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October 25, 2021

Ms. Rachel E Dickon
Secretary
Federal Maritime Commission
Washington, DC

Via email: secretary@fmc.gov

Docket No 20-15

RIN 3072-AC82

Submission of public comments regarding the
Notice of Proposed Rulemaking
on
Passenger Vessel Financial Responsibility

Comments submitted on behalf of Roanoke Insurance Group Inc.

Dear Ms. Dickon

Roanoke Insurance Group Inc. is an insurance broker that specializes in matching our transportation and international trade-focused clients with surety underwriting companies to meet their bond and insurance needs. While the Passenger Vessel Surety Bonds (both performance and casualty versions) are not frequently sought by our clients, we have had and do have clients that require them and we would like to submit comment to certain areas we believe the FMC may need to provide better clarity.

As an insurance broker, we are not the direct underwriter of the risk and we do not set the terms upon which a surety agrees to provide a bond, however our role with some surety companies does place us in the role of administering claims that may arise under certain bonds we arrange for our clients. The majority of our comments will focus in the area of how financial responsibility instruments may be called upon to handle claims.

Summary of some proposed changes:
The FMC regulations in Part 540, Subpart A, contemplate a PVO fulfilling its evidence of financial responsibility for performance through one, or any combination, of the instruments identified in Sections 540.5 and 540.6

(insurance, escrow, guaranty, or surety bond). Except when 46 CRF 540.9(l) may apply (alternative financial responsibility substitutes), the amount is no less than 110% of the highest unearned passenger revenue ("UPR") over the past 2 years, and could be adjusted semi-annually when UPR is required to be reported, but subject to a cap defined in Section 540.9(j) which presently stands at $32 million.

When a bond (FMC Form 132A) serves as financial responsibility, the amount of the bond may be adjusted through the issuance of a rider, or a new bond may be filed to replace a terminated bond. Over the course of time, there can be multiple and/or different instruments of financial responsibility and they could be for different amounts, or there can be one instrument whose amount may have changed over time.

The proposed expansion of matters that comprise the amount of UPR will invariably cause UPR to be higher than how it's calculated under today's regulations, and accordingly a greater number of PVOs than the current 22 may hit the $32 million cap. Even with the 10% cushion of UPR (the financial responsibility is not less than 110% of UPR), the cap imposes situations where the financial responsibility provided on behalf of PVOs by third parties may not be sufficient for all passengers. The FMC also proposes to impose claim settlement deadlines on PVOs and third parties providing the financial responsibility instrument(s).

The impact of changing the definition of UPR.
The expansion of the definition of UPR may likely cause surety companies to be more reluctant to provide larger bonds to PVOs, or make them available on pricing and/or collateral terms more expensive than they would be for a smaller bond amount. The definition expansion to include items ancillary to the cruise, such as but not limited to airfare and local accommodations, will cause the calculation of UPR to be a higher amount than it would be under today's rule. This higher amount means the bond, if not already at the cap, would be for a larger amount. However the financial structure of the PVO remains unchanged or could be more leveraged.

The financial structure and business nature of the cruise industry requires large dollar fixed assets, large dollar capitalization (often debt many times greater than equity), and meaningful current liabilities (unearned passenger revenue) since cruises are often booked over a year in advance. This high leverage business model makes bonding expensive or difficult to obtain unless adequate collateral security is posted with the surety. Now, by increasing UPR by an amount representing money that might already be paid by the PVO to the service provider (the costs billed by hotels, airlines, tour operators, etc,) means that the asset (cash collected from the passenger) is not on the balance sheet, but the PVO must now post a contingent liability for such amounts until it performs the cruise. This creates higher leverage from a financial analysis of the PVO's financial statements. It is Roanoke's experience that increasing larger bond amounts would typically mean the surety would require a higher amount of collateral and charge a higher premium than is required by smaller bond amounts under today's rule.

Our comments:
We request the FMC give clarity as to when claims attach to an instrument of financial responsibility and when the instrument no longer is responsible for claims.
When do claims attach to the financial responsibility instrument? The termination-related language of the bond stipulates that the date of booking is the point when a passenger's liability attaches to the bond.[1] However we wish to point out that if one financial responsibility instrument is terminated AND the PVO continues to maintain financial responsibility in a sufficient amount without a gap in coverage through another

[1] "…The Surety shall not be liable hereunder for any refunds due under ticket contracts made by the Principal for the supplying of transportation and other services after the termination of this bond as herein provided, but such termination shall not affect the liability of the Surety hereunder for refunds arising from ticket contracts made by the Principal for the supplying of transportation and other services prior to the date such termination becomes effective. …"

financial responsibility instrument, then the terminated instrument should no longer be responsible for any claims arising from ticket contracts booked while the earlier financial responsibility instrument was in effect. By continually providing sufficient financial responsibility in accordance with Part 540, the PVO continually protects the UPR regardless of when the ticket contracts are made, and the instrument in effect when the nonperformance event occurs should be the instrument that responds to passenger claims. In the instance when a PVO doesn't maintain sufficient instruments of financial responsibility after a termination, the terminated instrument would continue to be available for claims from contracts booked prior to the effective date of termination should a nonperformance event occur.

Financial responsibility limits can change over time. For purposes of claims, the amount available should be the amount of the financial responsibility instrument providing coverage at the time of nonperformance. A combination of instruments of financial responsibility together totaling an amount acceptable to the FMC might be in place, or even if only one instrument is in place, the amount of such might have changed over time. The FMC should determine the date when a claims for damages by passengers arise and attach. We suggest it would be the point in time when *nonperformance of transportation* occurs, as that term is defined in 540.2. The attachment should not automatically be the date the passenger books its trip, often with a small down payment, or any date(s) the passenger makes subsequent payment(s) for its voyage package. The date of nonperformance would attach to the instrument(s) in effect on that date, or if termination has become effective without a sufficient replacement instrument being filed, the non-performance event would attach to the last instrument in effect. This aligns with our suggestion in the prior comment regarding termination with a sufficient replacement instrument.

What amount of financial responsibility is involved? A PVO and its surety (or guarantor, trust administrator, etc.) may change (higher or lower) the amount of financial responsibility required based on its UPR as reported over time. For example, a PVO has a bond for $20 million and increases it by filing a rider to the bond effective on August 1, 2021[2], to $24 million. If nonperformance occurs on November 1, 2021, the amount available is $24 million, and the earlier amount ($20 million) has been fully discharged and no longer is available to provide funds for claims. Conversely, if the financial responsibility amount changed by rider effective on August 1, 2021, from $24 million to $20 million, and a non-performance event occurred November 1, 2021, the amount available should be $20 million since that amount was determined by the FMC to be sufficient when it was filed. In either example, there should not be the combined protection of (up to) $44 million.

When a combination of instruments are used by a PVO, how are claims filed and how are claims to be administered and paid?
Section 540.5 contemplates situations where a combination of instruments can be used to meet the total amount of financial responsibility. For example, a combination of instruments is used to provide $25 million of financial responsibility through use of a bond for $10 million and a guaranty for $15 million. Does one instrument respond before the other (the bond pays first until depleted, then the guaranty becomes available), or to they both respond jointly and proportionally (e.g., the bond pays 40% and the guaranty pays 60% of each claim), or are the instruments available on a joint and several basis (e.g., a claimant can seek full payment from either instrument, and the bond or guaranty provider must seek proportional contribution from the other). We recommend that, where multiple instruments are used, unless all providers of the instruments agree in writing

[2] In conjunction with the PVO's semi-annual reporting of UPR, the PVO and FMC determine the financial responsibility amount can adjust and still meet the 110% coverage requirement.

in their documents that instruments are intended to be layered one after the other[3], that each instrument must respond proportionally to its share of the total amount of financial responsibility the PVO provides.

When claims may or do exceed the amount of financial responsibility available, should claims be paid on a first come-first paid basis or should claims be prorated?
A lag in reporting UPR (reported semi-annually by July 31 and January 31) and/or a cap on the amount of financial responsibility can create a situation where the bond (or other instrument(s)) may not be sufficient to pay all the claims presented, even with the 110% of UPR requirement. The FMC is proposing to impose a requirement that claims presented under the instrument "…must be paid within 90 days of submission to the [Surety / Guarantor / Escrow Agent]. …"

Imposing a requirement of paying within 90 days of submission may imply, but does not actually imply, that claims are to be fully paid in the order of submission until the funds available under the instrument are gone. If not stated directly within the text of each respective financial responsibility instrument, the FMC should state in its regulations, or in the context of publishing its final rule, whether claims should be paid in the order of submission, or when claims may exceed the limit of the instrument, claims are to be prorated if submitted timely during a limited but reasonable window of time for passengers to file claims. We request the FMC give the providers of such instruments clarity in its regulations and/or in the language of the instruments. Should the FMC consider the pro-rata approach, it might find the manner that the FMCSA statute handles property broker or freight forwarder bond claims as a guidance for any regulations.[4]

Roanoke thanks the FMC for this opportunity to seek clarity and provide comment on the proposed regulatory changes leading to the Final Rule.

Best regards,

/s/
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[3] For example, the $15 million escrow pays all claims up to $15 million before the bond begins to pay claims after $15 million have been incurred. In other words, the bond serves in excess of the escrow agreement.
[4] 49 USC 13906(b)(6); 49 USC 13906(c)(7)