

PART 525—MARINE TERMINAL OPERATOR SCHEDULES

■ 1. The authority citation for part 525 continues to read as follows:

Authority: 46 U.S.C. 40102, 40501, 41101–41106.

■ 2. Amend § 525.1 by:

■ a. Revising paragraphs (a) and (c)(1), (2), (7), (8), (13), (18), and (19);

■ b. Redesignating paragraphs (c)(21) through (23) as paragraphs (c)(22) through (24); and

■ c. Adding a new paragraph (c)(21).

The revisions and addition read as follows:

§ 525.1 Purpose and scope.

(a) *Purpose.* This part implements the Shipping Act of 1984, as amended (46 U.S.C. 40101–41309). The requirements of this part are necessary to enable the Commission to meet its responsibilities with regard to identifying and preventing unreasonable preference or prejudice and unjust discrimination pursuant to section 10 of the Act (46 U.S.C. 41101–41106).

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(c) * * *

(1) *Act* means the Shipping Act of 1984, as amended.

(2) *Bulk cargo* means cargo that is loaded and carried in bulk without mark or count, in a loose unpackaged form, having homogenous characteristics. Bulk containerized cargo tendered by the shipper is subject to mark and count and is, therefore, subject to the requirements of this part.

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(7) *Expiration date* means the last day after which the entire schedule or a single element of the schedule, is no longer in effect.

(8) *Forest products* means forest products including, but not limited to, lumber in bundles, rough timber, ties, poles, piling, laminated beams, bundled siding, bundled plywood, bundled core stock or veneers, bundled particle or fiber boards, bundled hardwood, wood pulp in rolls, wood pulp in unitized bales, paper and paper board in rolls or in pallet or skid-sized sheets, liquid or granular by-products derived from pulping and papermaking, and engineered wood products.

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(13) *Marine terminal operator* means a person engaged in the United States in the business of providing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to Subchapter II of Chapter 135 of Title 49, United States Code. A marine terminal

operator includes, but is not limited to, terminals owned or operated by states and their political subdivisions; railroads who perform port terminal services not covered by their line haul rates; common carriers who perform port terminal services; and warehousemen who operate port terminal facilities. For the purposes of this part, marine terminal operator includes conferences of marine terminal operators. This term does not include shippers or consignees who exclusively provide their own marine terminal facilities in connection with tendering or receiving proprietary cargo from a common carrier or water carrier.

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(18) *Terminal facilities* means one or more structures comprising a terminal unit, which include, but are not limited to docks, berths, piers, aprons, wharves, warehouses, covered and/or open storage spaces, cold storage plants, cranes, grain elevators and/or bulk cargo loading and/or unloading structures, landings, and receiving stations, used for the transmission, care and convenience of cargo and/or passengers in the interchange of same between land and ocean common carriers or between two ocean common carriers.

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(21) *United States* means the States of the United States, the District of Columbia, Guam, Puerto Rico, the Virgin Islands, American Samoa, the Northern Mariana Islands, and any other territory or possession of the United States.

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■ 3. Amend § 525.3 by revising paragraphs (b) through (e) to read as follows:

§ 525.3 Availability of marine terminal operator schedules.

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(b) *Access to electronically published schedules.* Marine terminal operators shall provide access to their terminal schedules via the internet.

(c) *Internet connection.* (1) The internet connection requires that systems provide a uniform resource locator (URL) internet address (e.g., <http://www.tariffsrus.com> or <http://1.2.3.4>).

(2) Marine terminal operators shall ensure that their internet service providers provide static internet addresses.

(d) *Notification.* Each marine terminal operator shall notify the Commission's Bureau of Trade Analysis (BTA), prior to the commencement of marine terminal operations, of its organization name, home office address, contact

information for its representative, the location of its terminal schedule(s), and the publisher, if any, used to maintain its terminal schedule, by electronically submitting Form FMC–1 via the Commission's website at www.fmc.gov. Any changes to the above information shall be immediately transmitted to BTA within 30 calendar days. BTA has the authority to accept submitted Form FMC–1 filings and revisions. Form FMC–1 filings are pending until accepted. The Commission will publish, on its website, the location of any terminal schedule made available to the public.

(e) *Form and manner.* A marine terminal operator may make available to the public a schedule of rates, regulations, and practices, including limitations of liability for cargo loss or damage, pertaining to receiving, delivering, handling, or storing property at its marine terminal. Any such schedule made available to the public is enforceable by an appropriate court as an implied contract without proof of actual knowledge of its provisions. Each terminal schedule made available by a marine terminal operator shall contain an individual identification number, effective date, expiration date, if any, and the terminal schedule in full text and/or data format showing the relevant rates, charges, and regulations relating to or connected with the receiving, handling, storing, and/or delivering of property at its terminal facilities.

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By the Commission.

William Cody,

Secretary.

[FR Doc. 2022–05512 Filed 3–16–22; 8:45 am]

BILLING CODE 6730–02–P

FEDERAL MARITIME COMMISSION

46 CFR Part 540

[Docket No. 20–15]

RIN 3072–AC82

Passenger Vessel Financial Responsibility

AGENCY: Federal Maritime Commission

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission (Commission) is issuing this final rule to adopt regulatory changes to its passenger vessel operator financial responsibility requirements. The Commission is defining when nonperformance of transportation has occurred and establishing uniform

procedures regarding how and when passengers may make claims for refunds under a passenger vessel operator's financial responsibility instrument when nonperformance occurs. This rulemaking resulted from recommendations in an Interim Report issued by the Fact Finding Officer in Commission Fact Finding Investigation No. 30: COVID-19 Impact on Cruise Industry. In the August 25, 2021, Notice of proposed rulemaking, the Commission proposed to modify regulations to revise the definition of Unearned Passenger Revenue, adopt a definition of nonperformance of transportation, and detail the process for obtaining refunds under the PVOs' financial responsibility instruments filed with the Commission. Based on the comments received on the proposed rule, this final rule also clarifies that passengers must wait until the PVO refund period has ended as outlined in the PVO's claims procedure before making a claim against the financial instrument, or the claim has been denied by the PVO. Also, this final rule confirms that claims may be resolved between the passenger and the PVO as an alternative form of compensation. Finally, it creates a small business accommodation by delaying implementation of the new unearned passenger revenue definition by two years for small entities.

DATES:

Effective date: This rule is effective April 18, 2022.

Compliance date: For businesses that meet the criteria in the revised 46 CFR 540.2(i), the compliance date is March 17, 2024.

ADDRESSES: *Docket:* To view background documents or comments received, go to the Commission's Electronic Reading Room at: <https://www2.fmc.gov/readingroom/proceeding/20-15/>.

FOR FURTHER INFORMATION CONTACT: William Cody, Secretary, Phone: 202-523-5725, Email: secretary@fmc.gov.

SUPPLEMENTARY INFORMATION:

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I. Introduction

The Federal Maritime Commission has broad authority pursuant to 46 U.S.C. Ch. 44101 *et seq.* to establish rules pertaining to PVOs' financial responsibility instruments filed with the Commission. Fact Finding 30 was initiated on April 30, 2020, to investigate the impact of COVID-19 and identify commercial solutions to COVID-19 related issues that interfered with the operation of the cruise industry. Fact Finding 30: Covid-19 Impact on Cruise Industry, *Interim Report: Refund Policy* (July 27, 2020). This rulemaking was based on recommendations in an Interim Report issued by the Fact Finding Officer. The Commission has carefully considered all the comments it has received in an Advance Notice of Proposed Rulemaking (ANPRM), 85 FR 65020 (October 29, 2020) and a Notice of Proposed Rulemaking (NPRM), 86 FR 47441 (August 25, 2021), prior to issuing this Final Rule (FR). The NPRM contains a detailed background of this rule. See 86 FR at 47442.

II. Regulatory History: ANPRM and NPRM Summary

On October 29, 2020, the Commission issued an Advance Notice of Proposed Rulemaking (ANPRM) to obtain comments on potential regulatory changes recommended in the Fact Finding 30 Interim Report on PVO refund policies. The proposed changes were intended to provide a clear and consistent policy toward passenger vessel ticket refunds in the case of nonperformance by the vessel operator. Specifically, the Commission recommended modifying regulations in 46 CFR part 540 to: (1) Adopt a definition of nonperformance of transportation, and (2) detail the process for obtaining refunds under the PVOs' financial responsibility instruments filed with the Commission. Subsequent to the ANPRM, the Commission received 4 sets of comments; these were from Cruise Lines International Association (CLIA); Passenger Vessel Association (PVA); The Surety & Fidelity Association of America (SFAA); and Kacie Didier. The Commission took these comments into consideration in developing recommendations which

were included in the Notice of Proposed Rulemaking (NPRM).

The Commission considered the comments it received in response to the ANPRM and adjusted the proposed regulations published on August 25, 2021. In response to the NPRM, the Commission received 82 comments from interested parties. Of the comments received, six recommended changes to the proposed regulatory text and are discussed below. The 76 remaining comments detailed individual disputes between passengers and passenger vessel owners or operators but do not directly request changes to the proposed regulatory text. The Commission appreciates the examples provided and encourages passengers that have commented to utilize the tools the Commission provides in this final rule. The six comments recommending changes to the proposed rule text were filed by Alaskan Dream Cruises (ADC), CLIA, PVA, Roanoke, SFAA, and Fredric Lazarus. These comments are addressed in the discussion below.

III. Discussion of Changes and Public Comments

The Commission's current regulations provide that "[n]o person in the United States may arrange, offer, advertise or provide passage on a vessel unless a Certificate (Performance) has been issued to or covers such person." 46 CFR 540.3. Such persons must apply for a Certificate pursuant to Section 540.4, and, per Section 540.5, provide financial responsibility "in an amount determined by the Commission to be no less than 110 percent of the unearned passenger revenue of the [PVO] applicant" for the two immediately preceding fiscal years that reflect the greatest amount of unearned passenger revenue. The amount of required financial responsibility, however, is currently capped at \$32 million. 46 CFR 540.9(j). This Final Rule will revise the current regulations to include the following: (1) Implementation of the process for obtaining refunds from PVO financial responsibility instruments for nonperformance of transportation, (2) addition of the definition of nonperformance and reporting requirement for instances of nonperformance of transportation, (3) revision of the definition of unearned passenger revenue, (4) publishing information on how to obtain refunds, (5) acknowledgement of mutually-agreed settlements, and (6) accommodation for PVOs that fall into the small business category.

The sample surety bond, guaranty, and escrow agreement that are set forth

in the Commission's regulations are also amended. They are included in the Appendix to this final rule.

A. Substantive Changes to the Proposed Rule

1. Process for Obtaining Refunds From PVO Financial Instruments for Nonperformance of Transportation

The Commission's regulations do not currently prescribe how long passengers have after nonperformance to seek a refund from a PVO's financial responsibility instrument. The Fact Finding 30 Interim Report recommended that the Commission specify that a PVO may set a reasonable deadline for passenger refund requests, but the deadline may not be less than six months after the scheduled voyage. Fact Finding 30 Interim Report at 12. The Commission proposed: (1) The passenger makes a request for a refund from the Principal in accordance with the ticket contract. If the ticket contract refund procedure provides less than 180 days to submit a claim, the financial responsibility instrument will be available after written notification to the Principal and (2) If the passenger is unable to resolve the claim within 180 days after nonperformance, as defined in 46 CFR 540.2, the passenger may submit a claim against the financial responsibility instrument per the instructions on the Commission website. The claim may include a copy of the boarding pass, proof and amount of payment, cancellation notice, and dated proof of the properly filed claim against the Principal. All documentation submitted must clearly display the vessel and voyage with the scheduled and actual date of sailing. At the discretion of the financial instrument provider, a judgment may be required prior to resolving the claim; and (3) valid claims must be paid within 90 days of submission of the claim to the financial instrument provider.

In its submitted comments, CLIA requested that the Commission change the proposed text of 46 CFR 540.9(f)(1) and (2) to read: (1) The passenger must make a written request for a refund from the PVO in accordance with the respective PVO's claims procedures; (2) In the event the passenger is unable to resolve the claim within 180 days, or such shorter refund notice period for which the PVO's claims procedure provides, after nonperformance of transportation occurs or if the claim is denied by the PVO, the passenger may submit a claim against the financial instrument as per instructions on the Commission website. The Commission has considered the proposed changes

submitted by CLIA and has adopted the proposed changes with some modification. These changes will clarify that passengers must wait until (1) the PVO refund period has ended as outlined in the PVO's claims procedure before making a claim against the financial instrument, or (2) the claim has been denied by the PVO. With this minor change, the Commission adopts CLIA's recommendation.

CLIA also proposed to revise numbered paragraphs (1) and (2) of the Commission's proposed forms FMC-132(A), FMC-133(A) and "Appendix A of Escrow Agreement," changing the language to similarly match what they proposed for 46 CFR 540.9(f)(1) and (2). The Commission concurs and makes the corresponding changes to the forms.

2. Definition of Nonperformance

Congress requires that PVOs file with the Commission evidence of financial responsibility to indemnify passengers for nonperformance of transportation. 46 U.S.C. 44102. The Commission's regulations in 46 CFR 540 do not expressly define what constitutes nonperformance of transportation, but the substantive provisions and required financial responsibility instrument terms indicate that it means a PVO's failure to provide transportation or other accommodations and services subject to part 540, subpart A,¹ in accordance with the terms of the ticket contract between the PVO and passenger. *See* 46 CFR 540.1(a).

As discussed in the ANPRM and NPRM, the Commission sought comment on adopting a definition of nonperformance of transportation. In the ANPRM, the Commission include the following draft definition:

Nonperformance of transportation means (1) Canceling a voyage; or (2) delaying the boarding of passengers by more than twenty-four (24) hours if the passenger elects not to embark on the substitute or delayed voyage.

After considering the comments received in the ANPRM to this definition, which are discussed in the NPRM, the Commission revised the proposed definition of nonperformance of transportation as follows:

Nonperformance of transportation means cancelling or delaying a voyage by three (3) or more calendar days, if the passenger elects not to embark on the

delayed voyage or a substitute voyage offered by the passenger vessel operator.

The Commission also proposed revising the language of the forms for financial responsibility instruments (surety bonds, guaranties, and escrow agreements) to reflect coverage in situations that meet the added definition.²

PVA concurs with the Commission's change to the definition in the proposed rule from delaying the boarding of passengers by more than 24 hours to delaying the voyage by three or more calendar days because it does not believe that a 24-hour delay in sailing should constitute nonperformance of transportation. It states that the proposed rule embraces a more reasonable standard: a delay in sailing by three (3) or more calendar days, if the passenger elects not to embark on the delayed voyage or a substitute voyage.

The PVA also agrees with the change in the proposed rule excluding from the definition of "nonperformance of transportation" a scenario in which a passenger voluntarily cancels a booking at any time in advance of the scheduled sailing. It states that if the PVO's vessel in fact sails, there is no "nonperformance of transportation." PVA believes that the proposed definition of "nonperformance" satisfactorily addresses this potential problem.

The Alaska Catamaran, LLC dba Alaskan Dream Cruises (ADC) also concurs with revised definition of nonperformance of transportation in the proposed rule because it does not believe that a 24-hour delay in sailing should constitute nonperformance of transportation. The ADC concurs with the updated definition in the proposed rule of "a delay in sailing by three (3) or more calendar days, if the passenger elects not to embark on the delayed voyage or a substitute voyage." ADC encourages the Commission to resist suggestion to compress this standard.

The Commission took into consideration the comments of the various interested parties, and adopts a new definition of nonperformance of transportation in 46 CFR 540.2.

The adoption of the definition of nonperformance of transportation led the Commission to require PVOs to report nonperformance of transportation events to the Commission semi-

¹ The scope of the transportation, accommodations, and services covered is described in the definition of "unearned passenger revenue" in § 540.2 and includes water transportation and all other accommodations, services, and facilities relating thereto, but excludes air transportation, hotel accommodations, or tour excursions. 46 CFR 540.2(i).

² These forms include Form FMC-132A, Passenger Vessel Surety Bond (Performance); Form FMC-133A, Guaranty in Respect of Liability for Nonperformance, Section 3 of the Act; and Appendix A, Example of Escrow Agreement for Use Under 46 CFR 540.5(b)). There is no required or optional form for insurance, which must meet the requirement in § 540.5(a).

annually. This reporting is necessary in order for the Commission to be responsive to the public and to provide adequate monitoring and statistical information on occurrences of nonperformance. Nonperformance of transportation events occurring between January 1 and June 30 would be reported no later than July 20 of the same calendar year, and events occurring between July 1 and December 31 would be reported no later than January 31 of the following calendar year.

Also, this final rule requires all certified PVOs to report to the Commission, as part of their semi-annual statement, instances of nonperformance of transportation. The Commission will use the information to analyze any PVO's nonperformance and monitor the rule's impact on PVOs and consumers.

3. Definition of Unearned Passenger Revenue

Commission regulations currently state that the PVO financial responsibility instruments must provide coverage for "unearned passenger revenue," (UPR) which is defined in 46 CFR 540.2(i) as passenger revenue received for water transportation and all other accommodations, services, and facilities relating thereto not yet performed and includes port fees and taxes paid, but excludes such items as airfare, hotel accommodations, and tour excursions. In the NPRM, the Commission proposed redefining unearned passenger revenue as passenger revenue received for water transportation and all other accommodations, services, and facilities that have not been performed by the PVO. Passenger revenue includes port fees, taxes, and all ancillary fees remitted to the PVO by the passenger. The Commission received comments from CLIA, PVA, The Roanoke Insurance Group Inc. (Roanoke) and ADC stating their concerns with revising the definition of unearned passenger revenue.

CLIA proposes that the Commission's proposed definitions of unearned passenger revenue, at 46 CFR 540.2(i), be revised by adding the words, ". . . excluding any non-refundable amounts advanced by the PVO on behalf of the passenger to unaffiliated providers of goods and services, such as payments for non-refundable airline tickets provided to the passenger." CLIA believes the definition should exclude from ancillary fees any non-refundable payments by the PVO, which CLIA says is acting in good faith as the agent for passengers. With respect to non-

refundable airfares, CLIA maintains under most airlines' policies the passenger may be able to apply a non-refundable airfare for a different travel date for the passenger's benefit for up to a year after the original scheduled flight date. CLIA further claims that while the PVO cannot legally recoup the airfare payment for the passenger, the passenger may use the ticket.

The PVA continues to urge the Commission not to amend the definition of UPR. PVA believes that broadening the definition will cause the UPR of a PVO to go up and thereby increase how much financial responsibility must be demonstrated but that it will have no consequence for a PVO that can currently take advantage of the regulatory "cap" for financial responsibility (now at \$32 million). PVA asserts that for smaller PVOs for which the "cap" does not come into play, it will increase their costs for obtaining instruments attesting to their financial responsibility. More specifically, PVA states, this change will increase the costs of the five PVOs that operate "small ship" U.S.-flagged overnight cruise vessels.

The PVA further states that travel providers that offer land-based package trips with advance collection of fees for airfare, hotel accommodations, and third-party tours will not be subject to this requirement and the land-based travel companies often compete directly with "small ship" U.S.-flagged PVOs in Alaska and elsewhere. PVA claims that in the rare instances of "nonperformance of transportation," the passengers are not without remedies—the PVO is likely to provide voluntary refunds (or if the customer agrees, credits for future travel) or the customer can obtain reimbursement from a credit card company.

Roanoke believes that the expanded 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 revision will cause the calculation of UPR to be a higher amount than it would be under the current rule. This higher amount means that bond, if not already at the cap, would be for a larger amount. The financial structure of the PVO, however, would remain unchanged or could be more leveraged.

Roanoke further states that 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. In Roanoke's experience, increasing to 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 the current rule.

ADC is a member of PVA, and a portion of their submitted comments echoed exactly the comments submitted by PVA and discussed above. ADC believes that broadening the definition will cause the UPR to go up and thereby increase how much financial responsibility must be demonstrated. ADC believes this will have no consequence for a PVO that can take advantage of the regulatory "cap" for financial responsibility (now at \$32 million). The ADC asserts that for smaller PVOs, the cap does not come into play, and it will increase their costs for obtaining instruments attesting to financial responsibility, at a time when they are receiving great pressure from their bonding company to reduce their bond exposure through all steps necessary.

The ADC further claims that travel providers that offer land-based package trips with advance collection of fees for airfare, hotel accommodations, and third-party tours will not be subject to this requirement; these land-based travel companies often compete directly with "small ship" U.S.-flagged PVOs. According to ADC, in the rare instances of "nonperformance of transportation," the passengers are not without remedies as demonstrated by ADC work during 2020 when they either refunded passengers or the passengers volunteered to move their travel to a future year.

In addition, ADC stated that it is under contract with their credit card processor to hold funds received to use in the event the company is unable to refund passengers. During the COVID-19 pandemic, their credit card company increased ADC's cash on deposit from \$300,000 to \$2 million. ADC believes that the UPR definition in the proposed rule would significantly damage the company's ability to meet its financial obligations.

The Commission adopts the definition of unearned passenger revenue as passenger revenue received for water transportation and all other accommodations, services and facilities that have not been performed by the PVO. Passenger revenue will include

port fees, taxes and all ancillary fees submitted to the PVO by the passenger. The Commission, therefore, continues to believe that to provide better protection to passengers, and because PVOs have the existing relationship with the providers of ancillary services, the PVOs should be responsible for refunding all monies collected by the PVOs for all services not yet performed.

4. Publishing Information on How To Obtain Refunds

The Commission received one comment in reference to publishing information on how to obtain refunds. The PVA commented that it agrees with the Commission's suggestion of developing a template to place on its website with instructions for how a passenger might file a claim asserting "nonperformance of transportation."

In this final rule, the Commission is revising part 540.9 to include a new paragraph (f) describing the process a passenger can use to obtain a refund in the event of nonperformance. Also, a new paragraph (i) will require PVOs to provide clear instructions on their websites for how passengers may obtain refunds in the event of nonperformance. The Commission believes that asking PVOs to provide this type of information on their websites will provide passengers with clear and concise instructions to follow when requesting refunds for nonperformance of transportation.

The Commission will also include the PVOs' active web page address to the Commission's own website. Additionally, Form FMC-131 "Application for Certificate of Financial Responsibility" will be updated to provide a required field for PVOs to provide the web page address of their refund instructions for nonperformance of transportation.

5. Mutually-Agreed Settlements

Mutually-agreed settlements were not specifically discussed in the NPRM. However, CLIA requested as part of their comments that the Commission add a new paragraph reading, "Nothing in this rule shall be interpreted to preclude the passenger and the PVO from entering into an alternative form of compensation in full satisfaction of a required refund, such as a future cruise credit." The Commission agrees with CLIA that the added paragraph makes it clear that claims may be resolved between the passenger and the PVO as an alternative form of compensation. The Commission's proposed definition of nonperformance does not preclude alternative forms of compensation, such

as a future cruise credit. Thus, the Commission adopts CLIA's suggestion.

6. Small Business Accommodations

The Regulatory Flexibility Act analysis below suggests that the rule may have a substantial economic impact on small PVOs. The Commission has elected to delay the implementation of this rule with respect to small entities. This accommodation for small businesses will be discussed in depth in Section V, Regulatory Analyses.

B. Other Comments

1. Passenger Declaration With Refund Application

CLIA recommends that passengers applying for refunds sign and submit with the application a declaration that they have not received compensation from an alternative party. CLIA believes that the following statement should be included, "Under penalty of perjury, that the passenger, to the best of his/her/their knowledge, is due the refund sought and has not recovered and will not recover any portion of the refund sought from the cruise line or any other source, such as cancellation insurance or a credit card refund, and the passenger has not accepted an alternative form of compensation from the PVO, such as a future cruise credit, in full satisfaction of the refund." The Commission understands CLIA's concerns for possible duplicative refund claims by passengers. The Commission, however, does not regulate financial instrument providers. Financial instrument providers may follow their own claim procedure, and it is up to them whether to require the suggested declaration from passengers submitting claims.

2. Legal Authority

PVA restated that it does not believe the Commission has legal authority to issue a rule on nonperformance of transportation and refund policy. PVA claims that 46 U.S.C. 44102 does not grant legal authority to the Commission to address the matter of what constitutes nonperformance. PVA further asserts the Commission lacks the legal authority to issue a rule mandating when and how passenger refunds are payable in the event of nonperformance of transportation.

The statute requires PVOs to file with the Commission evidence of financial responsibility to indemnify passengers for nonperformance of transportation. 46 U.S.C. 44102. The statute states that satisfactory evidence includes the information the Commission considers necessary and must be filed in the forms

required by the Commission's regulation. 46 U.S.C. 44102 (a)-(b). Further, the Commission has broad authority to "prescribe regulations to carry out its duties and powers." 46 U.S.C. 46105(a).

To satisfy the statutory mandate of protecting passengers from nonperformance of transportation, the Commission believes that it must clarify what constitutes nonperformance and what is UPR. Without clear definitions of those terms, the cruise industry and passengers may continue to experience confusion as to when and how to indemnify passengers for nonperformance under the submitted financial responsibility instruments. This final rule does not regulate PVOs' own practice or policy of indemnifying passengers for nonperformance. Rather, the Commission clarifies when and how nonperformance may be covered under the financial responsibility instruments that must be submitted to the Commission by PVOs. The Commission has the statutory authority to implement these changes.

3. Sureties' Discretion To Require a Final Court Judgment

SFAA recommends that the Commission add to the rule the surety's authority to require a "final court judgment" prior to paying a claim. SFAA recommends that the provision providing that authority be included in the new proposed bond form. It recommends that Commission add that authority to the Commission's regulations to make clear that only judgments finally adjudicated by a court are acceptable.

The Commission does not adopt SFAA's recommendation. The Commission believes that it is better to allow the sureties establish their own claim procedures satisfying their obligation under the surety bonds submitted to the Commission.

4. Passengers' Own Cancellation

The Commission received a comment from Mr. Fredric Lazarus who stated that refunds should take place when (a) the passenger cancels a booking after the declaration by the Secretary of Health and Human Services of a nationwide Public Health Emergency and (b) the scheduled sailing is ultimately delayed or cancelled by the passenger vessel operator (PVO).

Presently, PVOs are required to file with the Commission evidence of financial responsibility to indemnify passengers for nonperformance of transportation. 46 U.S.C. 44102. The adopted definition of nonperformance also provides that it means cancellation

or significant delay of voyages by PVOs. Passengers' own cancellation does not constitute a nonperformance by PVOs that should be covered by the PVOs financial responsibility instruments for nonperformance.

IV. Rulemaking Analyses

Regulatory Flexibility Act

Final Regulatory Flexibility Analysis

Under the Regulatory Flexibility Act (RFA), whenever an agency promulgates a final rule after being required to publish a proposed rulemaking under the Administrative Procedure Act (5 U.S.C. 553), the agency must prepare and make available a Final Regulatory Flexibility Analysis (FRFA) describing the impact of the rule on small entities, unless the head of the agency certifies that the rulemaking will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 604–605. Below is the FRFA for this final rule.

Need for and Objectives of the Passenger Vessel Financial Responsibility Regulation

This rulemaking stems from the Commission's *Fact Finding Investigation No. 30: COVID-19 Impact on Cruise Industry* on PVO refund policies. Fact Finding 30's Interim Report concluded that clearer guidance is needed to determine whether a passenger is entitled to obtain a refund if a PVO cancels a voyage, makes a significant schedule change, or significantly delays a voyage. As part of the report, the Fact-Finding Officer recommended making regulatory changes with respect to the definition of nonperformance and to make clear how passengers may obtain refunds under the PVOs' financial responsibility instruments filed with the Commission.

This final rule establishes when passengers are entitled to a refund for nonperformance of transportation. First, the rule establishes a timeline for when a refund request can occur and requires PVOs to provide clear and precise instructions on how passengers may request refunds in the event of nonperformance. Second, it clarifies that nothing in the rulemaking precludes the passenger and PVO from entering into a mutually agreed settlement such as a future cruise credit. Third, it creates a small business accommodation by delaying implementation of the new UPR definition by two years for small entities. Fourth, it adds a definition of nonperformance which entitles passengers to a refund of their prepaid fares when voyages are canceled or

delayed for three or more calendar days and the passenger does not opt to accept an alternative voyage. Finally, it changes the definition of UPR to include ancillary fees such as airfare, hotel accommodations, and tour excursions if the PVO offers and collects monies from the passenger for such services.

Significant Comments in Response to the IRFA

The Commission discussed comments received in response to the NPRM in Section IV above. Two commenters touched on issues related to the Initial Regulatory Flexibility Analysis (IRFA), and the commenters either are or represent small PVOs. The PVA believes that small PVOs may be disproportionately impacted by the regulation based on the regulation's broadening definition of UPR. PVA argues that by including ancillary fees for services collected by the PVO in the definition of UPR, UPR will increase. PVA states that large PVOs will not have to demonstrate any additional financial responsibility because of the cap on coverage demonstrating financial responsibility for UPR. The cap is currently set at \$32 million and many large PVOs likely exceed the cap while small PVOs likely do not. PVA contends that UPR should not include ancillary fees collected by PVOs and expresses concerns companies offering financial instruments may leave the market because of the regulation. The SFAA also expressed concerns that some of the proposed changes in the regulation may reduce the number of surety companies offering financial responsibility instruments to PVOs. ADC expressed similar concerns regarding UPR. ADC believes the increased costs of instruments to demonstrate financial responsibility for UPR could be as high as \$1–\$1.5 million for the small family-owned business. Both PVA and ADC asked for the rule to not be adopted.

As part of the IRFA, the Commission considered alternatives for small entities including exemption from the rule, delayed compliance with the rule, and an alternative definition of nonperformance. The Commission ultimately decided the best way to balance the need for consumer protections while minimizing the impact on small entities was to delay the new definition of UPR for small entities. Therefore, the new definition of UPR created by this rulemaking will apply to small entities two years after the effective date of the regulation for all other PVOs. During this two-year period, the existing definition of UPR prior to this proposed rulemaking will remain in effect for small entities. The

Commission believes the delay will lessen potentially disproportionate impacts of the regulation on small PVOs.

The Commission defines and identifies small entities according to the Small Business Administration (SBA) regulations in 13 CFR 121.201. PVOs typically fall under the classification of the North American Industry Classification System (NAICS) code 483112, Deep Sea Passenger Transportation, and under this classification, businesses with a total number of 1,500 employees or less qualify as small. PVOs operating exclusively on coastal, the Great Lakes, and inland waterways fall under NAISC codes 483114 and 483212 and qualify as small if they have a total number of 500 employees or less. Although there may be PVOs that report employees of less than 1,500, lines that are subsidiaries of much larger companies would not qualify as small entities for the purpose of receiving regulatory relief under the RFA. See 13 CFR 121.106(b).

As noted above, small PVOs expressed concerns about the regulation increasing the costs of financial responsibility instruments to demonstrate financial responsibility for nonperformance. Part of the concern is the uncertainty around how financial responsibility products will be priced given the expanded definition of UPR and new definition of nonperformance. A two-year delay of the new definition of UPR for small PVOs will allow the market for financial responsibility instruments to adjust. Providers of such financial responsibility instruments can analyze how the new definitions of UPR and nonperformance will impact large PVOs and better price such products for small PVOs after the delay. Large PVOs are likely better able to absorb potential costs of the regulation due to larger volume of sales, likely higher cash reserves, and the monetary cap on the amount of financial responsibility for nonperformance. The two-year delay will also allow small PVOs the chance to have two full seasons of operation to adjust to the coming regulatory changes. Small PVOs will have the opportunity to evaluate their business practices for potential changes that may make it less costly to comply with the regulation's requirements and learn from changes already implemented by large PVOs.

Description and Estimate of the Number of Small Entities Effected

As part of the IRFA, the Commission estimated the number of small entities, small PVOs, to which the proposed rule would apply. The same methodology from the IRFA was used for the FRFA.

The Commission does not believe market conditions have changed to impact the number of small PVOs nor has the regulation changed enough between the IRFA and the FRFA that additional small PVOs would be impacted.

The SBA has established regulations to determine whether businesses qualify as small entities. 13 CFR part 121. The regulations use the NAICS with codes and descriptions to classify businesses and measure their size by either annual receipts (gross annual revenue) or number of employees. See 13 CFR subpart A—Size Eligibility Provisions and Standards (January 1, 2020). The calculation of total annual receipts or number of employees for the purpose of determining the size of a business includes those of the business itself plus those of its domestic and foreign affiliates. See 13 CFR 121.104 and 121.106.

The final rule modifies the regulations in 46 CFR part 540 governing evidence of PVOs financial responsibility for nonperformance of transportation. The regulated businesses that the rule applies to are PVOs. At present, there are a total of 43 PVOs with certificates of financial responsibility for nonperformance issued by the Commission. Pursuant to the SBA regulations in 13 CFR 121.201, PVOs fall under the classification of NAICS codes 483112, 483114, and 483212. For Deep Sea Passenger Transportation, businesses with a total number of 1,500 employees or less qualify as small. For coastal, the Great Lakes, and inland

waters passenger transportation, businesses with a total of 500 employees or less qualify as small. Accordingly, the Commission estimates that 14 out of the 43 PVOs (or 33 percent) qualify as small businesses under the size standard of the SBA. While there may be PVOs that report employees of less than 1,500 or 500 depending on where the PVO operates, lines that are subsidiaries of much larger companies would not qualify as small entities for the purpose of receiving regulatory relief under the RFA. See 13 CFR 121.106(b).

Projected Reporting, Recordkeeping, and Other Compliance Requirements

Cost to Government

The Commission estimates the total annual cost of this final rule to the Federal government to be \$145,356, offset by the collection of \$64,482 in filing fees, for a net annual cost of \$80,874.

Recordkeeping and Filing Costs to PVOs

The final rule would require that PVOs submit additional semi-annual reports on their instances of nonperformance. The estimated annual cost of the additional reports would be \$41,670.

Other Costs to PVOs

As part of the IRFA, the Commission discussed the types of costs likely to be incurred by PVOs and the challenges associated with accurately quantifying these costs. The Commission sought comments on additional data and methods that could help quantify

compliance costs. ADC was the only commenter who responded with an estimate of compliance cost and believes the increased costs of instruments to demonstrate financial responsibility for nonperformance could be as high as \$1–\$1.5 million for their small family-owned business.

In the IRFA, the Commission discussed what it believes to be the current costs to demonstrate financial responsibility for nonperformance. Based on interviews with PVOs as part of the investigation in Fact Finding No. 30 and its additional research, the Commission estimates the cost of premiums for nonperformance coverage to range from \$75,000 for the smallest of PVOs to around \$600,000 for the largest. The total cost of current nonperformance coverage for all PVOs is estimated to be around \$9,830,000. The Commission believes the regulation may increase the cost of nonperformance coverage to PVOs by 25 percent due to the change in the definition of nonperformance and UPR. The Commission estimates the percentage increase in premiums based on discussions it had with members of the financial services industry. Assuming a 25 percent increase, nonperformance coverage would increase by \$2,457,500 to a total of \$12,287,500. Breaking down the costs increases by size of PVOs, the total increase for small PVOs would be \$425,000 for a total cost of \$2,125,000 and for large PVOs would be \$2,032,500 for a total cost of \$10,162,500.

Figure 1. Estimated Costs of Financial Responsibility Instruments for Nonperformance

	Current estimated cost of Financial Responsibility Instruments for Nonperformance	New estimated cost of Financial Responsibility Instruments for Nonperformance
Small PVOs	\$1,700,000	\$2,125,000
Large PVOs	\$8,130,000	\$10,162,500
Total	\$9,830,000	\$12,287,500

Determining exactly how much premiums will rise as a result of this regulation is difficult. Several factors impact the cost of premiums such as the incidence rate of nonperformance, how many customers would choose refunds over future cruise credits, and the total amount of ancillary fees collected by

PVOs under the new definition of UPR. While the Commission was able to find data on rates of nonperformance, it was not able to find the other types of data necessary to fully quantify the costs of the regulation on PVOs. To minimize potential impacts to small PVOs, the Commission decided to delay

compliance with the regulation for small PVOs. Based on the delay, the increase in the cost of premiums for small PVOs may be less than the initially estimated 25 percent increase.

Steps To Minimize Significant Economic Impacts on Small Entities

As part of complying with the RFA, the Commission estimated the number of small entities that would be impacted by this rulemaking. The Commission was not able to ascertain that the proposed rule would not have a significant economic impact on a substantial number of small entities and thus provided an IRFA in the NPRM. As part of the IRFA, the Commission considered three alternatives for small entities including exemption from the regulation, delayed compliance with the regulation, and a separate definition of nonperformance with a longer time period. The Commission decided that the best way to minimize the economic impacts on small entities while maintaining consumer protections would be to delay for two years the new definition of UPR in the rulemaking for small entities. Small entities will have two additional years before they have to comply with the new definition of UPR during which time they will have the opportunity to better understand and adjust to how the new definition will impact their businesses. The Commission believes the delay will lessen potential impacts stemming from the regulation on small entities.

National Environmental Policy Act

The Commission's regulations categorically exclude certain actions rulemakings from any requirement to prepare an environmental assessment or an environmental impact statement because they do not increase or decrease air, water or noise pollution or the use of fossil fuels, recyclables, or energy. 46 CFR 504.4. The final rule discusses amendments to Commission's program for certifying the financial responsibility of PVOs. This rulemaking thus falls within the categorical exclusion for "[c]ertification of financial responsibility of passenger vessels" under 46 CFR 504.4(a)(2). Therefore, no environmental assessment or environmental impact statement is required.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) (PRA) 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 proposed rules to OMB in conjunction with the publication of the notice of proposed rulemaking. 5 CFR 1320.11.

The information collection requirements in part 540 are currently authorized under OMB Control Number 3072–0012. In compliance with the PRA, the Commission submitted the proposed revised information collection to the Office of Management and Budget. Notice of the revised information collections was published in the **Federal Register** and public comments were invited. See 86 FR 47441 (Aug. 25, 2021).

No comments specifically addressed the revised information collection in part 540.

Executive Order 12988 (Civil Justice Reform)

The Commission will ensure that any proposed or final rule issued in this proceeding meets the applicable standards in E.O. 12988 titled, "Civil Justice Reform," to minimize litigation, eliminate ambiguity, and reduce burden.

Regulation Identifier Number

The Commission assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda). The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda, available at <http://www.reginfo.gov/public/do/eAgendaMain>.

List of Subjects in 46 CFR Part 540

Insurance, Maritime carriers, Penalties, Reporting and recordkeeping requirements, Surety bonds.

For the reasons stated in the preamble, the Federal Maritime Commission amends 46 CFR part 540 as follows:

PART 540—PASSENGER FINANCIAL RESPONSIBILITY

■ 1. The authority citation for part 540 continues to read as follows:

Authority: 5 U.S.C. 552, 553; 31 U.S.C. 9701; 46 U.S.C. 305, 44101–44106.

■ 2. Amend § 540.2 by:

- a. Revising paragraph (i); and
- b. Adding Paragraph (m).

The revision and addition read as follows:

§ 540.2 Definitions.

* * * * *

(i) *Unearned Passenger Revenue* means: (1) Passenger revenue received for water transportation and all other

accommodations, services, and facilities that have not been performed by the PVO. Passenger revenue includes port fees, taxes, and all ancillary fees remitted to the PVO by the passenger;

(2) From March 17, 2022 through March 17, 2024, for small businesses that operate in deep sea waters and have 1,500 or fewer employees or operate exclusively in coastal, Great Lakes, and inland water ways and have 500 or fewer employees, *Unearned Passenger Revenue* means passenger revenue received for water transportation and all other accommodations, services, and facilities relating thereto not yet performed; this includes port fees and taxes paid, but excludes such items as airfare, hotel accommodations, and tour excursions.

* * * * *

(m) *Nonperformance of transportation* means cancelling or delaying a voyage by three (3) or more calendar days, if the passenger elects not to embark on the delayed voyage or a substitute voyage offered by the passenger vessel operator.

- 3. Amend § 540.9 by
- a. Adding paragraph (f);
- b. Revising paragraph (h); and
- c. Adding paragraph (i).

The additions and revision read as follows:

§ 540.9 Miscellaneous.

* * * * *

(f) *Process for obtaining refunds from the financial instrument in the event of nonperformance.* (1) The passenger must make a written request for a refund from the PVO in accordance with the respective PVO's claims procedure.

(2) In the event the passenger is unable to resolve the claim within 180 days, or such shorter claim resolution period for which the PVO's claims procedure provides, after nonperformance of transportation occurs or if the claim is denied by the PVO, the passenger may submit a claim against the financial instrument as per instructions on the Commission website. The claim may include a copy of the boarding pass, proof and amount of payment, the cancellation or delay notice, and dated proof of properly filed claim against the PVO or written notification as required in paragraph (f)(1) of this section. All documentation must clearly display the vessel and voyage with the scheduled and actual date of sailing.

(3) Nothing in this rule shall be interpreted to preclude the consumer and the PVO from entering into an alternative form of compensation in full

satisfaction of a required refund, such as a future cruise credit.

* * * * *

(h) Every person who has been issued a Certificate (Performance) must submit to the Commission a semi-annual statement of any changes with respect to the information contained in the application or documents submitted in support thereof or a statement that no changes have occurred. Negative statements are required to indicate no change. These statements must cover the 6-month period of January through June and July through December and include a statement of the highest unearned passenger vessel revenue accrued for each month in the 6-month reporting period as well as any instances of nonperformance of transportation. Such statements will be due within 30 days after the close of every such 6-month period. The reports required by this paragraph shall be submitted to the Bureau of Certification and Licensing at its office in Washington, DC by certified mail, courier service, or electronic submission.

(i) *Information on How to Obtain Refunds.* (1) PVOs shall provide on their websites clear instructions on how passengers may obtain refunds in the event of nonperformance of transportation; and

(2) PVOs shall submit an active web page address with their refund instructions for nonperformance of transportation to the Commission for publication on the Commission's website.

(3) Form FMC-131 "Application for Certificate of Financial Responsibility" will include a required field for PVOs to provide the web page address of their refund instructions for nonperformance of transportation.

* * * * *

■ 4. Revise Form FMC-132A to Subpart A of Part 540 to read as follows:

Form FMC-132A to Subpart A of Part 540

FORM FMC-132A

FEDERAL MARITIME COMMISSION

*Passenger Vessel Surety Bond
(Performance)*

Surety Co. Bond No. _____
FMC Certificate No. _____

Know all persons by these presents, that we _____ (Name of applicant), of (City), _____ (State and country), as Principal (hereinafter called Principal), and _____ (Name of surety), a company created and existing under the laws of _____ (State and

country) and authorized to do business in the United States as Surety (hereinafter called Surety) are held and firmly bound unto the United States of America in the penal sum of _____, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents. Whereas the Principal intends to become a holder of a Certificate (Performance) pursuant to the provisions of 46 CFR part 540, subpart A, and has elected to file with the Federal Maritime Commission (Commission) such a bond to insure financial responsibility and the supplying transportation and other services subject to 46 CFR part 540, subpart A.

Whereas this bond is written to assure compliance by the Principal as an authorized holder of a Certificate (Performance) pursuant to subpart A of part 540 of title 46, Code of Federal Regulations, and shall inure to the benefit of any and all passengers to whom the Principal may be held legally liable for any of the damages herein described. Now, therefore, the condition of this obligation is such that if the Principal shall pay or cause to be paid to passengers any sum or sums for which the Principal may be held legally liable by reason of the Principal's failure faithfully to provide such transportation and other accommodations and services 46 CFR 540, Subpart A made by the Principal and the passenger while this bond is in effect for the supplying of transportation and other services pursuant to and in accordance with the provisions of subpart A of part 540 of title 46, Code of Federal Regulations, then this obligation shall be void, otherwise, to remain in full force and effect. Whereas this bond is written to assure compliance by the Principal as an authorized holder of a Certificate (Performance) pursuant to 46 CFR part 540, subpart A, and shall inure to the benefit of any and all passengers to whom the Principal may be held legally liable for any of the damages herein described. Now, Therefore, the condition of this obligation is that the penalty amount of this bond shall be available to pay damages made pursuant to passenger claims, if:

(1) The passenger makes a request for refund from the Principal in accordance with the ticket contract.

(2) In the event the passenger is unable to resolve the claim within 180 days, or such shorter claim resolution period for which the PVO's claims procedure provides, after nonperformance of transportation occurs or if the claim is denied by the

PVO, the passenger may submit a claim against the bond as per instructions on the Commission's website. The claim may include a copy of the boarding pass, proof and amount of payment, cancellation notice, and dated proof of properly filed claim against the Principal. All documentation must clearly display the vessel and voyage with scheduled and actual date of sailing. And, Surety reserves the discretion to require a judgement prior to resolving the claim.

(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. The Surety agrees to furnish written notice to the Federal Maritime Commission forthwith of all suits filed, judgments rendered, and payments made by said Surety under this bond.

This bond is effective the ____ day of _____, 20 __, 12:01 a.m., standard time at the address of the Principal as stated herein and shall continue in force until terminated as hereinafter provided. 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. 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.

The underwriting Surety will promptly notify the Director, Bureau of Certification and Licensing, Federal Maritime Commission, Washington, DC 20573, of any claim(s) or disbursements against this bond.

In witness whereof, the said Principal and Surety have executed this instrument on ____ day of _____, 20 ____.

Principal _____

Name _____

By _____

(Signature and title)

Witness _____

SURETY _____

[SEAL]

Name _____

By _____

(Signature and title)

Witness _____

Only corporations or associations of individual insurers may qualify to act as surety, and they must establish to the satisfaction of the Federal Maritime Commission legal authority to assume the obligations of surety and financial ability to discharge them.

■ 5. Revise Form FMC-133A to Subpart A of Part 540 to read as follows:

Form FMC-133A to Subpart A of Part 540

FORM FMC-133A

FEDERAL MARITIME COMMISSION

Guaranty in Respect of Liability for Nonperformance

Guaranty No. _____

FMC Certificate No. _____

1. Whereas _____ (Name of applicant) (Hereinafter referred to as the "Applicant") is the Owner or Charterer of the passenger Vessel(s) specified in the annexed Schedule ("the Vessels"), which are or may become engaged in voyages to or from United States ports, and the Applicant desires to establish its financial responsibility in accordance with 46 CFR part 540, subpart A, provided that the Federal Maritime Commission ("FMC") shall have accepted, as sufficient for that purpose, the Applicant's application, supported by this Guaranty, and provided that FMC shall issue to the Applicant a Certificate (Performance) ("Certificate"), the undersigned Guarantor hereby guarantees to discharge the Applicant's legal liability to indemnify the passengers of the Vessels for nonperformance of transportation within the meaning of 46 CFR part 540.2, in the event that:

(1) The passenger makes a request for refund from the Principal in accordance with the ticket contract.

(2) In the event the passenger is unable to resolve the claim within 180 days, or such shorter claim resolution period for which the PVO's claims procedure provides, after nonperformance of transportation

occurs or if the claim is denied by the PVO, the passenger may submit a claim against the Guaranty as per instructions on the Commission website. The claim may include a copy of the boarding pass, proof and amount of payment, cancellation notice, and dated proof of properly filed claim against the Principal. All documentation must clearly display the vessel and voyage with scheduled and actual date of sailing. And, Guarantor reserves the discretion to require a judgement prior to resolving the claim.

(3) Valid claims must be paid within 90 days of submission to the Guarantor.

2. The Guarantor's liability under this Guaranty in respect to any passenger shall not exceed the amount paid by such passenger; and the aggregate amount of the Guarantor's liability under this Guaranty shall not exceed \$_____.

3. The Guarantor's liability under this Guaranty shall attach only in respect of events giving rise to a cause of action against the Applicant, in respect of any of the Vessels, for nonperformance of transportation within the meaning of 46 CFR 540.2, occurring after the Certificate has been granted to the Applicant, and before the expiration date of this Guaranty, which shall be the earlier of the following dates:

(a) The date whereon the Certificate is withdrawn, or for any reason becomes invalid or ineffective; or

(b) The date 30 days after the date of receipt by FMC of notice in writing delivered by certified mail, courier service or other electronic means such as email and fax, that the Guarantor has elected to terminate this Guaranty except that: (i) If, on the date which would otherwise have been the expiration date under the foregoing provisions (a) or (b) of this Clause 3, any of the Vessels is on a voyage whereon passengers have been embarked at a United States port, then the expiration date of this Guaranty shall, in respect of such Vessel, be postponed to the date on which the last passenger on such voyage shall have finally disembarked; and (ii) Such termination shall not affect the liability of the Guarantor for refunds arising from ticket contracts made by the Applicant for the supplying of transportation and other services prior to the date such termination becomes effective.

4. If, during the currency of this Guaranty, the Applicant requests that a vessel owned or operated by the Applicant, and not specified in the annexed Schedule, should become subject to this Guaranty, and if the Guarantor accedes to such request and so notifies FMC in writing or other

electronic means such as email and fax, then, provided that within 30 days of receipt of such notice, FMC shall have granted a Certificate, such Vessel shall thereupon be deemed to be one of the Vessels included in the said Schedule and subject to this Guaranty.

5. The Guarantor hereby designates _____, with offices at _____, as the Guarantor's legal agent for service of process for the purposes of the Rules of the Federal Maritime Commission, in accordance with 46 CFR part 540, subpart A

(Place and Date of Execution)

(Type Name of Guarantor)

(Type Address of Guarantor)

By _____

(Signature and Title)

Schedule of Vessels Referred to in Clause 1

Vessels Added to This Schedule in Accordance With Clause 4

■ 6. Revise Appendix A to Subpart A of Part 540 to read as follows:

Appendix A to Subpart A of Part 540— Example of Escrow Agreement for Use Under 46 CFR 540.5(b)

ESCROW AGREEMENT

THIS ESCROW AGREEMENT, ____ made as of this ____ day of (month & year), by and between (Customer), a corporation/company having a place of business at ("Customer") _____ a and (Banking Institution name & address) a banking corporation, having a place of business at ("Escrow Agent").

Witnesseth:

WHEREAS, Customer wishes to establish an escrow account in order to provide for the indemnification of passengers in the event of non-performance of water transportation to which such passengers would be entitled, and to establish Customer's financial responsibility therefore; and

WHEREAS, Escrow Agent wishes to act as Escrow Agent of the escrow account established hereunder;

NOW, THEREFORE, in consideration of the premises and covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. Customer has established on (month, & year) (the "Commencement Date") an escrow account with the Escrow Agent which escrow account shall hereafter be governed by the terms of this Agreement (the "Escrow Account"). Escrow Agent shall maintain the Escrow Account in its name, in its capacity as Escrow Agent.

2. Customer will determine, as of the date prior to the Commencement Date, the amount of unearned passenger revenue, including

any funds to be transferred from any predecessor Escrow Agent. Escrow Agent shall have no duty to calculate the amount of unearned passenger revenue. Unearned Passenger Revenues are defined as that passenger revenue received for water transportation and all other accommodations, services and facilities relating thereto not yet performed. 46 CFR 540.2(i).

3. Customer will deposit on the Commencement Date into the Escrow Account cash in an amount equal to the amount of Unearned Passenger Revenue determined under Paragraph 2 above plus a cash amount (“the Fixed Amount”) equal to (10 percent of the Customer’s highest Unearned Passenger Revenue for the prior two fiscal years. For periods on or after (year of agreement (2009)), the Fixed Amount shall be determined by the Commission on an annual basis, in accordance with 46 CFR part 540.

4. Customer acknowledges and agrees that until such time as a cruise has been completed and Customer has taken the actions described herein, Customer shall not be entitled, nor shall it have any interest in any funds deposited with Escrow Agent to the extent such funds represent Unearned Passenger Revenue.

5. Customer may, at any time, deposit additional funds consisting exclusively of Unearned Passenger Revenue and the Fixed Amount, into the Escrow Account and Escrow Agent shall accept all such funds for deposit and shall manage all such funds pursuant to the terms of this Agreement.

6. After the establishment of the Escrow Account, as provided in Paragraph 1, Customer shall on a weekly basis on each (identify day of week), or if Customer or Escrow Agent is not open for business on (identify day of week) then on the next business day that Customer and Escrow Agent are open for business recompute the amount of Unearned Passenger Revenue as of the close of business on the preceding business day (hereinafter referred to as the “Determination Date”) and deliver a Recomputation Certificate to Escrow Agent on such date. In each such weekly recomputation, Customer shall calculate the amount by which Unearned Passenger Revenue has decreased due to (i) the cancellation of reservations and the corresponding refund of monies from Customer to the persons or entities canceling such reservations; (ii) the amount which Customer has earned as revenue as a result of any cancellation fee charged upon the cancellation of any reservations; (iii) the amount which Customer has earned due to the completion of cruises; and (iv) the amount by which Unearned Passenger Revenue has increased due to receipts from passengers for future water transportation and all other accommodations, services and facilities relating thereto and not yet performed.

The amount of Unearned Passenger Revenue as recomputed shall be compared with the amount of Unearned Passenger Revenue for the immediately preceding period to determine whether there has been a net increase or decrease in Unearned Passenger Revenue. If the balance of the

Escrow Account as of the Determination Date exceeds the sum of the amount of Unearned Passenger Revenue, as recomputed, plus the Fixed Amount then applicable, then Escrow Agent shall make any excess funds in the Escrow Account available to Customer. If the balance in the Escrow Account as of the Determination Date is less than the sum of the amount of Unearned Passenger Revenue, as recomputed, plus an amount equal to the Fixed Amount, Customer shall deposit an amount equal to such deficiency with the Escrow Agent. Such deposit shall be made in immediately available funds via wire transfer or by direct transfer from the Customer’s U.S. Bank checking account before the close of business on the next business day following the day on which the Recomputation Certificate is received by Escrow Agent. The Escrow Agent shall promptly notify the Commission within two business days any time a deposit required by a Recomputation Certificate delivered to the Escrow Agent is not timely made.

7. Customer shall furnish a Recomputation Certificate, in substantially the form attached hereto as Annex 1, to the Federal Maritime Commission (the “Commission”) and to the Escrow Agent setting forth the weekly recomputation of Unearned Passenger Revenue required by the terms of Paragraph 6 above. Customer shall mail or fax to the Commission and deliver to the Escrow Agent the required Recomputation Certificate before the close of business on the business day on which Customer recomputes the amount of Unearned Passenger Revenue.

Notwithstanding any other provision herein to the contrary, Escrow Agent shall not make any funds available to Customer out of the Escrow Account because of a decrease in the amount of Unearned Passenger Revenue or otherwise, until such time as Escrow Agent receives the above described Recomputation Certificate from Customer, which Recomputation Certificate shall include the Customer’s verification certification in the form attached hereto as Annex 1. The copies of each Recomputation Certificate to be furnished to the Commission shall be mailed to the Commission at the address provided in Paragraph 25 herein. If copies are not mailed to the Commission, faxed or emailed copies shall be treated with the same legal effect as if an original signature was furnished. No repayment of the Fixed Amount may be made except upon approval of the Commission.

Within fifteen (15) days after the end of each calendar month, Escrow Agent shall provide to Customer and to the Commission at the addresses provided in Paragraph 25 below, a comprehensive statement of the Escrow Account. Such statement shall provide a list of assets in the Escrow Account, the balance thereof as of the beginning and end of the month together with the original cost and current market value thereof, and shall detail all transactions that took place with respect to the assets and investments in the Escrow Account during the preceding month.

8. At the end of each quarter of Customer’s fiscal year, Customer shall cause the independent auditors then acting for it to conduct an examination in accordance with

generally accepted auditing standards with respect to the weekly Recomputation Certificates furnished by Customer of the Unearned Passenger Revenues and the amounts to be deposited in the Escrow Account and to express their opinion within forty-five (45) days after the end of such quarter as to whether the calculations at the end of each fiscal quarter are in accordance with the provisions of Paragraph 6 of this Agreement. The determination of Unearned Passenger Revenue of such independent auditors shall have control over any computation of Unearned Passenger Revenue by Customer in the event of any difference between such determinations. To the extent that the actual amount of the Escrow Account is less than the amount determined by such independent auditors to be required to be on deposit in the Escrow Account, Customer shall immediately deposit an amount of cash into the Escrow Account sufficient to cause the balance of the Escrow Account to equal the amount determined to be so required. Such deposit shall be completed no later than the business day after receipt by the Escrow Agent of the auditor’s opinion containing the amount of such deficiency.

The opinion of such independent auditors shall be furnished by such auditors directly to Customer, to the Commission and to the Escrow Agent at their addresses contained in this Agreement. In the event that a required deposit to the Escrow Agent is not made within one Business Day after receipt of an auditor’s report or a Recomputation Certificate, Escrow Agent shall send notification to the Commission within the next two Business Days.

9. Escrow Agent shall invest the funds in the Escrow Account in Qualified Investments as directed by Customer in its sole and absolute discretion. “Qualified Investments” means, to the extent permitted by applicable law:

(a) Government obligations or obligations of any agency or instrumentality of the United States of America;

(b) Commercial paper issued by a United States company rated in the two highest numerical “A” categories (without regard to further gradation or refinement of such rating category) by Standard & Poor’s Corporation, or in the two highest numerical “Prime” categories (without regard to further gradation or refinement of such rating) by Moody’s Investor Services, Inc.;

(c) Certificates of deposit and money market accounts issued by any United States bank, savings institution or trust company, including the Escrow Agent, and time deposits of any bank, savings institution or trust company, including the Escrow Agent, which are fully insured by the Federal Deposit Insurance Corporation;

(d) Corporate bonds or obligations which are rated by Standard & Poor’s Corporation or Moody’s Investors Service, Inc. in one of their three highest rating categories (without regard to any gradation or refinement of such rating category by a numerical or other modifier); and

(e) Money market funds registered under the Federal Investment Company Act of 1940, as amended, and whose shares are registered under the Securities Act of 1933,

as amended, and whose shares are rated "AAA", "AA + " or "AA" by Standard & Poor's Corporation.

10. All interest and other profits earned on the amounts placed in the Escrow Account shall be credited to Escrow Account.

11. This Agreement has been entered into by the parties hereto, and the Escrow Account has been established hereunder by Customer, to establish the financial responsibility of Customer as the owner, operator or charterer of the passenger vessel(s) (see Exhibit A), in accordance with 46 CFR part 540, subpart A. The Escrow Account shall be held by Escrow Agent in accordance with the terms hereof, to be utilized to discharge Customer's legal liability to indemnify the passengers of the named vessel(s) for non-performance of transportation within the meaning of 46 CFR 540.2(m). The Escrow Agent shall make indemnification payments pursuant to written instructions from Customer, on which the Escrow Agent may rely, or in the event that:

(1) The passenger makes a request for refund from the Principal in accordance with the ticket contract.

(2) In the event the passenger is unable to resolve the claim within 180 days, or such shorter claim resolution period for which the PVO's claims procedure provides, after non-performance of transportation occurs or if the claim is denied by the PVO, the passenger may submit a claim against the Escrow Account as per instructions on the Commission website. The claim may include a copy of the boarding pass, proof and amount of payment, cancellation notice, and dated proof of properly filed claim against the Principal. All documentation must clearly display the vessel and voyage with scheduled and actual date of sailing. And, The Escrow Agent shall make indemnification payments pursuant to written instructions from Customer, on which the Escrow Agent may rely, or in the event that such legal liability has not been discharged by Customer within twenty-one (21) days after any such passenger has obtained a final judgment (after appeal, if any) against Customer from a United States Federal or State Court of competent jurisdiction the Escrow Agent is authorized to pay funds out of the Escrow Account, after such twenty-one day period, in accordance with and pursuant to the terms of an appropriate order of a court of competent jurisdiction on receipt of a certified copy of such order.

(3) Valid claims must be paid within 90 days of submission to the Escrow Agent.

As further security for Customer's obligation to provide water transportation to passengers holding tickets for transportation on the passenger vessel(s) (see Exhibit A) Customer will pledge to each passenger who has made full or partial payment for future passage on the named vessel(s) an interest in the Escrow Account equal to such payment. Escrow Agent is hereby notified of and acknowledges such pledges. Customers' instructions to Escrow Agent to release funds from the Escrow Account as described in this Agreement shall constitute a certification by Customer of the release of pledge with

respect to such funds due to completed, canceled or terminated cruises. Furthermore, Escrow Agent agrees to hold funds in the Escrow Account until directed by Customer or a court order to release such funds as described in this Agreement. Escrow Agent shall accept instructions only from Customer, acting on its own behalf or as agent for its passengers, and shall not have any obligations at any time to act pursuant to instructions of Customer's passengers or any other third parties except as expressly described herein. Escrow Agent hereby waives any right of offset to which it is or may become entitled with regard to the funds on deposit in the Escrow Account which constitute Unearned Passenger Revenue.

12. Customer agrees to provide to the Escrow Agent all information necessary to facilitate the administration of this Agreement and the Escrow Agent may rely upon any information so provided.

13. Customer hereby warrants and represents that it is a corporation in good standing in its State of organization and that is qualified to do business in the State. Customer further warrants and represents that (i) it possesses full power and authority to enter into this Agreement and fulfill its obligations hereunder and (ii) that the execution, delivery and performance of this Agreement have been authorized and approved by all required corporate actions.

14. Escrow Agent hereby warrants and represents that it is a national banking association in good standing. Escrow Agent further warrants and represents that (i) it has full power and authority to enter into this Agreement and fulfill its obligations hereunder and (ii) that the execution, delivery and performance of this Agreement have been authorized and approved by all required corporate actions.

15. This Agreement shall have a term of one (1) year and shall be automatically renewed for successive one (1) year terms unless notice of intent not to renew is delivered to the other party to this Agreement and to the Commission at least 90 days prior to the expiration of the current term of this Agreement. Notice shall be given by certified mail to the parties at the addresses provided in Paragraph 25 below. Notice shall be given by certified mail to the Commission at the address specified in this Agreement.

16. (a) Customer hereby agrees to indemnify and hold harmless Escrow Agent against any and all claims, losses, damages, liabilities, cost and expenses, including litigation, arising hereunder, which might be imposed or incurred on Escrow Agent for any acts or omissions of the Escrow Agent or Customer, not caused by the negligence or willful misconduct of the Escrow Agent. The indemnification set forth herein shall survive the resignation or removal of the Escrow Agent and the termination of this agreement.

(b) In the event of any disagreement between parties which result in adverse claims with respect to funds on deposit with Escrow Agent or the threat thereof, Escrow Agent may refuse to comply with any demands on it with respect thereto as long as such disagreement shall continue and in so refusing, Escrow Agent need not make any payment and Escrow Agent shall not be or

become liable in any way to Customer or any third party (whether for direct, incidental, consequential damages or otherwise) for its failure or refusal to comply with such demands and it shall be entitled to continue so to refrain from acting and so refuse to act until such conflicting or adverse demands shall finally terminate by mutual written agreement acceptable to Escrow Agent or by a final, non-appealable order of a court of competent jurisdiction.

17. Escrow Agent shall be entitled to such compensation for its services hereunder as may be agreed upon from time to time by Escrow Agent and Customer and which shall initially be set forth in a separate letter agreement between Escrow Agent and Customer. This Agreement shall not become effective until such letter agreement has been executed by both parties hereto and confirmed in writing to the Commission.

18. Customer may terminate this Agreement and engage a successor escrow agent, after giving at least 90 days written termination notice to Escrow Agent prior to terminating Escrow Agent if such successor agent is a commercial bank whose passbook accounts are insured by the Federal Deposit Insurance Corporation and such successor agrees to the terms of this agreement, or if there is a new agreement then such termination shall not be effective until the new agreement is approved in writing by the Commission. Upon giving the written notice to Customer and the Commission, Escrow Agent may terminate any and all duties and obligations imposed on Escrow Agent by this Agreement effective as of the date specified in such notice, which date shall be at least 90 days after the date such notice is given. All escrowed funds as of the termination date specified in the notice shall be turned over to the successor escrow agent, or if no successor escrow agent has been named within 90 days after the giving of such notice, then all such escrowed funds for sailing scheduled to commence after the specified termination date shall be returned to the person who paid such passage fares upon written approval of the Commission. In the event of any such termination where the Escrow Agent shall be returning payments to the passengers, then Escrow Agent shall request from Customer a list of passenger names, addresses, deposit/fare amounts and other information needed to make refunds. On receipt of such list, Escrow Agent shall return all passage fares held in the Escrow Account as of the date of termination specified in the notice to the passengers, excepting only amounts Customer is entitled to receive pursuant to the terms of this Agreement for cruises completed through the termination date specified in the notice, and all interest which shall be paid to Customer.

In the event of termination of this Agreement and if alternative evidence of financial responsibility has been accepted by the Commission and written evidence satisfactory to Escrow Agent of the Commission's acceptance is presented to Escrow Agent, then Escrow Agent shall release to Customer all passage fares held in the Escrow Account as of the date of termination specified in the notice. In the event of any such termination where written

evidence satisfactory to Escrow Agent of the Commission's acceptance has not been presented to Escrow Agent, then Escrow Agent shall request from Customer a list of passenger names, addresses, deposit/fare amounts and other information needed to make refunds. On receipt of such list, Escrow Agent shall return all passage fares held in the Escrow Account as of the date of termination specified in the notice to the passengers, excepting only amounts Customer is entitled to receive pursuant to the terms of this Agreement for cruises completed through the termination date specified in the notice, and all interest which shall be paid to Customer. Upon termination, Customer shall pay all costs and fees previously earned or incurred by Escrow Agent through the termination date.

19. Neither Customer nor Escrow Agent shall have the right to sell, pledge, hypothecate, assign, transfer or encumber funds or assets in the Escrow Account except in accordance with the terms of this Agreement.

20. This Agreement is for the benefit of the parties hereto and, accordingly, each and every provision hereof shall be enforceable by any or each or both of them. Additionally, this Agreement shall be enforceable by the Commission. However, this Agreement shall not be enforceable by any other party, person or entity whatsoever.

21. (a) No amendments, modifications or other change in the terms of this Agreement shall be effective for any purpose whatsoever unless agreed upon in writing by Escrow Agent and Customer and approved in writing by the Commission.

(b) No party hereto may assign its rights or obligations hereunder without the prior written consent of the other, and unless approved in writing by the Commission. The merger of Customer with another entity or the transfer of a controlling interest in the stock of Customer shall constitute an assignment hereunder for which prior written approval of the Commission is required, which approval shall not be unreasonably withheld.

22. The foregoing provisions shall be binding upon undersigned, their assigns, successors and personal representative.

23. The Commission shall have the right to inspect the books and records of the Escrow Agent and those of Customer as related to the Escrow Account. In addition, the Commission shall have the right to seek copies of annual audited financial statements and other financial related information.

24. All investments, securities and assets maintained under the Escrow Agreement will be physically located in the United States.

25. Notices relating to this Agreement shall be sent to Customer at (address) and to Escrow Agent at (address) or to such other address as any party hereto may hereafter designate in writing. Any communication sent to the Commission or its successor organization shall be sent to the following address: Bureau of Certification and Licensing, Federal Maritime Commission, 800 North Capitol NW, Washington, DC 20573-0001.

26. This agreement may be executed in any number of counterparts, each of which shall

be deemed to be an original and all of which when taken together shall constitute one and the same instrument.

27. This Agreement is made and delivered in, and shall be construed in accordance with the laws of the State of _____ without regard to the choice of law rules.

IN WITNESS WHEREOF, the undersigned have each caused this Agreement to be executed on their behalf as of the date first above written.

By: _____
Title: _____

By: _____
Title: _____

EXHIBIT A

ESCROW AGREEMENT, dated _____ by and between (Customer) and (Escrow Agent).

Passenger Vessels Owned or Chartered

ANNEX 1

RECOMPUTATION CERTIFICATE

To: Federal Maritime Commission
And To: ("Bank")

The undersigned, the Controller of _____ hereby furnishes this Recomputation Certificate pursuant to the terms of the Escrow Agreement dated _____, between the Customer and ("Bank"). Terms herein shall have the same definitions as those in such Escrow Agreement and Federal Maritime Commission regulations.

I. Unearned Passenger Revenue as of ("Date") was: \$ _____

a. Additions to unearned Passenger Revenue since such date were:

1. Passenger Receipts: \$ _____
2. Other (Specify) \$ _____
3. Total Additions: \$ _____

b. Reductions in Unearned Passenger Revenue since such date were:

1. Completed Cruises: \$ _____
2. Refunds and Cancellations: \$ _____
3. Other (Specify) \$ _____
4. Total Reductions: \$ _____

II. Unearned Passenger Revenue as of the date of this Recomputation Certificate is: \$ _____

a. Excess Escrow Amount \$ _____

III. Plus the Required Fixed Amount: \$ _____

IV. Total Required in Escrow: \$ _____

V. Current Balance in Escrow Account: \$ _____

VI. Amount to be Deposited in Escrow Account: \$ _____

VII. Amount of Escrow Account available to Operator: \$ _____

VIII. I declare under penalty of perjury that the above information is true and correct.

Dated: _____

(Signature) _____

Name: _____

Title: _____

(Signature) _____

Name: _____

Title: _____

By the Commission.

William Cody,
Secretary.

[FR Doc. 2022-05568 Filed 3-16-22; 8:45 am]

BILLING CODE 6730-02-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 214

[Docket No. FRA-2019-0074]

RIN 2130-AC78

Railroad Workplace Safety

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: FRA is revising its regulations governing railroad workplace safety to: Allow for the use of alternative cybersecurity standards for electronic display systems used to view track authority information for roadway worker safety, and exempt certain remotely operated roadway maintenance machines from existing heating, ventilation, and air conditioning (HVAC) requirements for enclosed cabs.

DATES: This final rule is effective March 17, 2022.

FOR FURTHER INFORMATION CONTACT: Lance Hawks, Track Specialist, Office of Railroad Safety, Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590, telephone: 678-633-7400, email: Lance.Hawks@dot.gov; or Sam Gilbert, Attorney Adviser, Office of Chief Counsel, Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590, telephone: 202-493-0270, email: Samuel.Gilbert@dot.gov.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

To ensure that regulations remain current and effective for their intended purpose, agencies periodically review and propose amendments to their regulations. Within this context, FRA reviewed its 49 CFR part 214—Railroad Workplace Safety regulations. As a result of this review, on December 11, 2020, FRA published a notice of proposed rulemaking (NPRM) proposing two amendments to subparts C and D of part 214 addressing Roadway Worker Protection and On-Track Roadway Maintenance Machines and Hi-Rail Vehicles, respectively. 85 FR 79973.