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June 9, 2016

Glenn A. Grant, J.A.D.  
Acting Administrative Director of the Courts  
Hughes Justice Complex;  
P.O. Box 037 Trenton, New Jersey 08625-0037

**Re: Comments on Bail Judge Subcommittee Report**

Dear Judge Grant:

We are submitting commentary with respect to the recommendations of the Bail Judge Subcommittee Report. The undersigned is responsible for the bail bond division of HCC Surety, part of the Tokio Marine HCC ("TMHCC"). TMHCC supports over 600 bail agents in 40 states nationwide utilizing the following three insurance companies 1) American Contractors Indemnity Company, 2) U.S. Specialty Insurance Company and 3) United States Surety Company. Through these insurance companies we have supported bail bond transactions for over 20 years and members of our management team have over 35 years' experience. For convenience we have restated the Subcommittee's Recommendations, along with our response and commentary in bold italics.

RECOMMENDATION 1. Adoption of the proposed revisions to Rules 3:26-6 and 7:4-5:

***We agree with the Committee's recommendation to enact statutory requirements on forfeiture and remission proceedings. However, the final proposed recommendation does not promote judicial economy. We encourage the Committee review statutes enacted in Oklahoma and Maryland. Key elements to these state statutes necessitate the bail agent satisfy forfeitures in order for remission to be eligible and further suspends the agent's ability to execute future bail (i.e. Removal Lists.) In compromising on the timeframes, we suggest increasing the forfeiture breach period to 90 days, whereby motions would not toll the due date of a forfeiture. Further, if forfeitures are not paid timely, then not only does the agent lose the ability to recoup on remission, a judgment should be issued to the surety to satisfy within 15 days of mailing. Failure by the surety to pay the judgment would result in their suspension, including all appointed agents, to the Removal Lists. However, timely satisfaction of the judgment would ensure the surety eligibility to file and receive remission.***

RECOMMENDATION 2. Adoption of the "Revised Remission Guidelines" and issuance of a revised Directive.

***We disagree there should be any guidelines as it does not promote judicial economy. We would recommend full remission be available, less any standardized cost for***

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**extradition, provided the agent or surety timely satisfies the forfeiture or judgment, and surrenders the defendant or identifies the defendant has been incarcerated within one year of entry of forfeiture. The surety proposed recommendation would set clear expectations, consistency in the application of remission, and promote judicial economy. The concept of remission being awarded based on merit or involvement by the agent or surety is too subjective. Further when extradition is required to return the defendant to the jurisdiction of the court, the cut-off for the one year remission period should be based on the affidavit filed with county counsel. Too often the government chooses to ignore the affidavits and the bail agent or surety has no ability to control the timing or coordination of extradition.**

RECOMMENDATION 3. Issuance by Directive of a standard "Order to Stay Entry of Judgment."

**The recommendation is unnecessary if the surety's above recommendation is enacted.**

RECOMMENDATION 4. Issuance by Directive of a revised "Order to Vacate Bail Forfeiture and/or Judgment and Discharge the Bond upon Payment."

**The recommendation is unnecessary if the surety's above recommendation is enacted.**

RECOMMENDATION 5. The Office of the Attorney General should be charged with overseeing bail forfeiture settlements and collections.

**We have no objections with the Office of the Attorney General overseeing bail forfeiture and judgment collections. However, there should be prohibitions on discounted settlements of the full penal sum of the bond. The idea of entertaining settlements is unnecessary and it trivializes the surety guarantee under the bond. Stricter oversight by the surety industry would be required and ultimately root out bad habits and behavior of the agents. The issues identified with discounted bail options and under-cutting court imposed bail set by the judges would naturally reform with strict enforcement of the bond.**

RECOMMENDATION 6. The Judiciary should not regulate the financial arrangements of defendants with bail bondsmen.

**We agree with the Subcommittee's recommendation. Strict compliance of the bond and proposed forfeiture, judgment and remission rules in #1 and #2 above would restore accountability and a stable bail marketplace.**

RECOMMENDATION 7. The Judiciary should not regulate county jails or the use of jailhouse runners.

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***We agree with the Subcommittee's recommendation. There are numerous state examples that address this untoward behavior. However, without enforcement and prosecution, behavior will not deter.***

RECOMMENDATION 8. A statute should be enacted to criminalize bail agencies employing unlicensed individuals and bail agents operating without a license.

***We agree with the Subcommittee's recommendation.***

RECOMMENDATION 9. The Preclusion and Removal lists should include unlicensed bail agents.

***It is difficult to understand the purpose of maintaining the Preclusion and Removal Lists for unlicensed bail agents. A better understanding of how bail is transacted with the court by unlicensed agents would need to be better understood to adequately address.***

***We do not understand why one government agency would be better equipped to regulate bail agents, agency owners and agency personnel versus another. The Subcommittee Report suggests the enforcement of regulation is not adequately funded. A fiscal budget should be developed to determine how to best staff and enforce the regulations. Fines and penalties should be considered as part of the revenue sources, in addition to licensing fees.***

RECOMMENDATION 10. The Department of Banking and Insurance should continue to be responsible for investigating the licensing of bail bond agents and agencies.

***We agree with the Subcommittee's recommendation.***

RECOMMENDATION 11. The Office of the Attorney General should be charged with the enforcement of licensure requirements for bail bond agents and agencies and the prosecution of any violations.

***We agree with the Subcommittee's recommendation.***

RECOMMENDATION 12. Adoption of a statewide policy to eliminate the filing fee for persons released on their own recognizance.

***We do not agree with the Subcommittee's recommendation. There is no basis why one form of surety should be exempt of certain fees. The mere implication suggests that filing fees for commercial bail will need to increase to offset the loss revenue to support the services provided by the court. The fact that the indigent population can't afford bail, let alone a filing fee, does not justify all persons released on their recognizance should be exempt from the fee.***

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RECOMMENDATION 13. Adoption of a statewide policy that unless otherwise ordered by the court, any filing fee shall be collected at the time bail is posted. Any unsatisfied bail fee shall be deducted from the bail refund amount.

***We do not agree with the Subcommittee's recommendation. The responsibility of collecting filing fees rests with the Court. Failure to charge the fee or process a filing without collecting a fee is not responsible. Further the burden placed on the agent to support filing fees were paid, after time has passed, is an unfair burden. The duty to collect the fees timely is that of the court and otherwise could promote and advance fraud within the court system.***

### General Commentary

The review, consideration and recommendations submitted by the Subcommittee attempts to amend an existing inefficient and broken system. Regardless of the origins of the system, the intent of the recommendations is to restore accountability and performance by the bail agents and surety industry. The following narrative provides additional observations on the bail industry and highlights opportunities to improve judicial economy and accountability.

There is a constitutional right to non-excessive bail and the utilization of commercial bail bonds has the greatest efficacy of all the pre-trial release systems. The reason for the effectiveness of commercial bail is that there are proper financial incentives in play to positively motivate defendant behavior. However for these financial incentives to work efficiently there needs to be accountability at all levels; 1) surety 2) bail agents, 3) judiciary, 4) judiciary administration, 5) state insurance regulatory agency. The commercial bail system keeps jail overcrowding to manageable levels, while not unjustly burdening taxpayers. Although there are other forms of surety and pre-trial release, none are more effective from an appearance outcome metric than commercial bail.

Common with all surety risks is the exchange of performance to an obligee, by a principal, guaranteed by a surety. In the example of bail, that performance is the appearance by the

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defendant at all required court hearings. Contrast to other forms of commercial surety, which some include; the physical completion of a construction project, payment on financial guarantees, and fulfilling fiduciary duties, to name just a few; however, the relative cost of these common commercial bond risks is far less than a bail bond. All forms of surety consider risk selection for a rate, so why does bail command such a large relative rate? We suspect it is exposure to a criminal element, aka environmental hazard, which justifies the rate differential.

The great majority of bail agents have very little financial wherewithal to support the notional bail liability they assume; however, the vast majority effectively manage the defendant's performance under the bond. Sureties provide credit enhancement to the agents in exchange for a very small risk premium. The credit enhancement is the guarantee under the bond, which makes bail commercially viable. Most insurance companies that write commercial surety risks do not support the bail class primarily due to the reputational, regulatory and vicarious risk insurance companies assume, despite bail being a profitable sub-class of surety. As such, most sureties that support bail are mono-line and more easily overcome the reputational and regulatory risk issues. Those that are not mono-line, tend to operate much tighter control of the agents. However, clearly there is a vibrant surety bail market willing to assume the risks in exchange for a relatively modest amount of premium. There are very few insurers, let alone surety insurers, that would cede an average commission rate of 90%. For insurance companies to support that risk reward relationship there generally is fairly predictable results.

Predictability is a by-product of several factors; including, a large sample of similar risks, consistent judicial decisions on policy and claim matters, and a regulatory and legislative climate that promotes fair competition and consumer protection. On whole, there are good forces in play to promote predictability in bail; however, the commercial bail industry is under constant threat with respect to legislative changes in multiple states. Often new legislation is introduced as an over-reaction or a misrepresentation to a problem. Rather than creating new legislation, existing statutes and regulations should be used to enforce and deter bad actors. Similarly there is a significant trend in the judiciary to increase the amount of bail ordered, whether it be based on schedule or discretion. We suspect much of the escalation in setting bail is in response to the bail industry softening terms in order to become more competitive. The judiciary wants to see defendants account, and as terms continue to soften; the judiciary continues to raise the average bail amount. Examples of softening terms include, low down payments on premium, long extended payments plans which essentially serve to rate cut, and little to no bond collateral required. On one hand the softening of terms is good for the consumer, the problem is that attracts individuals to the industry with ill intent. Modification in behavior is required by all the stakeholders, but it must start with the sureties. To help promote sounder risk management by the surety industry, stricter enforcement and review by both the judiciary and regulatory bodies is also required.

We would strongly encourage the Subcommittee to review the above recommendations with respect to enforcement of collection of bail forfeitures and what amounts are eligible for remission. The recommendations are based in part on successful bail environments in other states.

Breach Period – Currently New Jersey has a 75 day breach period on a forfeiture. Breach periods with shorter time frames (less than 30 days) are not vibrant markets as bail agents and sureties assume too much risk on the bond. Conversely, states that allow 150 days or more

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can encourage reckless behavior by agents and are unnecessarily taxing on judicial economy. As such, we recommend breach periods between 60 and 120 days, with the use of a remission for shorter periods.

Remission is an effective incentive for bail agents and sureties to follow-thru and return defendants that skip their criminal proceedings. Several states use remission to varying degrees, but in our experience, the best form is when it becomes less complicated to adjudicate. We discourage establishing remission schedules that reduce over time as it creates a disincentive to continue searching. Further, attempting to establish a merit based system can be unfair to the agent and unnecessarily burden the judiciary. Maryland and Oklahoma have good remission statutes and both require the payment of forfeiture prior to the due date for eligibility to receive the remission. We encourage a one year remission period to promote and incentivize an exhaustive search, location and surrender of a defendant. However, there are known abuses by law enforcement, district attorneys and court clerks. It is paramount that when forfeitures are declared, the court clerk should be required to mail notice, electronic or otherwise, to the agent, and surety. Reliability of the delivery of mail is overcome thru electronic bulletin boards and other web portals. Further, forfeitures need to be entered in the National Crime Institute Center ("NCIC") database. This process is paramount so law enforcement can coordinate on outstanding warrants in all jurisdictions and help agents locate defendants that were subsequently incarcerated. Further, when agents locate defendants fleeing outside the United States, the local district attorneys or county counsel needs to cooperate and sign-off on affidavits to enable the U.S. Marshall's Office to coordinate pick-up with foreign police authorities and travel back to the United States. Extradition costs should be standardized to avoid debate on reasonableness and passed to the agent by netting from the remission.

Too often when bondsman are unable to surrender defendants for their failure to appear within the statutory cure period, a motion is filed which serves to intentionally delay the enforcement of the forfeiture. To promote judicial economy, we recommend 1) increasing the breach period to 90 days, 2) eliminate the tolling of time when motions are filed, 3) strictly enforce the full satisfaction of bond forfeitures and then 4) extend full remission, net of extradition costs, only if the defendant is surrendered or incarcerated within 365 days from when the forfeiture was declared. Payment plans or discounts to satisfy the forfeitures should be prohibited by the court clerks and county counsel. Failure by the agent to satisfy the forfeiture timely should result in the revocation of their license, and bar them, including agents appointed with the same agency, to execute bail bonds with any surety. Further the agent would lose the opportunity to receive remission. The court clerk should be required to send judgment to the surety to satisfy the forfeiture within 15 days of mailing. The surety upon payment of the judgment shall then be eligible for remission and elect to have the agent reinstated or continued to be barred from operating until such time the agent has indemnified the surety. Failure by the surety to timely satisfy the judgment should result in their suspension with the Registry including all appointed agents. The Registry would be responsible for notifying the Department of Banking and Insurance for both agent and surety failure to perform under the bond. The recommendations cited above, eliminates the need for preclusion lists to be produced and managed by the Registry and unnecessary time spent by agents, judges and county counsel to sign-off on settlements. Sureties would be much quicker to respond with payment from agent build-up fund ("BUF") accounts to satisfy forfeiture because delays would not extend the remission period. Overall greater accountability would exist, enforced largely by the surety industry. Furthermore,

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the bad agents could be prohibited from executing bail with any surety for their failure to perform under prior bonds.

We would welcome the opportunity to have further dialogue with the Subcommittee on ways the stakeholders of bail can positively improve bail and more accountability.

Sincerely,



American Contractors Indemnity Company  
United States Surety Company  
U.S. Specialty Insurance Company  
Bail USA, Inc.

Jon Schneider  
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