



NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS

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Delivered via U.S. mail and e-mail to secretary@fmc.gov.

November 21, 2011

Ms. Karen V. Gregory
Secretary
Federal Maritime Commission (FMC)
800 North Capitol Street, NW
Washington, DC 20573-0001

Re: Docket No. 11-16 RIN 3072-AC45 “Passenger Vessel Operator Financial Responsibility Requirements for Nonperformance of Transportation”

Dear Ms. Gregory:

On behalf of the National Association of Surety Bond Producers (NASBP), a national trade organization of professional surety bond producers, representing firms employing over 5,000 personnel who specialize in surety bonding, including issuing bid, performance, and payment bonds for construction projects and other commercial purposes, I am contacting you to express concerns with proposed rules to amend financial responsibility for passenger vessel operators. Our comments focus on the impact increasing the performance coverage from \$15 million to \$30 million will have on small passenger vessel operators and consumers, as well as on proposed changes to FORM FMC-132A relating to the discharge of a surety’s liability.

Under 46, CFR 540.5, a Passenger Vessel Operator (PVO) is required to furnish financial security in an amount not less than 110% of the highest unearned passenger revenue (UPR) at any one time within the past two fiscal years. The amount of coverage required is capped at \$15 million as mandated under 46 CFR 540.9(j). Coverage may be provided by a surety bond underwritten by a surety acceptable to the Department of Treasury, acceptable insurance, a guaranty underwritten by an acceptable guarantor or an escrow account established in accordance with the terms of an escrow agreement approved by the Commission.

Impact on Small Vessel Operators

The proposed rule amends 46 CFR 540.9(j), by increasing the cap required to show evidence of responsibility from \$15 million up to \$30 million after the initial phase-in period of two years. Thereafter, the financial responsibility automatically increases to the nearest \$1 million based on changes as reflected in the Consumer Price Index. NASBP believes this requirement will place an undue financial burden on small vessel operators who choose to seek evidence of financial responsibility for coverage established through a surety bond.

A surety bond is a three-party agreement where the surety company assures the obligee (owner i.e., FMC) that the principal (PVO) will perform the contract. Unlike insurers, sureties do not expect to suffer losses. The fundamental difference is sureties demand reimbursement from their principals (PVO) in the event of a loss. Subsequently, in order to ensure that principal has the financial wherewithal to meet the contractual obligations, the surety conducts a thorough financial assessment of the principal and will require a certain financial strength based upon the surety bond amount. Moreover, the higher the bond amount, the greater the financial scrutiny placed on the principal. Subsequently, if the PVO is faced with a higher bond requirement due to an increase in the cap, the PVO may need to demonstrate greater financial strength. It is possible that small vessel operators may not have the financial wherewithal to qualify for a surety bond due to the increase in the cap.

Impact on Consumer Protection – A Flat % UPR may be the solution

NASBP is also concerned about consumer protection in the proposed regulations. According to the proposed rule, total UPRs have tripled since the coverage cap level was established in 1991, while the small operator has been greatly impacted. Total outstanding UPRs are \$3.7 billion equaling a total financial security on file of \$308 million, which is approximately 8% of the total UPR now in the hands of PVOs (See pg. 58228). With the proposed increase to the cap from \$15 million to \$30 million, the Commission believes it will increase total net financial protection for cruise passengers to approximately \$144 million (see pg. 58229). This would bring total security provided to the FMC to \$452 million, e.g. \$144 million plus \$308 million. This equates to 12.25% in total coverage based on the current outstanding UPRs.

However, if the Commission removed the 110% requirement with a hard cap, such as requiring a straight 15% of all outstanding UPRs to be guaranteed, they would actually increase their security to \$555 million and provide greater protection to consumers. The flat percentage 15% UPR would be a consistent and fair method of applying the security requirement for all PVOs. Currently, if a PVO has Unearned Passenger Revenue of \$500 million, under the proposed cap of \$30 million, they would only be providing 6% security. How does that protect consumers? NASBP believes that a flat 15% would be fair to small and large vessel operators while providing greater protection to consumers in the event of PVO failure.

Proposed Changes to Revised FORM FMC 132-A

Revised FORM FMC 132-A states, "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".

It appears that Revised FORM FMC 132-A does not have a definite term; it appears to run to the point in time if and when the bond penalty is released. No underwriter ever intends that a surety bond run for long periods. Whatever the Principal's obligation is, it should be capable of fulfillment in due course. Otherwise, it is impossible to underwrite. Surety underwriters cannot be expected to guarantee a firm's financial responsibility for periods that extend too far into the future. Without a provision for cancellation, bond

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availability may become a factor, especially for larger bond amounts. NASBP believes there should be a set time limit on how long the FMC can hold the bond if liabilities are less than the penal sum of the bond. Moreover, sureties should have the discretion to cancel the bond under appropriate circumstances with proper notice.

Thank you for your consideration and the opportunity to participate in the rulemaking process. If you have any questions regarding our comments, please feel free to contact me directly at 202-464-1217 or at lleclair@nasbp.org.

Sincerely,



Lawrence E. LeClair
Director, Government Relations

cc: Ms. Kathleen Mitchell
Chair, NASBP Commercial Surety Committee