

**BEFORE THE
FEDERAL MARITIME COMMISSION**

**COMMENTS TO ADVANCED NOTICE OF PROPOSED RULEMAKING
AMENDMENTS TO REGULATIONS GOVERNING OCEAN TRANSPORTATION
INTERMEDIARY LICENSING AND FINANCIAL RESPONSIBILITY
REQUIREMENTS, AND GENERAL DUTIES**

DOCKET NO. 13-05

COMMENTS OF THE INTERNATIONAL TRADE SURETY ASSOCIATION

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COMMENTS OF THE INTERNATIONAL TRADE SURETY ASSOCIATION

The International Trade Surety Association (“ITSA”) submits the following comments to FMC Docket No. 13-05, Advanced Notice of Proposed Rulemaking (“ANPR”), Amendments to Regulations Governing Ocean Transportation Intermediary Licensing and Financial Responsibility Requirements, and General Duties

INTRODUCTION AND SUMMARY

ITSA is an association whose members primarily consist of surety companies and insurance brokers that provide specialty insurance products and services, including ocean transportation intermediary (“OTI”) bonds required by the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998. ITSA estimates that its members underwrite approximately 67% of the OTI bonds on file with the FMC.

ITSA members or the sureties they represent are authorized by the Department of Treasury to secure government obligations, and are subject to regulatory requirements designed to assure that they are able to sustain government obligations. Recognizing these obligations, ITSA offers comments on the ANPR which are focused on assuring that the any changes create a transparent and efficient environment under which sureties may continue to make FMC bonds available to OTIs while reasonably underwriting their obligations, receive and respond to claims made against bonds in a timely and efficient manner, and discharge their obligations with certainty and finality to claimants.

ITSA also wishes to express its appreciation that the FMC has specifically requested input and comments from the surety industry to the FMC’s ANPR. While the surety industry and the OTI bonds they underwrite play a critical role in ocean transportation and in international trade, new rules can be proposed and/or implemented without consultation with the surety industry. We greatly appreciate the FMC’s specific request for the sureties to provide comments to the FMC’s ANPR, and urge that the Commission continue to reach out to the surety industry early in any future rulemakings.

ITSA’S COMMENTS TO THE FMC’S ANPR

ITSA limits its comments to those issues specific to financial responsibility and the ANPR’s specific request for information from the surety industry. Other matters raised in the ANPR, such as licensing and regulating OTIs, are better addressed by the entities and associations more directly affected by those proposed changes.

PRIORITIES FOR CLAIMS MADE AGAINST OTI BONDS

ITSA defers to the FMC and others regarding the proposed system of priority claims. In our role of securing the obligations of the OTI, we do not have an opinion as to which claims, if any, warrant priority treatment over others.

We do submit that additional clarity may be needed in defining where some parties will be placed in any priority system. For example, the NVOCC is both a shipper and a carrier. When tendering freight to a co-loading or master NVOCC, it is a shipper, and it is a carrier with respect to the shipper and consignee shown on its bill of lading. Also, can someone's status be assigned to a third party? For example, a cargo insurance underwriter may pay its insured's claim for loss or damage, and under a subrogation receipt, the insurer may seek payment from an OTI for the loss or damage. Does this subrogating insurer stand in the shoes of his insured shipper/consignee and assume that priority, or is he considered to be an "other third party creditor?"

The FMC's proposal to prioritize claims against OTI bonds provides an opportunity to resolve several problems long faced by ITSA members (and by claimants) which ITSA recommends be addressed. One problem is that where claims exceed the bond amount, the surety has no guidance from the FMC on how to allocate and distribute the limited bond funds. Usually, where there are several claimants and the covered claims exceed the bond amount, the surety commonly distributes the bond funds on a pro rata basis. In the event one or more claimants do not consent to a pro rata distribution, the surety has the option of interpleading the bond in a court Interpleader action and requesting that the court distribute the bond funds. However, utilizing the Interpleader court process results in unnecessary court costs and fees to both the surety and claimants and also possibly delays the distribution of the bond funds to claimants.

Another related problem arises when funds have been distributed to claimants and a new claimant comes forward after the distribution (for example, the Global Ocean Freight, Inc. claim cited in the ANPR). There are no rules governing how to handle the late claim. Finally, where the full amount of the bond has been paid by the surety, there are no guidelines to define whether its obligations have been fully discharged or will be reopened should a subsequent or new claim be filed. Although the current FMC Bond Form 48 does state that the surety's liability is discharged when the amount of the bond is paid, the FMC should make clear of the termination of the surety's liability in the FMC's regulations.

The text proposed in 515.23(f) (5) appears to adequately address the timing of claims in the Global Ocean claim scenario.

To address bond deficiencies under today's rules or the revised rule, we propose that the final rule include language stating that "when the claims for any priority class of claimants would exceed the remaining bond amount available for claims, such claimants with the class shall be paid on a pro rata basis."

We further propose that the final rule include language stating that "claims presented after payments are made, such payments having exhausted the bond, will not have any standing or recourse against the surety or other third party provider of financial responsibility."

Finally, ITSA raises some concerns as to how a priority of claims system promulgated by the FMC could conflict with a bankruptcy court action in the event that the bond principal files a petition for bankruptcy protection. ITSA seeks some FMC clarification on this issue.

RESTORATION OF BOND AMOUNTS

The Commission proposes, in section 515.21(a)(4), to require OTIs to restore their bond, insurance or surety to the required amount when claims have been paid. ITSA has no objection to a reasonable rule which provides both for restoring the bond amount (i.e., when a particular bond claim has been paid and some if not all of the bond has been exhausted) provided the time frames are clearly stated, are practical and will allow for ongoing business activities by a responsible OTI. In this regard, ITSA has several concerns and requests that the FMC provide clarification and/or revision to the proposed rule.

First, the ANPR text is unclear whether the 45-day period for the OTI to settle a valid claim and the 45-day period for the surety to pay are concurrent or consecutive periods. The final rule should make it clear that the two periods run consecutively.

Second, the requirement that the surety postpone payment for at least 5 months where claims exceed 20% of the bond amount, when coupled with the 45-days for settling a valid claim, creates an unhealthy situation in which the claims would remain unpaid for more than six (6) months. This is an unreasonably long time period and not in the interest of protecting the shipping public.

Third, the 60-day period to restore the bond amount would appear to run from the payment date (often 5 months after the claim is made). It should run from the end of the 45-day period to settle the claim and without regard to the actual payment

ITSA seeks clarification of situations in which the OTI license is suspended where there is an unfilled obligation to restore the bond amount, and whether there is any period in which the OTI continues to operate but it is clear that the bond amount has already been exhausted.

Finally, ITSA has concerns as to how the restoration of bond amounts would work with respect to group bonds which have an aggregate limit. If the FMC intends to apply the same rationale to the aggregate limit as it seeks to do for individual bonds this would undermine the concept of an aggregate limit. ITSA recommends that the FMC consider that the restoration of limits only apply the limit for each individual member of the group but to the aggregate limit.

§ 515.21 FINANCIAL RESPONSIBILITY REQUIREMENTS - PROPOSED INCREASES AND BONDING OF BRANCH OFFICES

The Commission proposes to increase the OTI financial responsibility levels in section 515.21 to reflect inflation and the fact that, in recent years, these levels have proven inadequate to provide security sufficient to cover claims against OTI bonds. ITSA has no position or

comment on these issues, as our concern is to be in a position to underwrite bonds and handle claims based upon a sound and transparent process. The amounts of bonds, and the entities referenced in calculating the bond amounts, are issues more involved in the operations of OTI's than of sureties. In that regard, we urge the FMC to fully consider and adopt the recommendations of the NCBFAA and TIA on these issues. However, should bond amounts be raised, ITSA provides the following comments based its experience.

First, an adjustment based upon a cost-of-living-index ("CPI") will serve little or no purpose in addressing the substantial insufficiencies experienced in individual claims. The examples set forth in the ANPR demonstrate that the small increase will not have any meaningful impact on the significant deficiency situations that the proposed increase is motivated to address (i.e., \$636,000 and \$549,000 in claims against \$75,000 bonds which may be increased to \$100,000).

Second, if the FMC desires to adjust the bond amounts to reflect inflation, it should look to the costs of ocean transportation rather than the more general CPI.

Finally, whether or not there is a decision to increase the three basic OTI bond amounts (i.e., \$50,000 to \$75,000; \$75,000 to \$100,000 and \$150,000 to \$200,000), the FMC should not increase the Group Bond amount (proposed to increase from \$3 million to \$4 million). The existing limit, especially if coupled with proposal to restore bond amounts due to paid claims, appears to be wholly satisfactory for handling claims and it is likely that the increased cost to group members for the much larger bond amount would be overly burdensome.

STRICT LIABILITY FOR ACTS OF EMPLOYEES AND AGENTS

ITSA believes that this provision is overly broad in that it does not limit the liability to acts by employees performed as employees of the OTI and related to its OTI business, nor does it define the nature of the agents subject to this "strict liability" and the nature of conduct covered. Furthermore, the term "strict liability" itself is misleading in that not all defenses are eliminated. In the absence of clarification, this provision will generate litigation rather than achieve its apparent purpose.

RIDERS AND BOND ANNIVERSARY DATES

ITSA is pleased that the ANPR provides that a bond amount may be increased by rider rather than by filing a new bond. However, we see no reason for requiring that a new bond be filed on the anniversary date of a bond previously increased by rider. The bond was valid in the increased amount the day before the anniversary; it should be valid on and after the anniversary date. The preparation, execution and filing of a new bond is unnecessary to protect the integrity of the bond, imposes a needless burden on the trade and creates the inevitability that there will be lapses in bond coverage due to late filing of new bonds, rejections of timely-filed bonds, among other things. If all OTI bonds are increased, the filing of riders will be an administrative

necessity and understandable; the additional burden of filing new bonds for all existing increased bonds on their anniversary date is a duplicative and unnecessary administrative burden and cost.

PROMPT NOTICE OF COURT ACTIONS, CLAIMS AND CLAIMS PAID

TSA supports the proposed rule in section 515.23 (e), that common carriers and marine terminal operators promptly “submit notices to the Commission of court and other transportation claims made by them that may result in payment of proceeds from such financial responsibility.” See ANPR at 77. Early notice of claims is essential to the sound approach to financial responsibility. We recognize that there are issues of confidentiality regarding the publication of claim information which is not truly a public record and the scope of claims that would be reported and/or published. These are issues which should be addressed by limiting publication to public records and limiting access to other claim information to the FMC, the OTI’s agent and its surety.

ITSA members have no objection to the new requirement that sureties promptly provide payment information to the FMC. However, we urge that the FMC develop, in consultation with the sureties, a standard set of procedures to allow for consistent and electronic systematic reporting by the sureties to facilitate reports in a timely and cost efficient manner.

As stated above, ITSA appreciates the opportunity to provide its comments to the Commission’s ANPR. ITSA looks forward to continue to work with the FMC on the FMC’s proposed rules on this and related issues and to supplement or clarify ITSA’s comments stated above.

Respectfully submitted,

INTERNATIONAL TRADE SURETY ASSOCIATION

By: 
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