SACRAMENTO, CA
SACRAMENTO OFFICE
TEL: (916) 442-2415

LOS ANGELES, CA
WESTWOOD OFFICE
TEL: (310) 470-1869
FAX: (310) 470-9648

DAMON M. RIBAKOFF
(1970-2007)

R P N A

ROXBOROUGH
POMERANCE
NYE & ADREANI

5820 CANOGA AVENUE,
SUITE 250
WOODLAND HILLS, CA 91367
TEL: (818) 992-9999
FAX: (818) 992-9991

NICHOLAS P. ROXBOROUGH
DREW E. POMERANCE
GARY A. NYE
MICHAEL B. ADREANI
MARINA N. VITEK
JOSEPH C. GJONOLA

DAVID R. GINSBURG
BURTON E. FALK
RYAN R. SALSIG
DARON A. BARSAMIAN
TREVOR R. WITT
VINCE S. GANNUSICO
DONNA M. LEUNG

December 2, 2019

Via Email: dhsdeskofficer@omb.eop.gov
OMB Desk Officer
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

Re: Department of Homeland Security – OMB Control Number 1653-0022

To the OMB Desk Officer:

This office has been asked by Gonzales & Gonzales Bonds and Insurance Agency, Inc. ("G&G") to submit the following comments in strong opposition to the Department of Homeland Security, U.S. Immigration and Customs Enforcement's ("ICE") proposed revisions to the Immigration Bond form. G&G posts immigration bonds with the government on behalf of certain aliens, and regularly uses the immigration bond form. The proposed revisions are identified in the October 31, 2019 Federal Register under OMB Control Number 1653-0022.

## I. ICE's Notice is Improper.

The notice of the proposed revisions is insufficient. As discussed below, the proposed changes and additions to the bond form constitute new rules and regulations. The federal register notice makes no mention of any proposed rulemaking as required under 5 U.S.C. § 553(b). And on the <regulations.gov> webpage docket details for the proposed revisions, it specifically states "nonrulemaking" under "type" for the proposed changes being made by ICE.

The notice also fails to include (1) a statement of the time, place, and nature of public rule making proceedings, (2) reference to the legal authority under which the rule is proposed, and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. All these items are required under 5 U.S.C. § 553(b).

In addition, the proposed revised immigration bond form does not appear to have been published in the federal register and there is no reference to the form in the federal register notice. It also does not appear on the <register.gov> website. Instead, there is a link to the proposed revised form which appears on the <regulations.gov> website. The link is unnecessarily obscure.

It appears under a "Supporting/Related Materials" tab off to the side. At a minimum, it should have been linked in the body of the actual federal register language. There are links in that language, so it does not make sense that the most important document – the proposed revised form – is not front and center and easily accessible to the public.

Further, ICE should have published a redlined version of the proposed changes to the immigration bond form. The technology to do this has been readily available for over 20 years now. In order to properly review the proposed changes, we had to go back and forth between the old form (which is not linked on either the register.gov or regulations.gov websites) and the proposed revised form and compare it word for word. This was cumbersome and entirely unnecessary.

Based on all this, we must conclude that ICE either negligently or purposely attempted to revise the immigration bond form in such a manner so as to obscure or hide the revisions and make it very difficult for the public to understand exactly what ICE is up to.

## II. ICE's Proposed Revisions Are Unlawful.

As to the proposed revisions and additions, we address them in the order they appear on the form.

1. Under "General Terms and Conditions" ICE has removed the language stating "Provided it has the concurrence of the government and it does not change the amount of the bond, an obligor may re-bond the alien at any time and at no expense to the government." G&G is opposed to the removal of this language. ICE has offered no explanation regarding the basis or reasons for the removal of this language. The ability to re-bond an alien has always been permitted.

The proposed revision also violates the Amwest Agreements entered into between DHS and G&G, which have been upheld and relied upon by the Court in *United States of America v. Gonzales & Gonzales Bonds and Insurance Agency, Inc., et al.* (Case No. C 09-4029 EMC). The Agreements authorize G&G to issue a new delivery bond in place of a previously issued delivery bond.

2. In the Federal Register publication under "General Terms and Conditions" ICE proposes the following:

> "Because certain jurisdictions do not honor ICE detainers, the General Terms and Conditions governing the bond have been revised to reflect that a bond will not be cancelled simply because ICE is on notice of the detention of the bonded alien for 30 or more days pursuant, or prior, to a conviction by local, state, or federal authorities. The revised General Terms and Conditions clarify that a delivery bond may not be breached when the bonded alien is in local, state, or federal custody on the date the obligor is scheduled to produce the alien. The bond will remain in effect in this situation unless ICE later takes the bonded alien into its custody

> directly from local, state, or federal authorities, in which case the bond will be cancelled."

In the proposed revised bond form, ICE has removed the language requiring cancellation when there is "notice of the detention of the bonded alien for 30 or more days pursuant, or prior, to a conviction by local, state, or federal authorities." ICE has also now added the following language:

> "A delivery bond may not be breached when the bonded alien is in local, state, or federal custody, or when the alien is not within the United States, on the date the obligor is to produce the alien; the bond stays in effect unless ICE later takes the bonded alien into its custody directly from local, state, or federal authorities, in which case the bond will be cancelled."

This is a new rule. It also violates the Amwest Agreements. For over 22 years, immigration bonds were required to be cancelled when there was "notice of the detention of the bonded alien for 30 or more days pursuant, or prior, to a conviction by local, state, or federal authorities." This changes the rules for when an immigration bond must be cancelled. Further, the Amwest Agreements require cancellation of the immigration bond under the same circumstances.

In addition, a bond must be canceled whether or not an agency honors a detainer. ICE is ultimately responsible for ensuring an alien in the custody of another law enforcement agency is taken into custody by ICE following the alien's release, whether or not a detainer is issued and whether or not an agency honors the detainer. This is addressed in the Amwest Agreements, which provide that if ICE fails to issue a detainer within 30 days of the alien being in custody, the bond is to be cancelled. There is no functional difference between an agency failing to honor a detainer and ICE failing to issue a detainer. Again, ICE is ultimately responsible for ensuring an alien in the custody of another law enforcement agency is taken into custody by ICE. The issue regarding the honoring of detainers has been around for quite some time now. ICE must surely by now have alternative procedures and mechanisms for taking such aliens into custody under such circumstances. It cannot be that ICE has no options to take an alien into custody other than their hope that a state or local agency will honor a detainer.

The proposed revision also creates questions that remain unanswered. For example: (1) Is the bond canceled upon conviction of the alien? If not, does someone sentenced 5 years, 10 years, or longer have to wait that long before the bond is canceled? This could leave an immigration bond virtually un-cancellable for decades.

Additionally, the language stating that the bond may not be breached "when the alien is not within the United States, on the date the obligor is to produce the alien" is confusing, appears to be a new rule, and may violate the Amwest Agreements. Since it only addresses when a bond may not be breached, it leaves open the possibility that a bond may stay in effect (albeit not breached) even though the alien may have departed the United States when a demand to produce the alien is issued.

3. Under "General Terms and Conditions" ICE has now changed the rule for when a voluntary departure will result in cancellation of the bond. Now cancellation occurs when there is "voluntary departure by the bonded alien pursuant to a grant of voluntary departure by the immigration court or Board of Immigration Appeals as evidenced by probative documentation (valid proof) thereof." Prior to this, there was no requirement that the alien depart "pursuant to a grant of voluntary departure." This is a new requirement. A bond must still be able to be cancelled if the alien departs the United States regardless of whether it is pursuant to a "grant of voluntary departure." The Amwest Agreements also contain no requirement that there be a grant of voluntary departure.

Further, the phrase "as evidenced by probative documentation" has been added by ICE. This is a new rule and is undefined. What does ICE consider probative documentation? ICE cannot make what appears to be a substantive additional requirement and label it in the Federal Register as a simple "Agency Information Collection Activity." This is much more than simply revising how the agency collects information.

4. Under "Address to Use for Notice Purposes" ICE proposes the following:

> "Part A of Form I-352 has been revised to delete the boxes indicating the address to use for notice purposes."

The bond form itself also now refers to notice as an "or" proposition where notice is only required to either the obligor or its agent/co-obligor. This proposed revision violates the Amwest Agreements. The Agreements require that notices must be provided to both the obligor and the obligor's agent if requested. That request cannot be made since the box is removed. And by no longer requiring notice go to both the obligor and its agent/co-obligor, ICE is again rewriting the rules. The proposed revision also creates questions that remain unanswered. For example: (1) To whom will notices be sent? The surety? The co-obligor? Both? Notice must go to both. ICE is well aware that surety agents/co-obligors do most, if not all, of the work on the ground with respect to the immigration bonds they have posted on behalf of a surety. And the surety must also receive notice as they are the entity listed on the Treasury Circular 570.

5. On page 3 of the proposed revised immigration bond form, part A, ICE has removed the information line seeking the "name and address of the person who executed a written instrument with the surety company requesting it to post bond." There is no explanation or reasoning provided for the removal of this line. It also appears that the removal of this item will hinder rather than assist in the collection of information.

6. On page 3 of the proposed revised immigration bond form, part C has been revised to state that the obligor and agency acting on its behalf agree that "they are immediately liable to the United States . . ." Before, the bond form provided that they agreed to be "firmly bound . . ." As with the "probative documentation" phrase above, we are not sure what ICE means or purports to mean by this change in language. As such, this may qualify as a new rule. Remaining unanswered is the question of what ICE contends is the legal significance of this change, if any.

7. Continuing with page 3, part C of the proposed revised immigration bond form, ICE refers to an "administratively final breach determination." ICE uses this phrase several times in the new revised bond form. However, ICE does not explain or state what ICE considers an "administratively final breach determination" to be. As such and without more, this may qualify as a new rule, and it may conflict with statutory and case law.

8. Sticking with page 3, part C of the proposed revised immigration bond form, ICE has removed the requirement that notice in connection with the bond is to be made by mail. The removal of this requirement is another example of a rule change. It remains unclear if ICE will abide by the rule that it must mail notices in connection with the immigration bond.

9. Again on page 3, part C of the proposed revised immigration bond form, ICE has added a provision including "any attached rider or riders specified above." G&G often does not receive riders. This provision creates a new requirement that may difficult if not impossible to follow since riders are often not provided.

10. On page 4, paragraph G(1) of the proposed revised immigration bond form, ICE has removed the language addressing the "warrant of arrest issued by the Attorney General charging that he/she is unlawfully in the United States, provided there is furnished a suitable bond as authorized by Section 236 and/or Section 241 of the Immigration and Nationality Act . . ." ICE does not explain or provide any guidance on the significance of this change, nor does ICE state its intent in removing the language. Without more, this too constitutes an unexplained rule change that ICE also fails to mention in the Federal Register notice.

11. On page 4, paragraph G(1) of the proposed revised immigration bond form, ICE has also removed "timely" from the provision that states "[i]f . . . however, the obligor or any co-obligor fails to surrender the alien in response to a timely demand . . ." The timeliness of a demand was and remains a fundamental issue with respect to the breaching and cancellation of immigration bonds. It was the biggest issue in *United States of America v. Gonzales & Gonzales Bonds and Insurance Agency, Inc., et al.* (Case No. C 09-4029 EMC). There, the court held that a demand must be timely. ICE's removal of this language is a rule change that defies the ruling in the *Gonzales & Gonzales* case.

12. On page 4, paragraph G(3) of the proposed revised immigration bond form, ICE has removed the provision stating that the bond issued for voluntary departure is to be suitable as "authorized by 8 U.S.C. 1229c." As with some of the above items, ICE does not explain or provide any guidance on the significance of this change, nor does ICE state its intent in removing the language. Without more, this too constitutes an unexplained rule change that ICE again fails to mention in the Federal Register notice.

13. Under "Maintenance of Status and Departure Bonds" ICE proposes the following:

> Paragraph G(4) has been added to explain the terms and conditions for Maintenance of Status and Departure Bonds. The former INS accepted maintenance of status and departure bonds using prior versions of Form I-352 when a bond was required for a non-immigrant traveling to the United States.

On the proposed, revised immigration bond form, ICE has added an entirely new section of rules regarding this type of bond. This certainly qualifies as rule-making and, as with the other new rules proposed through the revised immigration bond form, there is no reference to the legal authority under which the rule is proposed. As such it is difficult if not impossible to determine if this entirely new bond form section complies with statutory law authorizing this type of bond.

## III. The Proposed Revised Immigration Bond Form Must Not Go Forward.

ICE has made several substantive revisions, changes, and additions to the immigration bond form. ICE failed to disclose many of these changes to the public in the Federal Register. It also failed to follow the statutory rule-making procedures required under 5 U.S.C. 551, et seq. These proposed revisions are clearly above and beyond the scope of "Information Collection Activity" which ICE has improperly used to label these proposed revisions.

The proposed revisions to the immigration bond form must not be adopted. Such procedural and substantive changes to the immigration bond form must be made through the proper rule-making procedure pursuant to statutory legal requirements.

Should ICE seek to revise the current immigration bond through proper and lawful means, G&G reserves its right to comment on any such proposed revisions, changes, additions, or removal of language. Sufficient time for comment must also be provided, along with the proposed changes being made easily accessible and in a format that allows for an efficient and less cumbersome review, such as redlining the revisions.

Thank you for your attention to this matter.

Sincerely,

ROXBOROUGH, POMERANCE, NYE & ADREANI, LLP

DAVID R. GINSBURG

cc: Raul Atler, G&G