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FEDERAL MARITIME COMMISSION

46 CFR PARTS 580, 581 AND 583

[ DOCKET NO. 91-1 ]

BONDING OF NON-VESSEL-OPERATING  
COMMON CARRIERS

AGENCY: Federal Maritime Commission.

ACTION: Interim Rule With Request for Comments.

SUMMARY: This Interim Rule implements the Non-Vessel-Operating Common Carrier Amendments of 1990, which govern the bonding of non-vessel-operating common carriers in the foreign oceanborne commerce of the United States. The statute authorizes the Commission to prescribe rules as necessary to effectuate this legislation, including the issuance of interim rules. The Commission is also authorized to prescribe the form and amount of bonds to be filed. This Interim Rule sets forth the procedures for the filing of bonds, prescribes the form and amount of bonds to be filed, establishes procedures for designation of resident agents for carriers not domiciled in the United States, and provides a means for notifying the public of the requirements and availability of surety bonds as security for the protection of the public. In addition, Parts 580 and 581 are amended to require non-vessel-operating common carriers to comply with

applicable laws regarding tariffs and bonding, and to enable an ocean common carrier or conference to ascertain whether it is doing business with an untariffed or unbonded non-vessel-operating common carrier.

In addition, the Commission grants special permission for new tariffs filed by non-vessel-operating common carriers prior to February 14, 1991 to become effective on one day's notice. Carriers filing initial tariffs prior to February 14, 1991 will not be subject to civil penalties for prior failure to file such required tariffs.

The Interim Rule is intended to facilitate the filing of tariffs and bonds by NVOCCs and to minimize the administrative burden which the legislation places on ocean common carriers.

**DATE:** This Interim Rule becomes effective February 14, 1991.  
**Comments due:** [Insert date 90 days after publication in the Federal Register].

**ADDRESS:** Send comments (original and 20 copies) to:

Joseph C. Polking  
Secretary  
1100 L Street, N.W.  
Federal Maritime Commission  
Washington, D.C. 20573  
(202) 523-5725

FOR FURTHER INFORMATION, CONTACT:

Robert G. Drew, Director  
Bureau of Domestic Regulation  
1100 L Street, N.W.  
Federal Maritime Commission  
Washington, D.C. 20573  
(202) 523-5796

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

Although non-vessel-operating common carriers ("NVOCCs") have been operating in the foreign commerce of the United States for many years, the term NVOCC was first defined in section 3 of the Shipping Act of 1984 ("1984 Act") as "...a common carrier that does not operate the vessels by which the ocean transportation is provided and is a shipper in its relationship with an ocean common carrier," 46 U.S.C. app. 1702(17). As common carriers, NVOCCs hold themselves out to the public to provide transportation by water between the United States and foreign countries, utilizing vessels operating on the high seas. NVOCCs normally enter into affreightment agreements with their underlying shippers, issue bills of lading or equivalent documents, and assume full responsibility for the shipments they handle, from point of origin to point of destination. Ultimately, an NVOCC's conduct rather than what it calls itself determines its status.

The 1984 Act requires NVOCCs to file tariffs with the FMC, regardless of whether they are domestic- or foreign-based, if they offer transportation services in the U.S. foreign trades. In addition, NVOCCs are subject to the prohibitions set forth in

section 10 of the 1984 Act, including, most importantly, the prohibition against deviating from the rates and charges in their tariffs. Concerns had been raised by shipping interests, however, because many foreign NVOCCs were not abiding by the requirements of the 1984 Act and because persons using the services of NVOCCs were being hurt by practices of certain NVOCCs.

H.R. 5206, a bill to provide for the bonding of NVOCCs, was introduced by Congressmen Walter B. Jones, Robert W. Davis, and Norman F. Lent on June 28, 1990 to address two major concerns: (1) persons who suffered losses from unscrupulous or insolvent NVOCCs, and (2) lawfully operating NVOCCs who were placed at a competitive disadvantage by foreign NVOCCs who were failing to abide by the Shipping Act of 1984.

In his remarks accompanying introduction of this legislation, Chairman Jones noted that unlike ocean freight forwarders, NVOCCs are not required to be licensed nor were they bonded by the FMC. 136 Cong. Rec. E2210 (daily ed. June 28, 1990) (Statement of Rep. Jones). He further noted, however, that the Commission had been receiving an increasing number of complaints over the past several years reflecting a pattern of unlawful conduct by NVOCCs.<sup>1</sup> Mr. Jones also noted that many NVOCCs lack tangible assets sufficient to recompense persons injured by their actions. The legislation did not propose to license NVOCCs. The bill authors concluded that

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<sup>1</sup> The types of situations referenced included: (1) shippers having to pay for ocean transportation because of NVOCCs' failure to pay the ocean carrier; (2) NVOCC bankruptcies, requiring shippers to pay duplicate charges; and (3) NVOCC failure to pay lawful compensation to ocean freight forwarders.

a bonding requirement for NVOCCs would ameliorate many of these problems and would protect those shippers who use the services of an NVOCC. Mr. Jones also asserted that the bill was intended to apply equally to all NVOCCs, both foreign and domestic, inasmuch as foreign NVOCCs were already subject to tariff filing requirements under the Shipping Act of 1984. Lastly, Mr. Jones explained that the requirement that foreign-based NVOCCs designate a resident agent for service of process was designed to permit the FMC and others to initiate and conduct proceedings without the obvious difficulties inherent in attempting to effect service of process overseas.

H.R. 5206 was referred to the Committee on Merchant Marine and Fisheries. The Subcommittee on Merchant Marine held a hearing on H.R. 5206 on July 18, 1990. The Acting Chairman of the FMC testified supporting the bill. He noted the long history of complaints about NVOCC practices and the fact that the people most often injured by an NVOCC are the small shippers who can least afford it. Testimony was also received from representatives of several groups that would be affected by the legislation.

The Executive Vice President of the International Association of NVOCCs supported the bill. He stated his belief that all legitimate and responsible NVOCCs would welcome the legislation. He further emphasized that NVOCCs failing to comply with existing tariff filing requirements (many of which are foreign based) not only create problems for shippers and carriers but also create unfair competition for those NVOCCs that operate legally. The

President of the Pacific Coast Council of Customs Brokers and Freight Forwarders likewise supported the bill, although he would have preferred a more regulatory licensing and bonding scheme. He pointed out the vast number of foreign-based NVOCCs who do not comply with existing tariff filing requirements and suggested that such entities would be equally prone to misdeclaring cargo. He further noted that his members, who do comply with Shipping Act and regulatory requirements, are losing business to illegal operations.

The National Customs Brokers & Forwarders Association, 20 percent of which are NVOCCs, also supported H.R. 5206. Its representative noted that its members and their clients who have dealt with NVOCCs have been harmed by improper practices, including the failure to pay freight charges to ocean carriers, and he contended that the bill would protect those in the transportation industry who have been harmed by financially insolvent NVOCCs.

Statements in support of the NVOCC bonding requirement were also received from five groups of ocean common carriers or conferences, although many suggested changes in that aspect of the original bill dealing with ocean carrier responsibility. In addition, the National Industrial Transportation League, representing shippers, shippers' associations, boards of trade, and chambers of commerce, indicated that it had no objection to an NVOCC bonding requirement.

H.R. 5206 was subsequently reported out of the Full Committee, with amendments. The Committee's Report emphasized the dual purposes of the bill - (1) to protect the users of NVOCC services

from the practices of unscrupulous and insolvent NVOCCs, and (2) to ensure that foreign NVOCCs comply with their existing tariff filing requirements so that lawfully operating NVOCCs are not placed at a competitive disadvantage. H.R. Rep. No. 785, 101st Cong., 2d Sess. (1990). The bill passed the House and Senate without further modification. On November 16, 1990, the President signed into law the Non-Vessel-Operating Common Carrier Amendments of 1990, Pub. L. No. 101-585, section 710 ("1990 Amendments").

The 1990 Amendments modify provisions of the Shipping Act of 1984, and establish certain requirements applicable to the activities of non-vessel-operating common carriers in the oceanborne foreign commerce of the United States. New section 23 of the 1984 Act requires NVOCCs to obtain a bond to ensure their financial responsibility for damages, reparations or penalties; to designate a resident agent if the NVOCC is domiciled abroad; and to permit suspension or cancellation of NVOCC tariffs for failure to maintain a bond or resident agent. New section 10(b)(14) of the 1984 Act makes it a prohibited act to knowingly and willfully accept cargo from or transport cargo for the account of an unbonded or untariffed NVOCC. New section 10(b)(15) of the 1984 Act makes it a prohibited act to knowingly and willfully enter into a service contract with an unbonded or untariffed NVOCC.

The 1990 Amendments give the Commission the authority to prescribe interim rules and regulations necessary to carry out the statute. The legislative history to Pub. L. No. 101-585 indicates that such rules are exempted from the notice and comment

requirement of the Administrative Procedure Act, 5 U.S.C. 553. See H.R. Rep. No. 785, 101st Cong., 2d Sess. 6 (1990). The Interim Rule promulgated here is issued pursuant to that authority and the general rulemaking authority of section 17(a) of the 1984 Act, 46 U.S.C. app. 1716(a), and the Commission's specific authority under section 23(a) of the 1984 Act to prescribe the form and amount of an NVOCC bond.

This Interim Rule will take effect on February 14, 1991, the effective date of the 1990 Amendments. All NVOCCs are required to obtain and file proof of bonding with the Commission under section 23 of the 1984 Act prior to the effective date of the statute and the Interim Rule.

The Interim Rule will remain in effect and operative until such time as a final rule is adopted. If persons believe there are serious problems with the Interim Rule which should be addressed immediately, they may bring their concerns to the attention of the Commission in writing. The filing of emergency comments will not prejudice the rights of commenters to file additional comments within the 90-day comment period.

## II. SECTION-BY-SECTION DISCUSSION

The Interim Rule is organized in three parts under Title 46 of the Code of Federal Regulations. New Part 583 sets forth the bonding requirements and procedures, makes provision for designation of resident agent and service of process on the legal agent of an NVOCC, and provides for suspension or cancellation of



an NVOCC's tariffs for failure to maintain its bond or resident agent.

In Part 580, the Commission amends its rules governing the publishing and filing of tariffs by common carriers in the foreign commerce to address common carrier obligations under the new prohibited acts provisions of section 10(b)(14) of the 1984 Act. In Part 581, the Commission amends its rules governing service contracts to address the new obligations of ocean common carriers under section 10(b)(15) of the 1984 Act.

The following is a section-by-section discussion of the addition of Part 583 and amendments to Parts 580 and 581:

PART 583

Section 583.1 - Definitions

This section includes definitions of terms used in the statute and this rule which are relevant to NVOCC bonding issues.

Section 583.1(a) - Act.

The term "Act" means the Shipping Act of 1984.

Section 583.1(b) - Common carrier.

The term "common carrier" is defined in section 3(6) of the 1984 Act.

Section 583.1(c) - Commission.

The term "Commission" means the Federal Maritime Commission.

Section 583.1(d) - Non-vessel-operating common carrier.

The term "non-vessel-operating common carrier" is defined in section 3(17) of the 1984 Act.

Section 583.1(e) - Ocean common carrier.

The term "ocean common carrier" is defined in section 3(18) of the 1984 Act.

Section 583.1(f) - Person.

The term "person" is defined in section 3(20) of the 1984 Act.

Section 583.2 - Scope.

This section defines the scope of Part 583 as applying to all NVOCCs operating in the oceanborne foreign commerce of the United States.

Section 583.3 - Proof of financial responsibility, when required.

This section defines the bonding requirements for NVOCCs. In general, all NVOCCs are required to have a bond, as well as a tariff, to operate in the U.S. foreign commerce. When two or more NVOCCs operate under a single trade name, each person acting as an NVOCC is required to have its own bond.

NVOCCs exclusively engaged in transporting used military household goods and personal effects have been exempted from the bonding requirement. This exemption corresponds to the intent of Congress in passing the 1990 Amendments. See H.R. Rep. No. 785, 101st Cong., 2d Sess. 4 (1990).

Section 583.4 - Surety bond requirements.

This section establishes the form and amount of NVOCC bonding to be required pursuant to section 23 of the 1984 Act. The amount of bond is set at \$50,000 for purposes of the Interim Rule.

Bonds must be submitted under Form FMC-48 (Appendix A to this Part). All bonds must be issued by a surety company acceptable to the Secretary of the Treasury. See section 23(b) of the 1984 Act.

Section 583.5 - Resident agent.

This section sets forth the requirement that NVOCCs not domiciled in the United States must designate a legal agent in the United States for the receipt of judicial and administrative process, including subpoenas. The designated agent may be any person (including individuals, corporations, partnerships, or associations) resident in the United States and competent to receive service of process. In the event the resident agent designated by the NVOCC is unavailable to accept service, alternative service may be completed upon the Secretary, Federal Maritime Commission, as legal agent for the NVOCC.

Provisions applicable to the NVOCC's designation of resident agent, and information on bonding and service of process will be required to be published in the NVOCC's tariff under §580.5(d)(24).

Section 583.6 - Termination of bond or designation of resident agent.

An NVOCC is obligated to maintain its bond in full force and effect so long as it continues to do business; in addition, foreign-domiciled NVOCCs must maintain a resident agent. In the event of a breach of these requirements, the Commission may suspend or cancel the tariffs of the offending NVOCC. Formal hearings are not required before the Commission may suspend or cancel an NVOCC's

tariffs. See 136 Cong. Rec. E2210 (daily ed. June 28, 1990 (statement of Rep. Jones)).

Appendix A - NVOCC Bond Form.

The appendix contains Form FMC-48.

#### PART 580

Section 580.5(d)(24) - Bonding of non-vessel-operating common carriers and legal agent for service of process.

This section sets forth the requirement that every NVOCC publish in its tariff notice of its bond, bond number and the surety company issuing the bond. Where the NVOCC is domiciled in a foreign country, the tariff will also identify the NVOCC's legal agent for service of process, and provisions for alternative service upon the Commission in the absence of the agent designated by the NVOCC. These tariff provisions would be standardized within a single tariff rule to permit interested shippers and common carriers a uniform means by which to obtain information needed to effect service or lodge a claim against an NVOCC bond.

As a corollary benefit of the tariff publication requirement, the NVOCC's tariff could operate as evidence of both tariff compliance under section 8 of the 1984 Act and bonding compliance under new section 23 of the Act. This device has been incorporated as one means of verification by the common carrier accepting NVOCC cargo, under §580.5(d)(25).

Section 580.5(d)(25) - Certification of shipper status and rules applicable to acceptance of cargo for the account of non-vessel operating common carriers.

This section would require annotation of the shipper identification box on all common carrier bills of lading, whereby the ocean common carrier reflects the shipper status asserted by the party tendering the cargo, i.e. owner of the cargo, freight forwarder, shippers' association, NVOCC or other classification.

Where identified as an NVOCC, the ocean common carrier (or common carrier accepting cargo from an NVOCC) could require submission of the NVOCC's tariff page reflecting tariff publication and bonding, as described in §580.5(d)(24). Thereafter, the ocean common carrier could require periodic resubmission of documentation by the NVOCC establishing its compliance with sections 8 and 23 of the 1984 Act, in lieu of requiring such documentation as each shipment is tendered or booked.

Upon properly notating the shipper identification box of the bill of lading in accordance with the status asserted by its shipper, the ocean common carrier can rely upon such designation as demonstrating the ocean common carrier's compliance with new section 10(b)(14) of the 1984 Act, absent the ocean common carrier having reason to know that status to be false. In the case of an NVOCC designation, similar protection is afforded the ocean common carrier upon obtaining from the NVOCC documentary evidence of tariff publication and bonding. These provisions should substantially allay the concerns of ocean common carriers regarding their potential exposure under the new NVOCC requirements of the 1984 Act.

PART 581

Section 581.3(a) - Service contracts with non-vessel-operating common carriers.

This paragraph iterates the language of section 10(b)(15) of the 1984 Act, prohibiting ocean common carriers from entering into service contracts with untariffed, unbonded NVOCCs. Such contracts may not be filed with the Commission.

Section 581.4(a)(3) - [Amended]

This paragraph requires that all service contracts contain a shipper certification in the form required by §581.11.

Section 581.11 - Certification of shipper status.

This section relates specifically to the execution of service contracts and requires all shippers to certify their status, *i.e.*, owner of the cargo, shippers' association, NVOCC or other specified classification, at the time of execution of the service contract. The form of certification is to be incorporated within the terms of the service contract itself, or as a separate certification appearing on the signature page.

The service contract certification requirement is designed to permit ocean common carriers to comply with new section 10(b)(15) of the 1984 Act. The legislative history of the NVOCC statute makes clear that such certification should encompass not only the signatory shipper, but any affiliates or members of shippers' associations entitled to ship under the service contract.

In the event a shipper or an affiliated entity is identified as an NVOCC, the ocean common carrier would need to request

documentary evidence of tariff publication and bonding prior to entering into the service contract with such NVOCC. This can be accomplished in the same manner set forth in §580.5(d)(25), through submission of the NVOCC's tariff page and periodic resubmission of such documentation where required.

The Commission's Bureau of Domestic Regulation is empowered to reject service contract filings that lack the required shipper certification or which are known to involve an untariffed, unbonded NVOCC as a party to such contract.

### III. REQUEST FOR COMMENTS

This Interim Rule and all comments filed within the 90-day period will be used as the basis for a final rule pursuant to the requirements of the Administrative Procedure Act.

### IV. NOTICE OF SPECIAL PERMISSION AND STATEMENT OF COMMISSION ENFORCEMENT POLICY

The 1990 Amendments address the requirement that all NVOCCs operating in the foreign oceanborne commerce of the United States obtain a bond as a condition of doing business. The 1984 Act provides that all NVOCCs, foreign and domestic, are subject to tariff filing requirements of the Commission. The Commission is cognizant that numerous foreign-based NVOCCs have not yet filed tariffs with the Commission.

Section 8(d) of the 1984 Act provides that no new or initial rate may become effective earlier than 30 days after filing with the Commission. Section 8(d) further provides that the Commission, for good cause, may allow a new or initial rate to become effective in less than 30 days. Due to the limited time remaining before the

February 14, 1991 effective date of the 1990 Amendments, NVOCCs filing tariffs for the first time may find it impossible under the 30-day requirement to have the new tariffs become effective prior to February 14, 1991. Accordingly, the Commission concludes that good cause exists, and hereby grants permission for new tariffs filed by NVOCCs on or before February 14, 1991, to become effective on one day's notice.

The object of the Interim Rule, moreover, is not to penalize carriers but rather to bring NVOCCs into compliance with applicable law. Accordingly, NVOCCs who file initial tariffs on or before February 14, 1991 will not be subject to civil penalties for such past failure to file or observe filed rates and charges for NVOCC transportation services for the period prior to such initial NVOCC tariff filing. This forbearance shall not apply to pending or previously Commission-authorized formal administrative proceedings or court actions.

#### V. CONCLUSION

The Interim Rule and accompanying NVOCC bond form are intended to establish a comprehensive regulatory framework for NVOCCs which fulfills the purposes of the Shipping Act of 1984. The rule is intended to facilitate the filing of tariffs and bonds by NVOCCs and to minimize the administrative burden which the legislation places on ocean common carriers.

Although the Commission is not subject to the requirements of Executive Order 12291, dated February 17, 1987, 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 cost 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 Chairman of the Commission certifies pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that the Interim Rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small governmental jurisdictions.

The collection of information requirements contained in this Interim Rule have been sent to OMB for emergency processing under section 3507(g) of the Paperwork Reduction Act of 1980, as amended, 44 U.S.C. 3507(g). The Commission has requested that OMB provide its approval by January 31, 1991. Notice of OMB approval will be published when received by the Commission. Requests for copies of the collection of information and supporting documentation, may be obtained from John Robert Ewers, Director, Bureau of Administration, Federal Maritime Commission, 1100 L Street, N.W., Room 12211, Washington, D.C. 20573, telephone number (202) 523-5866. Comments may be submitted to the Commission and to the

Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503, Attention: Desk Officer for the Federal Maritime Commission.

List of Subjects:

46 CFR Part 583

Freight; Maritime carriers; Rates; Reporting and record keeping requirements; Surety bonds.

46 CFR Part 580

Cargo; Cargo vessels; Freight; Exports; Harbors; Imports; Maritime carriers; Rates; Reporting and record keeping requirements; Surety bonds; Water carriers; Water transportation.

46 CFR Part 581

Freight; Maritime carriers; Rates; Reporting and record keeping requirements.

Therefore, pursuant to 5 U.S.C. 553, sections 8, 10, 11, 12, 13, 17 and 23 of the Shipping Act of 1984, 46 U.S.C. app. 1707, 1709, 1710, 1711, 1712, 1716 and 1722, the Federal Maritime Commission amends Title 46, Code of Federal Regulations, by adding a new Part 583 and amending Parts 580 and 581 to read as follows:

1. A new Part 583 is added to read:

**PART 583 - BONDING OF NON-VESSEL-OPERATING COMMON CARRIERS**

**Sec.**

**583.1 Definitions.**

**583.2 Scope.**

583.3 Proof of financial responsibility, when required.

583.4 Surety bond requirements.

583.5 Resident agent.

583.6 Termination of bond or designation of resident agent.

APPENDIX A - NON-VESSEL-OPERATING COMMON CARRIER (NVOCC) BOND FORM

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1702, 1707, 1709, 1710-1712, 1716 and 1722.

§583.1 Definitions

In this part:

(a) "*Act*" means the Shipping Act of 1984 (46 U.S.C. app. 1701 et seq.).

(b) "*Common carrier*" means a person holding itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation that:

(1) Assumes responsibility for the transportation from port or point of receipt to the port or point of destination; and

(2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker. As used in this paragraph, 'chemical

parcel-tanker' means a vessel whose cargo-carrying capability consists of individual cargo tanks for bulk chemicals that are a permanent part of the vessel, that have segregation capability with piping systems to permit simultaneous carriage of several bulk chemical cargoes with minimum risk of cross-contamination and that has a valid certificate of fitness under the International Maritime Organization Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk.

(c) "*Commission*" means the Federal Maritime Commission.

(d) "*Non-vessel-operating common carrier*" or "*NVOCC*" means a common carrier that does not operate the vessels by which the ocean transportation is provided and is a shipper in its relationship with an ocean common carrier.

(e) "*Ocean common carrier*" means a vessel-operating common carrier.

(f) "*Person*" includes individuals, corporations, partnerships and associations existing under or authorized by the laws of the United States or of a foreign country.

#### §583.2 Scope

This part implements the Non-Vessel-Operating Common Carrier Amendments of 1990, Pub. L. No. 101-595, section

710, and applies to all NVOCCs operating in the waterborne foreign commerce of the United States.

§583.3 Proof of financial responsibility, when required.

(a) Except as provided in paragraph (c) of this section, no person shall provide transportation as a non-vessel-operating common carrier or obtain transportation for the account of such NVOCC unless a surety bond covering such NVOCC has been furnished to the Commission.

(b) Where more than one entity operates under a common trade name, a separate bond is required for each corporation or person separately providing transportation as a non-vessel-operating common carrier.

(c) Any person which exclusively transports used military household goods and personal effects may, without a bond, provide transportation as a non-vessel-operating common carrier or obtain transportation for the account of such NVOCC.

§583.4 Surety bond requirements.

(a) Prior to the date it commences common carriage operations, every non-vessel operating common carrier shall establish its financial responsibility by filing with the Commission a valid surety bond on Form FMC-48, in the amount of \$50,000. Bonds must be issued by a surety company found acceptable by the Secretary of the Treasury.

(b) Surety bonds shall be submitted to the Director, Bureau of Domestic Regulation, Federal Maritime Commission, Washington, D.C. 20573. Copies of Form FMC-48 may be obtained from the Commission's Bureau of Domestic Regulation at the address listed above, or from any of the Commission's district offices located in New York, NY, New Orleans, LA, San Francisco, CA, Hato Rey, PR, Los Angeles, CA, Miami, FL and Houston, TX.

§583.5 Resident agent.

(a) Every non-vessel-operating common carrier not domiciled in the United States shall designate and maintain a person in the United States as legal agent for the receipt of judicial and administrative process, including subpoenas.

(b) If the designated legal agent cannot be served because of death, disability, or unavailability, the Secretary, Federal Maritime Commission, will be deemed to be the legal agent for service of process. Any person serving the Secretary must also send to the NVOCC by registered mail, return receipt requested, at its address published in its tariff on file with the Commission, a copy of each document served upon the Secretary, and shall attest to that mailing at the time service is made upon the Secretary.

(c) Service of administrative process, other than subpoenas, may be effected upon the legal agent by mailing

a copy of the document to be served by certified or registered mail, return receipt requested. Administrative subpoenas shall be served in accordance with §502.134 of this chapter.

(d) Designations of resident agent under paragraphs (a) and (b) of this section and provisions relating to service of process under paragraph (c) of this section shall be published in the NVOCC's tariff in accordance with §580.5(d)(24) of this chapter.

§583.6 Termination of bond or designation of resident agent.

(a) Upon receipt of notice of termination of a surety bond, the Commission shall notify the NVOCC by certified or registered mail at its address published in its tariff on file with the Commission, that the Commission shall, without hearing or other proceeding, suspend or cancel the tariff or tariffs of the NVOCC as of the termination date of the bond, unless the common carrier submits a valid replacement surety bond before such termination date. Replacement surety bonds must bear an effective date no later than the termination date of the expiring bond.

(b) Upon receipt of notice of termination of a designation of resident agent, or upon receipt of alternative service of process upon the Secretary in accordance with §583.5(b), the Commission shall notify

the NVOCC by certified or registered mail, at its address published in its tariff on file with the Commission, that the Commission shall, without hearing or other proceeding suspend or cancel the tariff or tariffs of the NVOCC effective thirty days after receipt of such notice of termination or alternative service of process upon the Secretary unless the NVOCC publishes in its tariff a replacement designation of an agent in the United States for the receipt of judicial and administrative process before such date of suspension or cancellation.



Bond No. \_\_\_\_\_

FEDERAL MARITIME COMMISSION  
 NON-VESSEL OPERATING COMMON CARRIER (NVOCC) BOND  
 (SECTION 23, SHIPPING ACT OF 1984)

\_\_\_\_\_, as Principal (hereinafter called Principal), and \_\_\_\_\_, as Surety (hereinafter called Surety) are held and firmly bound unto the United States of America in the sum of \$\_\_\_\_\_ for the payment of which sum we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally.

WHEREAS, Principal operates as an NVOCC in the waterborne foreign commerce of the United States, has an NVOCC tariff on file with the Federal Maritime Commission, and pursuant to section 23 of the Shipping Act of 1984 has elected to file this bond with the Commission;

NOW, THEREFORE, the condition of this obligation is that the penalty amount of this bond shall be available to pay any judgment for damages against the Principal arising from the Principal's transportation related activities or order for reparations issued pursuant to section 11 of the Shipping Act of 1984, 46 U.S.C. app. § 1710, or any penalty assessed against the Principal pursuant to section 13 of the Shipping Act of 1984, 46 U.S.C. app. § 1712.

This bond shall inure to the benefit of any and all persons who have obtained a judgment for damages against the Principal arising from its transportation related activities or order of reparation issued pursuant to section 11 of the Shipping Act of 1984, and to the benefit of the Federal Maritime Commission for any penalty assessed against the Principal pursuant to section 13 of the Shipping Act of 1984. However, this bond shall not apply to shipments of used military household goods and personal effects.

The liability of the Surety shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall aggregate the penalty of this bond, and in no event shall the Surety's total obligation hereunder exceed said penalty regardless of the number of claims or claimants.

This bond is effective the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, and shall continue in effect until discharged or terminated as herein provided. The Principal or the Surety may at any time terminate this bond by written notice to the Federal Maritime Commission at its office in Washington, D.C. Such termination shall become effective thirty (30) days after receipt of said notice by the Commission. The Surety shall not be liable for any transportation related activities of the Principal after the expiration of the thirty (30) day period but such termination shall not affect the liability of the Principal and Surety for any event occurring prior to the date when said termination becomes effective.

The underwriting Surety will promptly notify the Director, Bureau of Domestic Regulation, Federal Maritime Commission, Washington, D.C. 20573, of any claim(s) against this bond.

Signed and sealed this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.  
(Please type name of signer under each signature.)

\_\_\_\_\_  
Individual Principal or Partner Business Address

\_\_\_\_\_  
Individual Principal or Partner Business Address

\_\_\_\_\_  
Individual Principal or Partner Business Address

\_\_\_\_\_  
Trade Name, if Any

\_\_\_\_\_  
Corporate Principal

\_\_\_\_\_  
State of Incorporation

\_\_\_\_\_  
Trade Name, if Any

\_\_\_\_\_  
Business Address (Affix Corporate Seal)

\_\_\_\_\_  
By

\_\_\_\_\_  
Title

\_\_\_\_\_  
Corporate Surety

\_\_\_\_\_  
Business Address (Affix Corporate Seal)

\_\_\_\_\_  
By

\_\_\_\_\_  
Title

## PART 580 - [AMENDED]

2. The authority citation for Part 580 is revised to read:  
 Authority: 5 U.S.C. 553; 46 U.S.C. app. 1702-1705, 1707, 1709, 1710-1712, 1714-1716, 1718, and 1722.

3. Section 580.5 is amended by reserving paragraphs (d)(22) and (d)(23) and by adding paragraphs (d)(24) and (d)(25) to read:  
 §580.5 Tariff contents.

\* \* \* \* \*

(d) \* \* \*

(24) *Bonding of non-vessel-operating common carriers and legal agent for service of process.*

(i) Every non-vessel-operating common carrier (NVOCC) shall state in its tariffs on file with the Commission that it has furnished the Commission a bond in the amount required by §583.4 of this chapter to ensure the financial responsibility of the NVOCC for the payment of any judgment for damages arising from its transportation-related activities, order for reparations issued pursuant to section 11 of the Act, or penalty assessed pursuant to section 13 of the Act. The NVOCC shall state its bond number and identify the name and address of the surety company issuing the bond.

(ii) Every NVOCC not domiciled in the United States shall state in its tariffs the name and address of a person in the United States designated under §583.5 of this chapter as its legal agent for the service of

judicial and administrative process, including subpoenas. The NVOCC also shall state that, in any instance in which the designated legal agent cannot be served because of death, disability or unavailability, the Secretary, Federal Maritime Commission will be deemed to be the NVOCC's legal agent for service of process.

(iii) Service of administrative process, other than subpoenas, may be effected upon the legal agent by mailing a copy of the documents to be served by certified or registered mail, return receipt requested.

(25) *Certification of shipper status and rules applicable to acceptance of cargo for the account of non-vessel-operating common carriers (NVOCC).*

(i) Every common carrier accepting or transporting cargo for the account of a shipper or shippers' association shall ascertain the identity and status of the shipper tendering the cargo, e.g., owner of the cargo, shippers' association, non-vessel-operating common carrier or specified other designation. The common carrier shall state the shipper's status in a clear and legible manner in the shipper identification box on its bill of lading, waybill, or other substitute record of carriage.

(ii) If the shipper or a member of a shippers' association tendering the cargo is identified as an NVOCC, the common carrier shall obtain documentation that the NVOCC has a tariff and a bond as required by sections

8 and 23 of the Act before the common carrier accepts or transports cargo for the account of the NVOCC. A copy of the tariff rule published by the NVOCC and in effect under §580.5 (d)(24) may be accepted by the common carrier as documenting the NVOCC's compliance with the tariff and bonding requirements of the Act.

(iii) A common carrier accepting or transporting cargo for the account of a shipper or shippers' association shall be deemed to have complied with section 10(b)(14) of the Act upon meeting the requirements of paragraphs (d)(25)(i) and (ii) of this section, unless the common carrier had reason to know such certification or documentation of NVOCC tariff and bonding was false.

PART 581 - [AMENDED]

4. The authority citation for Part 581 is revised to read:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1702, 1706, 1707, 1709, 1712, 1714-1716, 1718, and 1722.

5. Section 581.3 is amended by adding paragraph (e) to read as follows:

§581.3 Filing and maintenance of service contract materials.

\* \* \* \*

(e) *Service contracts with non-vessel-operating common carriers.* No ocean common carrier or conference shall execute or file any service contract in which a contract party or an affiliate of such contract party or member of a shippers' association entitled to receive service under the

contract is a non-vessel-operating common carrier, unless such non-vessel-operating common carrier has a tariff and a bond as required by sections 8 and 23 of the Act and Commission regulations under Parts 580 and 583 of this chapter.

6. Section 581.4 is amended by adding paragraph (a)(3) to read as follows:

§581.4 Form and manner.

(a) \* \* \* \*

(3) On the signature page of the service contract, a certification of shipper status in accordance with §581.11.

\* \* \* \* \*

7. Section 581.11 is added to read:

§581.11 Certification of shipper status.

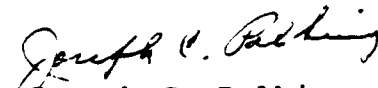
(a) The shipper contract party shall certify on the signature page of the service contract its shipper status, e.g., owner of the cargo, shippers' association, non-vessel-operating common carrier, or specified other designation, and the status of every affiliate of such contract party or member of a shippers' association entitled to receive service under the contract. The certification shall be signed by the contract party.

(b) If the certification completed by the contract party under paragraph (a) of this section identifies the contract party or an affiliate or member of a shippers'

association as a non-vessel-operating common carrier, the ocean common carrier or conference shall obtain documentation that such non-vessel-operating common carrier has a tariff and a bond as required under sections 8 and 23 of the Act before signing the service contract. A copy of the tariff rule published by the non-vessel-operating common carrier and in effect under §580.5 (d)(24) of this chapter may be accepted by the ocean common carrier as documenting the NVOCC's compliance with the tariff and bonding requirements of the Act.

(c) An ocean common carrier or conference executing a service contract shall be deemed to have complied with section 10(b)(15) of the Act upon meeting the requirements of paragraphs (a) and (b) of this section, unless the ocean common carrier or conference had reason to know such certification or documentation of non-vessel-operating common carrier tariff and bonding was false.

By the Commission.<sup>2</sup>

  
Joseph C. Polking

Secretary

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<sup>2</sup>Commissioner Quartel's views in opposition are attached.

COMMISSIONER QUARTEL'S VIEWS IN OPPOSITION TO THE INTERIM RULE

While I opposed the legislation underlying the issuance of these interim rules, I nonetheless believe the Commission has a legal obligation to timely issue final rules which will give guidance to the industry in complying with the new law. However, I strongly believe these rules should reflect a conservative interpretation of the legislation. Therefore, I oppose these interim rules because, in my opinion, they neither fulfill our explicit obligations under the law as passed, nor do they comport with the requirements of other United States laws governing the regulatory process. In particular, I disagree with the Commission's imposition of a single level bond, the allowance of NVO self-certification of compliance; and, I have significant doubts as to this Commission's full compliance with requirements of the Paperwork Reduction Act.

The law as written and signed by the President, specifically states that:

A bond obtained pursuant to this section shall be available to pay any judgement for damages against a non-vessel-operating common carrier arising from its transportation-related activities or order for reparations...or any penalties assessed.... (emphasis added)

P.L.101-585, sec.710(c)



Under the guise of minimum regulatory impact, however, this interim rule simply establishes a bond set at the minimum statutory requirement for all such carriers, regardless of actual potential liability under these provisions as determined by either fact or analysis. In my opinion, the only way to actually meet the requirements of the law as written would be to impose a differential bonding requirement that reflects actual risk of liability as measured by either value of goods moved, revenues of the carrier, or some other legitimate economic proxy for risk. This would in fact more accurately reflect the realities of the varied liabilities and sizes of the entities operating in this market, and allow us to follow the actual dictates of the statute. It has the added benefit of providing real protection to the consumer for whom this law was said to be written.

More importantly, in terms of this Commission's ability to enforce its responsibilities under this law, the rule establishes a process under which the NVOCC -- the entity whose failings are the target of the law itself -- in effect self-certificates its own compliance with the law. The interim rule then allows the carrier to rely on such self-certification for its own compliance with the new sections 10(b) (14) and (15) of the Act. By so doing, in my opinion, the rule ignores and undermines the fundamental precepts of the law which require the carrier, pursuant to a "knowing and willful" standard -- to act as an essential element of the enforcement mechanism under which this Commission gains compliance

with the statute.

I also have substantial doubts as to whether this interim rule and the analysis provided as to its potential impact complies with the intent and the spirit of the Paperwork Reduction Act, as set forth in 44 U.S.C. sec. 3507. While I have specific disagreements with the data and conclusions of the analysis as it regards the number and percentage of small business entities affected, both the direct and opportunity cost of bond compliance, and of possible economic consequences such as possible cargo diversions to other countries -- I am most concerned that the impact analysis fails to consider the anti-competitive impact of the bond requirement as structured in the interim rule. In addition to failing, in my opinion, to meet the actual risk requirements of the law, the single bond level will adversely affect competition by working to establish an unnecessary and comparatively larger burden on the cost structure of the small entity than on the larger one. While a large NVO will no doubt be able to obtain a bond at a low cost, many, if not most, small -- particularly foreign -- NVO's will have to provide collateral for such a bond. The use of the undifferentiated minimum bond level not only fails to meet the risk and liability requirements of the statute, but thus perversely and unnecessarily acts to increase the anti-competitive impact of the bonding requirement itself. This is the very impact against which a proper impact and alternatives analysis is intended to guard, particularly as it may affect small businesses.

Finally, I oppose the interim rule because I believe strongly that the public deserves an opportunity to comment, and to have such comments answered, prior to the imposition of regulations that will govern them and their responsibilities under the law. To solicit such comments after, rather than before, the implementation of such interim regulations, while provided for under the legislation, simply does not comport with the intent of the established rulemaking process -- particularly given the large amount of controversy and uncertainty surrounding the implementation of these regulations.

