

SUBCHAPTER F: FINANCIAL ASSURANCE MECHANISMS FOR LIABILITY
§§37.501, 37.511, 37.521, 37.531, 37.541, 37.551
Effective February 12, 2003

§37.501. Trust Fund for Liability.

(a) An owner or operator may satisfy the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage) by establishing a fully funded trust fund that conforms to the requirements of this section, in addition to the requirements specified in Subchapter A of this chapter (relating to General Financial Assurance Requirements), and submitting an originally signed duplicate of the executed trust agreement to the executive director.

(b) The trustee shall be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency.

(c) The wording of the trust agreement must be identical to the wording specified in §37.601(a) of this title (relating to Trust Agreement for Liability), including a formal certification of acknowledgment as specified in §37.601(b) of this title.

(d) The trust fund for liability shall be funded for the full amount of the liability coverage to be provided by the trust before it may be relied upon to satisfy the requirements of financial assurance for liability. If at any time after the trust is created the amount of funds in the trust is reduced below the full amount of the liability coverage to be provided, the owner or operator, by the anniversary date of the establishment of the trust, shall either add sufficient funds to the trust to cause its value to equal the full amount of liability coverage to be provided, or obtain another financial assurance mechanism as specified in this subchapter to cover the difference. For purposes of this section, "the full amount of liability coverage to be provided" means the amount of coverage for sudden and/or nonsudden accidental occurrences required to be provided less the amount of financial assurance for liability coverage being provided by other financial assurance mechanisms being used to demonstrate financial assurance by the owner or operator.

(e) If the value of the trust fund is greater than the total amount of the required liability coverage, the owner or operator may submit a written request to the executive director for release of the amount in excess of the required liability coverage.

(f) If an owner or operator substitutes other financial assurance as specified in this subchapter for all or part of the trust fund, the owner or operator may submit a written request to the executive director for release of the amount in excess of the required liability coverage as covered by the trust fund.

(g) Within 60 days after receiving a request from the owner or operator for release of funds

as specified in subsection (e) or (f) of this section, the executive director, if the request is approved, shall instruct the trustee in writing to release to the owner or operator such funds.

Adopted February 24, 2000

Effective March 21, 2000

§37.511. Surety Bond Guaranteeing Payment for Liability.

(a) An owner or operator may satisfy the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage) by obtaining a surety bond which conforms to the requirements of this section, in addition to the requirements specified in Subchapter A of this chapter (relating to General Financial Assurance Requirements), and submitting a signed duplicate original of the bond to the executive director.

(b) The surety company issuing the bond shall be among those listed as acceptable sureties on Federal bonds in the most recent Circular 570 of the United States Department of the Treasury.

(c) The wording of the surety bond must be identical to the wording specified in §37.611 of this title (relating to Payment Bond for Liability).

(d) A surety bond may be used to satisfy the requirements of Subchapter E of this chapter only if the Attorneys General or Insurance Commissioners of the state in which the surety is incorporated, and the State of Texas have submitted a written statement to the executive director that a surety bond executed as described in this subchapter and §37.611 of this title is a legally valid and enforceable obligation in that state.

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Effective March 21, 2000

§37.521. Irrevocable Standby Letter of Credit for Liability.

(a) An owner or operator may satisfy the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage) by obtaining an irrevocable standby letter of credit which conforms to the requirements of this section, in addition to the requirements specified in Subchapter A of this chapter (relating to General Financial Assurance Requirements), and submitting an originally signed irrevocable standby letter of credit to the executive director.

(b) The financial institution issuing the irrevocable standby letter of credit shall be an entity that has the authority to issue irrevocable standby letters of credit and whose letter of credit operations are regulated and examined by a federal or state agency.

(c) The wording of the irrevocable standby letter of credit must be identical to the wording specified in §37.621 of this title (relating to Irrevocable Standby Letter of Credit for Liability).

(d) An owner or operator who uses an irrevocable standby letter of credit to satisfy the requirements of this section may also establish a standby trust fund. Under the terms of such a letter of credit, all amounts paid pursuant to a draft by the trustee of the standby trust will be deposited by the issuing institution into the standby trust in accordance with instructions from the trustee. The trustee of the standby trust fund must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency.

(e) The wording of the standby trust fund must be identical to the wording specified in §37.671 of this title (relating to Standby Trust Agreement).

Adopted February 24, 2000

Effective March 21, 2000

§37.531. Insurance for Liability.

(a) An owner or operator may satisfy the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage) by obtaining insurance which conforms to the requirements of this section, in addition to the requirements specified in Subchapter A of this chapter (relating to General Financial Assurance Requirements), and submitting a signed duplicate original of the endorsement or certificate of insurance to the executive director.

(b) At a minimum, the insurer must be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

(c) The wording of the certificate of insurance must be identical to the wording specified in §37.631 of this title (relating to Certificate of Insurance for Liability). The wording of the endorsement must be identical to the wording specified in §37.641 of this title (relating to Endorsement for Liability).

(d) The insurance policy shall be amended by attachment of the Endorsement for Liability or evidenced by a Certificate of Insurance for Liability. If requested by the executive director, the owner or operator shall provide a signed duplicate original of the insurance policy.

Adopted February 24, 2000

Effective March 21, 2000

§37.541. Financial Test for Liability.

(a) An owner or operator may satisfy the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage) by demonstrating that it passes a financial test which conforms to the requirements of this section, in addition to the requirements specified in Subchapter A of this chapter (relating to General Financial Assurance Requirements).

(b) To pass this test, the owner or operator must meet the criteria of either paragraph (1) or (2) of this subsection:

(1) the owner or operator must have:

(A) net working capital and tangible net worth each at least six times the amount of liability coverage to be demonstrated by this test; and

(B) tangible net worth of at least \$10 million; and

(C) assets in the United States amounting to either:

(i) at least 90% of his total assets; or

(ii) at least six times the amount of liability coverage to be demonstrated by this test.

(2) the owner or operator must have:

(A) a current rating for the owner's or operator's most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A, or Baa as issued by Moody's; and

(B) tangible net worth of at least \$10 million; and

(C) tangible net worth at least six times the amount of liability coverage to be demonstrated by this test; and

(D) assets in the United States amounting to either:

(i) at least 90% of his total assets; or

(ii) at least six times the amount of liability coverage to be demonstrated by this test.

(c) The phrase "amount of liability coverage" refers to the annual aggregate amounts for which coverage is required for sudden or nonsudden liability.

(d) To demonstrate that the owner or operator meets this test, the owner or operator shall submit the following items to the executive director:

(1) a letter signed by the owner's or operator's chief financial officer and worded as specified in the Financial Test for Liability, Part A, §37.651 of this title (relating to Financial Test for Liability). An owner or operator using the financial test to demonstrate assurance for closure, post closure, or corrective action as specified in Subchapter B of this chapter (relating to Financial Assurance Requirements for Closure, Post Closure, and Corrective Action), and liability coverage must submit the letter specified in the Financial Test for Liability, Part B, §37.651 of this title to cover both forms of financial responsibility. A separate letter as specified in §37.351 of this title (relating to Financial Test) is not required; and

(2) a copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year; and

(3) a special report from the owner's or operator's independent certified public accountant to the owner or operator stating that:

(A) the accountant has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and

(B) in connection with that procedure:

(i) such amounts were found to be in agreement; or

(ii) no matters came to the attention of the independent certified public accountant which indicated that the specified data should be adjusted.

(e) After the initial submission of items specified in subsection (d) of this section, the owner or operator shall send updated information to the executive director within 90 days after the close of each succeeding fiscal year. This information shall consist of all three items specified in subsection (d) of this section.

(f) If the owner or operator no longer meets the requirements of subsection (b) of this section, the owner or operator must obtain alternate financial assurance as specified in this subchapter for the entire amount of required liability coverage. Evidence of liability coverage must be submitted to the executive director within 90 days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the test requirements.

(g) The executive director may, based on a reasonable belief that the owner or operator may no longer meet the requirements of subsection (b) of this section, require reports of financial condition at any time from the owner or operator in addition to those specified in subsection (d) of this section. If the executive director finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of subsection (b) of this section, the owner or operator shall

provide alternate financial assurance as specified in this subchapter within 30 days after notification of such a finding.

(h) The executive director may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant's report on examination of the owner's or operator's financial statements. An adverse opinion or disclaimer of opinion shall be cause for disallowance. The executive director shall evaluate other qualifications on an individual basis. The owner or operator shall provide alternate financial assurance as specified in this subchapter within 30 days after notification of the disallowance.

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§37.551. Corporate Guarantee for Liability.

(a) An owner or operator may meet the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage) by obtaining a written guarantee for liability coverage, hereinafter referred to as "corporate guarantee," which conforms to the requirements of this section, in addition to the requirements as specified in Subchapter A of this chapter (relating to General Financial Assurance Requirements).

(b) The guarantor must be the direct or higher-tier parent corporation of the owner or operator or a corporation with a substantial business relationship with the owner or operator. The guarantor must meet the requirements for owners or operators as specified in §37.541 of this title (relating to Financial Test for Liability). The guarantor must comply with the terms of the corporate guarantee.

(c) The wording of the corporate guarantee must be identical to the wording specified in §37.661 of this title (relating to Corporate Guarantee for Liability). The corporate guarantee shall accompany the items sent to the executive director as specified in §37.541(d) of this title.

(d) If the guarantor has a substantial business relationship with the owner or operator, in addition to the requirements specified in this chapter for the financial test and corporate guarantee, the guarantor will submit the following:

(1) a description of the substantial business relationship and the value received in consideration of the guarantee;

(2) an original or certified original copy of the Resolution by the Board of Directors or a certified letter from the chief financial officer, authorizing the corporate guarantee on behalf of the entity;

(3) an original or certified original copy of the Resolution by the Board of Directors authorizing the formation or acquisition of the guaranteed entity;

(4) an organizational chart which shows the relationship between the two entities; and

(5) the partnership agreement or other agreements, articles, or bylaws which set out the formation, structure, and operation of the guaranteed entity.

(e) After the initial submission of the items required in subsection (d) of this section, the chief financial officer may submit a letter attesting that there has been no change, to demonstrate a substantial business relationship, if there has been no change in the substantial business relationship.

(f) The terms of the corporate guarantee shall provide that if the owner or operator fails to satisfy a judgement based on a determination of liability for bodily injury or property damage to third parties caused by sudden or nonsudden accidental occurrences (or both, as the case may be), arising from the operation of facilities covered by this corporate guarantee, or fails to pay an amount agreed to in settlement of claims arising from or alleged to arise from such injury or damage, the guarantor shall do so up to the limits of coverage.

(g) In the case of corporations incorporated in the United States, a guarantee may be used to satisfy the requirements of this section only if the Attorneys General or Insurance Commissioners of:

(1) the state in which the guarantor is incorporated; and

(2) each state in which a facility covered by the guarantee is located have submitted a written statement to the commission that a guarantee executed as described in this section and §37.661 of this title is a legally valid and enforceable obligation in that state.

(h) In the case of corporations incorporated outside the United States (U.S.), a guarantee may be used to satisfy the requirements of this section only if:

(1) the non-U.S. corporation has identified a registered agent for service of process in each state in which a facility covered by the guarantee is located and in the state in which it has its principal place of business; and

(2) the Attorneys General or Insurance Commissioners of each state in which a facility covered by the guarantee is located and the state in which the guarantor corporation has its principal place of business, has submitted a written statement to the commission that a guarantee executed as described in this section and §37.661 of this title is a legally valid and enforceable obligation in that state.