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Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries; Final and Interim Final Rule

FEDERAL MARITIME COMMISSION

46 CFR Parts 510, 515, and 583

[Docket No. 98–28]

Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries

AGENCY: Federal Maritime Commission.

ACTION: Final rule and interim final rule.

SUMMARY: The Federal Maritime Commission adds new regulations establishing licensing and financial responsibility requirements for ocean transportation intermediaries in accordance with the Shipping Act of 1984, as modified by the Ocean Shipping Reform Act of 1998 and section 424 of the Coast Guard Authorization Act of 1998. As part of this rule, we are adopting as an interim final rule a provision that allows foreign non-vessel-operating common carriers the opportunity to seek a license under the licensing requirements of this part.

DATES: This rule is effective May 1, 1999.

Submit comments on the interim final rule on or before March 23, 1999.

ADDRESS: Address comments concerning the interim final rule to: Bryant L. VanBrakle, Secretary, Federal Maritime Commission, 800 North Capitol Street, N.W., Washington, D.C. 20573–0001.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: On December 22, 1998, the Federal Maritime Commission (''FMC'' or ''Commission'') published a proposed rule to add new regulations at 46 CFR part 515 to implement changes made by the Ocean Shipping Reform Act of 1998 (''OSRA''), Pub. L. 105–258, 112 Stat. 1902, to the Shipping Act of 1984 (''1984 Act''), 46 U.S.C. app. § 1701 *et seq.*, relating to ocean freight forwarders and non-vessel-operating common carriers (''NVOCCs''). 63 FR 70710–70727, December 22, 1998. In addition, the Commission removes existing parts 510 and 583. Finally, under the Commission's restructuring of its rules, the new part 515 will be included in subchapter B of chapter IV, 46 CFR.

The Commission received 28 comments on this proceeding from U.S. Traffic Service; Cargo Brokers International, Inc. (''Cargo Brokers''); Council of European and Japanese National Shipowners'' Associations (''CENSA''); Effective Tariff Management Corporation (''ETM''); EuroAmerica Group Inc.; DITTO; North American Van Lines, Inc. t/a North American International (''NAI''); D.J. Powers Co., Inc.; Ocean World Lines, Inc. (''OWL''); Kemper Insurance Companies; New York/New Jersey Foreign Freight Forwarders and Brokers Association (''NY/NJFFFBA''); American Surety Association and Intercargo Insurance Company (''ASA/Intercargo''); National Industrial Transportation League (''NITL''); Ocean Carrier Working Group Agreement (''OCWG''); International Association of NVOCCs (''IANVOCC''); Airborne Express;[1] National Customs Brokers & Forwarders Association of America, Inc. (''NCBFAA''); Worldlink Logistics, Inc. and Worldlink International, Inc. (collectively ''Worldlink''); Charter Container Line; Yellow Corporation on behalf of its subsidiary YCS; American International Freight Association and Transportation Intermediaries Association (''AIFA/TIA''); Distribution-Publications, Inc. (''DPI''); British Association of Removers; National Association of Transportation Intermediaries (''NATI''); C.A. Shea & Company, Inc.; Glad Freight Int'l Inc.; Direct Container Line, Inc. (''DCL''); and American President Lines, Ltd. and APL Co., Pte Ltd. (''APL'').

Licensing Requirements

OSRA applies the requirements of section 19 of the 1984 Act to all ''ocean transportation intermediaries'' (''OTIs'') in the United States. An OTI means an ocean freight forwarder or an NVOCC as those terms are defined by the 1984 Act. OSRA requires that all OTIs in the United States be licensed by the Commission. The legislative history of OSRA directs the Commission to determine ''when foreign-based entities conducting business in the United States are to be considered persons in the United States'' for purposes of the licensing requirements of section 19 of the 1984 Act. S. Rep. No. 105–61, 105th Cong., 1st Sess., at 31 (1997) (''Report'').

The proposed rule offered for comment two alternative definitions of ''in the United States'' for purposes of the licensing requirements of this part. The Commission received 17 comments addressing this issue. D.J. Powers, Yellow, NY/NJFFFBA, NCBFAA, and OWL support the first option presented by the Commission, which would require that foreign-based OTIs use only licensed OTIs in the United States. D.J. Powers notes that it seldom encounters an agent who ''simply processes bills of lading'' and does not perform at least some sales activities if not more. Yellow maintains that this alternative is the most fair and equitable, and it will level the playing field and increase competition, which is ''unquestionably the primary goal'' of OSRA. OWL suggests licensing all OTIs and then equalizing the bond amounts of foreign and U.S. entities. NY/NJFFFBA states that under this alternative, foreign-based OTIs should not have to secure a higher amount of financial responsibility because their agents will also be licensed and bonded and further that no data support the higher amounts of financial responsibility. NCBFAA maintains that this approach is too narrow but at least gives recognition to the ''in the United States'' language.

Charter, DPI, NITL, AIFA/TIA, NATI, and APL support the second, less restrictive definition of ''in the United States.'' Charter asserts that it would be logical to draw the distinction in the licensing requirement based on physical presence in the United States since Congress contemplated that some OTIs would not be licensed. DPI favors this approach because the first option would be too expensive and many foreign OTIs use agents in the United States who are not OTIs themselves. NITL supports this alternative because it appears to establish a more reasonable boundary to the scope of the licensing requirement and would be more consistent with the deregulatory purposes of OSRA. Similarly, AIFA/TIA believes that this option is more in line with Congressional intent, but supports § 515.21(a)(4), which holds foreign-based OTIs responsible for the acts or omissions of their agents. In contrast, DPI does not support § 515.21(a)(4) because it imposes too much regulation over NVOCCs operating outside the United States. NATI maintains that the first approach is restrictive and would unnecessarily prohibit existing business arrangements from continuing. APL also suggests that the Commission give foreign OTIs with minimal contacts in the United States the option of becoming licensed, so that they can perform their own services in the United States and reduce costs and increase quality control. In addition, APL asserts that some foreign OTIs may find the higher amount of financial

[1] Airborne Express adopts in full the comments of the IANVOCC and, therefore, will not be referenced further.

responsibility too high and would rather be licensed and furnish the lesser financial responsibility required of those OTIs in the United States.

CENSA and ASA/Intercargo support either option. In the event the Commission adopts option two, ASA/Intercargo suggests that the Commission provide guidance to the public as to what constitutes ''minimal'' services as opposed to a ''full spectrum'' of OTI services. The Commission is reluctant to set forth a rigid standard for when an entity is operating as a freight forwarder or an NVOCC, particularly in light of the innovations and technological advances made in the industry. Therefore, we refer to our discussion of this issue in the Notice of Proposed Rulemaking, 63 Fed. Reg. at 70710 (1998), especially pertaining to *In Re: The Impact of Modern Technology on the Customs and Practices of the Freight Forwarding Industry—Petition for Rulemaking: Order Denying Petition for Rulemaking or Declaratory Order,* 28 S.R.R. 418 (1998), and *Activities, Filing Practices and Carrier Status of Containerships, Inc.,* 9 F.M.C. 56 (1965).

DCL urges the Commission to reconsider the third alternative which it rejected at its meeting of December 9, 1998, which would have licensed any OTI providing services to or from the United States through an agent physically present in the United States. DCL believes that all NVOCCs, whether foreign or domestic, should be licensed, and maintains that nothing in the legislative history precludes this approach. Rather, DCL asserts that the Commission's overvaluation of the significance of the ''in the United States'' limitation should give way to the interpretation that allows the greatest fairness to those entities competing with unlicensed NVOCCs. In addition, DCL argues, this approach would strengthen the Commission's enforcement capabilities with respect to foreign entities who elude Commission regulation. Similarly, Glad Freight supports licensing foreign freight forwarders to lead to better enforcement.

IANVOCC and Worldlink also support the definition the Commission rejected, maintaining that Congress intended that only ''certain'' foreign OTIs would not be licensed, and therefore, some foreign OTIs would be licensed. Congress could have limited the licensing requirements as it has for freight forwarders, to NVOCCs engaged only in the U.S. export trade, but did not; thus, IANVOCC and Worldlink argue that Congress intended the ''in the United States'' phrase to encompass foreign-based NVOCCs that participate in the U.S. foreign commerce. Moreover, they assert that Congress gave the Commission broad discretion to rely on its experience and expertise to determine what it means to be ''in the United States'' in regulating the NVOCC industry. Both suggest a modified definition of ''in the United States'' combining both alternatives. Worldlink submits that without a broad definition of ''in the United States,'' ''unscrupulous, unlicensed foreign NVOCCs could continually disrupt shipping markets by engaging in misdescription or rebate schemes'' and, therefore, proposes the following definition to provide the broadest possible licensing coverage:

> For purposes of this part, a person is considered to be ''in the United States'' if such person is incorporated in, resident in, or established under the laws of the United States, or otherwise maintains a physical presence in the United States. Such indicia of physical presence may include, but are not limited to, whether the person holds a taxpayer identification number, *holds or is legally required to obtain* a state or local business license, or maintains a mailing address in the United States. Only persons licensed under this part may furnish or contract to furnish ocean transportation intermediary services in the United States on behalf of an unlicensed ocean transportation intermediary.

IANVOCC believes that the licensing requirement should be broad enough to cover all NVOCCs, whether based in the United States or foreign countries, that provide a significant amount of ocean transportation services in the United States, and it proposes the same definition suggested by Worldlink. IANVOCC also suggests defining ''in the United States'' to coincide with the jurisdictional reach of United States courts as follows:

> For purposes of this part, a person is considered to be ''in the United States'' if such person is resident in or incorporated or established under the laws of the United States or would be subject to jurisdiction in the courts of the United States for any of its ocean transportation intermediary activities in United States commerce.

In addition, IANVOCC notes that if the Commission is concerned about unfairly reaching certain foreign-based NVOCCs who have only minimal contacts in the United States, it could limit the definition in the following manner:

> Provided that any person handling only occasional or an insubstantial volume of shipments in United States trades as an ocean transportation intermediary shall not be considered to be ''in the United States'' for licensing purposes.

EuroAmerica, DITTO, and ETM object to the requirement that NVOCCs be licensed at all, because it represents an increased regulatory burden. However, the requirement that OTIs be licensed is statutorily imposed and cannot be waived by the Commission. In a similar vein, NATI objects to the definition of ''shipper'' in proposed § 515.2(s) and prefers the previous definition. However, this definition is statutory and cannot be changed. This section has been redesignated as § 515.2(t).

The Commission adopts the first proposed definition of what is considered to be ''in the United States'' for the licensing requirements of this part. Thus, after the first two sentences, § 515.3 is revised to read:

> For purposes of this part, a person is considered to be ''in the United States'' if such person is resident in, or incorporated or established under, the laws of the United States. Only persons licensed under this part may furnish or contract to furnish ocean transportation intermediary services in the United States on behalf of an unlicensed ocean transportation intermediary.

The Commission agrees with the comments that this approach is the most fair and equitable. We believe it is a good step towards leveling the playing field between OTIs in the United States who are within the Commission's jurisdictional reach and those who are outside of that reach. Moreover, this definition will increase competition, consistent with the intent of OSRA.

The Commission believes that this alternative provides foreign NVOCCs greater flexibility by presenting them with two options. First, a foreign NVOCC could use an independently licensed agent in the United States, in which event the agent would establish its own financial responsibility and the foreign NVOCC would be required to secure the higher amount of financial responsibility applicable to unlicensed OTIs pursuant to § 515.21(a)(3). Alternatively, a foreign NVOCC could choose to set up its operations in this country for licensing purposes in accordance with § 515.3 and establish financial responsibility applicable to OTIs in the United States. This alternative accommodates the suggestion of some commenters that foreign NVOCCs be permitted to seek to become licensed under this part.

The Commission intends that the appropriate instrument of financial responsibility is available to pay off on claims or judgments against an OTI. Under current practice, the instrument of financial responsibility is obtained in the name of the entity issuing the bill of lading and publishing the tariff. Thus, the licensee must be the entity on the bill of lading, tariff and instrument of financial responsibility in order to ensure that the financial responsibility

covers the shipments handled on the bill of lading. For example, ''ABC Freight Hong Kong'' handles shipments from the Far East inbound to the United States, and wants to obtain a license, and thus establish a lower amount of financial responsibility. Therefore, it sets up an unincorporated office that is resident in the United States (*see* § 515.3). We would not consider this unincorporated office to be a separate branch office subject to additional licensing and financial responsibility requirements of this part. However, in the event that the licensee seeks to establish other branch offices in addition to its primary United States office, those other offices would be subject to the licensing and financial responsibility requirements applicable to separately incorporated and unincorporated branch offices.

We have limited the option of a foreign entity becoming licensed under this part to NVOCCs, and not freight forwarders, because an ''ocean freight forwarder'' is defined in § 515.2(o)(1) as a person who dispatches shipments ''from the United States.'' Moreover, a freight forwarder has a fiduciary relationship with its customer, and a foreign freight forwarder, by its very nature, would be performing services for its customers in a foreign country beyond the reach of the Commission. Because this alternative to allow foreign NVOCCs to seek to become licensed under this part was not included in the proposed rule, interested parties will have the opportunity to comment on it, although it will go into effect as an interim final rule.

Section 515.11 provides that to be eligible for an OTI license, an applicant must possess the necessary experience, that is, that its qualifying individual has three years' experience in providing OTI activities in the United States and the necessary character to render ocean transportation intermediary services. This provision had been applicable only to freight forwarders under 46 CFR § 510.11. To effectuate the alternative outlined above to allow foreign NVOCCs the opportunity to become licensed under this part, we have amended § 515.11(a)(1) by adding the following provision:

> Foreign NVOCCs seeking to be licensed under this part must demonstrate that the qualifying individual has a minimum 3 years' experience in ocean transportation intermediary activities and the necessary character to render ocean transportation intermediary services.

This revision removes the ''in the United States'' restriction on the experience requirement, which we believe will better assist those foreign NVOCCs who seek to obtain a license under this part. We also seek comment on this modification because it was not included in the proposed rule. However, it will go into effect as an interim final rule.

NCBFAA supports applying the licensing requirements in § 515.11 to all OTIs, including those only operating as NVOCCs. NCBFAA notes that this requirement is ''one of the Commission's time proven methods for making sure that entities providing OTI services are qualified by character and experience to conduct business in the United States.'' NCBFAA further requests that the Commission specifically affirm the principle that a qualifying individual is permitted to be a corporate officer of more than a single company. Proposed § 515.11(c), which was modeled after 46 CFR § 510.11(c), provides that ''the qualifying individual of one active licensee shall not also be designated contemporaneously as the qualifying individual of an applicant for another ocean transportation intermediary license.'' Thus, as proposed, an individual could be a qualifying individual for an unincorporated, and therefore unlicensed, branch office, but separate licensees would not be permitted to have the same qualifying individual simultaneously. The Commission recognizes NCBFAA's position that many OTIs are relatively small companies which provide forwarding and NVOCC services through separate corporate entities, and affirms that a person may be a qualifying individual for more than one company. To that end, we have added in the final rule a qualifying phrase at the end of the above referenced sentence of § 515.11(c) that states ''except for a separately incorporated branch office.'' Thus, separately incorporated branch offices will be permitted to have the same qualifying individuals for licensing requirements.

NCBFAA, OWL and NY/NJFFFBA urge that existing licensees be able to keep their current license numbers, both because of the additional cost involved in printing new stationery with a new number, as well as because many forwarders are justifiably proud of their long period of service in the industry and of being amongst the Commission's first licensees. The Commission recognizes these reasons and will ensure that existing licensees keep their current license numbers. The Commission will issue new licenses which indicate whether an entity is operating as a freight forwarder, as an NVOCC, or both, as requested by several commenters, and will maintain the current license numbers for existing licensees. Because the Commission will be inundated with license applications on May 1, 1999, all licensees will have 90 days from the date of receipt of the new license to comply with the requirements of § 515.31(b) of this part, if applicable. Similarly, existing freight forwarders will not be required to pay an additional license fee, a concern raised by Glad Freight and NCBFAA.

U.S. Traffic Service argues that OTIs who perform services exclusively for affiliated carriers should not have to be licensed and instead proposes that these entities establish financial responsibility similar to unincorporated branch offices. Worldlink also opposes § 515.3 (existing 46 CFR § 510.3), which requires that separately incorporated branch offices be licensed, arguing that it assumes that the branch offices will be outside of the control of the licensee. However, the Commission declines to adopt these suggestions. As many of the commenters have noted, and as we considered with reference to the qualifying individual issue discussed above, many entities choose to become separately incorporated for a variety of business or tax reasons. If separate incorporations were allowed to post financial responsibility at a lower amount in conjunction with another entity, the separate incorporation would, in effect, be limiting its liability to $10,000. It would be more difficult for a claimant to pierce the corporate veil and attempt to go after the assets of the ''parent.'' This problem does not occur with the unincorporated branch offices, because in that scenario, the unincorporated branch office is, by definition, established by, maintained by, or under the control of the licensee.

The Commission proposed that any NVOCC with a tariff and evidence of its financial responsibility in effect as of the date of publication of the proposed rule in the **Federal Register**, December 22, 1998, would be permitted to continue operating without the requisite three years' experience and character requirement. DITTO and DPI criticize this date as being unfair to those NVOCCs who had complied with Commission regulations for becoming an NVOCC, but had not yet completed the process. DPI provided a list of entities who were either waiting the thirty days for their tariffs to become effective or had filed evidence of financial responsibility with the Commission but had not yet filed a tariff. DITTO and DPI suggested cut-off dates of January 30 and February 7, 1999, respectively. The Commission originally proposed the December 22, 1998 date because it seemed the least

arbitrary of any given date and had a nexus to the rulemaking process. However, in view of the comments, any NVOCC with a tariff and financial responsibility in effect as of April 30, 1999 (the final day prior to the effectiveness of the OSRA amendments) will be permitted to continue operating without the requisite three years' experience and character requirement; provided, however, that no individual may act as a qualifying individual for another company without the necessary experience. In addition, all NVOCCs must submit applications for a license by May 1, 1999.

Exemption From Licensing Requirement

The Commission proposed to exempt from its licensing requirements any person which exclusively transports used household goods and personal effects for the account of the Department of Defense (''DOD'') or under the International Household Goods Program administered by the General Services Administration (''GSA''). No comments were received on this proposal, and accordingly, § 515.4(e) will go into effect as proposed.

Financial Responsibility Requirements

The Commission proposed to define transportation-related activities, proposed § 515.2(v), to include all of the freight forwarding activities in proposed § 515.2(i), as well as other enumerated activities, including some specified in the Report. Kemper, ASA/Intercargo, APL, D.J. Powers, Charter, Yellow, DPI, NY/NJFFFBA, IANVOCC, NCBFAA, NATI, Worldlink and OWL commented on the proposed definition.

At the outset, many commenters complained that the definition blurs the distinction between freight forwarders and NVOCCs. NY/NJFFFBA notes that by combining freight forwarder services with NVOCC services, the Commission has ignored Congressional intent to keep these entities separate. To that end, OWL proposes that the Commission promulgate a new section for ''NVOCC services'' that parallels the ''freight forwarder services'' section.

The majority of commenters complain that the proposed definition was a list of damages rather than activities engaged in by OTIs. In particular, the commenters object to including loss or conversion of cargo (even though that item was in the Report), cargo damage and delay of shipment in any definition. Kemper and ASA/Intercargo point out that these items conflict with the Carriage of Goods by Sea Act (''COGSA''), 46 U.S.C. app. §§ 1300-1315, and assert that if the Commission adopts the definition as proposed, it must clarify that the definition does not deprive OTIs and financial responsibility providers of their right to assert defenses and limitations of liability consistent with COGSA and common law.

ASA/Intercargo states that holding NVOCCs liable for ''breach of fiduciary responsibility'' imputes to NVOCCs a duty where one does not exist. Moreover, ASA/Intercargo, NY/NJFFFBA and OWL assert that ''service contract obligations of an NVOCC, as a shipper'' must be removed from the list. Although the Report specifies that a bond or other instrument of financial responsibility covers an NVOCC's service contract obligations, the commenters contend that at the time the Report was drafted NVOCCs would have been allowed to enter service contracts as carriers, and, therefore, the Report has been superceded and that language is no longer binding.

The commenters offer varied suggestions as to what would be a viable definition of ''transportation-related activities,'' ranging from a minimalist approach to an exclusive, limited list. NATI proposes that the definition be removed entirely and instead maintains that what constitutes transportation-related activities should be determined on a case-by-case basis. IANVOCC asserts that the proposed definition is both too narrow, in that it tries to capture each potential claimant, and too broad, by defining causes of action which may not exist under statutory or common law. Instead, IANVOCC recommends that the Commission adopt a more flexible approach and focus on the necessary and customary activities performed by NVOCCs in the course of providing transportation services to their customers. Such an approach, IANVOCC avers, would better accommodate the evolving nature of NVOCC activities in the future.

Yellow and Worldlink also suggest a definition which is broad enough to cover all activities performed by OTIs, but which cannot be construed to cover matters beyond the OTI's control:

> Any activity performed by an ocean transportation intermediary that is necessary or customary in the provision of transportation services to customers.

Similarly, NCBFAA favors a general statement that informs parties that the instrument of financial responsibility is available to satisfy judgments for a broad range of transportation-related liabilities, not just those resulting from a violation of the Shipping Act. In the alternative, NCBFAA suggests a caveat be added to the proposed list indicating that the list is intended to limit future disputes between claimants and financial responsibility providers but is not a finding that OTIs are obligated to perform the listed services.

Charter suggests the following items should be included in a definition: leasing containers, contracting for space on vessels, entering into arrangements with origin or destination agents, and engaging truckers, consolidators or warehouses. APL states that ''payment of ocean freight charges'' should be removed from the proposed definition because it is too restrictive and does not recognize the range of services that OTIs provide, and should be replaced with ''payment of port-to-port or multimodal transportation charges.''

On the other end of the spectrum, D.J. Powers wants a limited definition of what constitutes ''transportation-related activities.'' Similarly, Kemper argues that the Commission was directed to issue a definition to ''restrict coverage under the bond'' and fails to do so with the qualifying statement that the definition ''includes but is not limited to'' the enumerated activities. As such, Kemper offers the following definition of NVOCC services:

> *Non-vessel-operating common carrier services* refers to the provision of carriage by water of cargo between the United States and a foreign country for compensation without operating the vessels by which the transportation is provided, which may include but are not limited to the following:
> (1) the purchase of transportation services from a VOCC and offering such services for resale to the NVOCC's shipper-customers;
> (2) the remitting of lawful compensation to ocean freight forwarders;
> (3) the arrangement of inland transportation and the payment of inland freight charges for through transportation movements as defined by the Act;
> (4) the assumption of responsibility for the safe transportation of cargo shipments by reasonable dispatch;
> (5) the issuance of bills of lading or equivalent documents; and/or
> (6) the entering of affreightment agreements with underlying shippers.

ASA/Intercargo proposes a similar definition of non-vessel-operating common carrier services:

> (1) assuming responsibility for the safe transportation of cargo shipments by reasonable dispatch;
> (2) purchasing transportation services from a VOCC and offering such services for resale to other persons;
> (3) entering into affreightment agreements with underlying shippers;
> (4) issuing bills of lading or equivalent documents;
> (5) arranging for inland transportation and paying for inland freight charges on through transportation movements as defined by the Act; or

(6) paying lawful compensation to ocean freight forwarders.

Both Kemper and ASA/Intercargo suggest that the Commission adopt the proposed definition of NVOCC services, or a modified version, and then define transportation-related activities as including, but not limited to, the freight forwarding services in § 515.2(i), and limited to the enumerated NVOCC services.

ASA/Intercargo, Kemper and D.J. Powers are the only commenters that advocate a restrictive definition. Indeed, Kemper argues that the Commission ''was directed to issue a definition to restrict coverage under the bond to the transportation-related activities arising out of an OTI's responsibility as an ocean carrier; namely providing ocean transportation services.'' Further, Kemper asserts that ''[b]y not including an exclusive list of ''transportation-related activities'' that are covered by the surety bond, the very point of having a definition of ''transportation-related activities'' is moot and ineffective in avoiding unnecessary litigation over what is ''transportation-related.'''

The Commission finds the comments very helpful. The Commission is aware that although they are subsumed under the umbrella of ''ocean transportation intermediaries,'' the individual definitions of ''ocean freight forwarder'' and ''NVOCC,'' and in fact the distinctive activities performed by the individual entities, remain intact from the 1984 Act. Therefore, the Commission adopts a definition of ''NVOCC services'' and a revised definition of ''transportation-related activities'' culled from the commenters' suggestions.

The definition of non-vessel-operating common carrier services, at § 515.2(l), will be as follows:

Non-vessel-operating common carrier services refers to the provision of transportation by water of cargo between the United States and a foreign country for compensation without operating the vessels by which the transportation is provided, and may include, but are not limited to, the following:

(1) Purchasing transportation services from a VOCC and offering such services for resale to other persons;

(2) Payment of port-to-port or multimodal transportation charges;

(3) Entering into affreightment agreements with underlying shippers;

(4) Issuing bills of lading or equivalent documents;

(5) Arranging for inland transportation and paying for inland freight charges on through transportation movements;

(6) Paying lawful compensation to ocean freight forwarders;

(7) Leasing containers; or

(8) Entering into arrangements with origin or destination agents.

The definition of transportation-related activities, redesignated § 515.2(w), will be revised to read as follows:

Transportation-related activities which are covered by the financial responsibility obtained pursuant to this part include, to the extent involved in the foreign commerce of the United States, any activity performed by an ocean transportation intermediary that is necessary or customary in the provision of transportation services to a customer, but are not limited to the following:

(1) For an ocean transportation intermediary operating as a freight forwarder, the freight forwarding services enumerated in § 515.2(i), and

(2) For an ocean transportation intermediary operating as a non-vessel-operating common carrier, the non-vessel-operating common carrier services enumerated in § 515.2(l).

The Commission does not, however, agree that it was directed to formulate a restrictive definition. Rather, the Report simply directs the Commission to define transportation-related activities and gives as examples a few items that are covered by the financial responsibility, including liabilities from service contract obligations, judgments and claims resulting from loss or conversion of cargo, negligence or complicity of the bonded entity, and nonperformance of services. In particular, we do not adopt the position advocated by ASA/Intercargo, NY/NJFFFBA, and OWL that ''service contract obligations of an NVOCC, as a shipper'' should not be covered by an OTI's financial responsibility. In fact, courts have recognized that damages arising from service contract obligations are covered by an OTI's financial responsibility and Congress did not intend to change this. *See P & O Containers* v. *American Motorists Ins. Co.*, No. CV–96–5828, 1997 U.S. Dist. LEXIS 5522 (C.D. Cal. April 15, 1997), and *P & O Containers, Ltd.* v. *American Motorists Ins. Co.*, 96 Civ. 8244(JFK), 1998 WL 146229 (S.D.N.Y. March 25, 1998). Moreover, the revised definitions should satisfy the commenters' concerns that the proposed definition conflicted with COGSA.

The point of defining what is considered ''transportation-related activities'' is to ensure that the instrument of financial responsibility is used to pay for claims arising out of an OTI's transportation-related activities. To that end, in the supplementary information to the Notice of Proposed Rulemaking in this proceeding, the Commission reaffirmed this principle stating that ''someone who operates as an OTI also provides non-OTI services, those services would not be covered by the bond, surety or other insurance.'' 63 FR at 70711. Further, we stated that prior to paying a judgment, ''the financial responsibility provider may inquire into the subject matter of the judgment to ensure that it is for damages covered by the instrument of financial responsibility—i.e. that it arises from transportation-related activities.'' *Id.* We embrace the approach advocated by IANVOCC that too narrow a definition ''does not allow for future growth and dynamism of the NVOCC industry * * * the activities they perform as NVOCCs will evolve, which could lead to new types of claims which should be, but are not, covered by this [proposed] definition.''

In a similar vein, ASA/Intercargo objects to the Commission's use of the phrase ''transportation-related liabilities'' in §§ 515.22(b) and (c). In view of the changes to the definition of ''transportation-related activities,'' we amend the language in §§ 515.22(b) and (c) to read ''damages arising from transportation-related activities.''

Claims Against an OTI's Financial Responsibility

The Commission has also proposed, at § 515.23, new procedures for pursuing claims against the bond, insurance or other surety of an OTI. Any party may seek an order for reparation at the Commission pursuant to sections 11 or 14 of the 1984 Act, in which event the bond, insurance or other surety shall be available to pay. Alternatively, where a claimant seeks relief in an appropriate court, the claimant shall attempt to resolve its claim with the financial responsibility provider prior to seeking payment on any judgment it has obtained or will obtain.

The bulk of the comments received on this issue are from ASA/Intercargo and Kemper. At the outset, ASA/Intercargo asserts that the supplementary information pertaining to the financial responsibility of OTIs is incomplete and inconsistent with the Congressional intent of OSRA because the Senate Report on which it relies was written prior to the final version of OSRA. The supplementary information states that the financial responsibility shall be available to pay for damages suffered by ocean common carriers, shippers and others injured by the OTI. ASA/Intercargo wants the Commission to qualify ''others'' by adding ''who employed the services of the OTI.'' Leaving ''others'' undefined, ASA/Intercargo maintains, would subject the surety to any claim, whether or not that party had privity of contract or any

relationship to the cargo movement. The Commission declines to limit ''others'' as sought. The language about which ASA/Intercargo complains is taken directly from the Report and we find no support for such a limitation. Rather, we note that during the legislative process, the objective as to what is covered by the financial responsibility obtained under this part has remained consistent.

Section 515.23(b) sets forth an alternative claim procedure which provides that upon a claimant's notification of its claim to the financial responsibility provider, the financial responsibility provider and claimant can settle the claim with the OTI's consent, or, if the OTI fails to respond to the notice of the claim within 45 days, the financial responsibility provider and claimant can settle the claim on their own. If, however, the parties fail to reach agreement within ninety (90) days, then the bond, insurance or other surety shall be available to pay any judgment for damages to the extent they arise from the transportation-related activities of the OTI.

OCWG argues that the Commission has proposed procedural requirements which unduly interfere with the ability of carriers and others to recover damages they have incurred. OCWG asserts that there is nothing in OSRA or its legislative history which requires a party to take additional steps prior to executing a judgement it has lawfully obtained, but rather avers that Congress was concerned that sureties be given adequate notice before they were required to pay on a claim against an OTI. Indeed, by interfering with a final judgment, proposed § 515.23(b) is said to be unconstitutional under the ''vested rights doctrine.'' OCWG proposes to revise § 515.23(b) as follows:

> If a party does not file a complaint with the Commission pursuant to section 11 of the Act, but otherwise seeks to pursue a claim against an ocean transportation intermediary bond, insurance or other surety for damages arising from its transportation related activities, it may commence suit before a court of competent jurisdiction, naming as parties both the financial responsibility provider and the ocean transportation intermediary.

In contrast, NCBFAA believes § 515.23 is a positive change, but recommends that regardless of whether a party intends to pursue a claim with the Commission or a court of law, it should first be required to make a demand directly with the OTI. Similarly, NATI supports the possibility of a settlement between the claimant and the financial responsibility provider, but wants to ensure that valid notification is established to prevent any abuse where notice is not received by the surety. DITTO complains that 90 days is an insufficient amount of time in which to properly research and process a claim.

Similarly, ASA/Intercargo and Kemper contend that while the Commission may not have the ability to restrict a claimant's judicial access, it has the duty and the authority to require a claimant to notify both the OTI and the surety upon the filing of a complaint against an OTI. ASA/Intercargo insists that the rules must provide for timely notice of claims, timely submission of information necessary to evaluate a claim, and notice of any request to enter a judgment. Kemper argues that a claimant must first seek to settle a *claim* and objects to the proviso in § 515.23(b) that prior to seeking payment on a *judgment* the claimant shall seek to resolve its claim with the financial responsibility provider. Kemper argues that this language negates the intent of OSRA, which Kemper asserts is to require that the parties seek to settle a claim before obtaining a judgment.

The Commission does not have the authority to limit or prevent a claimant from seeking judicial access prior to pursuing a settlement with the financial responsibility provider, particularly where such restrictions could prevent claimants from filing their actions within a statute of limitations. However, under the express language of section 19(b)(2)(C) of OSRA, the Commission may require the claimant to seek a settlement with the financial responsibility provider prior to enforcing any judgment it has obtained or will obtain against the OTI; the statute provides that the financial responsibility provider has a ''reasonable period of time'' within which to resolve the claim.

Moreover, even if the Commission were to require in its rules that a claimant make a demand on the OTI and financial responsibility provider prior to seeking relief in an appropriate court, or notify the financial responsibility provider when such a lawsuit is initiated, the Commission could not provide for any recourse if the claimant failed to comply. The Commission cannot nullify a valid court judgment. Moreover, imposing such an onerous burden on claimants would defeat the purpose of the legislation. As the sureties frequently point out, the purpose of establishing an alternative claim procedure is to protect the interests of the claimants, OTIs and the financial responsibility providers; this objective would not be served by removing the availability of the financial responsibility from claimants who are unfamiliar with the instant Commission regulations at the time they seek judicial recourse. The approach we have proposed accomplishes this goal in a balanced manner by ensuring that financial responsibility providers have a reasonable period of time within which to engage in a limited review of a judgment, regardless of when it was obtained, before being obligated to make payment. Moreover, this procedure does not add extra steps as OCWG argues, but rather just provides the financial responsibility provider sufficient time within which to review a judgment for scope and finality.

ASA/Intercargo and Kemper argue that section 19(b)(2)(C) of OSRA was intended to protect sureties against improperly entered default judgments. They also argue that Congress did not restrict the sureties' ability to contest default judgments and assert that ''as a matter of suretyship law, sureties have the right to deny claims based on judgments which are void, to review a claim for fraud or collusion, and in the case of default judgments, to inquire into the merits of the judgment to determine whether it was proper.'' Further, they state that making a default judgment absolutely binding on a surety represents a change in existing suretyship law. As a consequence, ASA/Intercargo wants an express recognition in the rules that the sureties retain their right to refuse to pay an invalid judgment, suggesting a modification which indicates the Commission is not restricting a surety's common law rights to review, inquire into the merits, or deny coverage of a claim. Alternatively, Kemper suggests a modification to the rule requiring sureties to pay only if a claim was contested and its validity determined on the merits.

The Commission declines to adopt these suggestions, as to do so would vitiate the intent of OSRA. The legislation is not limited to providing relief to claimants only where judgments are contested; many claims against foreign, defunct, or unscrupulous NVOCCs are in fact uncontested. We expect that financial responsibility providers will take these factors into account during the underwriting process. Similarly, OSRA's reliance on court judgments as determinative does not envision that a financial responsibility provider's obligations may be averted should the financial responsibility provider decide to proclaim a judgment invalid. OSRA's only caveat on the financial responsibility provider's requirement to pay is in section 19(b)(3)—that the

damages claimed arise from the OTI's transportation-related activities.

Moreover, § 67(c) of the Restatement (Third) of Suretyship and Guaranty, upon which ASA/Intercargo and Kemper rely, is not definitive as to this issue. Although the comment to that section states

> the probative significance of a judgment obtained by confession, default, or the like is much less than that of a judgment after trial on the merits. * * * Thus, a judgment against the principal obligor obtained by default, confession or the like does not create a presumption in favor of the principal obligor's liability in the subsequent action by the obligee against the secondary obligor; rather such a judgment is evidence only of its rendition,

Restatement (Third) of Suretyship and Guaranty § 67, cmt. c (1996), the analysis further explains that

> Cases vary widely on this point. Some hold that a default judgment is conclusive as to the liability of the secondary obligor. (citation omitted). Others hold that a default judgment is prima facie evidence of the secondary obligor's liability. (citation omitted). Still others hold a default judgment is inadmissible against the secondary obligor. (citation omitted).

Restatement (Third) of Suretyship and Guaranty § 67, cmt. c, reporter's note c (1996). Because suretyship law does not guarantee to sureties the right to deny or limit liability in cases of a default judgment, we decline to adopt such an approach here as advocated by the sureties, especially where the statute suggests no such approach.

Proposed § 515.23(b) provides that the financial responsibility provider shall pay a judgment for damages obtained in an appropriate court ordinarily within ten (10) days. Both ASA/Intercargo and Kemper want this rule to clearly state that payment need not occur until after a final judgment. In addition, both commenters assert that 10 days is insufficient time to review a judgment and suggest thirty (30) days as more appropriate. Moreover, both object to the provision that payment shall be made ''without inquiring into the validity of the claim.'' Both argue that the Report language stating ''the surety company would be expected to pay the judgment from the bond funds, without requiring further evidence of bills of lading or other documentation going to the validity, rather than the subject matter of the claim,'' is no longer valid because OSRA was amended to account for the sureties' interests after the Report was written, and thus this language violates the mandate of section 19(b)(2)(C). Further, they contend that this language does not recognize the sureties' right to refuse payment for void judgments. In particular, both argue that the Commission cannot require a surety to seek to vacate a void judgment in order to deny liability under its bond. ASA/Intercargo points out that sureties are not ordinarily parties to cases against OTIs and do not necessarily have the right to seek to vacate a judgment in such an action.

Section 515.23(b) provides 90 days during which time the financial responsibility provider may review a claim and attempt to reach a settlement with the claimant, regardless of whether the claimant has sought or will seek a court judgment; this procedure applies in either event. (*See* OSRA sections 19(b)(2)(B) and (C)). Payment of damages is due after 90 days. As ASA/Intercargo's suggestion in this regard is well taken, the Commission has amended this provision to clarify that payment under section 19(b)(2)(C) need not be made until after a judgment is final. Under the proposed procedure, the financial responsibility provider would have at least one hundred (100) days before it is required to pay any judgment or claim. We believe that ordinarily this would be sufficient time to research, review and process a claim. We recognize, however, that occasions may arise in which the 90-day negotiation period does not produce a settlement, and a judgment obtained after that period may raise issues not considered upon review of the original claim. Hence, the Commission amends the proposed rule to provide that payment must be made within 30, rather that 10, days of receipt of a final judgment.

Moreover, § 515.23 provides that *ordinarily*, the financial responsibility provider shall pay the judgment within 10 (now 30) days. While the Commission would intend to report occasions of delinquent or non-complying surety companies to the United States Department of the Treasury for appropriate action, it recognizes that on occasion, extraordinary circumstances may exist in which the good faith processing of a judgment may take more than the prescribed period. To that end, the Commission had provided ample periods of time in which the financial responsibility providers may review their rights and options regarding the judgment and take such action as may be available to them. We recognize that these options may vary by jurisdiction, and the Commission does not endeavor to assess the likelihood that a financial responsibility provider will successfully vacate (or effect a vacation through an OTI) a judgment where there are issues of service or other procedural or substantive questions. The Commission's role is simply to provide a procedure that incorporates adequate time for the providers to take such action as is available to them. Where, however, a final judgment stands, the statute clearly provides that the bond, insurance or other surety ''*shall* be available to pay *any* judgment for damages'' against an OTI arising from its transportation-related activities (section 19(b)(2)(C))(emphasis added), and that the judgment ''may not be enforced except to the extent that the damages claimed arise from'' these activities. (Section 19(b)(3)).

Financial responsibility amounts

In proposed § 515.21, the Commission proposes to establish a range of financial responsibility requirements commensurate with the scope of the activities conducted by the different OTIs and the past fitness of OTIs in the performance of intermediary services. Report at 31–32. Thus, OTIs operating as freight forwarders in the United States would be required to establish financial responsibility in the amount of $50,000; OTIs operating as NVOCCs in the United States in the amount of $75,000; and OTIs operating as both freight forwarders and NVOCCs in the United States would be required to establish financial responsibility in the amount of $100,000. Unlicensed foreign-based entities that provide OTI services for transportation to or from the United States, but are not operating ''in the United States'' as defined in proposed § 515.3, would be required to establish financial responsibility in the amount of $150,000. Groups or associations of OTIs would be able to provide financial responsibility for their members with the maximum aggregate amount of $3,000,000.

At the outset, the Commission received comments relating to its proposal that an OTI operating as both freight forwarder and an NVOCC in the United States could obtain a single instrument of financial responsibility in the amount of $100,000. AIFA/TIA points out that this proposal unfairly favors those entities who have combined their freight forwarder and NVOCC operations into a single company for no apparent reason. ASA/Intercargo and Kemper submit that while this type of financial responsibility may reduce the premium for an OTI, it actually offers no other benefits, but in fact, would be risky for the OTI. For example, ASA/Intercargo points out that if an NVOCC's coverage were cancelled, this would also result in cancellation of the freight forwarder portion of the coverage. In addition,

ASA/Intercargo contends, without expressly defined limits of coverage, the Commission would be increasing the penalty amount to $100,000, from $50,000 for freight forwarders and $75,000 for NVOCCs. Further, ASA/Intercargo maintains that in the event that competing claims from both freight forwarders and NVOCCs are made against a bond, the surety would have difficulty determining how the bond should be divided.

The Commission recognizes the problems presented by its proposal. We did not intend to create the appearance in favor of OTIs with joint operations. Nor did we anticipate the potential dual cancellation of the financial responsibility coverage. As a consequence, in the final rule we are removing the joint coverage proposal, and instead, OTIs operating in the United States as both freight forwarders and NVOCCs will continue to secure separate instruments of financial responsibility for their distinct operations. Thus, proposed § 515.21(a)(3) is removed, and proposed §§ 515.21(a)(4) and (a)(5) are redesignated as §§ 515.21(a)(3) and (a)(4). Moreover, even with respect to individual instruments of financial responsibility, the financial responsibility providers are now, and will continue to be, faced with the situation where there are multiple claims on an OTI's financial responsibility. The providers will continue to be required to fairly apportion the amount to address the claims presented.

With respect to the amount of financial responsibility required under this section, OCWG states that it supports the Commission proposal increasing the required levels of financial responsibility, in light of the Commission's recognition that an increasing number of NVOCCs have gone bankrupt or changed company names to avoid their responsibilities. Similarly, CENSA believes that the proposed amounts are consistent with applicable statutory requirements. Yellow supports the proposed amounts for those OTIs operating in the United States, but recommends that the amount for foreign OTIs be raised to $250,000, ''to more accurately reflect the risk involved with these entities.'' Yellow maintains that foreign entities are generally beyond the reach of U.S. law, requiring navigation of the ''often protectionist shoals of foreign laws,'' such that recovery imposes very significant costs not associated with domestic OTIs.

NCBFAA asserts that the proposed amounts for those OTIs operating in the United States are too high and could present financial burdens for smaller companies. Further, NCBFAA does not believe that the higher amounts will protect the public from unscrupulous operators who then subject their customers to carriers' lien claims and similar problems. Conversely, NCBFAA supports a higher amount for foreign, unlicensed OTIs. Noting that Commission press releases indicating its settlements with foreign NVOCCs are in multiples of $150,000 and given Commission experience with these entities, NCBFAA argues that the $150,000 proposed amount is rather modest. Similarly, IANVOCC proposes a minimum of $300,000, perhaps higher, and further suggests subjecting unlicensed NVOCCs to a branch office requirement similar to that for U.S.-based NVOCCs. D.J. Powers also supports the proposed amount for foreign OTIs and advocates requiring an additional amount per branch office, similar to the U.S. requirement, or perhaps a per country increase. In contrast, D.J. Powers finds the proposed amounts applicable to licensed OTIs too high and opines that the cost would be prohibitive for small companies. Worldlink believes that the financial responsibility requirement proposed for unlicensed, foreign OTIs is too low. Arguing that the Commission should ensure that no legitimate claim against these entities should go unpaid, Worldlink submits that an amount less than $1,000,000 would be insufficient.

AIFA/TIA urges the Commission to reconsider the proposed amounts, arguing that they are not supported by adequate facts or data. AIFA/TIA contends that ''high bond amounts penalize small companies and create barriers to entry that limit competition'', and further that some of these companies ''may have to pledge collateral'' for the increased amounts. AIFA/TIA notes that these proposed expenses may not have been budgeted by a number of small companies. OWL also states that the increased amounts for foreign OTIs are not substantiated. OWL suggests instead that adopting a broad definition of ''in the United States'' for licensing purposes and equalizing the bond amounts between foreign and domestic entities is the only way to achieve a proper balance between the licensing requirements imposed by Congress and the circumvention of U.S. law enjoyed by foreign companies. Similarly, NY/NJFFFBA opines that rather than increasing financial responsibility requirements for foreign OTIs, the Commission should instead adopt the broader definition of ''in the United States'' to protect the integrity of the OTI process completely. NY/NJFFFBA further asserts that the Commission failed to follow its Congressional mandate to determine the difference in potential for claims against unlicensed and licensed OTIs, and as such, must justify the difference with historical or other reliable data before implementing differing amounts of financial responsibility. The British Association of Removers argues that imposition of the higher guarantee on foreign NVOCCs is discriminatory and would be unfair to small volume entities who would have trouble meeting the requirements.

NITL states that it understands and appreciates the Commission's concern which would justify the proposed increases, but suggests that the increases would appear to impose substantial additional costs on many small business. NITL further notes that while shippers and carriers are likely to benefit from the increased amounts, they could restrict new companies from entering the OTI business and cause others to leave; thus NITL suggests imposing more modest increases.

Direct Container Line stresses that the Commission did not support the ''apparent expectation'' that the higher level of financial responsibility would result in increased enforcement action against unscrupulous foreign-based entities. Similarly, Charter contends that the increased amounts will only serve to punish the law-abiding NVOCCs, benefitting nobody but the insurance companies. Glad Freight also laments the increased financial responsibility requirements and would rather see stepped up enforcement to ensure compliance with the licensing and financial responsibility requirements.

The Commission adopts in the final rule the amounts of financial responsibility set forth in the proposed rule, with the exception of the joint $100,000 level previously discussed. We believe that these amounts are consistent with the obligations undertaken by OTIs and will better serve the shipping public, whom they are designed to protect and compensate for damage. Moreover, these amounts are an accurate reflection of the intent of OSRA to require OTIs to establish financial responsibility commensurate with the scope of their duties.

In response to comments that these amounts could pose a burden on small businesses, we believe that the burden of securing additional financial responsibility, as more fully detailed in the Regulatory Flexibility Analysis discussed, *infra*, is outweighed by the benefit to the shipping public. The

estimated burden per individual entity is not such that it will preclude from entering or remaining in the industry, those OTIs who are capable of satisfying their obligations, which was the goal of the NVOCC bonding requirement when it originated in 1990. *See* 136 Cong. Rec. E2210 (January 28, 1990) (statement of Rep. Jones). Moreover, when NVOCC bonds were implemented in 1990, Congressman Jones indicated that the $50,000 level was a starting point, which amount the Commission has not raised since that time. *Id.* Additionally, we have set forth provisions in the interim portion of this rulemaking allowing for the licensing of foreign NVOCCs, whose financial responsibility would, as a consequence, be at the lower $75,000 amount. Therefore, § 515.21 is adopted as proposed, subject to the modification relating to the $100,000 level discussed earlier.

With respect to branch offices, APL contends that the requirement that OTIs increase their financial responsibility by $10,000 per unincorporated branch office is unwarranted and counterintuitive. APL asserts that there is no logical correlation between the number of branch offices an OTI maintains and its propensity to default on its obligations. APL further points out that it has been a frequent critic of foreign governmental requirements which appear protectionist in nature. The provisions to which APL objects are carried over from existing freight forwarder rules. The Commission did not specifically solicit comment on this issue, and is reluctant to address APL's suggestion without its having been more fully addressed by industry commenters. Therefore, because consideration of branch office financial responsibility obligations is not necessary to the implementation of OSRA, the existing rules will not be amended in this regard.

ASA/Intercargo proposes amending § 515.21(b), relating to the amount of financial responsibility required by groups, to read ''In such cases a group or association must establish financial responsibility *in an amount equal to the lesser of* the amount required by paragraph (a) of this section for each member or $3,000,000 in the aggregate.'' We adopt this suggestion in order to clarify that groups with few members may establish an aggregate amount less than $3,000,000. This should also address DITTO's objection that the $3,000,000 amount will allow claims to be inflated. This amount refers to group bonds, the limits of liability under which are the same as if the financial responsibility were secured individually.

ASA/Intercargo also suggests amending § 515.22(d)(5) as follows:

515.22—Proof of financial responsibility (d)(5)(ii) *be for an amount up to the amount determined in accordance with § 515.21(b), taking into account a member's individual financial responsibility coverage already in place.* In the event of a claim against a group bond, the bond must be replenished up to the original amount of coverage within 30 days of payment of the claim; and (iii) *be in excess of a member's individual financial responsibility coverage already in place;* and

ASA/Intercargo contends that these changes are necessary because the financial responsibility requirements have already been set forth in § 515.21. This section contemplates supplemental coverage and the suggested language clarifies that the supplemental amount allows the member to aggregate coverage to meet the required limit. Moreover, the amendment clearly indicates that an individual's primary coverage is its other financial responsibility already in place and the supplemental coverage is available after the primary coverage has been exhausted. The Commission believes ASA/Intercargo's suggestions have merit and adopts them accordingly. Finally, the Commission adopts ASA/Intercargo's suggestion that with respect to group bond form FMC–69, it is more appropriate to use ''Appendix A'' to set forth the maximum limits of liability for each member OTI and in the aggregate.

Proof of Compliance

Section 10(b)(11) of the 1984 Act prohibits a common carrier from transporting cargo for an NVOCC unless that common carrier has determined that the NVOCC has a tariff and financial responsibility. In order to aid the common carriers in complying with this section, the Commission proposed in § 515.27(d) to publish at its website a list of the location of all carrier and conference tariffs and a list of OTIs who have furnished evidence of financial responsibility. The Commission specifically requested comments on this issue, and as none were received, the proposed language is carried forward in the final rule.

Compliance With Higher Bond Amounts

In accordance with § 515.21, all OTIs will need to provide increased financial responsibility by May 1, 1999. C.A. Shea, an insurance broker who currently administers over five hundred (500) bonds filed with the Commission, and NY/NJFFFBA contend that there is insufficient time, between March 1, 1999 and May 1, 1999, in which to obtain underwriting approval to execute increased financial responsibility in accordance with the new regulations. NY/NJFFFBA suggests that OTIs be allowed to continue to operate if they provide the Commission with proof that they have timely applied for the increased financial responsibility. C.A. Shea requests that the Commission ''phase in the replacement of the existing bonds over a period of time, perhaps on renewal, or by special rider to alleviate an unnecessary burden.''

The Commission is mindful of the expressed concerns, and, thus, allows OTIs and financial responsibility providers to increase their financial responsibility effective May 1, 1999, by rider to their existing instruments of financial responsibility. The rider to the instrument of financial responsibility shall indicate that the liability incurred under the instrument of financial responsibility shall be consistent with OSRA and 46 CFR part 515. The financial responsibility provider shall file the rider with the Commission by May 1, 1999. Financial responsibility providers shall then issue and file with the Commission new instruments of financial responsibility as required by 46 CFR part 515 at the time when the OTIs would ordinarily renew their instruments of financial responsibility.

Financial Responsibility Forms

Appendices A, B, C and D set forth the financial responsibility forms FMC–48 (surety bond), FMC–67 (insurance), FMC–68 (guaranty), and FMC–69 (group surety bond), respectively, to be used by the OTI and financial responsibility provider in contracting for financial responsibility. NVOCCs or freight forwarders may use the forms interchangeably and would choose a specific form according to the type of financial responsibility they obtain. ASA/Intercargo [2] contends that the Commission should adopt different surety bond forms for NVOCCs and freight forwarders because they are distinct entities that are required to obtain different amounts of coverage. As ASA notes, ''[r]equiring separate bond forms for each OTI activity will provide the shipping public with concise, clean, and unambiguous forms that accurately describe the activities that an OTI is performing or providing.''

The Commission agrees with ASA/Intercargo's suggestion and revises all four of the financial responsibility forms to require the OTI to indicate if it is obtaining the financial responsibility as an NVOCC or a freight forwarder. None of the proposed forms or the suggested

[2] C.A. Shea supports the comments made by Kemper and ''other sureties'' as to the proposed bond language.

surety bond forms proposed by ASA/Intercargo further detail the activities of the OTI, either as an NVOCC or a freight forwarder. The proposed forms do indicate that the financial responsibility shall be available to pay for damages arising from ''transportation-related activities.'' As the revised definition of ''transportation-related activities,'' § 515.2(w), clarifies that it applies to the services of freight forwarders and NVOCCs separately as further defined in §§ 515.2(i) and (l) respectively, it is unnecessary to detail these activities on the financial responsibility forms themselves. Therefore, it is sufficient to require that the OTI indicate on the form whether it is an NVOCC or a freight forwarder, and it is unnecessary to create different financial responsibility forms for NVOCCs and freight forwarders.

ASA/Intercargo and Kemper further object to the language in the surety bond form FMC–48 which provides that the surety ''consents to be sued'' in the event that the OTI or surety has not made payment on a final judgment. Neither OSRA nor proposed 46 CFR part 515, they argue, requires that a surety consent to being sued, and the Commission has not provided any justification for adding this language. Furthermore, they assert that the current Form FMC–48 does not contain the ''consents to be sued'' language, even though similar language is contained in the existing insurance and guaranty forms. The Commission, they contend, cannot add that language to the surety bond form merely because it is in the insurance and guaranty forms, because ''these forms of undertaking are different than surety undertakings.'' In addition, other government agencies' regulations and bond forms, they aver, do not contain such language. ASA/Intercargo and Kemper further argue that the ''consents to be sued'' language conflicts with the United States Department of the Treasury's procedures, under 31 CFR §§ 223.18–223.22, for complaining against sureties who fail to honor their bonds.

While the Commission acknowledges that the relationships and commitments made by entering a surety agreement are separate and distinct from those made in insurance and guaranty agreements, ASA/Intercargo's arguments to remove the ''consents to be sued'' language from Form FMC–48 are unpersuasive. The language does not alter the surety's obligations arising under the bond. Simply because the surety, insurance and guaranty are different types of agreements does not mean that a claimant who receives a final judgment against an OTI cannot sue a surety in the event that it fails to honor a valid judgment. Moreover, removing that language would not prevent a claimant from doing so. In addition, the Commission is not prevented from adding such language in this proceeding simply because it had not been in the earlier bond.

Further, the language does not conflict with the Department of the Treasury regulations providing procedures for complaining against a surety who has failed to honor its responsibilities under the bond, as Kemper and ASA/Intercargo argue. Part 223 of 31 CFR ensures that the bond companies doing business with the United States government, via underwriting surety bonds required by federal law, are in good standing. Sections 223.18–223.22 of 31 CFR specifically provide that a federal agency, not a private claimant, that is unable to collect on a bond to its satisfaction may turn the matter over to the Department of the Treasury by making a ''report'' of the claim. The language in the bond form would not subvert that process. Therefore, the Commission declines Kemper and ASA/Intercargo's request to remove the above paragraph from Form FMC–48.

Kemper further objects to the requirement in Form FMC–48 that the surety must pay on a final judgment within 10 days. Kemper asserts that only 10 days after being notified of the claimant's judgment the surety consents to being sued in almost any state, and, therefore, ''[t]his language, in addition to being in direct contrast to the regulations and the Act itself, defeats the purpose of providing for the regulations an alternate procedure rather than the claimant immediately seeking judgment.''

Kemper misreads the language as nullifying the procedure set forth in § 515.23(b), which requires the claimant to attempt to resolve the claim with the financial responsibility provider within 90 days prior to seeking payment on a judgment. This conforms with the language in Form FMC–48, which states that the Surety consents to be sued after claimant has obtained a final judgment *and* after claimant has complied with § 515.23(b). As discussed, *supra,* the 10 day period, which is revised to 30 days, is in addition to the 90-day settlement period. However, to the extent that it may be unclear what the ''within 10 [now 30] days'' language in Form FMC–48 modifies, the Commission revises FMC–48 to remove that phrase. This modification does not, however, alter the requirement in § 515.23(b) that the financial responsibility provider must ordinarily pay the judgment within 30 days of the final judgment.

Moreover, Kemper's complaint that the surety would consent to being sued ''in any state'' is irrelevant because where a complaint may be brought is determined by the particular state's laws of jurisdiction. The surety must be aware that a court may find it has jurisdiction over it based on its contacts with that state. Any company, based upon the reach of its business, takes the risk of being sued in a state that it may not consider its principal place of business. That is a risk a company assumes, however, and it must pay the consequences of that risk, including being sued in another state. The Commission has no ability to protect a surety from being sued in a particular state and, therefore, declines to change the rule.

Finally, ASA/Intercargo contends that the language that a surety's obligation shall not exceed ''the amount per group or association of OTIs set forth in 46 CFR § 515.21'' in Form FMC–48 should also be deleted. The inclusion of group or association bond form language, they argue, is improper because § 515.22(d)(6) provides that Form FMC–69 is the only form a group or association may use in obtaining coverage under a surety bond (unlike group or association coverage under insurance or a guaranty). ASA/Intercargo's comment is well-founded, and, therefore, the Commission revises Form FMC–48 accordingly.

Duties and Responsibilities of OTIs

Proposed § 515.31 set forth the duties of freight forwarders and NVOCCs to their principal and shipper, respectively, and the Commission generally. In doing so, the Commission incorporated many of the duties from 46 CFR §§ 510.21 and 510.22 that applied to freight forwarders and applied them to NVOCCs as well, so that all licensees would be subjected to the same responsibilities. Many commenters objected to this rationale for applying certain duties to NVOCCs and argued that many of these duties should not be applied to NVOCCs at all. OCWG, however, supports § 515.31 in its entirety.

NY/NJFFFBA, Worldlink, OWL, NAI, Charter, and D.J. Powers contend that freight forwarders and NVOCCs are separate and distinct legal and commercial entities, regardless of their common designation as OTIs and the fact that they would both now be licensed by the Commission. Congress intended for freight forwarders and NVOCCs to continue to be considered as such, NY/NJFFFBA, OWL, NAI, and

Charter argue, and, therefore, maintained the separate definitions of freight forwarders and NVOCCs within the general definition of OTI. As OWL contends that ''while perhaps recognizing the ''OTI'' as a creature of statutory construction, it is nothing more than a mere umbrella under which the legal distinction of both the ''ocean freight forwarder'' and ''[NVOCC]'' are preserved.''[3] Furthermore, IANVOCC and Charter aver that Congress did not mandate that any additional duties be imposed upon NVOCCs, but rather mandated that the Commission should avoid overly burdensome regulation.

NY/NJFFFBA, IANVOCC, NAI, Charter, Yellow, and D.J. Powers further argue that an NVOCC is not an agent who owes a fiduciary duty to its shipper-principal, like a freight forwarder, but rather the NVOCC is a principal in its relationship to its shipper-customer.[4] As such, Charter, IANVOCC and NAI contend, the NVOCC is a carrier and has the same relationship with its shipper as does a vessel-operating common carrier (''VOCC''). Thus, IANVOCC avers, ''while NVOCCs have a general duty to act in a law-abiding fashion, they are not subject to the fiduciary obligations of an agent.'' Charter, IANVOCC, Yellow, and NAI argue that the application of a freight forwarder's duties and responsibilities to an NVOCC is therefore inappropriate and would be harmful to an NVOCC's operations.

Proposed §§ 515.31(a) and (b)

IANVOCC and Worldlink do not oppose § 515.31(a), but contend that the rule should be revised to require a licensee's number to appear only once on a shipping document. This would avoid, they argue, unnecessary duplication in the case when a licensee's name appears as a consignee, shipper, and notify party on a single document. Charter is the only commenter who argues that the section should be deleted in its entirety as it applies to NVOCCs.

Section 515.31(a) remains applicable to NVOCCs, and the Commission agrees with the commenters that a licensed OTI's license number need only appear once on a shipping document. Accordingly, § 515.31(a) is revised to replace the word ''[w]herever'' at the beginning of the second sentence with the word ''when.'' This revision, however, does not allow a licensee to provide its license number on only one document in a single transaction if there are several shipping documents processed in the course of that transaction. Every document where a licensee's name appears must also include the licensee's license number.

NY/NJFFFBA, OWL, D.J. Powers, Yellow, and NAI argue that § 515.31(b)(2), the requirement that an OTI's status as, or affiliation with, a shipper or seller of goods be identified on its office stationary and billing forms, should be removed from the rule as it applies to NVOCCs. Section 515.31(b)(2) was created, NY/NJFFFBA, OWL, and NAI aver, because freight forwarders are prohibited from collecting compensation on shipments in which they have a beneficial interest. They argue, therefore, that this section has no applicability to an NVOCC, who does not collect carrier compensation. Yellow further avers that it would have the effect of treating NVOCCs and VOCCs differently because this duty is not imposed upon VOCCs, and would thus hinder competition in contravention of the intent of OSRA. Worldlink and IANVOCC, on the other hand, contend that this section should be revised so that it is not applicable to NVOCCs unless they are beneficial owners of cargo, while Charter argues that the entire § 515.31(b) should be deleted as to NVOCCs.

The Commission agrees that § 515.31(b)(2) is meant to address the prohibition against the collection of carrier compensation by a freight forwarder on shipments in which it has a beneficial interest, as reflected in section 19(d)(4) of the 1984 Act (redesignated as section 19(e)(3) in OSRA). NVOCCs do not collect carrier compensation and, therefore, the Commission revises § 515.31(b)(2) accordingly. The Commission, however, does not agree that § 515.31(b)(1) should be deleted as it applies to NVOCCs. All licensees, including NVOCCs, should be required to imprint their license number on their office stationary and billing forms. It serves to notify the public and shippers that an OTI is licensed by the Commission. In light of this change, § 515.31(b)(1) is redesignated as § 515.31(b), and § 515.31(b)(2) is redesignated as § 515.32(a) of renamed § 515.32, Freight forwarder duties. Accordingly, proposed § 515.32, Records required to be kept, will be renumbered as § 515.33, and proposed § 515.33, Regulated Persons Index, will be renumbered as § 515.34.

Proposed § 515.31(e)

The first sentence of § 515.31(e) prohibits licensees from entering any arrangement or agreement with an unlicensed person that confers any fee, compensation or other benefit upon that unlicensed person. NY/NJFFFBA, AIFA/TIA, APL, Worldlink, Cargo Brokers, Charter, D.J. Powers, and Yellow oppose this section as it applies to NVOCCs, while OWL opposes it as it applies to all OTIs. They argue that this section, read literally, would allow licensees only to do business with other licensees, thus preventing a licensee from entering arrangements with warehouses, truckers, consolidators, container lessors, and others who are unlicensed but necessary to an NVOCC's operations.

This regulation was originally intended to address the issue of compensation and fee sharing as it relates to freight forwarders. The Commission did not intend ''to prohibit forwarders from compensating bona fide sales agents for services rendered, provided that such services are restricted to soliciting and obtaining business for the forwarder and are not otherwise prohibited by law.'' 49 FR 18842, May 3, 1984 (Gen. Order 4, Revised, Docket No. 84–19, *Licensing of Ocean Freight Forwarders*). While the Commission believes that this would not adversely affect NVOCCs from entering arrangements with those unlicensed persons providing trucking services and the like, it agrees that the rule is unnecessary as it applies to NVOCCs because they do not collect carrier compensation or forwarding fees and thus are not subject to the limitations placed on freight forwarders regarding such payments.

The second sentence of § 515.31(e) provides that an OTI, when employed by the agent of the person paying for its services, must provide a copy of the invoice to both the agent and the person paying for those services. NY/NJFFFBA and Worldlink also object to this language as it applies to NVOCCs. This is not applicable to NVOCCs, they argue, who routinely bill third persons in the course of a shipment. Further, Worldlink asserts that it would be onerous to require NVOCCs to ''determine which of their customers are simply passing through the transportation charges and which are ultimately responsible for their payment.''

The Commission again recognizes that this regulation was meant to address freight forwarders and the issues related to fee sharing. As NVOCC's operations do not encompass these issues, it is

[3] OWL emphasizes this point by analogizing it to the recent decision of the European Commission regarding the joint inland rate setting authority of the Trans-Atlantic Conference Agreement.

[4] NAI, NY/NJFFFBA, and IANVOCC point out the extensive law regarding the freight forwarder as the agent of its shipper-principal and its fiduciary duties as such.

unnecessary to impose this regulation on them. Therefore, proposed § 515.31(e) will be removed as it applies to NVOCCs and will be redesignated as § 515.32(b).

Proposed § 515.31(g) and (k)

NY/NJFFFBA, IANVOCC, AIFA/TIA, OWL, NAI, Charter, D.J. Powers, and Yellow argue that § 515.31(g), which provides that no licensee shall withhold information from its principal or shipper concerning an OTI transaction and that such licensee must use due diligence to assure that information is accurate, should be removed from the rule as it applies to NVOCCs. Along with Cargo Brokers, they also aver that § 515.31(k), which requires that all licensees, upon the request of their principals or shippers, shall provide a complete breakout of their charges and any documents pertaining to the invoice, should be removed as it applies to NVOCCs. APL and Worldlink support these sections only to the extent that they require licensees to assure the accuracy of information they provide to their shippers, but contend that to the extent they prohibit NVOCCs from withholding information from their shippers or require NVOCCs to provide their shippers a breakdown of charges, the provisions are too broad.

All of the aforementioned commenters argue that an NVOCC is not an agent in a fiduciary relationship to its shipper, as is a freight forwarder, and does not have a duty to impart this information to its shippers. An NVOCC does not confer this type of information to its shipper in the general course of business, NY/NJFFFBA and OWL assert, rather it distributes only a bill of lading which is based on information received from its shipper or its forwarding agent. NY/NJFFFBA, IANVOCC, AIFA/TIA, OWL, NAI, Charter, D.J. Powers, Yellow, and Worldlink further argue that it would be harmful to an NVOCC's business to disclose all of its information, i.e., pricing strategies, vendor lists and other proprietary information. It would put NVOCCs at a competitive disadvantage with VOCCs, they contend, who would still be allowed to maintain the confidentiality of that information. Furthermore, they argue such disclosure provisions would nullify NVOCCs' ability to enter confidential service contracts as shippers with VOCCs.

The Commission agrees that §§ 515.31(g) and (k) were originally created to apply to freight forwarders who, as agents, owe a fiduciary duty to disclose all pricing information to their shipper-principals. NVOCCs, in contrast, are in the same position, as carrier-principal, as VOCCs in relationship to their shippers. Thus, the traditional duties applicable to freight forwarders regarding pricing information cannot be automatically applied to NVOCCs because each industry faces a different competitive environment. As the commenters correctly point out, disclosing such information would be ''commercial suicide.'' Furthermore, these sections would undermine OSRA's new confidential service contract environment. Moreover, NVOCCs would still be required to impart true and accurate information to their shipper-customers regarding any OTI transaction under proposed § 515.31(f). Deletion of the duties in §§ 515.31(g) and (k) as they apply to NVOCCs would, therefore, not exempt NVOCCs from this obligation. Sections 515.31(g) and (k) are revised to apply only to freight forwarders and are redesignated as §§ 515.32(c) and (d) respectively.

Proposed §§ 515.31(c), (d), (f), (h), (i), (j), and (l)

Section 515.31(c) prohibits licensed OTIs from permitting their licenses to be used by persons not employed by the OTI, but provides that an unincorporated branch office may use its parent's license name and number if it reports this information to the Commission and it is covered by the requisite increased financial responsibility. Worldlink seeks to revise this section to add language that would allow separately incorporated branch offices that are wholly owned, directly or indirectly, by the licensee to use the license name and number of the parent corporation. Charter opposes this section as it applies to NVOCCs in its entirety. As discussed, *supra*, regarding §§ 515.3 and 515.21, separately incorporated branch offices are required to obtain their own licenses and financial responsibility, and, therefore, Worldlink's request is denied. This section remains designated as § 515.31(c).

As to §§ 515.31(d), (f), (h), (i), (j), Charter is the only commenter who opposes their application to NVOCCs in their entirety and argues that they should be removed. IANVOCC and Worldlink contend that § 515.31(d), which limits the arrangements licensees can make with OTIs whose licenses have been revoked, is unfair and should be removed unless the Commission establishes and publishes a list of those persons on its website. APL supports §§ 515.31(f) and (h) to the extent that they prohibit OTIs from providing false information. Both Charter and NAI assert that § 515.31(l), which requires each licensee to account to its principal or shipper for various sums due such principal or shipper due to modifications in monies paid or received, should be removed as it applies to NVOCCs. Charter argues generally that there is no factual basis for imposing these freight forwarder regulations on NVOCCs, and thus they should be deleted or at the very least the Commission must examine and justify why additional duties should be applied to NVOCCs. NAI asserts that logic suggests that § 515.31(l) should be imposed on VOCCs as well, but then argues that neither NVOCCs nor VOCCs should be subjected to providing a refund to a shipper simply because they have developed a more cost-effective manner in which to provide their services.

Sections 515.31(d), (f), (h), (i), (j), and (l) impose duties upon OTIs that are not freight forwarder specific, unless indicated within a specific subsection. (*See* § 515.31(d)(3) (prohibiting a licensee from sharing forwarding fees or freight compensation with an OTI whose license has been revoked)). Furthermore, these duties do not rely on the fiduciary relationship between a freight forwarder as agent and a shipper as its principal. Therefore, the objection that these duties are inapplicable to NVOCCs because they are not the agents of their shippers is inappropriate and, thus, does not justify removing these sections from the final rule as they apply to NVOCCs. Furthermore, in regard to § 515.31(d), there is no need for the Commission to publish a list on its website of those persons whose licenses have been revoked, because under § 515.16 the Commission sends that information to the **Federal Register** quarterly, at the very least, for publication in paper format and electronic format on the **Federal Register**'s website at www.nara.gov/fedreg. This method has proven successful in notifying the public of OTIs whose licenses have been revoked, thus, the Commission will continue this procedure under the final rule. In accordance with the other revisions to § 515.31, §§ 515.31(f), (h), (i), (j), and (l) will be redesignated as §§ 515.31(e), (f), (g), (h), and (i) respectively. Section 515.31(d) remains designated as such.

Proposed § 515.32

Proposed § 515.32 set forth the recordkeeping requirements of licensed freight forwarders and NVOCCs, which requires licensees to maintain all records and books of account in connection with its OTI business in the United States for a period of five (5) years. NAI and AIFA/TIA object to this

requirement as it applies to NVOCCs. IANVOCC also opposes the rule as it applies to NVOCCs, except for the provision that they be required to maintain a separate file for each shipment. APL opposes the rule as it applies to all OTIs, arguing that it is unnecessary for the Commission to ''micromanage'' these entities.

IANVOCC and NAI point out that an NVOCC is not in a fiduciary relationship with its shipper like the freight forwarder who handles funds in trust as agent for its shipper-principal. IANVOCC contends that ''[a]n NVOCC does not incur expenses on behalf of, or as agent for, its customers, but rather as principal in the ordinary course of its commercial operations.'' As such, IANVOCC asserts, the Commission has no regulatory concern with the financial aspects of the NVOCC's business. AIFA/TIA further argues that since most NVOCC shipment files are maintained at the point of origin, which is generally not the United States, it would almost be an impossibility for NVOCCs to transport those files to the United States for maintenance.

Yellow, D.J. Powers, Worldlink, and NCBFAA do not object to the recordkeeping requirement as it applies to NVOCCs. They argue, however, in conjunction with IANVOCC as the rule applies to freight forwarders, that the Commission should permit OTIs the option of maintaining their records in electronic form as an alternative to paper form. NCBFAA also suggests that the Commission clarify that the recordkeeping requirements of the rule are independent of other federal agencies that may have different retention requirements that could be applicable to OTIs.

As discussed, *supra*, the NVOCC is not in a fiduciary relationship with its shipper as is the freight forwarder, thus it is improper to automatically impose the duties of freight forwarders which are necessary to their agency relationship with their shippers upon NVOCCs. The Commission does not need to oversee the financial dealings of NVOCCs, as IANVOCC argues, and as such revises proposed § 515.32 to apply only to freight forwarders. The Commission recognizes its own requirements for and the industry's evolution toward electronic media and, thus, revises proposed § 515.32 to enable licensed freight forwarders to maintain their records electronically if they so desire. The electronic records, however, must be made readily available to the Commission in a usable form, and it is the licensee's responsibility to insure that those electronic records are no less accessible than if they were maintained in paper form. Furthermore, the Commission revises proposed § 515.32 to incorporate NCBFAA's suggestion to clarify that the recordkeeping requirements are independent of the retention requirements of other federal agencies. In accordance with the changes to proposed § 515.31, § 515.32 will be redesignated as § 515.33.

In a related issue, D.J. Powers contends that the term ''agent'' should be defined in the rule because it relates to proposed §§ 515.31 and 515.32 specifically. The Commission declines to define the term agent because the term is used in this part to reflect the large body of agency law. The Commission does not want to inappropriately alter that definition, thus limiting or conflicting with the law relied on by the shipping industry in applying these regulations.

In-Plant Arrangements and Electronic Data Interchange

The Commission codified its decision in *In re: The Impact of Modern Technology on the Customs and Practices of the Freight Forwarding Industry—Petition for Rulemaking or Declaratory Order,* 28 S.R.R. 418 (1998), with regard to in-plant arrangements and electronic data interchange (''EDI'') in proposed §§ 515.41(e) and 515.42(e), respectively. Section 515.41(e) allows a licensed freight forwarder to place its employee on the premises of its principal as part of a package of services so long as the arrangement is reduced to writing in a special contract and it is not an artifice for payment or other unlawful benefit to the principal. Section 515.42(e) permits a licensed freight forwarder to own, operate or maintain an EDI-based computer system in its forwarding business and to collect carrier compensation if the forwarder performs value-added services.

NCBFAA commends the Commission for officially recognizing the use of in-plants and EDI and asserts that the rulemaking ''correctly endorsed the provisions of these services to OTI customers, while providing a structure that will enable the Commission to ensure that services are conducted within the constraints of the Shipping Act.'' NY/NJFFFBA supports the in-plant rule as it benefits the forwarding industry and the shippers they serve; however, it argues that the written agreement requirement is burdensome, intrusive and in contravention of the policies of the 1984 Act and OSRA to place ''a greater reliance on the marketplace.'' The parties should be allowed to reduce their agreement to writing, it contends, if they need to do so, but it should not be mandated by the Commission. APL objects to § 515.41 generally and argues the entire section should be removed.

In deciding whether to recognize the legitimacy of in-plant arrangements, the Commission carefully weighed the benefits of these arrangements to freight forwarders with the prohibitions of the 1984 Act and accompanying regulations against compensation and fee sharing. The Commission agrees with the NCBFAA that § 515.41(e) sufficiently addresses both of these concerns by allowing freight forwarders to use in-plants while providing the Commission the ability to determine if these arrangements are being implemented in accordance with the 1984 Act and the accompanying regulations. We believe § 515.41(e) allows freight forwarders far more leniency in developing these arrangements than if the Commission attempted to address every possible permutation of in-plant arrangements in a rulemaking. Therefore, in order to determine the parameters of a particular arrangement it is necessary for the freight forwarders and shippers to reduce the agreement to writing. Furthermore, NY/NJFFFBA incorrectly argues that the parties should be able to decide whether they want to reduce their agreement to writing. An in-plant arrangement is exactly the type of arrangement envisioned by proposed § 515.32(d) (requiring that copies or memorandum of all special arrangements or contracts between freight forwarders and their shipper-principals be maintained by the freight forwarder). The Commission therefore declines to remove the writing requirement of § 515.41(e) or § 515.41 in its entirety.

Final Regulatory Flexibility Analysis

(1) A Succinct Statement of the Need for and Objectives of the Rule

The Commission is adding new regulations establishing licensing and financial responsibility requirements for Ocean Transportation Intermediaries (''OTIs'') in accordance with the Shipping Act of 1984, 46 U.S.C. app. 1701 *et seq.*, as modified by Public Law 105–258, the Ocean Shipping Reform Act of 1998 (''OSRA''), and section 424 of Public Law 105–383, The Coast Guard Authorization Act of 1998.

OSRA amends the Shipping Act of 1984 in several respects relating to Ocean Freight Forwarders (''OFFs'') and Non-Vessel-Operating Common Carriers (''NVOCCs''). The Commission proposes new regulations, at 46 CFR part 515, to implement changes effectuated by OSRA.

OSRA requires that all OTIs in the United States be licensed by the Commission. Further, all OTIs will be required to establish their financial responsibility before performing any intermediary services in the United States. The bond, surety, or other insurance obtained pursuant to this part shall be available to pay for damages suffered by ocean common carriers, shippers, and others, arising from the transportation-related activities of the covered OTIs. S. Rep. No. 105–61, 105th Cong., 1st Sess., at 31 (1997) (''Report'').

The Report specifically indicates that the bonds, or other instruments of financial responsibility, are intended to cover liabilities related to service contract obligations, as well as damages resulting from loss or conversion of cargo, from the negligence or complicity of the insured entity, and from nonperformance of services. At the direction of the Report, the final rule establishes a range of financial responsibility requirements commensurate with the scope of the activities conducted by various OTIs and the past fitness of OTIs in the performance of intermediary duties.

(2) A Summary of the Significant Issues Raised by Public Comments in Response to the Initial Regulatory Flexibility Analysis, a Summary of the Agency's Assessment of such Issues and a Statement of any Changes Made in the Proposed Rule as a Result of such Comments

In the Initial Regulatory Flexibility Analysis (' IRFA'') appended to the proposed rule, the Commission invited comments in order to ensure that every possible aspect of the economic impact on small businesses would be considered. Specifically, comments were solicited regarding the effects of the cost of increased collateral and premium requirements on OTIs in the proposed rule. Several commenters to the proposed rule, including the National Industrial Transportation League (at p. 6), the National Customs Brokers & Forwarders Association of America, Inc. (''NCBFAA'') (at p. 5), and the American International Freight Association & Transportation Intermediaries Association (at p. 6), commented that the Rulemaking could pose an undue financial burden on small companies. The Commission clearly recognizes that the Rulemaking would impose a burden, in varying degrees, on small OFFs and NVOCCs. However, as discussed in the Supplementary Information to the final rule, the Commission has incorporated several of the suggestions in the comments to the proposed rule which will make the final rule less burdensome, while still complying with the spirit of OSRA. The Commission believes that the final rule is justified and necessary in light of the legislative requirement to effect the changes, and because of the benefit to the shipping public and to carriers gained by licensing and requiring financial responsibility of all OTIs.

The American Surety Association/ Intercargo (at p. 36) and Kemper Insurance Companies (at p. 16) commented that portions of the proposed rule duplicated, overlapped, or conflicted with existing Federal rules, such as the Carriage of Goods by Sea Act (''COGSA'') and Treasury Department regulations. The Supplementary Information to the final rule contains a thorough discussion of how the Rulemaking does not conflict with Treasury Department regulations, or any other relevant Federal, state, or local government rules. Further, the Supplementary Information discusses how certain terms contained in the proposed rule have been amended so as not to conflict with COGSA.

The NCBFAA (at p. 3) commented that the Commission failed to include an estimate for the costs associated with having a new license number printed on stationery, shipping documents, and billing forms. As discussed in the Supplementary Information to the final rule, although new licenses will be issued to indicate whether operators are acting as OFFs or NVOCCs, existing OFFs will retain their current license numbers and will not be required to reprint their business documents.

Other substantive issues that were raised to the proposed rule, but which were not specifically in response to the IRFA, are thoroughly addressed in the Supplementary Information to the final rule.

(3) A Description and an Estimate of the Number of Small Businesses to which the Rule Will Apply or an Explanation of Why No Such Estimate Is Available

To determine whether a business should be considered a small entity, the Small Business Administration (''SBA'') has established regulatory definitions of small businesses (13 CFR Part 121, FR January 31, 1996). Businesses classified in the Standard Industrial Classification code 4731, including OFFs and NVOCCs, are evaluated by their annual receipts (gross annual revenues). OFFs and NVOCCs with less than $18.5 million in annual receipts are considered small businesses by SBA. The Commission does not have OTI revenue data readily available, but, in general, is aware that while most OTIs are small operators, a few OTIs handle the bulk of the intermediary cargo in the U.S. trades. Without specific OTI revenue data, however, the Commission assumes that most, if not all, OTIs have revenues of less than $18.5 million, and are considered to be small businesses.

(4) A Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities that Will Be Subject to the Requirement and the Types of Professional Skills Necessary for the Preparation of the Report or Record

It is estimated that the final rule will impose, in varying degrees, a reporting burden on the entire OTI universe. The burden is calculated on the estimated amount of cost and time necessary to comply with various requirements of 46 CFR part 515. Calculated below are the estimated costs resulting from the final rule. Largely because the final rule contains several substantive changes from the proposed rule, some of the cost estimates presented below differ from those presented in the IRFA.

Cost to the Government

The Commission does not anticipate hiring any additional staff to administer changes occurring from the final rule. The additional burden to the government, *i.e.*, the Commission, as a result of the final rule will be absorbed by existing Commission staff.

Cost of Filing Time

The final rule changes the Commission's rules by requiring all entities to increase their financial responsibility. It also requires NVOCCs in the United States to be licensed with the FMC, and OFFs also operating as NVOCCs to acquire a separate FMC license for their NVOCC activities.

Based on a survey conducted by the Commission, it is estimated that the average hourly labor cost to file (or amend) an instrument of financial responsibility, or complete a new (or amended) license application, is $41. Further, it is estimated to take OFFs who are new entrants approximately 3.5 hours to obtain an instrument of financial responsibility and complete a new license application at an average labor cost to the respondent of $144. This cost takes into account time to gather information and complete the application form, as well as time to comply with the requirements of the rules. Since the licensing application form and financial responsibility procedures will remain substantively unchanged under the final rule, it is estimated that the additional labor cost

of the final rule for each NVOCC in the United States will be $144 in the first year.

Based on the Commission's survey, it is estimated that each OFF also operating as an NVOCC would require 1.5 hours per year to amend its application and its financial responsibility at an average labor cost to the respondent of $62 in the first year. Further, it would take each entity operating solely as an OFF, and each foreign-based NVOCC, 0.5 hours of staff time to increase its financial responsibility at an average labor cost to the respondent of $21 in the first year.

The total additional labor cost of the final rule is expected to reach $280,000 in the first year. In subsequent years, since all operating entities will be licensed, and will have increased their financial responsibility, the total labor cost is expected to decrease substantially.

Cost of Licensing Fee

The Commission's current user fee for processing a new application is $778, and $362 for an amendment. The final rule changes the current requirements by requiring NVOCCs in the United States to file a new application to become licensed. Further, OFFs also operating as NVOCCs will be required to amend their licenses. However, since licensing fees do not change under the final rule, OFFs in the U.S. export trade that are already required to be licensed with the FMC will not be affected in this regard. Further, foreign-based NVOCCs are not required to be licensed under the final rule. The total additional licensing cost to OTIs to comply with the final rule—specifically, the additional licensing cost to NVOCCs in the United States and to OFFS also operating as NVOCCs—is estimated to be $1.3 million.

Cost of Increasing the Financial Responsibility Requirement

The final rule raises the financial responsibility requirement as follows. The requirement for OFFs operating solely as OFFs in the U.S. export trade will increase from $30,000 to $50,000, with $10,000 in additional coverage for each unincorporated branch office. NVOCCs in the United States will be required to increase their financial responsibility from $50,000 to $75,000 with $10,000 in additional coverage for each unincorporated branch office. Foreign-based NVOCCs will be required to increase their financial responsibility from $50,000 to $150,000. Entities that operate as both OFFs and NVOCCs are presently required to have two separate instruments of financial responsibility, $30,000 covering their OFF activity and $50,000 covering their NVOCC activity. After considering comments objecting to the proposal to allow these entities to establish a single instrument of financial responsibility to cover both operations in the amount of $100,000, the Commission will continue the existing requirements that entities secure separate financial responsibility for each aspect of their operations. Entities operating as both OFFs and NVOCCs will also be required to acquire $10,000 in additional coverage for each unincorporated branch office.

The final rule also broadens the option for group bonds to include OFFs as well as NVOCCs, while raising the aggregate group requirement from $1 million to $3 million. Thus, the amount required will be the lesser of the amount required for each individual entity or $3 million aggregate. There are currently three group bonds on file with the Commission with a total of 166 NVOCC members. By posting a group bond, it is believed that participants save on premium payments by receiving a group coverage rate. However, it is difficult to project how many OFFs would opt for a group bond as a result of the final rule. Therefore, it is not feasible to forecast the potential cost savings to the industry of modifying the group bond provision in the final rule. Instead, the Commission will assume that all OTIs will post bonds at the higher individual premium rate.

For individual financial responsibility coverage, the Commission estimates that the premium ranges from $800 to $1,200 per year for $50,000 in coverage. The Commission employed an average premium cost of $1,000 per year for $50,000 in financial responsibility coverage to calculate the cost to OTIs of the proposed increases in coverage. In addition, the proportion of OFFs to branch offices was applied to estimate the number of NVOCC unincorporated branch offices.

The Commission estimates that the average cost to all OTIs of the additional financial responsibility requirements is as follows: OFFs operating solely as OFFs in the U.S. export trade will pay $897,000 ($578 per entity) more per year; OFFs also operating as NVOCCs will pay $554,000 ($1,078 per entity) more per year; NVOCCs in the United States will pay $967,000 ($678 per entity) more per year; and foreign-based NVOCCs will pay $1,252,000 ($2,000 per entity) more per year. The total first year cost of increased financial responsibility requirements for all entities under the final rule will be $3.7 million.

In some cases, underwriters may require individual OTIs to provide collateral in order to secure financial responsibility. Collateral accounts typically accrue interest at a risk-free rate until they are claimed or remitted in full to an OTI. However, when considering the industry as a whole, funds that are set aside as collateral could be otherwise invested in higher earning assets, such as in an OTI's business operations, thereby effectively assessing a cost to OTIs. Calculating the opportunity cost of increased collateral requires specific data on individual OTI's financial and operating riskiness. However, the Commission does not have that information available.

In lieu of such information, and in order to ensure that no substantial economic impact is overlooked, the Commission solicited comments in the proposed rule concerning the effects of the opportunity cost of increased collateral and premium requirements on OTIs. None of the commenters specifically addressed the issue of opportunity cost of increased collateral requirements. Since commenters did not view this issue as meriting specific comment, the Commission has concluded that the opportunity cost issue is not an issue in this proceeding.

Summary of Costs

In the first year of its implementation, the additional burden of the final rule is expected to average $1,600 for each NVOCC in the United States, $2,021 for each foreign-based NVOCC, $1,502 for each OFF also operating as an NVOCC, and $599 for each OFF operating solely as an OFF in the U.S. export trade. The total additional first year cost as a result of the final rule is estimated to be $5.3 million.

(5) A Description of the Steps the Agency Has Taken to Minimize the Significant Economic Impacts on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy and Legal Reasons for Selecting the Alternative Adopted in the Final Rule, and the Reasons for Rejecting Each of the Other Significant Alternatives

Upon a review of the comments regarding the proposed rule, the Commission significantly modified the Rulemaking to alleviate the most significant concerns of the commenters while complying with the spirit of OSRA. The modifications to the proposed rule, the reasons for selecting alternative approaches, and the reasons for rejecting certain initial proposals, are each thoroughly described in the

SUPPLEMENTARY INFORMATION to the final rule.

This regulatory action is not a ''major'' rule under 5 U.S.C. 804(2).

The Commission has received OMB approval for this collection of information pursuant to the Paperwork Reduction Act of 1995, as amended. In accordance with that Act, agencies are required to display a currently valid control number. The valid control number for this collection of information is 3072–0012.

Relevant federal rules that may duplicate, overlap, or conflict with the new rule.

The Commission is not aware of any other federal rules that duplicate, overlap, or conflict with the new rule.

List of Subjects

46 CFR Part 510

Freight forwarders, Maritime carriers, Reporting and recordkeeping requirements, Surety bonds.

46 CFR Part 515

Common carriers, Exports, Freight, Freight forwarders, Maritime carriers, Reports and recordkeeping requirements, Surety bonds.

46 CFR Part 583

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

Under the authority of Pub. L. 105–258 and as discussed in the preamble, the Federal Maritime Commission proposes to remove 46 CFR part 510 and 46 CFR part 583 and add part 515 to subchapter B, chapter IV, of 46 CFR as set forth below:

PART 510—[REMOVED]

1. Remove Part 510.

PART 583—[REMOVED]

2. Remove Part 583.

3. Revise the heading of subchapter B to read ''REGULATIONS AFFECTING OCEAN SHIPPING IN FOREIGN COMMERCE.''

4. Add Part 515 as follows:

PART 515—LICENSING, FINANCIAL RESPONSIBILITY REQUIREMENTS, AND GENERAL DUTIES FOR OCEAN TRANSPORTATION INTERMEDIARIES

Subpart A—General

Sec.
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Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 46 U.S.C. app. 1702, 1707, 1709, 1710, 1712, 1714, 1716, and 1718, 21 U.S.C. 862; Pub. L. 105–383, 112 Stat. 3411.

Subpart A—General

§ 515.1 Scope.

(a) This part sets forth regulations providing for the licensing as ocean transportation intermediaries of persons who wish to carry on the business of providing intermediary services, including the grounds and procedures for revocation and suspension of licenses. This part also prescribes the financial responsibility requirements and the duties and responsibilities of ocean transportation intermediaries, and regulations concerning practices of ocean transportation intermediaries with respect to common carriers.

(b) Information obtained under this part is used to determine the qualifications of ocean transportation intermediaries and their compliance with shipping statutes and regulations. Failure to follow the provisions of this part may result in denial, revocation or suspension of an ocean transportation intermediary license. Persons operating without the proper license may be subject to civil penalties not to exceed $5,500 for each such violation unless the violation is willfully and knowingly committed, in which case the amount of the civil penalty may not exceed $27,500 for each violation; for other violations of the provisions of this part, the civil penalties range from $5,500 to $27,500 for each violation (46 U.S.C. app. 1712). Each day of a continuing violation shall constitute a separate violation.

§ 515.2 Definitions.

The terms used in this part are defined as follows:

(a) *Act* means the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 and the Coast Guard Authorization Act of 1998.

(b) *Beneficial interest* includes a lien or interest in or right to use, enjoy, profit, benefit, or receive any advantage, either proprietary or financial, from the whole or any part of a shipment of cargo where such interest arises from the financing of the shipment or by operation of law, or by agreement, express or implied. The term ''beneficial interest'' shall not include any obligation in favor of an ocean transportation intermediary arising solely by reason of the advance of out-of-pocket expenses incurred in dispatching a shipment.

(c) *Branch office* means any office in the United States established by or maintained by or under the control of a licensee for the purpose of rendering intermediary services, which office is located at an address different from that of the licensee's designated home office. This term does not include a separately incorporated entity.

(d) *Brokerage* refers to payment by a common carrier to an ocean freight broker for the performance of services as specified in paragraph (n) of this section.

(e) *Commission* means the Federal Maritime Commission.

(f) *Common carrier* means any person holding itself out to the general public to provide transportation by water of passengers or cargo between the United

States and a foreign country for compensation that:

(1) Assumes responsibility for the transportation from the 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, chemical parcel tanker, or by a vessel when primarily engaged in the carriage of perishable agricultural commodities.

(i) if the common carrier and the owner of those commodities are wholly-owned, directly or indirectly, by a person primarily engaged in the marketing and distribution of those commodities, and

(ii) only with respect to those commodities.

(g) *Compensation* means payment by a common carrier to a freight forwarder for the performance of services as specified in § 515.42(c).

(h) *Freight forwarding fee* means charges billed by a freight forwarder to a shipper, consignee, seller, purchaser, or any agent thereof, for the performance of freight forwarding services.

(i) *Freight forwarding services* refers to the dispatching of shipments on behalf of others, in order to facilitate shipment by a common carrier, which may include, but are not limited to, the following:

(1) Ordering cargo to port;

(2) Preparing and/or processing export declarations;

(3) Booking, arranging for or confirming cargo space;

(4) Preparing or processing delivery orders or dock receipts;

(5) Preparing and/or processing ocean bills of lading;

(6) Preparing or processing consular documents or arranging for their certification;

(7) Arranging for warehouse storage;

(8) Arranging for cargo insurance;

(9) Clearing shipments in accordance with United States Government export regulations;

(10) Preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees, as required;

(11) Handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments;

(12) Coordinating the movement of shipments from origin to vessel; and

(13) Giving expert advice to exporters concerning letters of credit, other documents, licenses or inspections, or on problems germane to the cargoes' dispatch.

(j) *From the United States* means oceanborne export commerce from the United States, its territories, or possessions, to foreign countries.

(k) *Licensee* is any person licensed by the Federal Maritime Commission as an ocean transportation intermediary.

(l) *Non-vessel-operating common carrier services* refers to the provision of transportation by water of cargo between the United States and a foreign country for compensation without operating the vessels by which the transportation is provided, and may include, but are not limited to, the following:

(1) Purchasing transportation services from a VOCC and offering such services for resale to other persons;

(2) Payment of port-to-port or multimodal transportation charges;

(3) Entering into affreightment agreements with underlying shippers;

(4) Issuing bills of lading or equivalent documents;

(5) Arranging for inland transportation and paying for inland freight charges on through transportation movements;

(6) Paying lawful compensation to ocean freight forwarders;

(7) Leasing containers; or

(8) Entering into arrangements with origin or destination agents.

(m) *Ocean common carrier* means a vessel-operating common carrier (''VOCC'').

(n) *Ocean freight broker* is an entity which is engaged by a carrier to secure cargo for such carrier and/or to sell or offer for sale ocean transportation services and which holds itself out to the public as one who negotiates between shipper or consignee and carrier for the purchase, sale, conditions and terms of transportation.

(o) *Ocean transportation intermediary* means an ocean freight forwarder or a non-vessel-operating common carrier. For the purposes of this part, the term

(1) *Ocean freight forwarder* means a person that—

(i) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and

(ii) processes the documentation or performs related activities incident to those shipments; and

(2) *Non-vessel-operating common carrier (''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.

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

(q) *Principal*, except as used in Surety Bond Form FMC–48, and Group Bond Form FMC–69, refers to the shipper, consignee, seller, or purchaser of property, and to anyone acting on behalf of such shipper, consignee, seller, or purchaser of property, who employs the services of a licensed freight forwarder to facilitate the ocean transportation of such property.

(r) *Reduced forwarding fees* means charges to a principal for forwarding services that are below the licensed freight forwarder's usual charges for such services.

(s) *Shipment* means all of the cargo carried under the terms of a single bill of lading.

(t) *Shipper* means:

(1) A cargo owner;

(2) The person for whose account the ocean transportation is provided;

(3) The person to whom delivery is to be made;

(4) A shippers' association; or

(5) a non-vessel-operating common carrier that accepts responsibility for payment of all charges applicable under the tariff or service contract.

(u) *Small shipment* refers to a single shipment sent by one consignor to one consignee on one bill of lading which does not exceed the underlying common carrier's minimum charge rule.

(v) *Special contract* is a contract for freight forwarding services which provides for a periodic lump sum fee.

(w) *Transportation-related activities* which are covered by the financial responsibility obtained pursuant to this part include, to the extent involved in the foreign commerce of the United States, any activity performed by an ocean transportation intermediary that is necessary or customary in the provision of transportation services to a customer, but are not limited to the following:

(1) For an ocean transportation intermediary operating as a Freight forwarder, the freight forwarding services enumerated in § 515.2(i), and

(2) For an ocean transportation intermediary operating as a non-vessel-operating common carrier, the non-vessel-operating common carriers services enumerated in § 515.2(l).

(x) *United States* includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern

Marianas, and all other United States territories and possessions.

§ 515.3 License; when required.

Except as otherwise provided in this part, no person in the United States may act as an ocean transportation intermediary unless that person holds a valid license issued by the Commission. A separate license is required for each branch office that is separately incorporated. For purposes of this part, a person is considered to be ''in the United States'' if such person is resident in, or incorporated or established under, the laws of the United States. Only persons licensed under this part may furnish or contract to furnish ocean transportation intermediary services in the United States on behalf of an unlicensed ocean transportation intermediary.

§ 515.4 License; when not required.

A license is not required in the following circumstances:

(a) *Shipper.* Any person whose primary business is the sale of merchandise may, without a license, dispatch and perform freight forwarding services on behalf of its own shipments, or on behalf of shipments or consolidated shipments of a parent, subsidiary, affiliate, or associated company. Such person shall not receive compensation from the common carrier for any services rendered in connection with such shipments.

(b) *Employee or branch office of licensed ocean transportation intermediary.* (1) An individual employee or unincorporated branch office of a licensed ocean transportation intermediary is not required to be licensed in order to act solely for such licensee, provided that such branch offices:

(i) Have been reported to the Commission in writing; and

(ii) Are covered by increased financial responsibility in accordance with § 515.21(a)(4).

(2) Each licensed ocean transportation intermediary will be held strictly responsible for the acts or omissions of any of its employees or agents rendered in connection with the conduct of its business.

(c) *Common carrier.* A common carrier, or agent thereof, may perform ocean freight forwarding services without a license only with respect to cargo carried under such carrier's own bill of lading. Charges for such forwarding services shall be assessed in conformance with the carrier's published tariffs.

(d) *Ocean freight brokers.* An ocean freight broker is not required to be licensed to perform those services specified in § 515.2(n).

(e) *Federal military and civilian household goods.* Any person which exclusively transports used household goods and personal effects for the account of the Department of Defense, or for the account of the federal civilian executive agencies shipping under the International Household Goods Program administered by the General Services Administration, or both, is not subject to the requirements of subpart B of this part, but may be subject to other requirements, such as alternative surety bonding, imposed by the Department of Defense, or the General Services Administration.

§ 515.5 Forms and Fees.

(a) *Forms.* License form FMC–18 Rev., and financial responsibility forms FMC–48, FMC–67, FMC–68, FMC–69 may be obtained from the Commission's website at www.fmc.gov, the Director, Bureau of Tariffs, Certification and Licensing, Federal Maritime Commission, Washington, D.C. 20573, or from any of the Commission's area representatives.

(b) *Fees.* All fees shall be payable by money order, certified check, cashier's check, or personal check to the ''Federal Maritime Commission.'' Should a personal check not be honored when presented for payment, the processing of an application under this section shall be suspended until the processing fee is paid. In any instance where an application has been processed in whole or in part, the fee will not be refunded. Such fees are:

(1) Application for license as required by § 515.12(a): $778;

(2) Application for status change or license transfer as required by §§ 515.18(a) and 515.18(b): $362; and

(3) Supplementary investigation as required by § 515.25(a): $224.

Subpart B—Eligibility and Procedure for Licensing

§ 515.11 Basic requirements for licensing; eligibility.

(a) *Necessary qualifications.* To be eligible for an ocean transportation intermediary license, the applicant must demonstrate to the Commission that:

(1) It possesses the necessary experience, that is, its qualifying individual has a minimum of three (3) years experience in ocean transportation intermediary activities in the United States, and the necessary character to render ocean transportation intermediary services. A foreign NVOCC seeking to be licensed under this part must demonstrate that its qualifying individual has a minimum 3 years' experience in ocean transportation intermediary activities, and the necessary character to render ocean transportation intermediary services; and

(2) It has obtained and filed with the Commission a valid bond, proof of insurance, or other surety in conformance with § 515.21.

(3) An NVOCC with a tariff and proof of financial responsibility in effect as of April 30, 1999, may continue to operate as an NVOCC without the requisite three years' experience and will be provisionally licensed while the Commission reviews its application. Such person designated as the qualifying individual for a provisionally licensed NVOCC may not act as a qualifying individual for another ocean transportation intermediary until it has obtained the necessary three years' experience in ocean transportation intermediary services.

(b) *Qualifying individual.* The following individuals must qualify the applicant for a license:

(1) *Sole proprietorship.* The applicant sole proprietor.

(2) *Partnership.* At least one of the active managing partners, but all partners must execute the application.

(3) *Corporation.* At least one of the active corporate officers.

(c) *Affiliates of intermediaries.* An independently qualified applicant may be granted a separate license to carry on the business of providing ocean transportation intermediary services even though it is associated with, under common control with, or otherwise related to another ocean transportation intermediary through stock ownership or common directors or officers, if such applicant submits: a separate application and fee, and a valid instrument of financial responsibility in the form and amount prescribed under § 515.21. The qualifying individual of one active licensee shall not also be designated contemporaneously as the qualifying individual of an applicant for another ocean transportation intermediary license, except for a separately incorporated branch office.

(d) *Common carrier.* A common carrier or agent thereof which meets the requirements of this part may be licensed to dispatch shipments moving on other than such carrier's own bills of lading subject to the provisions of § 515.42(g).

§ 515.12 Application for license.

(a) *Application and forms.* Any person who wishes to obtain a license to operate as an ocean transportation intermediary shall submit, in duplicate, to the Director of the Commission's

Bureau of Tariffs, Certification and Licensing, a completed application Form FMC–18 Rev. (''Application for a License as an Ocean Transportation Intermediary'') accompanied by the fee required under § 515.5(b). All applications will be assigned an application number, and each applicant will be notified of the number assigned to its application. Notice of filing of such application shall be published in the **Federal Register** and shall state the name and address of the applicant and the name and address of the qualifying individual. If the applicant is a corporation or partnership, the names of the officers or partners thereof shall be published.

(b) *Rejection.* Any application which appears upon its face to be incomplete or to indicate that the applicant fails to meet the licensing requirements of the Act, or the Commission's regulations, shall be returned by certified U.S. mail or other method reasonably calculated to provide actual notice to the applicant without further processing, together with an explanation of the reason(s) for rejection, and the application fee shall be refunded in full. Persons who have had their applications returned may reapply for a license at any time thereafter by submitting a new application, together with the full application fee.

(c) *Investigation.* Each applicant shall be investigated in accordance with § 515.13.

(d) *Changes in fact.* Each applicant and each licensee shall submit to the Commission, in duplicate, an amended Form FMC–18 Rev. advising of any changes in the facts submitted in the original application, within thirty (30) days after such change(s) occur. In the case of an application for a license, any unreported change may delay the processing and investigation of the application and may result in rejection or denial of the application. No fee is required when reporting changes to an application for initial license under this section.

§ 515.13 Investigation of applicants.

The Commission shall conduct an investigation of the applicant's qualifications for a license. Such investigations may address:

(a) The accuracy of the information submitted in the application;

(b) The integrity and financial responsibility of the applicant;

(c) The character of the applicant and its qualifying individual; and

(d) The length and nature of the qualifying individual's experience in handling ocean transportation intermediary duties.

§ 515.14 Issuance and use of license.

(a) *Qualification necessary for issuance.* The Commission will issue a license if it determines, as a result of its investigation, that the applicant possesses the necessary experience and character to render ocean transportation intermediary services and has filed the required bond, insurance or other surety.

(b) *To whom issued.* The Commission will issue a license only in the name of the applicant, whether the applicant is a sole proprietorship, a partnership, or a corporation. A license issued to a sole proprietor doing business under a trade name shall be in the name of the sole proprietor, indicating the trade name under which the licensee will be conducting business. Only one license shall be issued to any applicant regardless of the number of names under which such applicant may be doing business, and except as otherwise provided in this part, such license is limited exclusively to use by the named licensee and shall not be transferred without prior Commission approval to another person.

§ 515.15 Denial of license.

If the Commission determines, as a result of its investigation, that the applicant:

(a) Does not possess the necessary experience or character to render intermediary services;

(b) Has failed to respond to any lawful inquiry of the Commission; or

(c) Has made any materially false or misleading statement to the Commission in connection with its application; then, a letter of intent to deny the application shall be sent to the applicant by certified U.S. mail or other method reasonably calculated to provide actual notice, stating the reason(s) why the Commission intends to deny the application. If the applicant submits a written request for hearing on the proposed denial within twenty (20) days after receipt of notification, such hearing shall be granted by the Commission pursuant to its Rules of Practice and Procedure contained in part 502 of this chapter. Otherwise, denial of the application will become effective and the applicant shall be so notified by certified U.S. mail or other method reasonably calculated to provide actual notice.

§ 515.16 Revocation or suspension of license.

(a) *Grounds for revocation.* Except for the automatic revocation for termination of proof of financial responsibility under § 515.26, or as provided in § 515.25(b), a license may be revoked or suspended after notice and an opportunity for a hearing for any of the following reasons:

(1) Violation of any provision of the Act, or any other statute or Commission order or regulation related to carrying on the business of an ocean transportation intermediary;

(2) Failure to respond to any lawful order or inquiry by the Commission;

(3) Making a materially false or misleading statement to the Commission in connection with an application for a license or an amendment to an existing license;

(4) Where the Commission determines that the licensee is not qualified to render intermediary services; or

(5) Failure to honor the licensee's financial obligations to the Commission.

(b) *Notice of revocation.* The Commission shall publish in the **Federal Register** a notice of each revocation.

§ 515.17 Application after revocation or denial.

Whenever a license has been revoked or an application has been denied because the Commission has found the licensee or applicant to be not qualified to render ocean transportation intermediary services, any further application within 3 years of the Commission's notice of revocation or denial, made by such former licensee or applicant or by another applicant employing the same qualifying individual or controlled by persons on whose conduct the Commission based its determination for revocation or denial, shall be reviewed directly by the Commission.

§ 515.18 Changes in organization.

(a) The following changes in an existing licensee's organization require prior approval of the Commission, and application for such status change or license transfer shall be made on Form FMC–18 Rev., filed in duplicate with the Commission's Bureau of Tariffs, Certification and Licensing, and accompanied by the fee required under § 515.5(b)(2):

(1) Transfer of a corporate license to another person;

(2) Change in ownership of a sole proprietorship;

(3) Addition of one or more partners to a licensed partnership;

(4) Any change in the business structure of a licensee from or to a sole proprietorship, partnership, or corporation, whether or not such change involves a change in ownership;

(5) Any change in a licensee's name; or

(6) Change in the identity or status of the designated qualifying individual,

except as described in paragraphs (b) and (c) of this section.

(b) *Operation after death of sole proprietor.* In the event the owner of a licensed sole proprietorship dies, the licensee's executor, administrator, heir(s), or assign(s) may continue operation of such proprietorship solely with respect to shipments for which the deceased sole proprietor had undertaken to act as an ocean transportation intermediary pursuant to the existing license, if the death is reported within 30 days to the Commission and to all principals and shippers for whom services on such shipments are to be rendered. The acceptance or solicitation of any other shipments is expressly prohibited until a new license has been issued. Applications for a new license by the executor, administrator, heir(s), or assign(s) shall be made on Form FMC–18 Rev., and shall be accompanied by the transfer fee required under § 515.5(b)(2).

(c) *Operation after retirement, resignation, or death of qualifying individual.* When a partnership or corporation has been licensed on the basis of the qualifications of one or more of the partners or officers thereof, and such qualifying individual(s) no longer serve in a full-time, active capacity with the firm, the licensee shall report such change to the Commission within 30 days. Within the same 30-day period, the licensee shall furnish to the Commission the name(s) and detailed intermediary experience of any other active managing partner(s) or officer(s) who may qualify the licensee. Such qualifying individual(s) must meet the applicable requirements set forth in § 515.11(a). The licensee may continue to operate as an ocean transportation intermediary while the Commission investigates the qualifications of the newly designated partner or officer.

(d) *Incorporation of branch office.* In the event a licensee's validly operating branch office becomes incorporated as a separate entity, the licensee may continue to operate such office pending receipt of a separate license, provided that:

(1) The separately incorporated entity applies to the Commission for its own license within ten (10) days after incorporation, and

(2) While the application is pending, the continued operation of the office is carried on as a *bona fide* branch office of the licensee, under its full control and responsibility, and not as an operation of the separately incorporated entity.

(e) Acquisition of one or more additional licensees. In the event a licensee acquires one or more additional licensees, for the purpose of merger, consolidation, or control, the acquiring licensee shall advise the Commission of such change within 30 days after such change occurs by submitting in duplicate, an amended Form FMC–18, Rev. No application fee is required when reporting this change.

Subpart C—Financial Responsibility Requirements; Claims Against Ocean Transportation Intermediaries

§ 515.21 Financial responsibility requirements.

(a) *Form and amount.* Except as otherwise provided in this part, no person may operate as an ocean transportation intermediary unless that person furnishes a bond, proof of insurance, or other surety in a form and amount determined by the Commission to insure financial responsibility. The bond, insurance or other surety covers the transportation-related activities of an ocean transportation intermediary only when acting as an ocean transportation intermediary.

(1) Any person operating in the United States as an ocean freight forwarder as defined by § 515.2(o)(1) shall furnish evidence of financial responsibility in the amount of $50,000.

(2) Any person operating in the United States as an NVOCC as defined by § 515.2(o)(2) shall furnish evidence of financial responsibility in the amount of $75,000.

(3) Any unlicensed foreign-based entity, not operating in the United States as defined in § 515.3, providing ocean transportation intermediary services for transportation to or from the United States, shall furnish evidence of financial responsibility in the amount of $150,000. Such foreign entity will be held strictly responsible hereunder for the acts or omissions of its agent in the United States.

(4) The amount of the financial responsibility required to be furnished by any entity pursuant to paragraphs (a)(1) or (a)(2) of this section shall be increased by $10,000 for each of the applicant's unincorporated branch offices.

(b) *Group financial responsibility.* Where a group or association of ocean transportation intermediaries accepts liability for an ocean transportation intermediary's financial responsibility for such ocean transportation intermediary's transportation-related activities under the Act, the group or association of ocean transportation intermediaries must file either a group supplemental coverage bond form, insurance form or guaranty form, clearly identifying each ocean transportation intermediary covered, before a covered ocean transportation intermediary may provide ocean transportation intermediary services. In such cases a group or association must establish financial responsibility in an amount equal to the lesser of the amount required by paragraph (a) of this section for each member or $3,000,000 in aggregate.

(c) *Common trade name.* Where more than one person operates under a common trade name, separate proof of financial responsibility is required covering each corporation or person separately providing ocean transportation intermediary services.

(d) *Federal military and civilian household goods.* Any person which exclusively transports used household goods and personal effects for the account of the Department of Defense, or for the account of the federal civilian executive agencies shipping under the International Household Goods Program administered by the General Services Administration, or both, is not subject to the requirements of subpart C of this part, but may be subject to other requirements, such as alternative surety bonding, imposed by the Department of Defense, or the General Services Administration.

§ 515.22 Proof of financial responsibility.

Prior to the date it commences furnishing ocean transportation intermediary services, every ocean transportation intermediary shall establish its financial responsibility for the purpose of this part by one of the following methods:

(a) Surety bond, by filing with the Commission a valid bond on Form FMC–48. 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 provide coverage for damages, reparations or penalties arising from any transportation-related activities under the Act of the insured ocean transportation intermediary. This evidence of financial responsibility shall be accompanied by: in the case of a financial rating, the Insurer's financial rating on the rating organization's letterhead or designated form; in the case of insurance provided by Underwriters at Lloyd's, documentation verifying membership in Lloyd's; and in the case of insurance provided by surplus lines insurers, documentation verifying inclusion on a current ''white list'' issued by the Non-Admitted Insurers' Information Office of the

National Association of Insurance Commissioners. The Insurer must certify that it has sufficient and acceptable assets located in the United States to cover all damages arising from the transportation-related activities of the insured ocean transportation intermediary as specified under the Act. The insurance must be placed with:

(1) An Insurer having a financial rating of Class V or higher under the Financial Size Categories of A.M. Best & Company, or equivalent from an acceptable international rating organization;

(2) Underwriters at Lloyd's; or

(3) Surplus lines insurers named on a current ''white list'' issued by the Non-Admitted Insurers' Information Office of the National Association of Insurance Commissioners; or

(c) Guaranty, by filing with the Commission evidence of guaranty on Form FMC–68. The guaranty must provide coverage for damages, reparations or penalties arising from any transportation-related activities under the Act of the covered ocean transportation intermediary. This evidence of financial responsibility shall be accompanied by: in the case of a financial rating, the Guarantor's financial rating on the rating organization's letterhead or designated form; in the case of a guaranty provided by Underwriters at Lloyd's, documentation verifying membership in Lloyd's; and in the case of a guaranty provided by surplus lines insurers, documentation verifying inclusion on a current ''white list'' issued by the Non-Admitted Insurers' Information Office of the National Association of Insurance Commissioners. The Guarantor must certify that it has sufficient and acceptable assets located in the United States to cover all damages arising from the transportation-related activities of the covered ocean transportation intermediary as specified under the Act. The guaranty must be placed with:

(1) A Guarantor having a financial rating of Class V or higher under the Financial Size Categories of A.M. Best & Company, or equivalent from an acceptable international rating organization;

(2) Underwriters at Lloyd's; or

(3) Surplus lines insurers named on a current ''white list'' issued by the Non-Admitted Insurers' Information Office of the National Association of Insurance Commissioners; or

(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 ocean transportation intermediaries on behalf of its members, subject to the following conditions and procedures:

(1) Each group or association of ocean transportation intermediaries 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 ocean transportation intermediaries shall provide the Commission with a list certified by its Chief Executive Officer containing the names of those ocean transportation intermediaries to which it will provide coverage; the manner and amount of existing coverage each covered ocean transportation intermediary has; an indication that the existing coverage provided each ocean transportation intermediary 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 meeting the requirements of paragraphs (b) or (c) of this section with coverage limits specified above in § 515.21; and the name, address and facsimile number of each surety, insurer or guarantor providing coverage pursuant to this section. Each group or association of ocean transportation intermediaries or its financial responsibility provider shall notify the Commission within 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 ocean transportation intermediaries;

(4) Each group or association of ocean transportation intermediaries 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 ocean transportation intermediary arising from its transportation-related activities under the Act, or order for reparations issued pursuant to section 11 of the Act, or any penalty assessed against the ocean transportation intermediary pursuant to section 13 of the Act. Each group or association of ocean transportation intermediaries shall be responsible for requiring each member ocean transportation intermediary to provide it with valid proof of financial responsibility annually;

(5) Where the group or association of ocean transportation intermediaries 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 ocean transportation intermediary arising from each covered member ocean transportation intermediary's transportation-related activities under the Act, or order for reparations issued pursuant to section 11 of the Act, or any penalty assessed against each covered member ocean transportation intermediary pursuant to section 13 of the Act; and

(ii) Be for an amount up to the amount determined in accordance with § 515.21(b), taking into account a member's individual financial responsibility coverage already in place. In the event of a claim against a group bond, the bond must be replenished up to the original amount of coverage within 30 days of payment of the claim; and

(iii) be in excess of a member's individual financial responsibility coverage already in place; and

(6) The coverage provided by the group or association of ocean transportation intermediaries on behalf of its members shall be provided by:

(i) 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

(ii) in the case of insurance and guaranty, a firm having a financial rating of Class V or higher under the Financial Size Categories of A.M. Best & Company or equivalent from an acceptable international rating organization, Underwriters at Lloyd's, or surplus line insurers named on a current ''white list'' issued by the Non-Admitted Insurers' Information Office of the National Association of Insurance Commissioners and issued by such firms on Form FMC–67 and Form FMC–68, respectively.

(e) All forms and documents for establishing financial responsibility of ocean transportation intermediaries 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; and the address of each ocean transportation intermediary.

§ 515.23 Claims against an ocean transportation intermediary.

The Commission or another party may seek payment from the bond, insurance, or other surety that is obtained by an ocean transportation intermediary pursuant to this section.

(a) *Payment pursuant to Commission order.* If the Commission issues an order for reparation pursuant to sections 11 or 14 of the Act, or assesses a penalty pursuant to section 13 of the Act, a bond, insurance, or other surety shall be available to pay such order or penalty.

(b) *Payment pursuant to a claim.* (1) If a party does not file a complaint with the Commission pursuant to section 11 of the Act, but otherwise seeks to pursue a claim against an ocean transportation intermediary bond, insurance or other surety for damages arising from its transportation-related activities, it shall attempt to resolve its claim with the financial responsibility provider prior to seeking payment on any judgment for damages obtained. When a claimant seeks payment under this section, it simultaneously shall notify both the financial responsibility provider and the ocean transportation intermediary of the claim by certified mail, return receipt requested. The bond, insurance, or other surety may be available to pay such claim if:

(i) The ocean transportation intermediary consents to payment, subject to review by the financial responsibility provider; or

(ii) The ocean transportation intermediary fails to respond within forty-five (45) days from the date of the notice of the claim to address the validity of the claim, and the financial responsibility provider deems the claim valid.

(2) If the parties fail to reach an agreement in accordance with paragraph (b)(1) of this section within ninety (90) days of the date of the initial notification of the claim, the bond, insurance, or other surety shall be available to pay any judgment for damages obtained from an appropriate court. The financial responsibility provider shall pay such judgment for damages only to the extent they arise from the transportation-related activities of the ocean transportation intermediary ordinarily within 30 days, without requiring further evidence related to the validity of the claim; it may, however, inquire into the extent to which the judgment for damages arises from the ocean transportation intermediary's transportation-related activities.

(c) The Federal Maritime Commission shall not serve as depository or distributor to third parties of bond, guaranty, or insurance funds in the event of any claim, judgment, or order for reparation.

§ 515.24 Agent for service of process.

(a) Every ocean transportation intermediary not located in the United States and every group or association of ocean transportation intermediaries not located in the United States which provides financial coverage for the financial responsibility of a member ocean transportation intermediary 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 ocean transportation intermediary, or group or association of ocean transportation intermediaries which provide financial coverage for the financial responsibilities of a member ocean transportation intermediary, by registered mail, return receipt requested, at its address published in its tariff, 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 ocean transportation intermediary's tariff, when required, in accordance with part 520 of this chapter.

(e) Every ocean transportation intermediary using a group or association of ocean transportation intermediaries to cover its financial responsibility requirement under § 515.21(b) 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, when required, in accordance with part 520 of this chapter.

§ 515.25 Filing of proof of financial responsibility.

(a) *Filing of proof of financial responsibility.* Upon notification by the Commission by certified U.S. mail or other method reasonably calculated to provide actual notice that the applicant has been approved for licensing, the applicant shall file with the Director of the Commission's Bureau of Tariffs, Certification and Licensing, proof of financial responsibility in the form and amount prescribed in § 515.21. No tariff shall be published until a license is issued, if applicable, and proof of financial responsibility is provided. No license will be issued until the Commission is in receipt of valid proof of financial responsibility from the applicant. If more than six (6) months elapse between issuance of the notification of qualification and receipt of the proof of financial responsibility, the Commission may, at its discretion, undertake a supplementary investigation to determine the applicant's continued qualification, for which a fee is required under § 515.5(b)(3). Should the applicant not file the requisite proof of financial responsibility within two (2) years of notification, the Commission will consider the application to be invalid.

(b) *Branch offices.* New proof of financial responsibility, or a rider to the existing proof of financial responsibility, increasing the amount of the financial responsibility in accordance with § 515.21(a)(4), shall be filed with the Commission prior to the date the licensee commences operation of any branch office. Failure to adhere to this requirement may result in revocation of the license.

§ 515.26 Termination of financial responsibility.

No license shall remain in effect unless valid proof of financial responsibility is maintained on file with the Commission. Upon receipt of notice of termination of such financial responsibility, the Commission shall notify the concerned licensee by certified U.S. mail or other method reasonably calculated to provide actual notice, at its last known address, that the Commission shall, without hearing or other proceeding, revoke the license as of the termination date of the financial responsibility, unless the licensee shall have submitted valid replacement proof of financial responsibility before such termination date. Replacement financial responsibility must bear an effective date no later than the termination date of the expiring financial responsibility.

§ 515.27 Proof of compliance.

(a) No common carrier may transport cargo for the account of a shipper known by the carrier to be an NVOCC unless the carrier has determined that

the NVOCC has a tariff and financial responsibility as required by sections 8 and 19 of the Act.

(b) A common carrier can obtain proof of an NVOCC's compliance with the tariff and financial responsibility requirements by:

(1) Reviewing a copy of the tariff published by the NVOCC and in effect under part 520 of this chapter;

(2) Consulting the Commission to verify that the NVOCC has filed evidence of its financial responsibility; or

(3) Any other appropriate procedure, provided that such procedure is set forth in the carrier's tariff.

(c) A common carrier that has employed the procedure prescribed in either paragraphs (b)(1) or (b)(2) of this section shall be deemed to have met its obligations under section 10(b)(11) of the Act, unless the common carrier knew that such NVOCC was not in compliance with the tariff and financial responsibility requirements.

(d) The Commission will publish at its website, www.fmc.gov, a list of the locations of all carrier and conference tariffs, and a list of ocean transportation intermediaries who have furnished the Commission with evidence of financial responsibility, current as of the last date on which the list is updated. The Commission will update this list on a periodic basis.

Appendix A to Subpart C—Ocean Transportation Intermediary (OTI) Bond Form [Form 48]

Form FMC–48

Federal Maritime Commission

Ocean Transportation Intermediary (OTI) Bond (Section 19, Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 and the Coast Guard Authorization Act of 1998) _____[indicate whether *NVOCC* or *Freight Forwarder*], as Principal (hereinafter ''Principal''), and _____, as Surety (hereinafter ''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 OTI in the waterborne foreign commerce of the United States in accordance with the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 and the Coast Guard Authorization Act of 1998 (''1984 Act''), 46 U.S.C. app 1702, and, if necessary, has a valid tariff published pursuant to 46 CFR part 515 and 520, and pursuant to section 19 of the 1984 Act, files 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 or any settlement made pursuant to a claim under 46 CFR § 515.23(b) for damages against the Principal arising from the Principal's 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 against the Principal pursuant to section 13 of the 1984 Act, 46 U.S.C. app. 1712.

This bond shall inure to the benefit of any and all persons who have obtained a judgment or a settlement made pursuant to a claim under 46 CFR § 515.23(b) for damages against the Principal arising from its transportation-related activities or order of reparation issued pursuant to section 11 of the 1984 Act, and to the benefit of the Federal Maritime Commission for any penalty assessed against the Principal pursuant to section 13 of the 1984 Act. However, the bond shall not apply to shipments of used household goods and personal effects for the account of the Department of Defense or the account of federal civilian executive agencies shipping under the International Household Goods Program administered by the General Services Administration.

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 _____, _____ 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 Principal after the expiration of the 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 Surety consents to be sued directly in respect of any *bona fide* claim owed by Principal for damages, reparations or penalties arising from the transportation-related activities under the 1984 Act of Principal in the event that such legal liability has not been discharged by the Principal or Surety after a claimant has obtained a final judgment (after appeal, if any) against the Principal from a United States Federal or State Court of competent jurisdiction and has complied with the procedures for collecting on such a judgment pursuant to 46 CFR § 515.23(b), the Federal Maritime Commission, or where all parties and claimants otherwise 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 Principal and/or Surety pursuant to 46 CFR § 515.23(b), whereby, upon payment of the agreed sum, the Surety is to be fully, irrevocably and unconditionally discharged from all further liability to such claimant; provided, however, that Surety's total obligation hereunder shall not exceed the amount set forth in 46 CFR § 515.21, as applicable.

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 _____, _____.

(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

_____
By

_____
Title
(Affix Corporate Seal)

_____
Corporate Surety

_____
Business Address

_____
By

_____
Title
(Affix Corporate Seal)

Appendix B to Subpart C—Ocean Transportation Intermediary (OTI) Insurance Form [Form 67]

Form FMC–67

Federal Maritime Commission

Ocean Transportation Intermediary (OTI) Insurance

Form Furnished as Evidence of Financial Responsibility

Under 46 U.S.C. app. 1718

This is to certify, that the *(Name of Insurance Company)*, (hereinafter ''Insurer'') of *(Home Office Address of Company)* has issued to *(OTI or Group or Association of OTIs [indicate whether NVOCC(s) or Freight Forwarder(s)])* (hereinafter ''Insured'') of *(Address of OTI or Group or Association of OTIs)* a policy or policies of insurance for purposes of complying with the provisions of 46 U.S.C. app. 1718 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 the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 and the Coast Guard Authorization Act of 1998 (''1984 Act'').

Whereas, the Insured is or may become an OTI subject to the 1984 Act, 46 U.S.C. app. 1701 *et seq.*, and the rules and regulations of the Federal Maritime Commission, or is or may become a group or association of OTIs, and desires to establish financial responsibility in accordance with section 19 of the 1984 Act, files with the Commission this Insurance Form as evidence of its financial responsibility and evidence of a financial rating for the Insurer of Class V or higher under the Financial Size Categories of A.M. Best & Company or equivalent from an acceptable international rating organization on such organization's letterhead or designated form, or, in the case of insurance provided by Underwriters at Lloyd's, documentation verifying membership in Lloyd's, or, in the case of surplus lines insurers, documentation verifying inclusion on a current ''white list'' issued by the Non-Admitted Insurers' Information Office of the National Association of Insurance Commissioners.

Whereas, the Insurance is written to assure compliance by the Insured with section 19 of the 1984 Act, 46 U.S.C. app. 1718, and the rules and regulations of the Federal Maritime Commission relating to evidence of financial responsibility for OTIs, this Insurance shall be available to pay any judgment obtained or any settlement made pursuant to a claim under 46 CFR § 515.23(b) for damages against the Insured arising from the Insured's transportation-related activities under the 1984 Act, or order for reparations issued pursuant to section 11 of the 1984 Act, 46 U.S.C. app. 1710, or any penalty assessed against the Insured pursuant to section 13 of the 1984 Act, 46 U.S.C. app. 1712; provided, however, that Insurer's obligation for a group or association of OTIs 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 OTI(s) against which a claim or final judgment has been brought and that Insurer's total obligation hereunder shall not exceed the amount per OTI set forth in 46 CFR § 515.21 or the amount per group or association of OTIs set forth in 46 CFR § 515.21 in aggregate.

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 pursuant to 46 CFR § 515.23(b) arising from its transportation-related activities under the 1984 Act, or order of reparation issued pursuant to section 11 of the 1984 Act, and to the benefit of the Federal Maritime Commission for any penalty assessed against the Insured pursuant to section 13 of the 1984 Act.

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 1984 Act, of Insured in the event that such legal liability has not been discharged by the Insured or Insurer 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 and has complied with the procedures for collecting on such a judgment pursuant to 46 CFR § 515.23(b), the Federal Maritime Commission, or where all parties and claimants otherwise 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 and/or Insurer pursuant to 46 CFR § 515.23(b), whereby, upon payment of the agreed sum, the Insurer 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 the amount per OTI set forth in 46 CFR § 515.21 or the amount per group or association of OTIs set forth in 46 CFR § 515.21.

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 in the amount per member OTI set forth in 46 CFR § 515.21 or the amount per group or association of OTIs set forth in 46 CFR § 515.21, 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 _____, _____, 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 1984 Act of the Insured after the expiration of the 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 _____, _____.

_____

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.

Appendix C to Subpart C—Ocean Transportation Intermediary (OTI) Guaranty Form [Form 68]

Form FMC–68

Federal Maritime Commission

Guaranty in Respect of Ocean Transportation Intermediary (OTI) Liability for Damages, Reparations or Penalties Arising from Transportation-Related Activities Under the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 and the Coast Guard Authorization Act of 1998

1. *Whereas*

_____

(Name of Applicant [indicate whether *NVOCC* or *Freight Forwarder*]) (hereinafter ''Applicant'') is or may become an Ocean Transportation Intermediary (''OTI'') subject to the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 and the Coast Guard Authorization Act of 1998 (''1984 Act''), 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 OTIs, and desires to establish its financial responsibility in accordance with section 19 of the 1984 Act, then, provided that the FMC shall have accepted, as sufficient for that purpose, the Applicant's application, supported by evidence of a financial rating for the Guarantor of Class V or higher under the Financial Size Categories of A.M. Best & Company or equivalent from an acceptable international rating organization on such rating organization's letterhead or designated form, or, in the case of Guaranty provided by Underwriters at Lloyd's, documentation verifying membership in Lloyd's, or, in the case of surplus lines insurers, documentation verifying inclusion on a current ''white list'' issued by the Non-Admitted Insurers' Information Office of the National Association of Insurance Commissioners, the undersigned Guarantor certifies that it has sufficient and acceptable assets located in the United States to cover all damages arising from the transportation-related activities of the covered OTI as specified under the 1984 Act.

2. *Now, Therefore,* The condition of this obligation is that the penalty amount of this Guaranty shall be available to pay any judgment obtained or any settlement made pursuant to a claim under 46 CFR § 515.23(b) for damages against the Applicant arising from the Applicant's 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 against the Principal pursuant to section 13 of the 1984 Act, 46 U.S.C. app. 1712.

3. The undersigned Guarantor hereby consents to be sued directly in respect of any *bona fide* claim owed by Applicant for damages, reparations or penalties arising from Applicant's transportation-related activities under the 1984 Act, in the event that such legal liability has not been discharged by the Applicant 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 and has complied with the procedures for collecting on such a judgment pursuant to 46 CFR § 515.23(b), the FMC, or where all parties and claimants otherwise 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 and/or Guarantor pursuant to 46 CFR § 515.23(b), whereby, upon payment of the agreed sum, the Guarantor 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 OTIs, 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 OTI(s) against which a claim or final judgment has been brought.

4. The Guarantor's liability under this Guaranty in respect to any claimant shall not exceed the amount of the guaranty; and the aggregate amount of the Guarantor's liability under this Guaranty shall not exceed the amount per OTI set forth in 46 CFR § 515.21 or the amount per group or association of OTIs set forth in 46 CFR § 515.21 in aggregate.

5. 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 1984 Act, occurring after the Guaranty has become effective, and before the expiration date of this Guaranty, which shall be the date thirty (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.

6. 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.

7. Guarantor shall pay, subject to the limit of the amount per OTI set forth in 46 CFR § 515.21, 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 1984 Act and the rules and regulations of the FMC, made by Applicant while this agreement is in effect, regardless of the financial responsibility or lack thereof, or the solvency or bankruptcy, of Applicant.

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

9. 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.

10. 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.

11. This Guaranty is effective the day of _____ ,_____ ,_____ 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.

12. 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)

Appendix D to Subpart C—Ocean Transportation Intermediary (OTI) Group Bond Form [FMC–69]

Form FMC–69

Federal Maritime Commission

Ocean Transportation Intermediary (OTI) Group Supplemental Coverage Bond Form (Section 19, Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 and the Coast Guard Authorization Act of 1998)

_____[indicate whether *NVOCC* or *Freight Forwarder*], as Principal (hereinafter ''Principal''), and

_____

as Surety (hereinafter ''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 OTIs in the waterborne foreign commerce of the United States and pursuant to section 19 of the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 and the Coast Guard Authorization Act of 1998 (''1984 Act''), files this bond with the Federal Maritime Commission;

Now, therefore, the conditions of this obligation are that the penalty amount of this bond shall be available to pay any judgment obtained or any settlement made pursuant to a claim under 46 CFR § 515.23(b) against the OTIs enumerated in Appendix A of this bond for damages arising from any or all of the identified OTIs' transportation-related activities under the 1984 Act, 46 U.S.C. app. 1701 *et seq.*, 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, that are not covered by the identified OTIs' 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 or made a settlement pursuant to a claim under 46 CFR § 515.23(b) for damages against any or all of the OTIs identified in Appendix A not covered by said OTIs' insurance policy(ies), guaranty(ies) or surety bond(s) arising from said OTIs' transportation-related activities under the 1984 Act, or order for reparation issued pursuant to section 11 of the 1984 Act, and to the benefit of the Federal Maritime Commission for any penalty assessed against said OTIs pursuant to section 13 of the 1984 Act. However, the bond shall not apply to shipments of used household goods and personal effects for the account of the Department of Defense or the account of federal civilian executive agencies shipping under the International Household Goods Program administered by the General Services Administration.

The Surety consents to be sued directly in respect of any *bona fide* claim owed by any or all of the OTIs identified in Appendix A for damages, reparations or penalties arising from the transportation-related activities under the 1984 Act of the OTIs in the event that such legal liability has not been discharged by the OTIs or Surety after a claimant has obtained a final judgment (after appeal, if any) against the OTIs from a United States Federal or State Court of competent jurisdiction and has complied with the procedures for collecting on such a judgment pursuant to 46 CFR § 515.23(b), the Federal Maritime Commission, or where all parties and claimants otherwise 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 OTIs and/or Surety pursuant to 46 CFR § 515.23(b), whereby, upon payment of the agreed sum, the Surety is to be fully, irrevocably and unconditionally discharged from all further liability to such claimant.

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 the amount per member OTI set forth in 46 CFR § 515.21 identified in Appendix A, or the amount per group or association of OTIs set forth in 46 CFR § 515.21, regardless of the number of OTIs, claims or claimants.

This bond is effective the _____ day of _____, _____, 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 OTIs identified in Appendix A as covered by the Principal after the expiration of the 30-day period, but such termination shall not affect the liability of the Principal and Surety for any transportation-related activities occurring prior to the date when said termination becomes effective.

The Principal or financial responsibility provider 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 OTIs 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 OTI(s) shall become effective 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 OTI(s) deleted from Appendix A after the expiration of the 30-day period, but such termination shall not affect the liability of the Principal and Surety for any transportation-related activities of said OTI(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 _____, _____,
(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

Subpart D—Duties and Responsibilities of Ocean Transportation Intermediaries; Reports to Commission

§ 515.31 General duties.

(a) *License; name and number.* Each licensee shall carry on its business only under the name in which its license is issued and only under its license number as assigned by the Commission. When the licensee's name appears on shipping documents, its Commission license number shall also be included.

(b) *Stationery and billing forms.* The name and license number of each licensee shall be permanently imprinted on the licensee's office stationery and billing forms. The Commission may temporarily waive this requirement for good cause shown if the licensee rubber stamps or types its name and Commission license number on all papers and invoices concerned with any ocean transportation intermediary transaction.

(c) *Use of license by others; prohibition.* No licensee shall permit its license or name to be used by any person who is not a *bona fide* individual employee of the licensee. Unincorporated branch offices of the licensee may use the license number and name of the licensee if such branch offices:

(1) have been reported to the Commission in writing; and

(2) are covered by increased financial responsibility in accordance with § 515.21(a)(4).

(d) *Arrangements with ocean transportation intermediaries whose licenses have been revoked.* Unless prior written approval from the Commission has been obtained, no licensee shall, directly or indirectly:

(1) Agree to perform ocean transportation intermediary services on shipments as an associate, correspondent, officer, employee, agent, or sub-agent of any person whose license has been revoked or suspended pursuant to § 515.16;

(2) Assist in the furtherance of any ocean transportation intermediary business of such person;

(3) Share forwarding fees or freight compensation with any such person; or

(4) Permit any such person, directly or indirectly, to participate, through ownership or otherwise, in the control or direction of the ocean transportation intermediary business of the licensee.

(e) *False or fraudulent claims, false information.* No licensee shall prepare or file or assist in the preparation or filing of any claim, affidavit, letter of indemnity, or other paper or document concerning an ocean transportation intermediary transaction which it has reason to believe is false or fraudulent, nor shall any such licensee knowingly impart to a principal, shipper, common carrier or other person, false information relative to any ocean transportation intermediary transaction.

(f) *Errors and omissions of the principal or shipper.* A licensee who has reason to believe that its principal or shipper has not, with respect to a shipment to be handled by such licensee, complied with the laws of the United States, or has made any error or misrepresentation in, or omission from, any export declaration, bill of lading, affidavit, or other document which the principal or shipper executes in connection with such shipment, shall advise its principal or shipper promptly of the suspected noncompliance, error, misrepresentation or omission, and shall decline to participate in any transaction involving such document until the matter is properly and lawfully resolved.

(g) *Response to requests of Commission.* Upon the request of any authorized representative of the Commission, a licensee shall make available promptly for inspection or reproduction all records and books of account in connection with its ocean transportation intermediary business, and shall respond promptly to any lawful inquiries by such representative.

(h) *Express written authority.* No licensee shall endorse or negotiate any draft, check, or warrant drawn to the order of its principal or shipper without the express written authority of such principal or shipper.

(i) *Accounting to principal or shipper.* Each licensee shall account to its principal(s) or shipper(s) for overpayments, adjustments of charges, reductions in rates, insurance refunds, insurance monies received for claims, proceeds of C.O.D. shipments, drafts, letters of credit, and any other sums due such principal(s) or shipper(s).

§ 515.32 Freight forwarder duties.

(a) *Notice of shipper affiliation.* When a licensed freight forwarder is a shipper or seller of goods in international

commerce or affiliated with such an entity, the licensed freight forwarder shall have the option of:

(1) Identifying itself as such and/or, where applicable, listing its affiliates on its office stationery and billing forms, or

(2) Including the following notice on such items:

This company is a shipper or seller of goods in international commerce or is affiliated with such an entity. Upon request, a general statement of its business activities and those of its affiliates, along with a written list of the names of such affiliates, will be provided.

(b) *Arrangements with unauthorized persons.* No licensed freight forwarder shall enter into an agreement or other arrangement (excluding sales agency arrangements not prohibited by law or this part) with an unlicensed person that bestows any fee, compensation, or other benefit upon the unlicensed person. When a licensed freight forwarder is employed to perform forwarding services by the agent of the person responsible for paying for such services, the licensed freight forwarder shall also transmit a copy of its invoice for services rendered to the person paying those charges.

(c) *Information provided to the principal.* No licensed freight forwarder shall withhold any information concerning a forwarding transaction from its principal, and each licensed freight forwarder shall comply with the laws of the United States and shall exercise due diligence to assure that all information provided to its principal or provided in any export declaration, bill of lading, affidavit, or other document which the licensed freight forwarder executes in connection with a shipment is accurate.

(d) *Invoices; documents available upon request.* Upon the request of its principal(s), each licensed freight forwarder shall provide a complete breakout of its charges and a true copy of any underlying document or bill of charges pertaining to the licensed freight forwarder's invoice. The following notice shall appear on each invoice to a principal:

Upon request, we shall provide a detailed breakout of the components of all charges assessed and a true copy of each pertinent document relating to these charges.

§ 515.33 Records required to be kept.

Each licensed freight forwarder shall maintain in an orderly and systematic manner, and keep current and correct, all records and books of account in connection with its forwarding business. These records must be kept in the United States in such manner as to enable authorized Commission personnel to readily determine the licensed freight forwarder's cash position, accounts receivable and accounts payable. The licensed freight forwarder may maintain these records in either paper or electronic form, which shall be readily available in usable form to the Commission; the electronically maintained records shall be no less accessible than if they were maintained in paper form. These recordkeeping requirements are independent of the retention requirements of other federal agencies. The licensed freight forwarder must maintain the following records for a period of five years:

(a) *General financial data.* A current running account of all receipts and disbursements, accounts receivable and payable, and daily cash balances, supported by appropriate books of account, bank deposit slips, canceled checks, and monthly reconciliation of bank statements.

(b) *Types of services by shipment.* A separate file shall be maintained for each shipment. Each file shall include a copy of each document prepared, processed, or obtained by the licensee, including each invoice for any service arranged by the licensee and performed by others, with respect to such shipment.

(c) *Receipts and disbursements by shipment.* A record of all sums received and/or disbursed by the licensee for services rendered and out-of-pocket expenses advanced in connection with each shipment, including specific dates and amounts.

(d) *Special contracts.* A true copy, or if oral, a true and complete memorandum, of every special arrangement or contract between a licensed freight forwarder and a principal, or modification or cancellation thereof. *Bona fide* shippers shall also have access to such records upon reasonable request.

§ 515.34 Regulated Persons Index.

The Regulated Persons Index is a database containing the names, addresses, phone/fax numbers and financial responsibility information, where applicable, of Commission-regulated entities. The database may be purchased for $84 by contacting Bureau of Tariffs, Certification and Licensing, Federal Maritime Commission, Washington, DC 20573. Contact information is listed on the Commission's website at www.fmc.gov.

Subpart E—Freight Forwarding Fees and Compensation

§ 515.41 Forwarder and principal; fees.

(a) *Compensation or fee sharing.* No licensed freight forwarder shall share, directly or indirectly, any compensation or freight forwarding fee with a shipper, consignee, seller, or purchaser, or an agent, affiliate, or employee thereof; nor with any person advancing the purchase price of the property or guaranteeing payment therefor; nor with any person having a beneficial interest in the shipment.

(b) *Receipt for cargo.* Each receipt for cargo issued by a licensed freight forwarder shall be clearly identified as ''Receipt for Cargo'' and be readily distinguishable from a bill of lading.

(c) *Special contracts.* To the extent that special arrangements or contracts are entered into by a licensed freight forwarder, the forwarder shall not deny equal terms to other shippers similarly situated.

(d) *Reduced forwarding fees.* No licensed freight forwarder shall render, or offer to render, any freight forwarding service free of charge or at a reduced fee in consideration of receiving compensation from a common carrier or for any other reason. *Exception:* A licensed freight forwarder may perform freight forwarding services for recognized relief agencies or charitable organizations, which are designated as such in the tariff of the common carrier, free of charge or at reduced fees.

(e) *In-plant arrangements.* A licensed freight forwarder may place an employee or employees on the premises of its principal as part of the services rendered to such principal, provided:

(1) The in-plant forwarder arrangement is reduced to writing in the manner of a special contract under § 515.33(d), which shall identify all services provided by either party (whether or not constituting a freight forwarding service); state the amount of compensation to be received by either party for such services; set forth all details concerning the procurement, maintenance or sharing of office facilities, personnel, furnishings, equipment and supplies; describe all powers of supervision or oversight of the licensee's employee(s) to be exercised by the principal; and detail all procedures for the administration or management of in-plant arrangements between the parties; and

(2) The arrangement is not an artifice for a payment or other unlawful benefit to the principal.

§ 515.42 Forwarder and carrier; compensation.

(a) *Disclosure of principal.* The identity of the shipper must always be disclosed in the shipper identification box on the bill of lading. The licensed freight forwarder's name may appear with the name of the shipper, but the forwarder must be identified as the shipper's agent.

(b) *Certification required for compensation.* A common carrier may pay compensation to a licensed freight forwarder only pursuant to such common carrier's tariff provisions. Where a common carrier's tariff provides for the payment of compensation, such compensation shall be paid on any shipment forwarded on behalf of others where the forwarder has provided a written certification as prescribed in paragraph (c) of this section and the shipper has been disclosed on the bill of lading as provided for in paragraph (a) of this section. The common carrier shall be entitled to rely on such certification unless it knows that the certification is incorrect. The common carrier shall retain such certifications for a period of five (5) years.

(c) *Form of certification.* Where a licensed freight forwarder is entitled to compensation, the forwarder shall provide the common carrier with a signed certification which indicates that the forwarder has performed the required services that entitle it to compensation. The required certification may be placed on one copy of the relevant bill of lading, a summary statement from the forwarder, the forwarder's compensation invoice, or as an endorsement on the carrier's compensation check. Each forwarder shall retain evidence in its shipment files that the forwarder, in fact, has performed the required services enumerated on the certification. The certification shall read as follows:

The undersigned hereby certifies that neither it nor any holding company, subsidiary, affiliate, officer, director, agent or executive of the undersigned has a beneficial interest in this shipment; that it is the holder of valid FMC License No., issued by the Federal Maritime Commission and has performed the following services:

(1) Engaged, booked, secured, reserved, or contracted directly with the carrier or its agent for space aboard a vessel or confirmed the availability of that space; and

(2) Prepared and processed the ocean bill of lading, dock receipt, or other similar document with respect to the shipment.

(d) *Compensation pursuant to tariff provisions.* No licensed freight forwarder, or employee thereof, shall accept compensation from a common carrier which is different from that specifically provided for in the carrier's effective tariff(s). No conference or group of common carriers shall deny in the export commerce of the United States compensation to an ocean freight forwarder or limit that compensation, as provided for by section 19(e)(4) of the Act and 46 CFR part 535.

(e) *Electronic data interchange.* A licensed freight forwarder may own, operate, or otherwise maintain or supervise an electronic data interchange-based computer system in its forwarding business; however, the forwarder must directly perform value-added services as described in paragraph (c) of this section in order to be entitled to carrier compensation.

(f) *Compensation; services performed by underlying carrier; exemptions.* No licensed freight forwarder shall charge or collect compensation in the event the underlying common carrier, or its agent, has, at the request of such forwarder, performed any of the forwarding services set forth in § 515.2(i), unless such carrier or agent is also a licensed freight forwarder, or unless no other licensed freight forwarder is willing and able to perform such services.

(g) *Duplicative compensation.* A common carrier shall not pay compensation for the services described in paragraph (c) of this section more than once on the same shipment.

(h) *Non-vessel-operating common carriers; compensation.* (1) A licensee operating as an NVOCC and a freight forwarder, or a person related thereto, may collect compensation when, and only when, the following certification is made together with the certification required under paragraph (c) of this section:

The undersigned certifies that neither it nor any related person has issued a bill of lading or otherwise undertaken common carrier responsibility as a non-vessel-operating common carrier for the ocean transportation of the shipment covered by this bill of lading.

(2) Whenever a person acts in the capacity of an NVOCC as to any shipment, such person shall not collect compensation, nor shall any underlying ocean common carrier pay compensation to such person, for such shipment.

(i) *Compensation; beneficial interest.* A licensed freight forwarder may not receive compensation from a common carrier with respect to any shipment in which the forwarder has a beneficial interest or with respect to any shipment in which any holding company, subsidiary, affiliate, officer, director, agent, or executive of such forwarder has a beneficial interest.

§ 515.91 OMB control number assigned pursuant to the Paperwork Reduction Act.

The Commission has received OMB approval for this collection of information pursuant to the Paperwork Reduction Act of 1995, as amended. In accordance with that Act, agencies are required to display a currently valid control number. The valid control number for this collection of information is 3072–0012. By the Commission.*

Bryant L. VanBrakle,

Secretary.

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*Commissioner Moran voted nay on §§ 515.21(a) and 515.41(e)(1).