime Commission (FMC) for fiscal years 2022 through 2025; establishes additional requirements and prohibited conduct for ocean carriers; requires the FMC to issue additional rules related to certain fee assessments (including demurrage invoicing requirements), prohibited practices, establishment of a shipping registry; and authorizes the FMC under certain circumstances to issue an emergency order requiring common carriers to share information directly with shippers, rail and motor carriers.

If the Commission determines that cargo congestion has created an emergency, it may issue an order requiring any ocean common carrier or MTO to share directly with relevant shippers, rail carriers, or motor carriers information relating to cargo throughput and availability. In view of these factors and consistent with the requirements set out in Section 18 of OSRA 2022, the Commission sought public comments on an emergency order, as found in this 15 August 2022

Federal Register notice: <https://www.federalregister.gov/documents/2022/08/15/2022-17582/request-for-information>, ultimately determining that the emergency order was unnecessary. Comments were due by 14 September 2022 and were provided by 47 parties as found in this FMC Reading Room: <https://www2.fmc.gov/readingroom/proceeding/22-19/>.

d. FMC Notice of Proposed Rulemaking | Demurrage and Detention Billing Requirements

Finally, OSRA 2022 mandates rulemaking for further definition of D&D practices, including which parties may be appropriately billed. On 14 October 2022, the FMC released a [Notice of Proposed Rulemaking \(NPRM\)](#) to identify further D&D billing requirements with comments due by 13 December 2022 and a Final Rule in June 2023.

II. Ocean Carrier & MTO Stakeholder Requirements & Solutions

a. California Assembly Bill 2406

The bill was signed 30 September 2022 and is effective 01 January 2023.

i. Free Time Impacts

Free time must be paused, and fees cannot be assessed if:

- 1) Truck gates close during posted normal working hours, a holiday or labor disruption exists.
- 2) If empty equipment is diverted from the original interchange location w/o 48-hour notice.
- 3) Due to a MTO health & safety code violation.
- 4) Chassis OOS conditions.
- 5) Closed or inaccessible container delivery area at time of MC arrival.
- 6) Terminal congestion forces MC turn away.
- 7) MC documentation of an unsuccessful attempt to make an appointment (import / export) and no other appointments are available within the following windows:
 - For 1st Shift appointment attempts, no other appts available.
 - For 2nd Shift appointment attempts, no other appts available.
 - If no posted shift hours:
 - 1st Shift = 7:00 AM – 4:59 PM
 - 2nd Shift = 5:00 PM – 3:00 AM
- 8) If EP/ MTO transaction restrictions (e.g., single / dual transactions, chassis matching, empty container requirements) prevent a transaction, as well as failure to provide a return location or other conditions that impede MC ability to pick up or terminate the container.
- 9) If container return or delivery is delayed due to a booked vessel receiving date change.
- 10) If cargo retrieval / return obstacles fall within the scope of responsibility of the carrier / agent beyond the control of the invoiced or contracted party.

ii. Intermodal Marine Container Providers Restrictions

Intermodal Marine Container Providers shall not:

- 1) Charge back, deduct or offsets per diem, M&R, or peak hour pricing from a MC freight bill.

- 2) Terminate, suspend, or restrict interchanges rights...
 - During a UIIA dispute.
 - For late payment of an undisputed invoice if < 60 days past due.
 - For MTO parking violations < 60 days past due with no tickets issued if an assigned spot or alternative was not adequately provided.
 - Given the above, hold the Motor Carrier liable for any portion of demurrage when the container is not picked up during allowed free time.
 - Commence or continue free time if cargo is unavailable for retrieval and timely notice of cargo availability has not been provided.
 - If all outstanding fees have been paid and container is not available at MC arrival, no further demurrage fees can be charged.

iii. Potential Solutions

Relative to the above, key components to AB 2406 compliance include:

- 1) Ability for the Lines and MTOs to leverage a common system (e.g., eModal) & a dynamic process to universally manage the **start / stop of free time calculation**.
 - Versus changing the Last Free Day which should remain constant based on first container available date.
 - Calculations would be based on actual free time overages and date specific charges.
- 2) Standard 48-hour advanced Empty Return Instruction (ERI) and Earliest Receiving Date (ERD) notification to eModal by Lines and MTOs.
 - Integration to Appointment System validation (as provided by eModal for any appointment system, including eModal).
- 3) Differentiation between “**Road Ready Availability**” and “**Container Clearance**” for appointment setting.
 - See explanation below.
- 4) Appointment system and ERI / ERD documentation, metrics & reporting to validate fee invoicing.

iv. Key MTO & Line Compliance Issues:

1) Container Availability

Container availability, as currently received by eModal, is most typically tied to the date & time of vessel discharge. The Commission has not yet ruled on this definition, but a ruling is expected soon. If the container is not available at discharge, MTOs and Lines should deploy an exception management process to identify any such containers and communicate such to eModal.

Of note, a differentiation must be made between “**Container availability**”, defined as readiness for road or rail transit, as opposed to “**Delivery Clearance**” which is defined as released and clear of all holds.

For instance, if the container is deliverable and road ready the box is “available” but holds may exist for the purposes of Customs exam, freight, USDA, CTF, TMF or other hold reasons, whereby the shipper has the responsibility to facilitate and obtain final clearance.

2) Appointment Availability

There is a need to decouple “**Container Availability**” from “**Appointment Availability**.”

Appointment Availability should be considered as a separate data element / attribute, especially for reporting purposes should the sharing of this data become mandated.

It appears optimal for regulatory compliance that if a container is “**Available**” but on hold and lacking “**Delivery Clearance**”, an appointment can be made residing in a “Pending” or “Warning” status until the hold is cleared.

However, many terminals require the container to be fully released of holds to create an appointment. eModal offers the business rule management option to allow appointment creation, showing a warning that fees or container releases are pending and must be satisfied prior to gate arrival.

Options include:

- Error – Preventing appointment creation.
- Warning – Includes messaging.
- Info – Works like a warning. When creating an appointment.

Appointment Status areas upon submittal will include:

- Pending – Queued up to post to the Terminal Operating System [TOS].
- Accepted – No errors from the TOS.
- Tentative – Warnings exist in the TOS.
- Rejected – Critical errors from the TOS.

MTOs have the flexibility of displaying the remaining appointments and available appointments per timeslot. This is displayed on the date / timeslot dropdown next to each slot on the PreGate appointment creation screen.

AeM surmises that MTOs are preventing appointment creation if the box is Available but void of Delivery Clearance in the fear that motor carriers will not pay attention to the warnings and arrive at the Terminal in an unserviceable container state. The eModal “Check In” features for import picks, with the check in by a set amount of time prior to the appointment timeslot, could alleviate this operational issue. The check in could be automated if all conditions for a viable Motor Carrier mission are met and not allowed or cancelled if the container has not received Delivery Clearance.

3) Burden of Proof

As a system of record, eModal is designed to present an immediate AB 2406 and OSRA compliant invoice and freight release at the time of payment, prior to freight pick up. If required to share additional data, eModal is well positioned to serve as a conduit for the distribution of this information to relevant MTO and Line trading partners.

From the point of vessel discharge through the Last Free Day [LFD], eModal can track how many appointment slots are available at the container level. However, logging appointment availability data at this level can prove burdensome and is not currently provided due to the cost of data processing, hardware, maintenance, disaster recovery.

Burden of Proof must be established. The following issues must be answered and proactively addressed by Lines and MTOs:

- Proof of Container or Appointment Availability.
- The definition of Container Availability.
- Proof of Appointment Availability at the specific container level.
- Reporting and audit features for appointment availability, empty and export receiving at the container level.

III. POLA / POLB Container Dwell Fee | Effective date TBD

a. Pre-pay Fee Collections & Container Holds

To calculate and pre-collect the fee, as well as place container level (vs. BOL level) fee payment holds on containers, Ocean Carriers will need a proven “quick launch” system or method to integrate with MTO Terminal Operating Systems (TOS), as well as process advanced invoicing and payments.

b. Prepared Solution

Based on eModal’s bespoke capabilities to manage the POLA/POLB dwell fee calculation, payment processing and terminal hold / release messaging, most Lines have pre-arranged for eModal to provide this service under an Ocean Carrier Equipment Management Association (OCEMA) negotiated agreement, if necessary.

IV. Ocean Shipping Reform Act of 2022

a. Minimum billing requirements | Effective 16 June 2022

- i. Date that container is made available.
- ii. The port of discharge.
- iii. The container number or numbers.
- iv. For exported shipments, the earliest return date.
- v. The allowed free time in days.
- vi. The start date of free time.
- vii. The end date of free time.
- viii. The applicable detention or demurrage rule on which the daily rate is based.
- ix. The applicable rate or rates per the applicable rule.
- x. The total amount due.
- xi. The email, telephone number, or other appropriate contact information for questions or requests for mitigation of fees.
- xii. A statement that the charges are consistent with any of Federal Maritime Commission rules with respect to detention and demurrage.
- xiii. A statement that the common carrier's performance did not cause or contribute to the underlying invoiced charges.

b. Prepared Solution

The above information must be supplied on D&D invoicing by both Lines and MTOs. The challenge lies in MTO / Line integration to accurately invoice in advance with the associated container level hold & release processes, as well as Last Free Day / Good Through Day date exception management and data synchronization between the MTO TOS and Line systems.

eModal can provide the above, as well as assist with the shift of export / empty fee collections from a post-pay to pre-pay process.

Ahead of OSRA compliance deadlines, eModal established an import ready digital invoicing and collection solution, as deployed as the core MTO collection platform across 22 North American terminals, as well as over 50 terminals total when including collections, freight hold / release and exception management for Ocean Network Express, Evergreen and Yang Ming Lines, among other in active Line implementations.

V. FMC NPRM – Demurrage and Detention Billing Requirements

Published on 14 October 2022 with comments due by 13 December 2022 and a Final Rule expected by 16 June 2023.

a. Newly Proposed Definitions

Proposes additional minimum information and billing requirements, while pulling MTOs more firmly into the scope of D&D invoicing requirements for VOCCs, NVOCCs and MTOs alike. New definitions are foreshadowed for the following areas:

i. Demurrage or detention, Billed Party, Billing Party, Billing Disputes**ii. Commercial relationship with Common Carrier or MTO needed for billing**

- 1) i.e., Contracted Party
- 2) Motor Carriers, Customs Brokers not liable for the underlying charges
- 3) 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 demurrage and detention invoices to persons other than the person for whose account the billing party provided ocean transportation or storage.

iii. Required Invoice Information Refinements

- 1) Identifying information
 - BOL, Container number, Port of discharge (imports), Basis for why the invoiced party is responsible for the charges
- 2) Timing information
 - Time period when the charges apply, Due date for invoiced charges, Specific dates when D&D was charged
- 3) Rate information
 - Total Due, Applicable D&D rule, Specific rate detail, Grounds for application

- 4) Dispute information
 - Contact person, URL to any necessary documentation, Dispute timeframe and resolution process

iv. Billing Timeframes

- 1) Common Carriers and MTOs must invoice within 30-days
- 2) Billed parties must dispute within 30-days
- 3) Disputes must be resolved within 30-days of receipt
- 4) If incorrect party is billed, correct party must receive an invoice within:
 - 30-days from the date the incorrect party disputes the charges
 - 60-days after the charges were last incurred

b. Proposed Solution

Failure of the above items will excuse the billed party from paying the underlying charges

Existing eModal OSRA compliance processes will be augmented to support any additional data needs, for instance identification of the contracted party.

Like CA AB 2406, a pre-pay solution assists in meeting the regulations, especially for empty detention and exported shipment storage charges. When tied with empty / export appointment setting and a claiming process for gate control, a Payor pre-approved merchant-initiated payment transaction (like a subscription service) will enable pre-payment of empty / export fees versus post pay invoicing and accounts receivable collections.

Earliest Return Dates (ERDs) and Empty Return instructions must be properly communicated to the appointment and associated billing system by the Line.

Of note, the requirement that invoices are only issued to the contracted billing party, does not preclude 3rd parties from paying on behalf of the shipper.