

Issued August 14, 2020

FEDERAL MARITIME COMMISSION

46 CFR Part 540

Docket No. 20-13

POLICY STATEMENT ON PASSENGER VESSEL FINANCIAL RESPONSIBILITY

AGENCY: Federal Maritime Commission.

ACTION: Policy statement.

SUMMARY: The Federal Maritime Commission (Commission) is publishing this policy statement in order to provide guidance on possible regulatory relief with respect to COVID-19's unprecedented economic effects to passenger vessel operators.

DATES: This policy statement is effective August 14, 2020.

FOR FURTHER INFORMATION CONTACT: Cindy Hennigan, Director, Bureau of Certification and Licensing, Federal Maritime Commission, 800 North Capitol Street, N.W., Room 1018, Washington, DC 20573; email: bcl@fmc.gov; phone: 202-523-5787.

SUPPLEMENTARY INFORMATION:

I. Background

On March 14, 2020, the Centers for Disease Control and Prevention (CDC) issued a "No Sail Order and Suspension of Further Embarkation" causing passenger vessel operators (PVOs) in the U.S. to cease all operations. CDC later extended the term of the order, demonstrating the uncertainty associated with this coronavirus pandemic (COVID-19).

On April 30, 2020, the Commission initiated Fact Finding 30 to investigate COVID-19's impact on the cruise industry. The Commission's Fact-Finding Officer has been meeting with PVOs, marine terminal operators, and other stakeholders to understand COVID-19's effects on the cruise industry.

To overcome the effects COVID-19 has had on our economy, on May 19, 2020, President Trump issued Executive Order 13924, Regulatory Relief To Support Economic Recovery. President Trump declared that federal agencies “should address this economic emergency by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery, consistent with applicable law and with protection of the public health and safety, with national and homeland security, and with budgetary priorities and operational feasibility.”

II. Policy Statement for 46 CFR part 540 Passenger Vessel Financial Responsibility

The Commission administers Public Law 89-777, 46 U.S.C. 44101 *et seq.*, to ensure PVOs satisfy the financial responsibility requirements related to nonperformance of transportation and death or injury to passengers. The Commission set forth the procedures for PVOs to establish their financial responsibility in 46 CFR part 540.

Pursuant to the Commission’s regulations, PVOs must file with the Commission evidence of financial responsibility for nonperformance of transportation in the form and amount described in the regulations. The Commission’s regulations at 46 CFR 540.5 provides that the amount of coverage generally required shall be in an amount determined by the Commission to be no less than 110 percent of the unearned passenger revenue (UPR) of the applicant on the date within the two fiscal years immediately prior to the filing of the application which reflects the greatest amount of unearned passenger revenue.

The regulation, however, also provides that the Commission may, for good cause shown, consider a time period other than the previous two-fiscal-year requirement or other methods acceptable to the Commission to determine the amount of coverage required. The Commission’s

regulations at 46 CFR 540.9(1) further allow smaller PVOs¹ to submit a request to substitute alternative forms of financial protection to evidence the financial responsibility as otherwise provided in the regulations.

The Commission believes the sudden suspension of most cruise transportation due to COVID-19 has likely significantly reduced some PVOs' current UPR, leading to substantial disparity between current UPR and the generally required coverage amount under 46 CFR 540.5. This disparity could result in unnecessarily high premiums and required collateral for PVOs to maintain their required financial instruments. The Commission believes that COVID-19's unprecedented effects on the cruise industry constitute good cause under 46 CFR 540.5 and 46 CFR 540.9(1) for the Commission to consider alternative forms of financial protection using a shorter period to determine the amount of PVOs' financial responsibility.

PVOs eligible under 46 CFR 540.9(1) (i.e., those whose UPR at no time during the two immediately prior fiscal years has exceeded 150% of the cap (currently \$32 million)) are therefore encouraged to submit a request to the Director of the Bureau of Certification and Licensing (BCL) to substitute alternative forms of evidence of financial responsibility for nonperformance with a lower coverage amount based on UPR determined over a shorter period of time. In accordance with 46 CFR 540.9(1), such requests should include copies of the requesting PVO's most recently available annual and quarterly financial and income statements, as well as any other supporting documentation. *See* 46 CFR 540.9(1)(3). The Commission intends to review such requests with greater flexibility considering the unprecedented economic effects of COVID-19 to the cruise industry.

¹ Only PVOs whose UPR at no time during the two immediately prior fiscal years has exceeded 150% of the required cap may request alternative forms of financial responsibility under § 540.9(1).

In particular, the Commission will look favorably on requests for alternative forms of evidence of financial responsibility that are based upon 110% of the PVO's previous month's UPR, provided that: (1) the PVO agrees to comply with individual reporting requirements imposed by the Director of BCL regarding the submission of satisfactory documentation demonstrating the PVO's UPR on a monthly basis;² and (2) if the PVO fails to comply with the requirements and conditions of the alternative form of evidence of financial responsibility, the PVO will once again be subject to the generally applicable financial responsibility requirements and coverage amounts under part 540.³ The Director of BCL is delegated the authority to grant such requests. Requests for other types of alternative forms of evidence of financial responsibility, other than those described in 46 CFR 501.26(d),⁴ will continue to be reviewed by the Commission.

The Commission will maintain this policy as long as it determines that COVID-19's negative effects on the cruise industry continue and may maintain the policy after the expiration of the CDC's "No Sail Order" but in no case shall this policy terminate prior to the 1st of April 2021.

PVOs with any questions or concerns are encouraged to contact the Commission's Bureau of Certification and Licensing by email at bcl@fmc.gov or phone at 202-523-5787.

² In accordance with § 540.9(l)(8), the Commission or BCL may request additional information from a PVO whose request under this section has been granted. Under this authority, BCL may establish individual reporting requirements for each PVO whose request is granted in order to monitor their UPR and ensure that the amount covered by the financial instrument (or instruments) remains adequate.

³ In addition, failure to comply with the conditions of an approved request for an alternative form of evidence of financial responsibility may result in the suspension or revocation of the PVO's certificate under 46 CFR 540.26(b)(2) and (3).

⁴ The Director of BCL is delegated the authority to grant requests to substitute alternative financial responsibility under § 540.9(l) based upon existing protection available to purchases of passenger vessel transportation by credit card by an amount up to fifty (50) percent of the passenger vessel operator's highest two-year unearned passenger revenues. *See* 46 CFR 501.26(d).

III. Regulatory Analyses and Notices

Administrative Procedure Act

The Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) excludes the following types of rules from the notice-and-comment requirement: interpretative rules; general statements of policy; rules of agency organization, procedure, or practice; or when the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to public interest. *See* 5 U.S.C. 553(b). This is a general statement of policy that is exempt from many of the procedural rulemaking requirements of the APA, including the requirements for prior notice, an opportunity for comment, and a delay between the issuance of a final rule and its effective date.

Congressional Review Act

This policy statement is not a “major rule” as defined by the Congressional Review Act, codified at 5 U.S.C. 801 *et seq.* The policy will not result in: (1) an annual effect on the economy of \$100,000,000 or more; (2) a major increase in costs or prices; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies. 5 U.S.C. 804(2).

Regulatory Flexibility Act

The Regulatory Flexibility Act (codified as amended at 5 U.S.C. 601–612) provides that whenever an agency promulgates a final rule after being required to publish a notice of proposed rulemaking under the APA (5 U.S.C. 553), the agency must prepare and make available a final regulatory flexibility analysis describing the impact of the rule on small entities or the head of the agency must certify that the rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 604–605. As indicated above, this policy statement is not

subject to the APA's notice-and-comment requirements, and the Commission is not required to either prepare a regulatory flexibility analysis or certify that the final rule would not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) requires an agency to seek and receive approval from the Office of Management and Budget (OMB) before collecting information from the public. 44 U.S.C. 3507. The agency must submit collections of information in rules to OMB in conjunction with the publication of the notice of proposed rulemaking. 5 CFR 1320.11. This policy statement, however, does not contain any new collections of information, as defined by 44 U.S.C. 3502(3) and 5 CFR 1320.3(c).

By the Commission.

Rachel E. Dickon,
Secretary