SFAA THE SURETY & FIDELITY ASSOCIATION OF AMERICA

October 25, 2021

Rachel E. Dickon, Secretary
Federal Maritime Commission
800 North Capitol Street, NW
Washington, DC 20573

Via: Rulemaking Email at secretary@fmc.gov

Re: Docket No. 20–15, Comments on PVO Financial Responsibility Rulemaking (Federal Maritime Commission)

Dear Secretary Dickon:

As a leading representative of the surety bond industry, The Surety & Fidelity Association of America (SFAA)[1] is writing to provide comments on the Notice of Rulemaking action by the Federal Maritime Commission (Commission) to adopt new regulations related to its Passenger Vessel Operator (PVO) Financial Responsibility requirements (Rulemaking). Specifically, the Commission is proposing to define when nonperformance of transportation has occurred and to establish uniform procedures regarding how and when passengers may make claims for refunds under a PVO's financial responsibility instrument upon nonperformance.

Previously, SFAA submitted comments on November 13, 2020, in response to the Commission's October 14, 2020, Advance Notice of Proposed Rulemaking regarding its passenger vessel operator (PVO) financial responsibility requirements (ANPR). The Commission, through the ANPR, sought comments on proposed changes to the definition of nonperformance by a PVO and establishing a refund policy that would allow passengers to make claims directly to the PVO's surety. In its comments, SFAA provided the Commission with a number of recommendations to change the ANPR proposal to ensure any changes would not adversely impact the PVO bond market. As SFAA pointed out, some of the proposals could have significantly increased the cost of PVO bonds as well as reduce the number of sureties providing PVO bonds.

[1] SFAA is a trade association of more than 425 insurance companies that write 98 percent of surety and fidelity bonds in the U.S. SFAA is licensed as a rating or advisory organization in all states and it has been designated by state insurance departments as a statistical agent for the reporting of fidelity and surety experience.

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SFAA is very appreciative of the Commission's acceptance of most of SFAA's recommendations as reflected in the Rulemaking. While SFAA believes the changes included in the Rulemaking addressed many of the concerns with the ANPR, SFAA urges the Commission to adopt the additional changes to the Rulemaking SFAA recommends below in order to clarify some of the changes to the ANPR now contained in the Rulemaking.

First, SFAA welcomes the Commission's change to the proposed refund process to provide the option for sureties to require a judgment prior to paying a claim. Pursuant to the Rulemaking, the provision providing that authority is included in the new proposed bond form. However, SFAA recommends the Commission add that authority to the regulations as well. Since the bond is conditioned on the Principal's compliance with the Commission's regulations, the regulations should include all of the authority of a surety providing a PVO bond. SFAA also recommends changing the term "judgment" to "final court judgement" in the regulations and proposed bond form to make clear that only judgments finally adjudicated by the courts are acceptable. Additionally, SFAA recommends the provision be included in both parts of the proposed bond form that provide for payments to passengers. To accomplish these changes, SFAA recommends the following amendments to the Rulemaking:

1. Amend 46 C.F.R.§ 540.9(f) by adding a new subsection (3) to read as follows:

   "(3) Prior to becoming liable for a payment under subsection (f)(1) or (f)(2), the surety may, at its discretion, require a passenger to reduce its claim to a final court judgement, and submit the final court judgement, with all other documents required for submitting a claim, to the surety." ; and

2. Amend the proposed bond form as follows:

   a. In paragraph (1), add the following phrase at the end: "And, Surety reserves the discretion to require a final court judgement prior to resolving the claim."; and

   b. In paragraph (2), strike the word "judgment" and insert the phrase "final court judgment" in its place.

Second, SFAA urges the Commission to clarify a surety's obligations and options under a PVO bond. When the PVO bond was developed and underwritten, it was to guaranty the

PVO's compliance with the requirements under subpart A of part 540 of title 46, Code of Federal Regulations, including compensation for certain damages to passengers. Generally, it was not anticipated that the surety bond process would be used to provide mass refund processing services. This seems to be acknowledged in the Rulemaking which states that current regulations do not include uniform procedures regarding how and when passengers may make claims for refunds against the various financial responsibility instruments.

While a surety may be able to deal with a handful of refunds not paid by the PVO, it is not set up to handle a large number of claims associated with nonperformance refunds. In that case, to make the bond marketable, SFAA recommends the Commission clarify that a surety has the ability to forfeit or interplead its PVO bond in addition to adjusting claims. This would make clear that a surety has the option to adjust the claims in its discretion or surrender the bond to the Commission for use in the payment of nonperformance refunds of the principal or interplead it with a court of competent jurisdiction. To accomplish this change, SFAA recommends the following amendment to the Rulemaking:

> Amend the language in the proposed bond form by inserting the phrase "The Surety may in its discretion pay the full penal sum of this bond to the Commission or as ordered by a court of competent jurisdiction and thereby discharge the bond or the Surety may elect to adjust the individual claims." after the phrase "(3) Valid claims must be paid within 90 days of submission to the Surety. The liability of the Surety with respect to any passenger shall not exceed the passage price paid by or on behalf of such passenger. 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 amount in the aggregate to the penalty of the bond, but in no event shall the Surety's obligation hereunder exceed the amount of said penalty. "

Finally, there could be some confusion regarding the conditions for terminating a bond. Currently, the proposed bond form provides that a termination cannot become effective during a voyage. SFAA has no issue with the limitation on termination. However, there is a concern that the provision may be unclear about what happens to a bond for which a surety provides the 30-day notice, and the notice period ends during a voyage. SFAA recommends an amendment to the proposed bond form, and regulations, to clarify that the bond would terminate upon the end of the voyage. To accomplish this change, SFAA recommends the following amendment to the Rulemaking:

Amend the language in the proposed bond form as follows:

> Insert the phrase ", but where the end of the 30-day notice occurs while a voyage is in progress, the bond shall terminate upon the end of the voyage." after the phrase "The Principal or the Surety may at any time terminate this bond by written notice sent by certified mail, courier service, or other electronic means such as email and fax to the other and to the Federal Maritime Commission at its office in Washington, DC, such termination to become effective thirty (30) days after actual receipt of said notice by the Commission, except that no such termination shall become effective while a voyage is in progress"

Again, SFAA believes its modifications recommended herein would prevent the increase premium costs or a reduction in the of availability of PVO bonds. Accordingly, SFAA requests the Commission to make the changes recommended above.

Thank you for the opportunity to comment on the Rulemaking. We stand ready to answer any questions you may have regarding our comments or provide any information you may require.

Sincerely,

Stephen C. Taylor
Directory of Policy