FEDERAL MARITIME COMMISSION

46 CFR PART 540

[DOCKET NO. 92-19]

# REVISION OF FINANCIAL RESPONSIBILITY REQUIREMENTS FOR NON-PERFORMANCE OF TRANSPORTATION

**AGENCY:** Federal Maritime Commission.

**ACTION:** Final Rule.

**SUMMARY:** The Federal Maritime Commission amends its rules regarding financial responsibility for passenger vessel operators to (1) institute a sliding scale formula for determining the amount of financial responsibility coverage required for operators meeting certain requirements; (2) exclude, under certain conditions, revenue from "whole-ship" arrangements from being considered as unearned passenger revenue; and (3) publish a suggested form escrow arrangement as a guideline for the industry.

**EFFECTIVE DATE:**

Thirty days after publication in the Federal Register.

**FOR FURTHER INFORMATION CONTACT:**

Bryant L. VanBrakle,
Director
Bureau of Tariffs, Certification and Licensing
Federal Maritime Commission
1100 L Street, N.W.
Washington, DC 20573
(202) 523-5796

**SUPPLEMENTARY INFORMATION:**

## BACKGROUND

The Federal Maritime Commission ("Commission") initiated this proceeding by publishing a Notice of Proposed Rulemaking ("NPR") in the Federal Register on May 4, 1992 (57 FR 19097). The NPR solicited comment on a proposed rule to revise the Commission's administration of section 3 of Public Law 89-777, 46 U.S.C. app. 817e ("Section 3"). Section 3 requires certain passenger vessel operators to have sufficient financial responsibility to indemnify passengers for nonperformance of transportation.[1]

The proposed rule would revise 46 CFR Part 540, Subpart A, to (1) institute a sliding-scale formula for operators meeting certain requirements; (2) provide that operators need meet only existing net worth standards to qualify as self-insurers; (3) require semi-annual rather than annual filing of certain financial statements by self-insurers; (4) exclude, under certain conditions, revenue from "whole-ship" arrangements from being considered as unearned

---

[1]Section 3 provides, in pertinent part:

> No person in the United States shall arrange, offer, advertise, or provide passage on a vessel having berth or stateroom accommodations for fifty or more passengers and which is to embark passengers at United States ports without there first having been filed with the Federal Maritime Commission such information as the Commission may deem necessary to establish the financial responsibility of the person arranging, offering, advertising, or providing such transportation, or, in lieu thereof, a copy of a bond or other security, in such form as the Commission, by rule or regulation, may require and accept, for indemnification of passengers for nonperformance of the transportation.

passenger revenue ("UPR");[2] and (5) publish a suggested form escrow arrangement as a guideline for the industry.

## COMMENTS

Comments to the NPR were received from Delta Queen Steamboat Company ("Delta Queen"), an intercoastal waterway U.S.-flag passenger vessel operator;[3] American Hawaii Cruises ("AHC"), a deep-water U.S.-flag passenger vessel operator; District 2 of the Marine Engineers Beneficial Association ("MEBA"), a maritime labor union representing the officers of AHC's vessels; the International Council of Cruise Lines ("ICCL"), an association of foreign-flag passenger vessel operators; Diamond Cruise Inc. ("Diamond"), a passenger vessel operator intending to specialize in "whole-ship" charters; and Mr. John W. McConnell, Jr., commenting on his own behalf.

The comments were generally supportive of the proposed rule. The Commission has considered all of the comments received in this proceeding. Other than for the NPR's proposed self-insurance revisions, the Commission has determined to adopt the rule published in the Federal Register on May 4, 1992, with certain changes discussed below. The Commission has determined to institute a separate proceeding to consider further revisions to

---

[2]UPR is defined under 46 CFR 540.2(i) as:

> . . . that passenger revenue received for water transportation and all other accommodations, services, and facilities relating thereto not yet performed.

[3]Delta Queen filed two comments, a June 16, 1992 submission by David W. Kish, Vice President, Administration, and a June 17, 1992 submission by S. Cody Engle, Chairman of the Board.

its Section 3 self-insurance regulations. Any comments not expressly discussed either have been incorporated, have been found to be mooted by the changes incorporated into the final rule, or have been found to be irrelevant, without merit or beyond the scope of the proceeding.

## DISCUSSION

### 1. The Sliding Scale

Delta Queen commends the sliding scale as striking an appropriate balance by providing adequate protection to passengers while proportionately impacting various-sized operators. It asserts that the current regulations unfairly disadvantage small- and medium-sized operators, because larger operators are required to cover only a proportion of their UPR while small and medium size operators are required to cover their entire UPR up to the current $15 million ceiling. It suggests that the Commission also consider an operator's financial and operating history (including the number of years of uninterrupted service beyond the 5-year minimum proposed in the NPR) in determining an operator's coverage requirements under the sliding scale. Delta Queen states that a company with many years of incident-free service would be less likely to cancel trips than one with a shorter operating history.

AHC also supports the NPR's sliding scale. It asserts that the sliding scale would eliminate the current disparity in coverage requirements for larger and smaller operators, and would more accurately recognize the economic realities causing the cruise industry's fluctuating revenue levels. AHC believes that the

proposed maximum $5 million coverage per vessel under the sliding scale is more than adequate to meet Section 3's purposes. With regard to the criteria based on a satisfactory record of performance, AHC asserts that history has demonstrated that all non-performance problems which have occurred involved inadequately capitalized, start-up companies which relied on advance deposits to cover operating losses as they filled their cash-flow "pipeline".

For operators with less than five years' experience and therefore ineligible to use the proposed rule's sliding scale, AHC urges the Commission to consider determining coverage on the basis of an operator's average UPR.[4] It states that it would be more realistic and far more accurate to use an operator's average collections over the previous two years to determine the base amount of an operator's UPR. AHC also suggests that if the operator has less than two years' experience, the Commission should use its highest UPR level to determine the amount of coverage necessary. AHC suggests that setting coverage amounts according to revenue averages for operators with less than five years' continuous service would help ease the regulatory and economic burdens associated with financial responsibility requirements, while at the same time preserve the purpose of the underlying statute. Moreover, AHC maintains that an averaging approach also would ease the regulatory burden upon the Commission, because it would simplify the reporting process and ease the burden

---

[4]AHC notes that the coverage requirement under the present regulations is 110% of the highest UPR on any single day during the prior two years.

accompanying the Commission's task of setting coverage requirements in every case.

MEBA supports the sliding scale formula as giving proper credit to operators such as AHC which have had a long history of reliable, stable cruise service and which have experienced no claims or otherwise demonstrated any unreliability of financial performance. MEBA states that the proposed regulations also would have the advantage of differentiating among the various size operators so as to more equitably spread the burden of performance coverage over those who have ships in the one to four vessel range.

ICCL believes the sliding scale is an option for providing flexibility in meeting the certification requirements within the $15 million ceiling. This approach is said to recognize the value of a cruise operator's clean performance record as a criterion for easing the burden of providing security. It commends the sliding scale's criteria as representing an adequate, fair and constructive approach.

Mr. McConnell proposes an additional sliding scale arrangement to address vessel operators' changes in Section 3 coverages. This proposal would cover the period after a vessel operator has changed its coverage, but before all UPR covered by the former source of coverage has been reconciled. He suggests that responsibility be apportioned between the old and new coverage in accordance with the current ratio of the vessel operator's old and new UPR.

The Commission has determined to adopt the proposed sliding scale concept. AHC's suggestion for basing coverage requirements

on revenue averages and Mr. McConnell's suggestion for a sliding scale to cover changes in coverage are outside of the scope of this rulemaking and cannot be considered here.

**2. Self-insurance**

The NPR proposed to eliminate the requirement that passenger vessel operators wishing to qualify as self-insurers demonstrate both net worth and working capital equal to 110 percent of their UPR. The NPR proposed to allow operators to qualify on the basis of their net worth alone, subject to certain requirements including the requirement that the assets used to qualify as a self-insurer be physically located in the United States. In connection with the liberalization of the self-insurance requirements, the NPR proposed more frequent reports concerning the financial standing of self-insurers.

As noted above, the Commission has determined to institute a separate proceeding to consider further revisions to its Section 3 self-insurance requirements.

**3. Whole-ship Contracts**

ICCL states that the NPR's proposal to exempt whole-ship contracts from Section 3 coverage requirements, and the accompanying corporate certification, appears to be reasonable.

Diamond supports exempting whole-ship contracts, but suggests that instead of the approach set forth in the NPR, the Commission consider a straightforward class exemption allowing any operator conducting a whole-ship charter to exclude advance payments thereunder from its UPR calculations. If the Commission

nonetheless believes that some informational reporting is needed, Diamond requests that cruise lines be required to do no more than (1) report the number of whole-ship charters processed and the amount of advance revenue attributable thereto; and (2) certify that all whole-ship charter contracts entered into contained certain standard terms (Diamond does not, however, suggest what these "standard terms" should be).

Diamond states that no reason has been offered for the proposed rule's filing and acknowledgement requirements, asserting that such a process is unnecessary and would impose an unjustified administrative and economic burden on the Commission and cruise lines. Diamond submits that only a total class exemption would enable operators that intend to operate substantial numbers of whole-ship charters to benefit from the regulatory relief contemplated by the proposed rule.

Diamond offers four specific objections to the NPR's treatment of whole-ship charters. First, it asserts that there is no evidence that Congress intended Section 3's financial responsibility provisions to extend beyond the individually ticketed portion of the travelling public to that portion which will utilize whole-ship contracts. In this connection, Diamond asserts that on its face, Section 3 only protects "passengers" and there is no basis upon which to conclude that corporate charterers, which themselves will not be receiving any passage on board the vessel, come within the meaning of that term. Second, Diamond anticipates handling a very large number of such charters, and

believes that it would be administratively burdensome and intrusive for a carrier to be required to submit each contract to the Commission.[5] Third, given its contention that "these parties have no legitimate expectation of protection" under Section 3 (Diamond comment, 3), Diamond characterizes as unnecessary and inappropriate the proposed requirement that cruise lines obtain a separate statement from their whole-ship charter counterparties acknowledging that Section 3's protections do not apply. Fourth, Diamond urges the Commission not to require whole-ship charterers to indemnify their passengers in the event of a cruise line's non-performance, asserting that these passengers "are not paying for their cruise and therefore, by definition, cannot be financially harmed by the cruise line's putative failure to perform" (Ibid).

Diamond's position appears to be supported by two underlying assumptions: (1) that Section 3 is intended only to afford protection to the person to whom the transportation is provided, or, stated conversely, that Congress did not intend to provide protection to those who purchase transportation and then assign, without consideration, that transportation contract to a third party beneficiary; and (2) that Section 3 is not intended to afford protection to corporations. We disagree on both counts.

---

[5]Diamond also observes that these contracts will inevitably contain confidential business terms and other proprietary information that the Commission does not need to discharge its Section 3 obligations and to which the cruise line will legitimately not want either the Commission or the public-at-large to have access.

Congress enacted Section 3 to ensure an available remedy to passengers left stranded on the pier. Nothing in that statute or its legislative history suggests that Congress intended to limit the statute's application where the ticket purchaser transfers its rights to another with or without consideration. If a corporation purchases all of the available berths for a particular voyage, that corporation or its designated beneficiaries/assignees are entitled to the benefits afforded by the ticket contract. These interests are likewise entitled to the benefits provided by Section 3. We find no reason to differentiate between passengers whose tickets were purchased and offered by a corporate employer, vis-a-vis persons whose tickets were purchased and conveyed by a friend or family member. No one has ever suggested, for example, nor do we believe, that if a person purchases fares for himself and his family, Section 3 covers only the purchaser's ticket in the event of nonperformance.

In addition, the Commission believes that the statute was designed to provide a methodology for establishing an operator's financial responsibility for its passengers, regardless of their identity. Although Public Law 89-777 nowhere defines the term "passenger", section 540.2(g) of the Commission's rules defines the term as "<u>any</u> person who is to embark on a vessel at any U.S. port and who has paid any amount for a ticket contract entitling him to water transportation" (emphasis supplied). Section 540.2(a), in turn, defines the term "person" as including "individuals, corporations, partnerships, associations, and other legal entities

existing under or authorized by the laws of the United States or any State thereof . . . ." The Commission adopted this definition of the term passenger in 1967 when it promulgated regulations to implement Section 3. To date, the Commission has not received any complaints or concerns about this definition. Accordingly, the Commission finds that the existing definition of "passenger" appropriately extends beyond individuals to include corporate charterers of passenger vessels subject to Section 3, and that a broad interpretation of the term "passenger" is consistent with the legislative intent of ensuring that purchasers of passenger fares are protected against operator nonperformance.

With regard to Diamond's concerns about reporting burden, the Commission believes that Diamond misunderstands the rule. A single agreement could cover a series of voyages. In any event, no more than one charter arrangement would need to be filed per voyage. As to the treatment of confidential information, section 540.9(g) of the Commission's rules would appear to cover Diamond's concerns.[6] This, coupled with the existing exception to the availability of records afforded under 46 CFR § 503.35(a)(4),[7] would permit the

---

[6]46 CFR 540.9(g) provides:

> Financial data filed in connection with the rules of this subpart shall be confidential except in instances where information becomes relevant in connection with hearings which may be requested by applicant pursuant to § 540.8(a) or (b).

[7]46 CFR § 503.35(a)(4) includes among the records not to be made available in response to a Freedom of Information Act request:

> Information given in confidence. This includes information obtained by or given to the Commission which constitutes trade

(continued...)

Commission to keep financial information confidential.

Diamond states that the proposed definition of the term "whole-ship charter" is ambiguous and should be clarified. It states that it does not understand what is intended by the phrase "the full reach of the passenger accommodation of the vessel" in the proposed definition. To avoid the ambiguity it perceives in this definition, and to effect the regulatory class exemption it has requested, Diamond suggests that the Commission adopt the following definition:

> Whole-ship charter means any contract, agreement or other arrangement between a passenger vessel operator and a person (other than an individual) whereby all of the passenger accommodations on a vessel for a particular voyage or series of voyages (i) are purchased by that person, (ii) are not resold by that person to members of the public and (iii) are provided by that person to the ultimate passengers free of charge.

The Commission has modified the definition of "whole-ship charter" in certain respects to accommodate Diamond's suggestion. However, the reporting requirements have been retained.

**4. Escrow arrangements**

The NPR published a draft "form" of the type of escrow arrangement the Commission has previously found acceptable for Section 3 purposes. It did so to provide a guideline concerning the type of instrument the Commission generally considers

---

[7](...continued)
secrets, confidential commercial or financial information, privileged information, or other information which was given to the Commission in confidence or would not customarily be released by the person from whom it was obtained.

(emphasis supplied)

acceptable in its case-by-case evaluation of escrow account applications.

AHC states that while escrow arrangements may benefit and provide an attractive certification alternative to some operators, they do not offer any significant advantages to AHC, particularly given the prospect of the NPR's sliding scale. AHC does not believe that escrow arrangements will cure the difficulties associated with the seasonal fluctuations in its business. Therefore, AHC urges the Commission not to view the escrow alternative as obviating the need for other flexible alternatives such as the sliding scale.

AHC advises that an escrow arrangement would be impractical for several reasons. First, AHC advises its primary depository bank cannot handle individual disbursements to agents requesting refunds for cancellations; the bank only performs deposit/disbursement and funds management functions on a weekly basis and at a significant additional cost. Therefore, an escrow arrangement calculated on a weekly basis would be both more costly and inaccurate for AHC because refunds would have been made and not accounted for. Second, the requirement for a quarterly audit would allegedly result in a substantial additional expense since AHC uses independent auditors only once a year. Third, AHC claims it cannot -- without enormous expense -- reprogram its computer accounting system to sort out deposits received for air, hotel, car rental, and cancellation insurance from passenger fares to determine what amount should be deposited into an escrow account.

Moreover, it allegedly cannot determine as a practical matter what portion of an individual deposit should be apportioned between each component of passenger fare, air, hotel, car rental, etc., which could result in it depositing an inaccurate amount into an escrow fund. Fourth, AHC believes that because the escrow certification alternative is not currently subject to the current $15 million ceiling on UPR coverage the use of such an arrangement in conjunction with another certification method could lead to confusion in setting the certification amount. Finally, AHC states that an escrow account would eliminate a segment of its working capital. AHC explains that, like other operators, it relies on customer deposits for a portion of its daily working capital; an escrow account would require it to secure additional financing to replace funds placed in escrow, at a significant interest expense exceeding income earned by escrow account investments.

ICCL states that it may be desirable to have escrow arrangements available as an option to be considered with other methods -- but not the exclusive means -- of meeting Section 3 requirements.

In response to the concerns expressed by AHC, the Commission did not intend escrow arrangements to remove the opportunity to take advantage of other flexible alternatives, such as the sliding scale. The arrangements upon which the form escrow arrangement published in the NPR are based have worked well in the past, and the Commission has determined to adopt the NPR's form escrow arrangement in the final rule.

Although the Commission as an independent regulatory agency, is not subject to Executive Order 12291, dated February 17, 1981, it has nonetheless reviewed the rule in terms of this order and has determined that this rule is not a "major rule" because it will not result in:

(1) An annual effect on the economy of $100 million or more:

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effect on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Federal Maritime Commission certifies, pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that this rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units, and small governmental organizations because the passenger vessel operators impacted by the rule are generally not small businesses.

OMB CONTROL NUMBER: The collection of information requirements contained in this regulation have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980, as amended, and have been assigned OMB control number 3072-0012. Public reporting burden for this amendment to: (1) institute a sliding scale formula for operators

meeting certain requirements; (2) provide for certain treatment for "whole-ship" arrangements; and (3) follow Commission-suggested guidelines for escrow arrangements is estimated to average 15.15 hours per response. This includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. No comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, were sent to the Commission or to the Office of Information and Regulatory Affairs, Office of Management and Budget.

**List of Subjects in 46 CFR Part 540**

Insurance, Maritime carriers, Penalties, Reporting and record keeping requirements, Surety bonds, Transportation.

Therefore, pursuant to 5 U.S.C. 553; section 3 Pub. L. 89-777, 80 Stat. 1356-1358 (46 U.S.C. app. 817e); section 43 of the Shipping Act, 1916 (46 U.S.C. app. 841a); and section 17 of the Shipping Act of 1984 (46 U.S.C. app. 1716), the Federal Maritime Commission amends Part 540 of Title 46 of the Code of Federal Regulations as follows:

**Part 540 - [AMENDED]**

1. The authority citation to Part 540 continues to read:

Authority: 5 U.S.C. 552, 553; secs. 2 and 3, Pub. L. 89-777, 80 Stat. 1356-1358 (46 U.S.C. app. 817e, 817d); sec. 43 of the Shipping Act, 1916 (46 U.S.C. app. 841a); sec 17 of the Shipping Act of 1984 (46 U.S.C. app. 1716).

2. A new § 540.2 (l) is added to read as follows:

(l) Whole-ship charter means an arrangement between a passenger vessel operator and a corporate or institutional entity:

(i) which provides for the purchase of all the passenger accommodations on a vessel for a particular voyage or series of voyages; and

(ii) whereby the involved corporate or institutional entity provides such accommodations to the ultimate passengers free of charge and such accommodations are not resold to the public.

3. Section 540.5 is amended by revising its introductory text, paragraph (b), and by adding new paragraphs (e) and (f) reading as follows:

**§ 540.5 Insurance, guaranties, escrow accounts, and self-insurance**

Except as provided in § 540.9(j), the amount of coverage required under this section and § 540.6(b) shall be in an amount determined by the Commission to be no less than 110 percent of the unearned passenger revenue of the applicant on the date within the 2 fiscal years immediately prior to the filing of the application which reflects the greatest amount of unearned passenger revenue, unless the applicant qualifies for consideration under § 540.5(e). The Commission, for good cause shown, may consider a time period other than the previous 2-fiscal-year requirement in this section or other methods acceptable to the Commission to determine the amount of coverage required. Evidence of adequate financial responsibility for the purposes of this subpart may be established by one or a combination (including § 540.6 Surety Bonds) of the

following methods:

* * * * *

(b) Filing with the Commission evidence of an escrow account, acceptable to the Commission, for indemnification of passengers in the event of nonperformance of water transportation. Parties filing escrow agreements for Commission approval may execute such agreements in the form set forth in Appendix A of Subpart A of this Part.

* * * * *

(e) The following schedule may be applied to determine the minimum coverage required for indemnification of passengers in the event of nonperformance of water transportation for those operators who can provide evidence (in the form of an affidavit by the operator's Chief Executive Officer or other responsible corporate officer) of a minimum of five years of operation in United States trades with a satisfactory explanation of any claims for nonperformance of transportation:

| UNEARNED PASSENGER REVENUE ("UPR") | REQUIRED COVERAGE |
|---|---|
| $0-$5,000,000 | 100% of UPR up to $5,000,000 |
| $5,000,001 to $15,000,000 | $5,000,000 plus 50% of excess UPR over $5,000,000 subject to an overall maximum of $5,000,000 per vessel |
| $15,000,001 to $35,000,000 | $10,000,000 plus 25% of excess of UPR over $15,000,000 subject to an overall maximum of $5,000,000 per vessel and a $15,000,000 overall maximum |
| over $35,000,000 | $15,000,000 overall maximum |

(f) Revenues derived from whole-ship charters, as defined in section 540.2(l), may be exempted from consideration as unearned passenger revenues, on condition that, in the case of a new operator or within 30 days of the execution of the whole-ship charter if the operator has a Performance Certificate for the vessel in question: (1) a certified true copy of the contract or charter is furnished with the application; (2) the chartering party attests that it will redistribute the vessel's passenger accommodations without charge; and (3) a document executed by the chartering party's Chief Executive Officer or other responsible corporate officer is submitted by which the chartering party specifically acknowledges that its rights to indemnification under section 3 of Public Law 89-777 may be affected by the reduction in section 3, Public Law 89-777, financial responsibility coverage attributable to the exclusion of such funds from the operator's UPR.

4. An Appendix A is added to Part 540, Subpart A, reading as follows:

**Appendix A - Example of Escrow Agreement for use under 46 CFR 540.5(b)**

**ESCROW AGREEMENT**

1. Legal name(s), state(s) of incorporation, description of business(es), trade name(s) if any, and domicile(s) of each party.
2. Whereas, [name of the passenger vessel operator]("Operator") and/or [name of the issuer of the passenger ticket]("Ticket

Issuer") wish(es) to establish an escrow account to provide for the indemnification of certain of its passengers utilizing [name vessel(s)] in the event of nonperformance of transportation to which such passengers would be entitled, and to establish the Operator's and/or Ticket Issuer's financial responsibility therefor; and

3. Whereas, [name of escrow agent]("the Escrow Agent") wishes to act as the escrow agent of the escrow account established hereunder.

4. The Operator and/or Ticket Issuer will determine, as of the day prior to the opening date, the total amounts of U.S. unearned passenger revenues ("UPR") which it had in its possession. Unearned passenger revenues are defined as [incorporate the elements of 46 CFR 540.2(i)].

5. The Operator and/or Ticket Issuer shall on the opening date deposit an amount equal to UPR as determined above, plus a cash amount equal to [amount equal to no less than 10% of the Operator's and/or Ticket Issuer's UPR on the date within the 2 fiscal years immediately prior to the filing of the escrow agreement which reflects the greatest amount of UPR, except that the Commission, for good cause shown, may consider a time period other than the previous 2-fiscal-year requirement or other methods acceptable to the Commission to determine the amount of coverage required]("initial deposit").

6. The Operator and/or Ticket Issuer may at any time deposit additional funds into the account.

7. The Operator and/or Ticket Issuer shall, at the end of each business week, recompute UPR by first computing:

A. the amount by which UPR has decreased due to: (1) refunds due to cancellations; (2) amount of cancellation fees assessed in connection with (1) above; and (3) the amount earned from completed cruises; and

B. the amount by which UPR has increased due to receipts from passengers for future water transportation and all other related accommodations and services not yet performed.

The difference between the above amounts is the amount by which UPR has increased or decreased ("new UPR"). If the new UPR plus the amount of the initial deposit exceeds the amount in the escrow account, the Operator and/or Ticket Issuer shall deposit the funds necessary to make the account balance equal to UPR plus the initial deposit. If the account balance exceeds new UPR plus the initial deposit, the balance shall be available to the Operator and/or Ticket Issuer. The information computed in paragraph 7 shall be furnished to the Commission and the Escrow Agent in the form of a recomputation certificate signed and certified by a competent officer of the Operator and/or Ticket Issuer. Copies sent to the Commission are to be addressed to the Director, Bureau of Tariffs, Certification and Licensing, Federal Maritime Commission, Washington, D.C. 20573.

8. A monthly report shall be prepared by the Escrow Agent and provided to the Operator and/or Ticket Issuer and the Commission within 15 days of the end of each month and shall list the investment assets of the account, their original cost, their current market value, and the beginning and ending balance of the account.

9. The Operator's and/or Ticket Issuer's independent auditors shall prepare quarterly reports, such reports to be furnished to the Escrow Agent and the Commission, and any shortfall is to be covered within one business day.

10. The Escrow Agent shall invest the funds of the account in qualified investments as directed by the Operator and/or Ticket Issuer. Some examples of qualified investments are, to the extent permitted by law:

    (a) Government obligations of the United States or its agencies;

    (b) Certificates of deposit, time deposits or acceptances of any bank, savings institution or trust company whose debt obligations are in the two highest categories rated by Standard and Poor's or Moody's, or which is itself rated in the two highest categories by Keefe, Bryette and Woods;

    (c) Commercial paper similarly rated;

    (d) Certificates or time deposits issued by any bank, savings institution or trust company when fully insured by the FDIC or the FSLIC;

(e) Money market funds utilizing securities of the same quality as above; and/or

(f) Corporate bonds of the three highest categories, as rated by Standard and Poor's or Moody's.

11. Income derived from the investments shall be credited to the escrow account.

12. The purpose of the escrow agreement is to establish the financial responsibility of the Operator and/or Ticket Issuer pursuant to section 3 of Public Law 89-777, approved November 5, 1966, and the account is to be utilized to discharge the Operator's and/or Ticket Issuer's legal liability to indemnify passengers for nonperformance of transportation via the [name of vessel(s)]. The Escrow Agent is to make such payments on instructions from the Operator and/or Ticket Issuer, or, in the absence of such instructions, 21 days after final judgment against the Operator and/or Ticket Issuer in a U.S. Federal or State court having jurisdiction. The Operator and/or Ticket Issuer will pledge to each passenger holding a ticket for future passage on the Operator's/Ticket Issuer's vessel(s) an interest in the Escrow Account equal to the Fares amount shown on the face of such ticket. The Escrow Agent agrees to act as nominee for each passenger until transportation is performed or until passenger has been compensated.

13. Escrow Agent shall waive right to offset.

14. The Operator and/or Ticket Issuer will indemnify and hold Escrow Agent harmless.

15. Statement of the parties' agreement concerning warranty of bona fides by the Operator and/or Ticket Issuer and Escrow Agent.

16. Statement of the parties' agreement concerning fees to be paid by the Operator and/or Ticket Issuer to Escrow Agent, reimbursable expenses to be paid by the Operator and/or Ticket Issuer to Escrow Agent. A statement that fees for subsequent terms of agreement are to be negotiated.

17. Statement of the parties' agreement concerning the term of agreement and renewal/termination procedures.

18. Statement of the parties' agreement concerning procedures for appointment of successor Escrow Agent.

19. Statement that disposition of funds on termination shall be to the Operator and/or Ticket Issuer, if evidence of the Commission's acceptance of alternative evidence of financial responsibility is furnished; otherwise, all passage fares held for uncompleted voyages are to be returned to the passengers. The Operator and/or Ticket Issuer shall pay all fees previously earned to the Escrow Agent.

20. The agreement may be enforced by the passengers, the Escrow Agent, the Operator and/or Ticket Issuer or by the Federal Maritime Commission.

21. All assets maintained under the escrow agreement shall be physically located in the United States and may not be transferred, sold, assigned, encumbered, etc., except as provided in the agreement.

22. The Commission has the right to examine the books and records of the Operator and/or Ticket Issuer and the Escrow Agent, as related to the escrow account, and the agreement may not be modified unless agreed in writing by the Operator and/or Ticket Issuer and Escrow Agent and approved in writing by the Commission.

* * * * *

IT IS ORDERED, That Docket No. 92-19, Revision of Financial Responsibility Requirements for Nonperformance of Transportation, is hereby discontinued.

By the Commission

Joseph C. Polking
Secretary

22. The Commission has the right to examine the books and records of the Operator and/or Ticket Issuer and the Escrow Agent, as related to the escrow account, and the agreement may not be modified unless agreed in writing by the Operator and/or Ticket Issuer and Escrow Agent and approved in writing by the Commission.

* * * * *

IT IS ORDERED, That Docket No. 92-19, Revision of Financial Responsibility Requirements for Nonperformance of Transportation, is hereby discontinued.

By the Commission

Joseph C. Polking
Secretary