

FEDERAL MARITIME COMMISSION

46 CFR PARTS 514, 580, 581 and 583

[DOCKET NO. 92-37]

FINANCIAL RESPONSIBILITY FOR NON-VESSEL-OPERATING COMMON CARRIERS

AGENCY: Federal Maritime Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Maritime Commission ("FMC" or "Commission") proposes to amend its regulations governing the financial responsibility requirements of Non-Vessel-Operating Common Carriers ("NVOCCs") in response to the Non-Vessel-Operating Common Carrier Act of 1991 ("1991 Act"). The 1991 Act amended the Non-Vessel-Operating Common Carrier Amendments of 1990 ("1990 Amendments") to permit the Commission to accept -- in addition to bonds -- insurance or other surety as proof of an NVOCC's financial responsibility. The 1991 Act also deleted the \$50,000 minimum amount for a bond previously prescribed by the 1990 Amendments. The proposed rule would: (1) specify the conditions for accepting insurance and guaranties as means to evidence an NVOCC's financial responsibility; (2) provide forms and procedures for accepting insurance and guaranties as evidence of an NVOCC's financial responsibility; (3) specify guidelines for evaluating the acceptability of insurance companies and guarantors; and (4) specify the amount and method of coverage.

DATES: Comments (original and 15 copies) must be received at the Commission (on or before 30 days from date of publication of the Notice in the **FEDERAL REGISTER**). The date of mailing will not be accepted as the date of filing in this proceeding.

ADDRESS: Comments (Original and 15 copies) to:

Joseph C. Polking, Secretary
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Washington, D.C. 20573-0001

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

BACKGROUND

A. The 1990 Amendments

The 1990 Amendments amended the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. 1701 *et seq.*, by adding a new section 23, 46 U.S.C. app. 1721, to (1) require NVOCCs to obtain a bond to ensure their financial responsibility for damages, reparations or penalties; (2) specify the amount of the bond to be no less than \$50,000; (3) require that any bond submitted be issued by a surety company found acceptable by the Secretary of the Treasury; (4) provide that any bond obtained be available to pay any judgment for damages against an NVOCC arising from its transportation-related activities, or order for reparations issued pursuant to section 11 of the 1984 Act, 46 U.S.C. app. 1710, or any penalty assessed

pursuant to section 13 of the 1984 Act, 46 U.S.C. app. 1712; (5) require the designation of a resident agent for NVOCCs not domiciled in the United States; and (6) provide for the suspension or cancellation of any or all tariffs of an NVOCC for failure to maintain a bond or designate a resident agent, or for a violation of section 10(a)(1) of the 1984 Act, 46 U.S.C. app. 1709(a)(1).

Section 10(b) of the 1984 Act, 46 U.S.C. app. 1709(b), was also amended to make it a prohibited act for: (1) a common carrier or conference to knowingly and willfully accept cargo from, or transport cargo for, the account of an unbonded or untariffed NVOCC; or (2) an ocean common carrier or conference to knowingly and willfully enter into a service contract with an unbonded or untariffed NVOCC.

The Commission's interim rule (56 FR 1493, January 15, 1991) and final rule (56 FR 51987, October 17, 1991) implementing the 1990 Amendments became effective April 15, and November 18, 1991, respectively.

B. The 1991 Act

On March 9, 1992, the President signed H.R. 3866, Public Law 102-251. Section 201 of this statute contains the Non-Vessel-Operating Common Carrier Act of 1991. The 1991 Act amends the 1990 Amendments to permit the Commission to accept -- in addition to bonds -- insurance or other surety as proof of an NVOCC's financial responsibility. Additionally, the \$50,000 minimum amount for a bond prescribed in the 1990 Amendments is deleted. The 1991 Act became effective June 7, 1992.

In remarks accompanying this legislation, Congressman Walter B. Jones stated that there was merit to giving the FMC more flexibility in the manner by which it assures that

NVOCCs are financially responsible. 138 Cong. Rec. H70-H71 (daily ed. January 28, 1992) (statement of Rep. Jones). He further noted that, although Congress was granting the Commission the authority to allow methods for financial security other than bonds, it was not necessarily requiring changes in the present regulatory structure. Mr. Jones asserted that the current rules are an effective way of ensuring financial responsibility by NVOCCs. He therefore cautioned that, if the Commission chooses to allow alternative methods, it should ensure that shippers are afforded no less protection than provided by a bond and that any alternative method the Commission might accept should be no more procedurally cumbersome for injured claimants than are bonds. Lastly, Mr. Jones referred to the Commission's experience with overseeing financial responsibility requirements relating to passenger vessels, and suggested that the Commission take full advantage of this experience when implementing the new legislation.

Congressman Davis, the only other Congressman to comment on the legislation, stated that the current law has proven to be costly to small businesses in that it only allows the posting of a bond. He further indicated that the change in the law should not diminish NVOCC financial responsibility. 138 Cong. Rec. H71 (daily ed. January 28, 1992) (statement of Rep. Davis).

C. The Advance Notice

This proceeding was initiated by an Advance Notice of Proposed Rulemaking ("ANPR") published in the **FEDERAL REGISTER**, 57 FR 27413 (June 19, 1992), requesting comment on implementing the 1991 Act. The ANPR requested comment on: (1) the appropriateness of accepting insurance and guaranties as evidence of an NVOCC's

financial responsibility, as well as suggestions for other types of surety; (2) the development of forms and procedures for certain sureties; (3) guidelines for evaluating the acceptability of companies that issue sureties, other than bonds; and (4) the appropriate amount and possible methods of protection to cover an NVOCC's financial responsibilities under the 1991 Act.

Thirteen comments were received in response to the ANPR. Comments were submitted by the following conferences: the Trans-Pacific Freight Conference of Japan and the Japan-Atlantic and Gulf Freight Conference ("Japan Conferences"); jointly by the Asia North America Eastbound Rate Agreement, "8900" Lines, Israel Trade Conference, South Europe/U.S.A. Freight Conference, U.S. Atlantic & Gulf Western Mediterranean Rate Agreement, and the U.S. Atlantic & Gulf Ports/Eastern Mediterranean and North African Freight Conference ("ANERA *et al.*"); jointly by the Venezuelan American Maritime Association, Atlantic and Gulf/West Coast South America Conference, United States/Central America Liner Association, Central America Discussion Agreement, United States Atlantic and Gulf/Hispaniola Steamship Freight Association, Hispaniola Discussion Agreement, United States Atlantic Gulf/Southeastern Caribbean Steamship Freight Association, Southeastern Caribbean Discussion Agreement, Jamaica Discussion Agreement, United States/Panama Freight Association, PANAM Discussion Agreement, Puerto Rico/Caribbean Discussion Agreement, Caribbean and Central American Discussion Agreement, Ecuador Discussion Agreement, and the United States Atlantic and Gulf/Ecuador Freight Association ("Latin American Agreements"); the Pacific

Coast/Australia-New Zealand Tariff Bureau ("PCATB"); and the Inter-American Freight Conference ("IAFC").

Comments were also submitted by the following shipping intermediaries: the International Association of NVOCCs ("IANVOCC"); the International Federation of Freight Forwarders Associations ("FIATA"); Fritz Companies Inc. ("Fritz"); the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA"), and the Pacific Coast Council of Customs Brokers and Freight Forwarders Associations, Inc. ("PCC"). Insurance industry comments were received from the Customs Bond Committee of the American Surety Association ("TASA") and the Surety Association of America ("SAA"). The Department of Transportation ("DOT") also submitted comments. Because a number of commenters take essentially similar positions, we will make generalized representations without individual attribution, unless otherwise appropriate.

SUMMARY OF COMMENTS

A. Types of Coverage

1. Insurance

The ANPR recognized that insurance coverage able to satisfy the requirements of the 1991 Act could be obtained in different forms including either individual or group coverage. It noted the possibility that some NVOCCs could use current policies, while others may have to acquire some form of new coverage. The Commission's primary concern was that NVOCCs provide evidence of financial responsibility as required under the 1991

Act, and that any NVOCC using insurance must ensure that it is covered for all liabilities arising under the Shipping Act of 1984.

The ANPR presented one possible approach for the use of insurance as a means to ensure an NVOCC's financial responsibility. That approach would allow a group or association of NVOCCs to provide the Commission with a certified list of its members that carry liability and/or errors and omissions insurance adequate to satisfy each NVOCC's responsibility under the 1991 Act. Each NVOCC's insurance policy would have to permit claims against the insurer for risks stated in the 1991 Act, and the group would require its members to provide it with a valid certificate of insurance on a periodic basis. The group would be required to advise the Commission of all members carrying the required insurance, and keep the Commission apprised of any changes to its list. The name of each insurer, along with a sample copy of each insurance policy, would be provided to the Commission by the group. Should some specific risk contained in the 1991 Act not be covered in the basic insurance policy, members would be required to obtain another form of coverage for such risk, either individually or with a group. The group or association would be responsible for apprising the Commission of any member in this category, along with the type of additional coverage obtained and verification or proof thereof. The Commission also would require some form of documentation, *e.g.*, articles of incorporation, bylaws, *etc.*, of any group or association using this procedure to ascertain its authenticity and acceptability to represent its members. The Commission would review the qualifications of the insurance companies to ensure their acceptability.

The ANPR pointed out that the development of verification procedures to ascertain the acceptability of the underwriting entity would be necessary for any rule that provided for insurance (either individual or group) as an acceptable means to evidence an NVOCC's financial responsibility. It requested comment on possible forms and procedures for verifying insurance companies.

The ANPR also anticipated that U.S.-based, as well as foreign-based, insurance companies would provide NVOCCs with insurance to cover their financial responsibilities under the 1991 Act, and requested comment on standards that it could apply to insurance companies located in the U.S., as well as in foreign countries. The Commission acknowledged the existence of rating institutions that rate the financial stability and underwriting record of insurance companies and requested comment on whether such rating institutions' standards could be used to evaluate the financial status of insurance companies located in both the U.S. and foreign countries. Comment also was requested on whether insurance companies located in foreign countries maintain assets in the U.S., or should be required to do so. Suggestions for other possible methods of evaluating the acceptability of insurance companies also were requested. In addition, comment was requested on any perceived adverse effects on beneficiaries and the industry in general regarding the submission, processing and settlement of claims under insurance coverage.

With a single exception, all commenters support the use of insurance as a means to ensure an NVOCC's financial responsibility. Commenters generally endorse the approach presented in the ANPR with respect to insurance, provided persons doing business with NVOCCs are afforded no less protection than is provided under the current bonding

regulations. Commenters also stress that Commission-approved financial security instruments should be no more procedurally cumbersome for the claimant than are bonds. DOT states that the Commission should proceed from the premise that the shipper protections contemplated by Congress are to be accomplished in the manner least burdensome to NVOCCs. The IANVOCC believes that group coverage would be beneficial both in terms of the commercial flexibility it would allow, as well as alleviating the perceived problem that some smaller NVOCCs may have in obtaining a bond.

FIATA supports the general group insurance concept as outlined in the ANPR and provides specific guidelines its members would follow to implement such a program. FIATA suggests that the Commission rely on FIATA's qualified national freight forwarders associations to ensure the acceptability of each NVOCC member's coverage. Each association would separately notify the Commission of its intent to participate in such a program and would verify its own members' coverage by reviewing annual certificates of insurance or other documentation. The name and address of any listed NVOCC's insurer, as well as a sample copy of the insurance policy would be furnished to the Commission upon request. Such insurance would be required to permit claims to be made against the insurer by U.S. shipper customers in the United States.

Each association would require its members to notify it within 30 days of any cancellation of insurance, and in turn, the association would notify the Commission within 30 days of such a cancellation. Each qualifying association would maintain a bond or guaranty to cover risks not covered by the basic insurance policy -- such as civil penalties -- for up to \$50,000 per member. FIATA states that claims against an NVOCC could be made

directly against a national association's bond, not to exceed \$50,000. Each qualifying association's aggregate bond amount would vary depending on the number of NVOCC members, but in no instance should an association be required to post a bond in excess of one million dollars (\$1,000,000). FIATA contends that in many countries with few NVOCCs and low historical levels of cargo movement, a significantly lower bond amount would be in order.

FIATA submits that the Commission's approach to group insurance, as modified by FIATA, would provide at least the level of protection required by the 1991 Act, as insurance claims are frequently easier to submit and process than are claims against a bond. It notes that while the national associations will not be "individually liable" for each member's covered risks, they have an interest in seeing that their members handle covered claims properly and live up to their obligations. FIATA believes that this approach will lessen the burden on NVOCCs around the world to meet financial responsibility requirements and may also encourage many companies to participate in the U.S. trades.

The Japan Conferences suggest that individual or group policies be designed and limited to the type of risks set forth in the 1991 Act, and that existing policies should not be accepted. They note that existing policies may not include all the risks which must be covered and would, therefore, result in a patchwork of policies by one or more insurers (and riders thereto) through which a claimant would have to wade to enforce a judgment. Acceptance of non-standard insurance policies allegedly would place a burden on the Commission to review the legal adequacy and terms of coverage for various combinations of sureties for a potentially large number of NVOCCs.

The IAFC believes that, given the relatively large number of NVOCCs currently on file with the Commission compared to the number of passenger vessel operators on file, the Commission's regulations pertaining to passenger vessel financial responsibility may be inappropriate for the administration of a similar program that would provide for insurance for NVOCCs. Instead, the IAFC suggests the Commission consider the U.S. Coast Guard's regulations relating to financial responsibility for water pollution which require the applicant to file a document in a form prescribed by the agency that confirms the amount and type of coverage required, and allows for claims to be made against it. The Japan Conferences similarly suggest that the Commission draft the precise language for insurance policies (individual and group) to assure all policies cover the same risks in the same manner so that the ability to collect from a policy will be uniform regardless of the insurance company involved.

ANERA *et al.*, argue that while requiring a group or association to submit a certified list of members that carry liability and sample copies of insurance policies would be useful, the actual insurance policy of each NVOCC should be filed with the Commission and made publicly available. The Japan Conferences are concerned that allowing associations or groups of NVOCCs to assure each member's compliance with the 1991 Act would add a significant element of risk for claimants. They question whether claimants would be indemnified by the group or association so that claimants could enforce a judgment against a group member if, for example, the group failed to apprise the Commission of a member NVOCC's failure to maintain appropriate coverage. They view this type of arrangement as one that "insulates" NVOCCs from their responsibilities under the 1990 Amendments and

1991 Act. They believe each NVOCC should be required to be directly and solely responsible for maintaining its security (whether insurance or bonds) and for informing the Commission of the status of its financial responsibility. They suggest that group coverage be limited to the conventional type where lower rates are offered to a large number of participants.

ANERA *et al.*, add that for the protection of claimants, cancellations of an NVOCC's tariff should not automatically cause the cancellation of the NVOCC's bond, insurance or guaranty without first providing public notice in the *Federal Register*. ANERA *et al.*, explain that when a carrier or shipper has a claim against an NVOCC that is tarified and bonded, an attempt is made to amicably resolve the claim before filing suit or placing a claim against the NVOCC's bond. They report that in some cases, when a claim is ultimately made, it is found that the bond has been canceled. ANERA *et al.*, therefore, suggest that a 60-day period from the date of publishing a notice of cancellation in the *Federal Register* would be appropriate to avoid this problem.

With respect to the ANPR's request for comment on possible forms or procedures the Commission should use for accepting underwriters, commenters endorse the use of relevant industry rating organizations and further suggest that where possible, the Commission review other sources to ensure the accuracy of ratings institutions' evaluations. DOT recommends the adoption of a practice similar to it and the Interstate Commerce Commission ("ICC") of setting coverage amounts and accepting insurance companies that either are state certified, or that have received a superior rating level as determined by organizations such as A. M. Best & Company, Standard and Poor's and Moody's.

Commenters suggest that foreign underwriters be required to provide their written consent to accept service of legal process in the United States and designate a U.S. agent for service of such process. It is recommended that the procedures for this designation be similar to those for passenger vessel guarantors.

With respect to whether foreign-based insurance companies should maintain assets in the United States, ANERA *et al.*, stated that it did not see any such need, while several other commenters believe the proceeds of any security instrument should be available in the United States. It is suggested that assets be substantial enough to cover the entirety of the coverage provided to all NVOCCs.

TASA was the only commenter opposed to the use of insurance as a means to evidence an NVOCC's financial responsibility. It believes that alternate forms of financial security will neither, increase the protection of the shipping industry, increase the availability of coverage, nor reduce the cost to the NVOCC. TASA states that the premium on a \$50,000 bond is currently between \$500 and \$750 and that it is unrealistic to assume that comparable coverage can be obtained for less. It suggests that the Commission consider the ICC's experience in evaluating various types of financial security that might provide equivalent protection to the surety bonds required for property brokers. TASA claims that while the ICC received comments on such instruments as trust funds, insurance policies, irrevocable letters of credit, pledged certificates of deposit and security escrow accounts, it determined to accept only trust funds and surety bonds. TASA concludes that the present bonding system appears to satisfy the needs of the shipping industry and should remain unchanged.

2. Other Financial Security

Most commenters believe that alternative forms of security in lieu of surety bonds would be acceptable if sufficient assets are available in the United States for injured parties. SAA takes the position that guaranties from non-regulated or off-shore companies with little or no available asset base in the U.S. may prove to be worthless should claims arise against them. DOT contends, however, that there should be no reason to preclude the use of foreign guarantors, particularly since many NVOCCs are foreign themselves. ANERA *et al.*, agree, stating that it has no objection to the use of both U.S.- and foreign-based guarantors.

NCBFAA is particularly concerned about the availability of the assets backing any alternative form of financial security. It is said to be common knowledge in the international transportation industry -- or any international industry -- that it is nearly impossible to recover damages against a foreign-based entity that has no assets physically located in the United States. It argues that even assuming the country involved has established procedures that a U.S. or foreign citizen may follow to enforce a judgment, that process involves time and a tremendous amount of money. NCBFAA suggests that one solution to this problem is for the Commission to mandate that all insurance or guarantee companies providing coverage to NVOCCs have sufficient assets located in the U.S. ANERA *et al.*, presume that guarantors will often be affiliate companies of NVOCCs, *e.g.*, a parent company. They suggest that in order to determine their acceptability, the Commission should require that they maintain a minimum amount of assets in this country

or conduct a certain minimum amount of business in the United States and have sufficient ties to this country to afford U.S. courts jurisdiction over them.

Commenters are also concerned that any alternative instruments the Commission accepts be equally available for collection by claimants as surety bonds. TASA states that bonds are legally superior to guaranty instruments in protecting the shipping public because a guarantor is only secondarily liable for the debt of another, whereas, under a bond, the principal and the surety are jointly and severally liable. TASA therefore concludes that a claimant's prospects for recovery are reduced under a guaranty. The Japan Conferences echo this concern, stating that guarantors are secondarily liable and must pay only after the primary party is unable to pay. The IAFC believes that since the 1991 Act refers to "other surety" and not to "guarantor," the form of the guaranty should provide that a claimant be able to proceed directly against the guarantor without having to proceed first against the NVOCC.

Finally, commenters are concerned that the security actually provided by an alternative financial security provider be carefully evaluated by the Commission. TASA observes that sureties perform a valuable function by evaluating the NVOCC's fiscal integrity when they underwrite a bond. Sureties are said to satisfy themselves that the NVOCC is fiscally responsible, function on a day-to-day basis without incurring the risk of default under the bond, and in the event a default occurs, satisfy the claimant or reimburse the surety who pays the claim. TASA's implicit concern appears to be that a provider of an alternative form of financial security may be less vigilant than a surety company.

In order to delineate a uniform set of financial responsibilities, ANERA *et al.*, suggest the use of a standard guaranty form patterned after one currently used by the Commission for passenger vessel non-performance coverage. DOT urges that any such procedures be flexible and non-onerous.

B. Level and Methods for Determining Surety Amount

The ANPR requested comment on the appropriate level of coverage to protect the interests of shippers, ocean common carriers and others who do business with NVOCCs, and requested comment on whether other methods to determine the coverage amount are desirable or practical. It also requested comment on whether the coverage level should vary depending on the type of surety used.

The majority of commenters believe the \$50,000 minimum bond amount currently required by the 1990 Act is sufficient and should be maintained for all NVOCCs regardless of size. They argue that the industry and the Commission have not had enough experience with the \$50,000 minimum bond amount to warrant change at this time. Most commenters who advocate a sliding scale approach for determining the surety amount also argue that a floor of at least \$50,000 should be maintained.

Commenters that recommend implementing a sliding scale method submit suggestions that include sliding scales based on: (1) an NVOCC's gross revenue, with a minimum amount of \$50,000 and a maximum of \$250,000; (2) 110 percent of an NVOCC's highest unearned revenue over a certain time period (similar to the Commission's regulations for

passenger vessel operators); or (3) an NVOCC's gross freight revenue with the assumption that a three month cargo and freight exposure should be covered by a surety.

Commenters opposed to a sliding scale argue that such a method is unrealistic and would likely impose greater reporting burdens on NVOCCs and present more monitoring and surveillance difficulties for the Commission. Others contend that a sliding scale has the potential to be discriminatory given the complexities of the many operational factors of NVOCCs that would have to be considered in implementing such a method.

Both SAA and DOT argue that there may be some justification for lowering the minimum bond amount for at least some small NVOCCs. This suggestion appears to imply a two-tier method of determining the surety amount with smaller NVOCCs being subject to a lower minimum than larger NVOCCs. SAA states that it would support some form of sliding scale coverage based on an NVOCC's past revenue record (or expected revenue for new NVOCCs) subject to some minimum amount. DOT recommends that the Commission consider whether a lesser minimum coverage level for all NVOCCs would be consistent with its obligation to protect the shipping community. Those that specifically commented on whether the coverage amount should vary depending on the type of coverage, unanimously agree that the coverage amount should not vary.

DISCUSSION

After considering all comments, the Commission is proposing a rule that authorizes NVOCCs to use insurance, or obtain a guaranty, as alternatives to surety bonds. The Commission believes that insurance and a guaranty provide the same level and kind of

protection afforded by a surety bond and are not procedurally more cumbersome for injured parties to obtain compensation from than a surety bond. The procedures and forms developed herein for the group supplemental coverage bond, insurance coverage and guaranty are intended to preserve the same rights as those provided for under the Commission's present regulations governing surety bonds.

Trust funds are not an acceptable alternative to surety bonds under the proposed rule. The Commission believes the necessary procedures for identifying acceptable trust holders and the 100 percent collateralized nature of a trust would be significantly more costly and administratively burdensome for NVOCCs than a bond, insurance policy or guaranty. Parties interested in using a trust fund, however, are invited to comment on how a trust fund differs from a surety bond, insurance or guaranty, develop a form which parties to a trust agreement would submit to the Commission, specify the criteria the Commission should use for evaluating trust holders and detail the liabilities assumed by the parties under such an agreement.

The proposed rule provides guidelines to facilitate the process of obtaining adequate security acceptable to the Commission. The Commission agrees with the commenters that any security instrument should, at a minimum, contain the following elements: (1) there must be a third party directly responsible for paying claims; (2) the third party must be responsible for maintaining acceptable assets in the United States in the amount of \$50,000 for each NVOCC¹ to cover any claims made against the security instrument; (3) payment must be paid only to bona fide claimants for damages, reparations or penalties incident to

¹ In the case of group coverage, the assets required to be held by the surety, insurer or guarantor of a group or association of NVOCCs would not exceed \$1,000,000 for each group or association.

transportation-related activities under the Shipping Act of 1984; (4) payment directly to the injured party must be made for any sum or sums for which the surety, insurer or guarantor, in good faith, determines that the NVOCC is liable; (5) the third party must agree to give notice to the Commission in case of any drawdown or cancellation of the \$50,000 protection; (6) claims against the surety, insurance policy or guaranty must be able to be brought in the United States; and (7) each insurance company or guaranty must have a financial rating of Class VIII or higher under the Financial Size Categories of A.M. Best & Company or equivalent from an acceptable international rating organization. The Commission believes NVOCC surety bonds, insurance coverage and guaranties will protect carriers, shippers, other intermediaries and the Commission against dishonest and financially unstable NVOCCs with minimal government regulation.

The continuation of a \$50,000 bond or the initiation of a \$50,000 insurance policy or guaranty should provide the appropriate amount of protection. The majority of commenters support continuation of the minimum \$50,000 coverage required by the 1990 Amendments, regardless of the type of coverage used or the size of the NVOCC. It is argued that the Commission and the industry have not had sufficient experience with the \$50,000 bond amount to justify a change at this time. The proposed rule therefore, retains the \$50,000 coverage amount for all NVOCCs regardless of the type of coverage used.

The proposed rule provides that sufficient assets be held in the United States to cover the liability assumed by the surety, insurer or guarantor for the transportation-related activities of an NVOCC under the Shipping Act of 1984. This would ensure that assets would be available for claims or judgments against an NVOCC made by U.S. claimants.

The proposed rule requires the amount of assets held in the U.S. to be \$50,000 for each individual NVOCC, or \$50,000 for each NVOCC that is a member of a group or association of NVOCCs for which the surety, insurer or guarantor provides coverage, up to a maximum of \$1,000,000 for each such group or association. The requirement that sufficient assets be held in the United States to cover claims or judgments against an NVOCC for damages, reparation or penalties does not preclude a claimant from bringing an action or obtaining a judgment in a foreign court.

The proposed rule permits cancellation of a group supplemental coverage bond, insurance coverage or a guaranty 30 days after written notice is received by the Commission. This should adequately protect injured parties for transportation-related activities occurring while the group supplemental coverage bond, insurance coverage or guaranty was effective. Although the surety, insurer or guarantor's obligation may not exceed fifty thousand dollars (\$50,000) for each NVOCC, or one million dollars (\$1,000,000) for each group or association of NVOCCs, the existing funds must remain available until all legitimate claims are settled or the fund is depleted. Cancellation of coverage does not extinguish any prior NVOCC liability to claimants incurred while the coverage was in effect.

The proposed rule provides that an NVOCC's surety bond, group supplemental coverage bond, insurance policy or guaranty may be replaced by another surety bond, group supplemental coverage bond, insurance policy or guaranty, and the liability of the retiring surety, insurer or guarantor shall be considered as having terminated as of the effective date of the replacement surety bond, group supplemental coverage bond, insurance policy or guaranty. However, such termination shall not affect the liability of the retiring surety,

insurer or guarantor arising as a result of an NVOCC's financial responsibility for damages, reparations or penalties prior to the date such termination becomes effective and subsequent coverage is obtained.

The Commission agrees with commenters that uniform procedures and forms should be adopted for any financial security instrument it accepts. The Commission therefore proposes standard forms an individual NVOCC, or a group or association of NVOCCs, on behalf of its members, must submit to verify insurance coverage or a guaranty it has obtained instead of a bond. The Commission also proposes forms and procedures to verify an individual NVOCC's insurance coverage and supplemental coverage obtained through a group or association of NVOCCs. These procedures and standard forms are based on the comments received in response to the Commission's ANPR. A uniform insurance policy, as suggested by some commenters, is not provided under the proposed rule. The Commission, however, solicits comment on whether it should attempt to draft a uniform insurance policy, and suggestions for developing such a policy.

The uniform guaranty and insurance forms prescribed in the proposed rule require the identity of the guarantor or insurance company, their address, and the identity of an agent domiciled in the United States for service of process. Both forms clearly indicate that the insurer or guarantor must pay all claims which they, in good faith, believe the NVOCC, group or association is liable by reason of the covered NVOCC's financial responsibility for damages, reparations or penalties incident to the NVOCC's transportation-related activity under the Shipping Act of 1984 while the insurance or guaranty is effective. The insurance form and guaranty form also contain notice of cancellation provisions which require the

insurer or guarantor, or the covered NVOCC, group or association to inform the Commission when the existing insurance or guaranty has been discontinued. The NVOCC, group or association must then furnish evidence to the Commission that it has acquired a replacement surety bond, insurance policy or guaranty in the amount of \$50,000 or discontinue NVOCC operations, as required by 46 U.S.C. app. 1721.

The Commission believes that for adequate protection of injured claimants, an insurer or a guarantor must have a financial rating of Class VIII or higher under the Financial Size Categories of A.M. Best & Company or equivalent from an acceptable international rating organization. Evidence of such rating must be submitted to the Commission, on the rating organization's letter-head or designated form, along with the completed insurance or guaranty form. Such certified financial rating would be used by the Commission to evaluate the insurance company or guarantor.

Supplemental coverage by a group or association of NVOCCs that assumes financial responsibility for damages, reparations or penalties arising from the transportation-related activities of its members under the Shipping Act of 1984 that are not covered by the member's individual bond, insurance policy or guaranty, may be established by filing the insurance, guaranty or group supplemental coverage bond forms with the Commission. The proposed rule provides that each group or association must provide the Commission with a list certified by its Chief Executive Officer of the members covered by this supplemental coverage. The group or association is responsible for informing the Commission of additions or deletions to this list within 30 days. The group or association's supplemental coverage will remain effective until 30 days after the Commission receives written notice

that a member is no longer covered. Each group or association must certify that each member NVOCC participating in such program has individual coverage with an insurer or guarantor with a financial rating of Class VIII or higher under the Financial Size Categories of A.M. Best & Company or equivalent from an acceptable international rating organization. In addition, where such supplemental coverage is established by use of insurance or guaranty, the group or association must demonstrate that its insurer or guarantor has a financial rating of Class VIII or higher under the Financial Size Categories of A.M. Best & Company or equivalent from an acceptable international rating organization on the rating organization's letter-head or designated form. The proposed rule requires that the supplemental coverage be available to pay any damages, reparations or penalties arising from a covered member NVOCC's transportation-related activities under the Shipping Act of 1984 not covered, for any reason, by the covered member's individual bond, insurance or guaranty.

After the June 19, 1992, publication of the ANPR in this proceeding, an interim rule was published on August 12, 1992 (57 FR 36248), in Docket No. 90-23, *Tariffs and Service Contracts* (46 CFR part 514), which implements the Commission's Automated Tariff Filing and Information System ("ATFI"). Accordingly, the appropriate provisions of part 514 are also proposed to be amended herein in a manner similar to the proposed changes to parts 580 and 581.

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

rule" as defined 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 effects 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.

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the Commission certifies that the proposed rule will not, if adopted, have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small governmental jurisdictions. In addition, the Commission believes that the proposed rule, if adopted, would be less burdensome to the industry because of the enhanced flexibility they would be afforded by expanding the possible types of financial security available to satisfy NVOCC responsibilities under the Shipping Act of 1984.

The collection of information requirements contained in this proposed rule have been submitted to the Office of Management and Budget for review under the provisions of the Paperwork Reduction Act of 1980 (P.L. 96-511), as amended. Public reporting burden for this collection of information is estimated to take 42.75 hours per response for group supplemental coverage (32.5 hours to set up program, 1.75 hours to maintain current membership list, and 8.5 hours to establish resident agent, file replacement group coverage, and file cancellation notices as necessary); 12.5 hours per response for insurance coverage; and 12.5 hours per response for a guaranty. This collection of information includes the time for reviewing instructions, searching existing data needed, and completing and reviewing the

collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Norman W. Littlejohn, Director, Bureau of Administration, Federal Maritime Commission, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503.

List of Subjects

46 CFR Part 514

Barges, Cargo, Cargo vessels, Exports, Fees and user charges, Freight, Harbors, Imports, Maritime carriers, Motor carriers, Ports, Rates and fares, Reporting and record keeping requirements, Surety bonds, Trucks, Water carriers, Waterfront facilities, Water transportation.

46 CFR PART 580

Cargo, Cargo vessels, Exports, Freight, Harbors, Imports, Maritime carriers, Rates, Reporting and recordkeeping requirements, Surety bonds, Water carriers, Water transportation.

46 CFR Part 581

Freight, Maritime carriers, Rates, Reporting and recordkeeping requirements.

46 CFR Part 583

Freight, Maritime carriers, Rates, Reporting and recordkeeping requirements; Surety bonds.

Therefore, pursuant to 5 U.S.C. 552 and 553; 31 U.S.C. 9701; 46 U.S.C. app. 804, 812, 814-817(a), 820, 833a, 841a, 843, 844, 845, 845a, 845b, 847, 1702-1712, 1714-1716, 1718, 1721 and 1722; and sec. 2(b) of Pub.L. 101-92, 103 Stat. 601, the Federal Maritime Commission proposes to amend Title 46, Code of Federal Regulations, parts 514, 580, 581 and 583 as follows.

Part 514 - [AMENDED]

1. The authority citation for Part 514 continues to read as follows:

Authority: 5 U.S.C. 552 and 553; 31 U.S.C. 9701; 46 U.S.C. app. 804, 812, 814-817(a), 820, 833a, 841a, 843, 844, 845, 845a, 845b, 847, 1702-1712, 1714-1716, 1718, 1721 and 1722; and sec. 2(b) of Pub.L. 101-92, 103 Stat. 601.

2. Paragraph (d) of section 514.7 is revised to read as follows:

§ 514.7 Service contracts in foreign commerce

* * * * *

(d) *Service contracts with non-vessel-operating common carriers.* No ocean common carrier or conference may 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 an NVOCC, unless such NVOCC has a tariff and proof of financial responsibility as required by sections 8 and 23 of the Shipping Act of 1984 and Commission regulations under this part and part 583 of this chapter.

3. Paragraphs (b)(24), initial paragraph, (b)(24)(i) and (b)(24)(ii) of section 514.15 are revised to read as follows:

§ 514.15 Tariff Rules.

* * * * *

(b) * * *

(24) *Financial responsibility for NVOCCs in foreign commerce and legal agent for service of process.* (i) Every non-vessel-operating common carrier ("NVOCC") shall state in Tariff Rule 24 of its tariffs on file with the Federal Maritime Commission that it has furnished the Commission proof of financial responsibility in the manner and amount required by 46 CFR 583.4 for the payment of any judgment for damages arising from its transportation-related activities under the Shipping Act of 1984, order for reparations issued pursuant to section 11 of the Shipping Act of 1984, or penalty assessed pursuant to section 13 of the Shipping Act of 1984. In Tariff Rule 24, the NVOCC shall state the manner of its financial responsibility; whether it is relying in whole or in part on coverage provided by a group or association of NVOCCs to which it is a member; the name(s) and address(es) of the surety company(ies), insurance company(ies) or guarantor(s) issuing the bond(s), insurance policy(ies) or guaranty(ies); the bond(s), insurance policy(ies) or guaranty(ies) number(s); and, where applicable, the name and address of the group or association of NVOCCs providing full or partial coverage.

(ii) Every NVOCC in foreign commerce which is not domiciled in the United States shall enter in the first address field provided in each of its Tariff Records under 46 CFR 514.11(b)(8)(ii) 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. Every NVOCC using a group or association of NVOCCs not domiciled in the United States for financial coverage, in whole or in part, pursuant to §583.4

shall state in its tariff the name and address of the group or association of NVOCC's resident agent for service of judicial and administrative process, including subpoenas. The NVOCC also shall state in Tariff Rule 24 that, in any instance in which the designated legal agent(s) 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.

* * * * *

Part 580 - [AMENDED]

4. The authority citation for Part 580 is revised to read as follows:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1702-1705, 1707, 1709, 1710-1712, 1714-1716, 1718, and 1721.

5. Paragraphs (d)(24)(i) and (d)(24)(ii) of section 580.5 are revised to read as follows:

§ 580.5 Tariff contents.

* * * * *

(d) * * *

(24) *Financial responsibility for non-vessel-operating common carriers and legal agent for service of process.* (i) Every non-vessel-operating common carrier ("NVOCC") shall state in Tariff Rule 24 of its tariffs on file with the Federal Maritime Commission that it has furnished the Commission proof of financial responsibility in the manner and amount required by § 583.4 of this chapter for the payment of any judgment for damages arising from its transportation-related activities under the Shipping Act of 1984, order for

reparations issued pursuant to section 11 of the Shipping Act of 1984, or penalty assessed pursuant to section 13 of the Shipping Act of 1984. In Tariff Rule 24, the NVOCC shall state the manner of its financial responsibility; whether it is relying in whole or in part on coverage provided by a group or association of NVOCCs to which it is a member; the name(s) and address(es) of the surety company(ies), insurance company(ies) or guarantor(s) issuing the bond(s), insurance policy(ies) or guaranty(ies); the bond(s), insurance policy(ies) or guaranty(ies) number(s); and, where applicable, the name and address of the group or association of NVOCCs providing full or partial coverage.

(ii) Every NVOCC in foreign commerce which is not domiciled in the United States shall state in Tariff Rule 24 of 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. Every NVOCC using a group or association of NVOCCs not domiciled in the United States for financial coverage, in whole or in part, pursuant to §583.4 shall state in Tariff Rule 24 of its tariff the name and address of the group or association of NVOCC's resident agent for service of judicial and administrative process, including subpoenas. The NVOCC also shall state in Tariff Rule 24 that, in any instance in which the designated legal agent(s) 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.

* * * * *

Part 581 - [AMENDED]

6. The authority citation for part 581 is revised to read as follows:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1702, 1706, 1707, 1709, 1712, 1714-1716, 1718, and 1721.

7. Paragraph (e) of section 581.3 is revised 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 may 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 an NVOCC, unless such NVOCC has a tariff and proof of financial responsibility as required by sections 8 and 23 of the Shipping Act of 1984 and Commission regulations under parts 580 and 583 of this chapter.

* * * * *

Part 583 - [AMENDED]

8. The authority citation for part 583 is revised to read as follows:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1702, 1707, 1709, 1710-1712, 1716 and 1721.

9. Part 583 is amended by revising the part heading to read as follows:

PART 583 -- SURETY FOR NON-VESSEL-OPERATING COMMON CARRIERS

10. Part 583 table of contents is amended by adding Appendices B, C and D to read as follows:

Appendix B to Part 583 -- **NON-VESSEL-OPERATING COMMON CARRIER (NVOCC) INSURANCE FORM (FMC-67)**

Appendix C to Part 583 -- NON-VESSEL-OPERATING COMMON CARRIER
(NVOCC) GUARANTY FORM (FMC-68)

Appendix D to Part 583 -- NON-VESSEL-OPERATING COMMON CARRIER
(NVOCC) GROUP BOND FORM (FMC-69)

11. Section 583.2 is revised to read as follows:

§ 583.2 Scope.

This part implements the Non-Vessel-Operating Common Carrier Amendments of 1990 and the Non-Vessel-Operating Common Carrier Act of 1991, Public Law No. 101-595, section 710 and Public Law No. 102-251, section 201 respectively, and applies to all NVOCCs operating in the waterborne foreign commerce of the United States.

12. Section 583.3 is revised to read as follows:

§ 583.3 Proof of financial responsibility, when required.

(a) Except as provided in paragraph (c) of this section, no person may provide transportation as a non-vessel-operating common carrier or obtain transportation for the account of such NVOCC unless a surety bond, insurance form, or guaranty form which demonstrates that such NVOCC is covered for any transportation-related liability under the Shipping Act of 1984 has been furnished to and accepted by the Commission. Where a group or association of NVOCCs accepts liability for all or part of an NVOCC's financial responsibilities for such NVOCC's transportation-related activities under the Shipping Act of 1984, the group or association of NVOCCs must file either a group supplemental coverage bond form, insurance form or guaranty form, clearly identifying each NVOCC covered before a covered NVOCC may provide transportation as a non-vessel-operating

common carrier or obtain transportation for the account of such NVOCC. An individual NVOCC's bond, insurance or guaranty coverage shall be for \$50,000 except in the case where an individual NVOCC's responsibility is covered, in whole or in part, by a group or association's bond, insurance or guaranty. In such cases the group or association's coverage must be for \$50,000 per covered member NVOCC, or \$1,000,000 in aggregate.

(b) Where more than one entity operates under a common trade name, separate proof of financial responsibility is required covering 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 filing proof of financial responsibility, provide transportation as a non-vessel-operating common carrier or obtain transportation for the account of such NVOCC.

13. Section 583.4, is revised to read as follows:

§ 583.4 Financial responsibility requirements.

Prior to the date it commences common carriage operation, every non-vessel-operating common carrier shall establish its financial responsibility for the purpose of this part by one the following methods:

(a) Surety bond, by filing with the Commission a valid 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) Insurance, by filing with the Commission evidence of insurance on Form FMC-67. The insurance must be issued by an Insurer acceptable to the Commission and

must provide coverage for damages, reparations or penalties arising from any transportation-related activities under the Shipping Act of 1984 of the insured NVOCC. This evidence of financial responsibility shall be accompanied by a financial rating for the Insurer of Class VIII or higher under the Financial Size Categories of A.M. Best & Company or equivalent from an acceptable international rating organization on such organization's letter-head or designated form.

(c) Guaranty, by filing with the Commission evidence of guaranty on Form FMC-68. The guaranty must be issued by a guarantor acceptable to the Commission and must provide coverage for damages, reparations or penalties arising from any transportation-related activities under the Shipping Act of 1984 of the NVOCC. This evidence of financial responsibility shall be accompanied by a financial rating for the guarantor of Class VIII or higher under the Financial Size Categories of A.M. Best & Company or equivalent from an acceptable international rating organization on such organization's letter-head or designated form.

(d) Evidence of financial responsibility of the type provided for in paragraphs (a), (b) and (c) of this section established through and filed with the Commission by a group or association of NVOCCs on behalf of its members, subject to the following conditions and procedures:

(1) Each group or association of NVOCCs shall notify the Commission of its intention to participate in such a program and furnish documentation as will demonstrate its authenticity and authority to represent its members, such as articles of incorporation, bylaws, etc.;

(2) Each group or association of NVOCCs shall provide the Commission with a list certified by its Chief Executive Officer containing the names of those NVOCCs to which it will provide coverage, in whole or in part; the manner and amount of existing coverage each covered NVOCC has; an indication that the existing coverage provided each NVOCC is provided by a surety bond issued by a surety company found acceptable to the Secretary of the Treasury, or by insurance or guaranty issued by a firm with a Class VIII or higher rating in the Financial Size Categories of A.M. Best & Company or equivalent from an acceptable international rating organization with coverage limits of at least \$50,000.00; and the name, address and facsimile number of each surety, insurer or guarantor providing coverage pursuant to this section. Each group or association of NVOCCs shall notify the Commission within thirty (30) days of any changes to its list.

(3) The group or association shall provide the Commission with a sample copy of each type of existing financial responsibility coverage used by member NVOCCs.

(4) Each group or association of NVOCCs shall be responsible for ensuring that each member's financial responsibility coverage allows for claims to be made in the United States against the Surety, Insurer or Guarantor for any judgment for damages against the NVOCC arising from its transportation-related activities under the Shipping Act of 1984, 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 NVOCC pursuant to section 13 of the Shipping Act of 1984, 46 U.S.C. app. 1712. Each group or association of NVOCCs shall be responsible for requiring each member NVOCC to provide it with valid proof of financial responsibility annually.

(5) Where the group or association of NVOCCs determines to secure on behalf of its members other forms of financial responsibility, as specified by this section, for damages, reparations or penalties not covered by a member's individual financial responsibility coverage, such additional coverage must:

(i) Allow claims to be made in the United States directly against the group or association's Surety, Insurer or Guarantor for damages against each covered member NVOCC arising from each covered member NVOCC's transportation-related activities under the Shipping Act of 1984, 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 each covered member NVOCC pursuant to section 13 of the Shipping Act of 1984, 46 U.S.C. app. 1712; and

(ii) Be for an amount up to \$50,000.00 for each covered member NVOCC up to a maximum of \$1,000,000.00 for each group or association of NVOCCs.

(6) The coverage provided by the group or association of NVOCCs on behalf of its members, in whole or in part, shall be provided by, in the case of a surety bond, a surety company found acceptable to the Secretary of the Treasury and issued by such a surety company on Form FMC-69, and in the case of insurance and guaranty, a firm with a Class VIII or higher rating in the Financial Size Categories of A.M. Best & Company or equivalent from an acceptable international rating organization and issued by such a firm on Form FMC-67 and Form FMC-68, respectively.

All forms and documents for establishing financial responsibility of NVOCCs prescribed in this section shall be submitted to the Director, Bureau of Tariffs, Certification and Licensing, Federal Maritime Commission, Washington, DC 20573. Such forms and documents must clearly identify the name; trade name, if any; the address; and, effective January 1, 1994, the organization number as provided in 46 CFR 514.11(a) of each NVOCC. Copies of all Forms may be obtained from the Commission's Bureau of Tariffs, Certification and Licensing at the address listed above, or from any other 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.

14. Paragraphs (a) and (b) of section 583.5 are revised and 583.5(e) is added to read as follows:

§ 583.5 Resident agent.

(a) Every non-vessel-operating common carrier not domiciled in the United States and every group or association of NVOCCs which provide, in whole or in part, financial coverage for a member NVOCC's financial responsibilities pursuant to § 583.4 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, group or association of NVOCCs 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) * * *

(d) * * *

(e) Every non-vessel-operating common carrier using a group or association of NVOCCs to cover all or part of its financial responsibility requirement under §583.4 shall publish the name and address of the group or association's resident agent for receipt of judicial and administrative process, including subpoenas, in its tariff in accordance with §514.15(b)(24)(ii) and §580.5(d)(24)(ii) of this chapter.

15. Paragraph (a) of section 583.6 is revised to read as follows:

§ 583.6 Termination of financial responsibility or designation of resident agent.

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

supplemental coverage bond, insurance coverage or guaranty. The liability of the retiring surety, insurer or guarantor shall be considered as having terminated as of the effective date of the replacement surety bond, group supplemental coverage bond, insurance policy or guaranty.

16. Appendix B to Part 583 is added to read as follows:

**APPENDIX B TO PART 583 -- SURETY FOR NON-VESSEL-OPERATING
COMMON CARRIERS (NVOCC) INSURANCE FORM [FMC-67]**

Form FMC - [67]

FEDERAL MARITIME COMMISSION

**NON-VESSEL-OPERATING COMMON CARRIER INSURANCE FORM FURNISHED
AS EVIDENCE OF FINANCIAL RESPONSIBILITY UNDER 46 U.S.C. app. 1721**

This is to certify, that the _____
(Name of Insurance Company)
(hereinafter "Insurer") of _____
(Home Office Address of Company)
has issued to _____ (hereinafter
(Non-Vessel-Operating Common Carrier or
Group or Association of NVOCCs)
called "Insured") of _____
(Address of Non-Vessel-Operating Common Carrier
or Group or Association of NVOCCs)

a policy or policies of insurance for purposes of complying with the provisions of 46 U.S.C. app. 1721 and the rules and regulations, as amended, of the Federal Maritime Commission, which provide compensation for damages, reparations or penalties arising from the transportation-related activities of Insured, and made pursuant to Shipping Act of 1984.

WHEREAS, the Insured is or may become a Non-Vessel-Operating Common Carrier ("NVOCC") subject to the Shipping Act of 1984, 46 U.S.C. app. 1701 *et seq.*, and the rules and regulations of the Federal Maritime Commission ("FMC"), or is or may become a group or association of NVOCCs, and desires to establish financial responsibility in accordance with section 23 of the Shipping Act of 1984, has elected to file with the Commission this Insurance Form as evidence of its financial responsibility and evidence of a financial rating

for the Insurer of Class VIII or higher under the Financial Size Categories of A.M. Best & Company or equivalent from an acceptable international rating organization on such organization's letter-head or designated form,

WHEREAS, this Insurance is written to assure compliance by the Insured with section 23 of the Shipping Act of 1984, 46 U.S.C. app. 1721, and the rules and regulations of the Federal Maritime Commission relating to evidence of financial responsibility for non-vessel-operating common carriers, this Insurance shall be available to pay any and all claimants to whom the Insured may be legally liable for any damages against the Insured arising from the Insured's transportation-related activities under the Shipping Act of 1984, 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 Insured pursuant to section 13 of the Shipping Act of 1984, 46 U.S. C. app. 1712; provided, however, that Insurer's obligation for a group or association of NVOCCs shall extend only to such damages, reparations or penalties described herein as are not covered by another insurance policy, guaranty or surety bond held by the NVOCC(s) against which a claim or final judgment has been brought and that Insurer's total obligation hereunder shall not exceed Fifty Thousand Dollars (\$50,000.00) per NVOCC, or One Million Dollars (\$1,000,000.00) in aggregate, for a group or association of NVOCCs,

WHEREAS, the Insurer certifies that it has sufficient and acceptable assets located in the United States to cover all liabilities of Insured herein described, this Insurance shall inure to the benefit of any and all persons who have a bona fide claim against the Insured arising from its transportation-related activities under the Shipping Act of 1984, 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 Insured pursuant to section 13 of the Shipping Act of 1984.

The Insurer consents to be sued directly in respect of any bona fide claim owed by Insured for damages, reparations or penalties arising from the transportation-related activities under the Shipping Act of 1984 of Insured in the event that such legal liability has not been discharged by the Insured within 30 days after a claimant has obtained a final judgment (after appeal, if any) against the Insured from a United States Federal or State

Court of competent jurisdiction, the Federal Maritime Commission, or where all parties and claimants mutually consent, from a foreign court, or where such claimant has become entitled to payment of a specified sum by virtue of a compromise settlement agreement made with the Insured, whereby, upon payment of the agreed sum, the Insured is to be fully, irrevocably and unconditionally discharged from all further liability to such claimant; provided, however, that Insurer's total obligation hereunder shall not exceed Fifty Thousand Dollars (\$50,000.00) per NVOCC, or One Million Dollars (\$1,000,000.00) for a group or association of NVOCCs.

The liability of the Insurer shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall aggregate the penalty of the Insurance or Fifty Thousand Dollars (\$50,000.00) per NVOCC, or One Million Dollars (\$1,000,000.00) for a group or association of NVOCCs, whichever comes first, regardless of the financial responsibility or lack thereof, or the solvency or bankruptcy, of Insured.

The insurance evidenced by this undertaking shall be applicable only in relation to incidents occurring on or after the effective date and before the date termination of this undertaking becomes effective. The effective date of this undertaking shall be _____ day of _____, 19 __, and shall continue in effect until discharged or terminated as herein provided. The Insured or the Insurer may at any time terminate the Insurance by filing a notice in writing with 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 Insurer shall not be liable for any transportation-related activities under the Shipping Act of 1984 of the Insured after the expiration of the thirty (30) day period but such termination shall not affect the liability of the Insured and Insurer for such activities occurring prior to the date when said termination becomes effective.

Insurer or Insured shall immediately give notice to the Federal Maritime Commission of all lawsuits filed, judgments rendered, and payments made under the insurance policy.

(Name of Agent) _____ domiciled in the United States, with offices located in the United States, at _____ is hereby

designated as the Insurer's agent for service of process for the purposes of enforcing the Insurance certified to herein.

If more than one insurer joins in executing this document, that action constitutes joint and several liability on the part of the insurers.

The Insurer will promptly notify the Director, Bureau of Tariffs, Certification and Licensing, Federal Maritime Commission, Washington, D.C. 20573, of any claim(s) against the Insurance.

Signed and sealed this _____ day of _____, 19__.

Signature of Official signing on behalf of Insurer

Type Name and Title of signer

This Insurance Form has been filed with the Federal Maritime Commission.

17. Appendix C to Part 583 is added to read as follows:

**APPENDIX C TO PART 583 -- SURETY FOR NON-VESSEL-OPERATING
COMMON CARRIERS (NVOCC) GUARANTY FORM [FMC-68]**

Form FMC-[68]

FEDERAL MARITIME COMMISSION

**GUARANTY IN RESPECT OF NON-VESSEL-OPERATING COMMON CARRIER
LIABILITY FOR DAMAGES, REPARATIONS OR PENALTIES ARISING
FROM TRANSPORTATION-RELATED ACTIVITIES
UNDER THE SHIPPING ACT OF 1984**

1. WHEREAS _____ (Name of applicant) (Hereinafter referred to as the "Applicant") is or may become a Non-Vessel Operating Common Carrier ("NVOCC") subject to the Shipping Act of 1984, 46 U.S.C. app. 1701 *et seq.*, and the rules and regulations of the Federal Maritime Commission ("FMC"), or is or may become a group or association of NVOCCs, and desires to establish its financial responsibility in accordance with section 23 of the 1984 Act, then, provided that the FMC shall have accepted, as sufficient for that purpose, the Applicant's application, supported by evidence on the rating company's letter-head or designated form that the guarantor has a Class VIII or higher rating under the Financial Size Categories of A.M. Best & Company or equivalent, the undersigned Guarantor hereby guarantees to discharge the Applicant's legal liability to indemnify bona fide claimants for damages, reparations or penalties arising from Applicant's transportation-related activities under the Shipping Act of 1984 in the event that such legal liability has not been discharged by the Applicant within 30 days after any such claimant has obtained a final judgment (after appeal, if any) against the Applicant from a United States Federal or State Court of competent jurisdiction, the FMC, or where all parties and claimants mutually consent, from a foreign court, or where such claimant has become entitled to payment of a specified sum by virtue of a compromise settlement agreement made with the Applicant, with the approval of the Guarantor, whereby, upon payment of the agreed sum, the Applicant is to be fully, irrevocably and unconditionally discharged from all further liability to such claimant. In the case of a guaranty covering the liability of a

group or association of NVOCCs, Guarantor's obligation extends only to such damages, reparations or penalties described herein as are not covered by another insurance policy, guaranty or surety bond held by the NVOCC(s) against which a claim or final judgment has been brought.

2. The Guarantor's liability under this Guaranty in respect to any claimant shall not exceed the amount due to such claimant; and the aggregate amount of the Guarantor's liability under this Guaranty shall not exceed Fifty Thousand Dollars (\$50,000.00) per NVOCC, or One Million Dollars (\$1,000,000.00) in aggregate, for each group or association of NVOCCs.

3. The Guarantor's liability under this Guaranty shall attach only in respect of such activities giving rise to a cause of action against the Applicant, in respect of any of its transportation-related activities under the Shipping Act of 1984, occurring after the Guaranty has become effective, and before the expiration date of this Guaranty, which shall be the date 30 days after the date of receipt by FMC of notice in writing that either Applicant or the Guarantor has elected to terminate this Guaranty. The Guarantor and/or Applicant specifically agree to file such written notice of cancellation.

4. Guarantor shall not be liable for payments of any of the damages, reparations or penalties hereinbefore described which arise as the result of any transportation-related activities of Applicant after the cancellation of the Guaranty, as herein provided, but such cancellation shall not affect the liability of the Guarantor for the payment of any such damages, reparations or penalties prior to the date such cancellation becomes effective.

5. Guarantor shall pay, subject up to a limit of Fifty Thousand Dollars (\$50,000.00), directly to a claimant any sum or sums which Guarantor, in good faith, determines that the Applicant has failed to pay and would be held legally liable by reason of Applicant's transportation-related activities, or its legal responsibilities under the Shipping Act of 1984 and the rules and regulations of the Federal Maritime Commission, made by Applicant while this agreement is in effect, regardless of the financial responsibility or lack thereof, or the solvency or bankruptcy, of Applicant.

6. Applicant or Guarantor shall immediately give written notice to the FMC of all lawsuits filed, judgments rendered, and payments made under the Guaranty.

7. Applicant and Guarantor agree to handle the processing and adjudication of claims by claimants under the Guaranty established herein in the United States, unless by mutual consent of all parties and claimants another country is agreed upon. Guarantor agrees to appoint an agent for service of process in the United States.

8. This Guaranty shall be governed by the laws in the State of _____ to the extent not inconsistent with the rules and regulations of the FMC.

9. This Guaranty is effective the ___ day of _____, 19 __, 12:01 a.m., standard time at the address of the Guarantor as stated herein and shall continue in force until terminated as herein provided.

10. The Guarantor hereby designates as the Guarantor's legal agent for service of process domiciled in the United States _____, with offices located in the United States at _____, for the purposes of enforcing the Guaranty described herein.

(Place and Date of Execution)

(Type Name of Guarantor)

(Type Address of Guarantor)

By _____
(Signature and Title)

18. Appendix D to Part 583 is added to read as follows:

**APPENDIX D TO PART 583 -- NON-VESSEL-OPERATING COMMON
CARRIER (NVOCC) GROUP BOND FORM [FMC-69]**

Form FMC - [69]

FEDERAL MARITIME COMMISSION

**FEDERAL MARITIME COMMISSION NON-VESSEL-OPERATING COMMON CARRIER (NVOCC)
GROUP SUPPLEMENTAL COVERAGE BOND FORM (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 a group or association of non-vessel-operating common carriers in the waterborne foreign commerce of the United States and pursuant to section 23 of the Shipping Act of 1984 has elected to file this bond with the Commission;

NOW, THEREFORE, the conditions of this obligation are that the penalty amount of this bond shall be available to pay any judgment against the NVOCCs enumerated in Appendix A of this bond for damages arising from any or all of the identified NVOCCs' transportation-related activities under the Shipping Act of 1984, 46 U.S.C. app. 1701 *et seq.*, 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 pursuant to section 13 of the Shipping Act of 1984, 46 U.S.C. app. 1712 that are not covered by the identified NVOCCs' individual insurance policy(ies), guaranty(ies) or surety bond(s).

This bond shall inure to the benefit of any and all persons who have obtained a judgment for damages against any or all of the NVOCCs identified in Appendix A not covered by said NVOCCs insurance policy(ies), guaranty(ies) or surety bond(s) arising from said NVOCCs transportation-related activities under the Shipping Act of 1984, or order for 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 said NVOCCs 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 Fifty Thousand Dollars (\$50,000.00) per NVOCC identified in Appendix A, or One Million Dollars (\$1,000,000.00) regardless of the number of NVOCCs, 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, DC. 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 NVOCCs identified in Appendix A as covered by 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 transportation-related activity occurring prior to the date when said termination becomes effective.

The Principal will promptly notify the underwriting Surety and the Director, Bureau of Tariffs, Certification and Licensing, Federal Maritime Commission, Washington, DC 20573, of any additions, deletions or changes to the NVOCCs enumerated in Appendix A. In the event of additions to Appendix A, coverage will be effective upon receipt of such notice, in writing, by the Commission at its office in Washington, DC. In the event of deletions to Appendix A, termination of coverage for such NVOCC(s) shall become effective thirty (30) days after receipt of written notice by the Commission. Neither the Principal nor the Surety shall be liable for any transportation-related activities of the NVOCC(s) deleted from Appendix A after the expiration of the thirty (30) day period, but such termination shall not affect the liability of the Principal and Surety for any transportation-related activity of said NVOCC(s) occurring prior to the date when said termination becomes effective.

The underwriting Surety will promptly notify the Director, Bureau of Tariffs, Certification and Licensing, Federal Maritime Commission, Washington, DC 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

Place of Incorporation

Trade Name, If Any

Business Address (Affix Corporate Seal)

By

Title

Principal's Agent for Service of Process
(Required if Principal is not a U.S. Corporation)

Agent's Address


Corporate Surety

Business Address (Affix Corporate Seal)

By

Title

By the Commission.


Ronald D. Murphy
Assistant Secretary

