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Passenger Vessel Operator Financial Responsibility Requirements
For Non-Performance of Transportation
Notice of Proposed Rulemaking dated September 13, 2011 (Docket No. 11-16)

COMMENTS AND RESPONSES OF AMERICAN CRUISE LINES, INC. TO PROPOSED RULE: REQUEST FOR ADDITIONAL COMMENTS AND INFORMATION
77 Fed. Reg. 11995 (Feb. 28, 2012)

March 29, 2012

American Cruise Lines, Inc. ("ACL") respectfully submits the following comments and information to the Federal Maritime Commission ("Commission") on the Proposed Rulemaking on Passenger Vessel Financial Responsibility (Docket No. 11-16), 76 Fed. Reg. 58227-58236 (Sept. 20, 2011) to implement Public Law 89-777 (*codified at* 46 USC 44101-44106)[1] with amendments (the "Proposed Rule") to 46 CFR Part 540 in response to the Commission's Request for Additional Comments and Information (the "RFI"), 77 Fed. Reg. 11995-11996 (Feb. 28, 2012).

I. General Comments and Information

The preliminary discussion in the RFI addresses the principal types of information sought by the Commission pursuant to the Regulatory Flexibility Act (RFA),[2] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA).[3] The RFI notes ACL's request that it be considered a "small entity" under the size standards currently promulgated by the Small Business Administration (SBA) and accepted by the Commission[4] and the assertion by the Passenger Vessel Association (PVA), a national trade association representing owners and operators of U.S. flag passenger vessels of all types, that at least four of its members (which are both subject to the requirements of 46 USC § 44102 and engaged in the carriage of overnight passengers in coastwise trade) likewise would qualify as "small entities." The RFI discussion proceeds to request data and other responses to the questions it poses for four stated purposes:

1. To determine the number and extent to which small entity passenger vessel operators (PVOs) may be affected by the Proposed Rule;
2. To estimate the economic effects of the Proposed Rule upon those small entities;
3. To estimate whether those economic impacts are "significant" (including whether such entities would be placed at a competitive disadvantage relative to larger entities); and

[1] Pub. L. No. 89-777, 80 Stat. 1356 (1966).
[2] Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (*codified at* 5 USC § 601 *et seq.*).
[3] Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857.
[4] FMC Policy and Procedures Regarding Proper Consideration of Small Entities in Rulemakings (Feb. 7, 2003) ("FMC Policy") (http://www.fmc.gov/assets/1/Page/SBREFA_Guidelines_2003.pdf).

4. To estimate whether such economic impacts would fall upon a "substantial" number of small entities.

The RFI thus properly focuses on whether the Proposed Rule would have a "significant economic impact" on a "substantial number" of "small entities" as the critical issue requiring analysis under the RFA. The purpose of the RFA, to require the Commission to consider the impact of its rules on small entities, can only be achieved if the broadest possible economic impacts of a proposed rule are fully considered.[5] Other than by reference to the SBA definition of what constitutes a "small entity," however, the RFI does not acknowledge this purpose, nor does it address the standards to be applied in evaluating the impact of the Proposed Rule under the applicable criteria.

A. Applicable Standards of the Regulatory Flexibility Act

The standards to be applied by the Commission in determining the impact of the Proposed Rule on small entities for purposes of the RFA are not only those standards declared by the SBA with respect to (1) what constitutes a "small entity" for RFA purposes, but also those standards declared by the SBA as to (2) what constitutes a "significant" economic impact, and (3) what constitutes a "substantial" number of small entities (in a specific industry sector) upon which the economic impacts of the Proposed Rule fall. The SBA also specifically directs that in evaluating any "significant" economic impact and in any initial regulatory analysis, the Commission must evaluate (4) "any significant alternatives" to the Proposed Rule which "minimize any significant economic impact" of the Proposed Rule on small entities.

Small Entity. The determination of what is a "small entity" for purposes of the RFA is straightforward. The RFI notes that "SBA regulations establish principles relative to the calculation of a business' total number of employees. For example, 'the average number of employees of the concern is used ... based upon the number of employees for each of the pay periods for the preceding completed 12 calendar months.' 13 CFR § 121.106(b)." 77 Fed. Reg. at 11996 n.7.

Significant Impact. The RFI does not explain the process outlined by the SBA for determining whether the Proposed Rule's economic impact on small entities is "significant." The SBA emphasizes that every rule is different and that in order to determine the level, scope, and complexity of analysis, the characteristics and composition of the small entity sectors in an industry must be understood.[6] A "significant impact" is not to be understood in absolute terms but relative to the size of the business, the size of the competition's business, and the impact of the proposed rule on the competition.[7] Economic impact should be considered not just in terms of easily quantifiable operating costs but in terms of the impact of a proposed rule on the ability of small entities to make future capital investment necessary to compete against larger firms.[8]

[5] SBA, "A Guide for Government Agencies – How to Comply with the Regulatory Flexibility Act," at 1-2, 20 (June 2010) (hereinafter "SBA Guide").
[6] SBA Guide, at 14.
[7] SBA Guide, at 17.
[8] SBA Guide, at 1, 17, 19.

Congress has noted, for example, that a rule which provides a strong disincentive to seek capital has significant adverse economic impact.[9]

Industry Sector; Substantial Number. The RFI also does not explain the process outlined by the SBA for determining whether the Proposed Rule's economic impact would fall upon "a substantial number" of small entities. The SBA makes clear that the first step in this analysis is identification of the industry sector in question when a proposed rule regulates only a specific industry and not all small businesses in the United States overall.[10] The SBA explains that the North American Industry Classification System (NAICS) can be used for purposes of categorizing regulated businesses on an industry-by-industry basis.[11]

The industry-specific sectors distinguished under the NAICS that the Commission regulates and that consist of small entities should be evaluated to determine whether a "substantial number" of small entities in that particular industry segment are impacted by a proposed rule. The SBA notes that the legislative history of the RFA defines the term "substantial number" to mean "a substantial number of entities within a particular economic or other activity."[12] Implementing the goal of ensuring that the broadest possible impacts are fully considered, the SBA explains that although five small firms in an industry with more than 1,000 small firms is not likely to be a "substantial number,"

> … it is important to recognize that five small firms in an industry with only 20 small firms would be a substantial number. Depending on the rule, the substantiality of the number of small businesses affected should be determined on an industry-specific basis and/or on the number of small businesses overall. For example, the Internal Revenue Service, when changing the tax deposit rules, would examine the entire universe of small businesses to see how many would be affected. On the other hand, a change by the Food and Drug Administration in the regulation of meat irradiators might affect only 15 firms, but that would be the entire industry.[13]

See Section I.B, *infra*, for a description of the industry sector of small entity PVOs affected by the Proposed Rule.

Alternatives. Finally, the RFI nowhere mentions the importance of evaluation of alternatives as part of RFA compliance. The statute enumerates certain exemplary alternatives of the type to be discussed. 5 USC § 603(c) (1) – (4). In connection with assessing economic impacts on a small entity, the SBA specifically notes that a "significant impact" includes "any impact less cost-efficient than another reasonable regulatory alternative."[14] Section 603(c) of the RFA is clear that such an analysis "of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant

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[9] SBA Guide, at 19 (*citing* 126 Cong. Rec. S10,938 (Aug. 6, 1980)).
[10] SBA Guide, at 20.
[11] SBA Guide, at 16-17.
[12] SBA Guide, at 19 (*citing* 126 Cong. Rec. S10,938 (Aug. 6, 1980)).
[13] SBA Guide, at 20.
[14] SBA Guide, at 19 (*citing* 126 Cong. Rec. H24,595 (Sept. 8, 1980)).

economic impact of the proposed rule on small entities" is mandatory in each initial regulatory analysis. 5 USC § 603(c).

B. Application of Standards to Smaller U.S. Flag Coastwise Trade PVOs

ACL submitted written comments dated November 21, 2011, to the NPRM with respect to the Proposed Rule which addressed in some detail the application of the applicable standards under the RFA to smaller, U.S. flag coastwise trade PVOs such as ACL. ACL refers the Commission to those comments and further states as follows:

Industry Sector. ACL is within a distinct and small segment of the cruise line industry consisting of U.S. flag coastwise trade PVOs which are both subject to the requirements of 46 USC § 44102 and are engaged in the carriage of overnight passengers in coastwise trade on smaller passenger vessels designed to reach smaller and shallower U.S. ports where large cruise ships cannot go. Ships in this industry segment do not travel internationally and must meet stringent requirements of U.S. build, U.S. ownership, and U.S. crew operation applicable to U.S. coastwise trade. The 2007 NAICS classification system delineates a clear distinction between those operators whose vessels qualify for coastwise trade (2007 NAICS class 483114, "Coastal and Great Lakes Passenger Transportation"), and operators of the larger vessels intended for international passenger transportation (2007 NAICS class 483112, "Deep Seas Passenger Transportation"). In other words, the distinction between those large entity PVOs that carry overnight passengers internationally and the separate industry sector comprised of the small U.S. flag coastwise trade cruise PVOs is one recognized in the NAICS classifications. A separate economic analysis examining the economic effects of the Proposed Rule on the small entity U.S. flag coastwise trade PVO sector is necessary.

Small Entity. ACL submits that it is a "small entity" within the standards announced by the SBA and accepted by the Commission.[15] In addition to ACL, all the operators in this industry segment consisting of small U.S. flag coastwise trade PVOs which are both subject to the requirements of 46 USC § 44102 and are engaged in the carriage of overnight passengers in coastwise trade on smaller passenger vessels, are believed to be "small entities" within the applicable definitions and share common economic and operating concerns. ACL is a member of the PVA and joins the PVA in its belief that at least four PVA members which are PVOs regulated by the Commission are similarly "small entities" for purposes of the RFA. Data received in response to the specific questions of the RFI will further establish the status of these companies.

Significant Impact. ACL submits that the existing regulations promulgated by the Commission to implement Public Law 89-777 unfairly discriminate against small entity U.S. flag coastwise trade PVOs such as ACL by increasing their operating costs and requiring them to tie

[15] In accordance with the FMC Policy, ACL has formally requested that the Commission treat it as a "small business" for purposes of the RFA and SBREFA because ACL is within the 2007 NAICS class 483114, "Coastal and Great Lakes Passenger Transportation," employs fewer than 500 employees, and has always employed fewer than 500 employees. *See* Letter dated November 16, 2011, to Chairman and Members of the Commission.

up a much greater proportion of their capital as security as compared with large PVOs. The proposed doubling of the cap for required non-performance financial security from $15 million to $30 million under the Proposed Rule would directly aggravate that unfair discriminatory burden on small U.S. flag coastwise trade PVOs in a manner disproportionate to the risk of their non-performance. In its November 21, 2011 written comments, ACL rebutted the examples purporting to show that such an increase would serve any useful purpose. For the larger foreign flag PVOs the doubling of the cap from $15 million to $30 million is so small a percentage of their total unearned passenger revenue (UPR) as to be inconsequential. The Commission has not disputed the discriminatory aspect of the current regulations nor the continued discrimination that would be wrought by the Proposed Rule. Detailed information submitted in response to the specific questions in the RFI will further establish the extent of this significant and discriminatory adverse economic impact on small entity PVOs in the U.S.-flag coastwise trade sector.

Substantial Number. ACL submits that the significant adverse economic impact of the Proposed Rule would fall upon not only ACL but upon many if not all the small entities in its industry sector. Indeed, ACL believes and therefore submits that the small entities upon which the significant adverse economic impact of the Proposed Rule would fall comprise the entire industry segment of small U.S. flag coastwise trade PVOs which are both subject to the requirements of 46 USC § 44102 and are engaged in the carriage of overnight passengers in coastwise trade on smaller passenger vessels. Thus these impacted small entity PVOs are indeed a "substantial number" for purposes of the RFA. Detailed information submitted in response to the specific questions in the RFI will further establish the extent to which these small entities comprise the entirety of this industry segment.

Alternatives. Alternatives to the Proposed Rule were identified in ACL's November 21, 2011, comments to the Commission with respect to the Proposed Rule. Alternatives are further elaborated in ACL's response to Question 13 of the RFI below.

As dictated by the SBA, in furtherance of the goal of ensuring that the broadest possible range of impacts are fully considered, consideration of these alternatives is necessary in order for the Commission to determine whether the Proposed Rule creates a "significant impact" on small entities such as ACL. A description of such alternatives is required by statute in any initial regulatory analysis under the RFA.

II. Specific Responses to Questions

Question 1. Please detail your estimated cost of compliance with the Proposed Rule's requirements pertaining to financial responsibility for nonperformance of passenger vessel transportation (i.e., premiums and fees by sureties; collateral required by credit card issuers; other costs):

(a) Based on current operations and costs for the past year (2011).

Response 1(a): The Proposed Rule continues to require that in order to establish financial responsibility for indemnification of passengers for non-performance, PVOs must provide a surety bond equal to 110% of its highest UPR within the most current two year period, up to the cap. 76 Fed. Reg. at 58228. The Proposed Rule would increase the cap from the current $15 million to the proposed $30 million. *Id.*

The industry segment consisting of U.S. flag coastwise trade PVOs as a whole operates at greater cost than large, foreign flag PVOs because this industry segment operates only in the United States, hires only U.S. citizens, and builds its ships only in the United States. ACL is subject to these costs and the competitive disadvantage they create in competition with foreign flag cruise line operators.

Increasing the $15 million UPR cap as per the Proposed Rule would only further add to the costs of this U.S. flag industry segment, including ACL. ACL would be required to purchase a surety bond in the increased cap amount of $30 million. ***

For ACL to obtain a surety bond, the surety requires ACL to obtain a letter of credit as collateral. ***

In order to reflect such changes in amounts and to obtain a new letter of credit, amendments to the loan documents will have to be made. ***

One of the most important additional costs that ACL would suffer from the Proposed Rule would be the cost and lost opportunity resulting from tying up additional capital and credit for borrowing. Credit availability and capital are needed for capital expenses, fleet expansion, and corporate growth. ***

In summary, the fees associated with acquiring a surety bond and a letter of credit may be expected to increase under the Proposed Rule ***. There are other fees, such as attorney's fees, which will also be significant. *** Capital otherwise available for construction or acquisition or other expansion will thereby be diminished.

These costs are in addition to the higher costs associated with this industry segment of U.S. flag coastwise trade PVOs operating only in the United States and in addition to the discriminatory 10% administrative fee that is only charged to PVOs with UPR less than the cap.

(b) Your estimated cost of compliance if alternative forms of protections as contained in the Proposed Rule are available.

Response 1(b): The Proposed Rule does not define the "alternative forms of protections" intended by the Commission. It is therefore uncertain which alternative forms of protection are to be available. The Commission should clarify which alternative forms of protection would be available under the Proposed Rule as well as what would be needed to qualify for those protections.

In the Background section of the Proposed Rule, the Commission lists PVOs that ceased operations and states that certain percentages of passengers of PVOs with the highest UPR were reimbursed through credit card issuers and travel insurance. 76 Fed. Reg. at 58228. In addition, the Commission states that respondents to the Commission's Notice of Inquiry issued December 3, 2009, requested the Commission to consider travel insurance and protection for credit card payments to offset the required financial coverage for nonperformance. *Id.* The number of passengers who buy travel insurance with this type of coverage is not known. Therefore, our response focuses only on credit card reimbursement.

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The Fair Credit Billing Act requires passengers to notify the credit card company of a "billing error" within sixty (60) days after the credit card company transmits a statement of the passenger's credit card account. 15 USC § 1666(a). A "billing error" is defined to include a "reflection on a statement of . . . services . . . not delivered to the [passenger] or his designee in accordance with the agreement made at the time of a transaction." 15 USC § 1666(b) (3).

Due to the Fair Billing Credit Act sixty (60) day notification requirement, when a passenger pays by credit card the amount of time prior to the cruise date when a cruise is cancelled due to, for instance, the financial inability of the cruise line to continue operations, may be a factor for determining reimbursement. For example, if the PVO ceases operations more than thirty (30) days prior to the cruise date, then the passengers who paid by credit card are more likely to be reimbursed by the credit card company than if the PVO ceases operations only ten (10) days prior to the cruise date.

Given reliance on credit card companies to reimburse unearned passenger fares in the event of the financial collapse of the PVO, it is apparent that the credit card companies may demand collateral from the PVO as further protection in the event the PVO ceases operations. American Express stated in its comment letter dated May 29, 2003, that if the Commission offsets the bond amount with credit card sales, "credit card companies will then require PVOs to post collateral that cover *all unearned passenger revenue* charges with the company's credit cards...."[16] Thus the reduction in bonding requirements which might be afforded by the Commission to PVOs on the basis of "alternate protection" may be replaced with an equal or greater burden to the PVOs of having to provide collateral in favor of credit card companies.

The Proposed Rule suggests that the forms of "alternative protection" it proposes will be available only to smaller PVOs. The Proposed Rule states that "PVOs with UPR not exceeding 150% of the cap may request relief from coverage requirements otherwise provided for in these rules by substituting alternative forms of protection." 76 Fed. Reg. at 58231. The effect of the limitation to "150% of the cap," i.e. UPR not exceeding $45 million, is to create a disincentive to growth by PVOs in order to qualify for the discount or offset for "alternative protection."

ACL supports the Commission's concept that some forms of alternate protection, including for sales by credit card subject to the protections of the Fair Credit Billing Act, are appropriate for the Commission to take into account in establishing the UPR cap for each PVO. Yet ACL further submits that more consideration of the effect of "alternate protection" on small entity PVOs and more clarity from the Commission in these respects would be helpful. While

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[16] Letter, Jason Halpren, Counsel, American Express Travel Related Services Company, Inc. to Bryant L. VanBrakle, Secretary, Federal Maritime Commission, May 29, 2003, at 4.

the benefits of alternative forms of protection in the Proposed Rule are uncertain, the increased costs associated with increasing the UPR cap to $30 million are clear.

Question 2. Will the nonperformance requirements in the Proposed Rule change your type of coverage? If so, explain how.

Response 2: Yes. *** *See* Response 1(a).

Question 3. How will the proposed changes to the requirements affect your continuing operations?

Response 3: The proposed changes would significantly increase costs, tie up a considerably greater amount of capital, and consequently stifle our growth. *See* Responses 1(a) and 2.

Question 4. Estimated number of your company's staff hours required to comply with proposed changes to the application form (Form 131).

Response 4: It is not certain what the proposed changes to Form 131 are since the form is no longer published in the regulation and the proposed new Form 131 is not available. See 76 Fed. Reg. at 58229. ***

The Proposed Rule does propose a five year expiration period for each Certificate issued, thereby increasing the frequency which Form 131 must be completed from a one-time requirement for every passenger vessel operated by ACL to a requirement applicable every five years. *Id.* Completing paperwork is proportionately more burdensome for small entities than for large entities and increasing the frequency of the paperwork requirements further increases this burden.

Question 5. Estimated number of your company's staff hours required to comply with proposed changes to Unearned Passenger Revenue (UPR) reports.

Response 5: The only proposed change to the UPR report requirements appears to be the definition of the 6-month reporting period. 76 Fed. Reg. at 58231 (46 CFR § 540.9(h)). The prior UPR reporting period was based on a PVO's fiscal year whereas the proposed UPR reporting period is January to June, and July to December. ***

Question 6. What was your total revenue in 2011? These figures should reflect revenues obtained from all sources (not just from cruises under the Commission's program).

Response 6: ACL's total revenue in 2011 was $***. There can be no assurance that future years' revenue will continue at this rate, however.

Question 7. What were your total expenses in 2011? These figures should reflect expenditures incurred by all activities (not just by cruises under the Commission's program).

Response 7: ACL's total expenses in 2011 were $***. There can be no assurance that future years' total expenses will continue at this rate, however.

Question 8. What were your earnings after taxes in 2011? These figures should reflect earnings after taxes from all operations (not just operations conducted under the Commission's program).

Response 8: ACL's earnings after taxes in 2011 totaled $***. There can be no assurance that future years' earnings after taxes will continue at this rate, however.

Question 9. Please provide the following information regarding the number of employees your company employed in the most recent 12 calendar months (include any domestic and/or foreign affiliates in calculating number of employees):

General Response 9: The largest number of employees employed by ACL on any given day during the most recent 12 calendar months is ***. The total number of ACL employees who worked for ACL during the most recent 12 calendar months is *** (based on the total number of W-2s). ACL operates its vessels in compliance with the Jones Act and for that purpose, hires only U.S. citizens as necessary.

(a) Full-time, permanent employees (head count).

Response 9(a): The largest number of full-time, permanent employees employed on any one day during the most recent 12 calendar months is ***.

The total number of full-time, permanent employees given W-2s during the most recent 12 calendar months is ***.

(b) Part-time, permanent employees (head-count and full-time equivalents).

Response 9(b): The largest number of part-time, permanent employees employed on any one day during the most recent 12 calendar months is ***.

The total number of part-time, permanent employees given W-2s during the most recent 12 calendar months is ***.

(c) Full-time, seasonal or temporary employees (head-count).

Response 9(c): The largest number of full-time, seasonal or temporary employees employed on any one day during the most recent 12 calendar months is ***.

The total number of full-time, seasonal or temporary employees given W-2s during the most recent 12 calendar months is ***.

(d) Part-time, seasonal or temporary employees (head-count and full-time equivalents).

Response 9(d): The largest number of part-time, seasonal or temporary employees employed on any one day during the most recent 12 calendar months is ***.

The total number of part-time, seasonal or temporary employees given W-2s during the most recent 12 calendar months is ***.

(e) Staff obtained from temporary employment agencies (head-count and full-time equivalents). Do not include these totals in (a) through (d) above.

Response 9(e): Total number of staff obtained from temporary employment agencies during the most recent 12 calendar months is ***.

(f) Staff obtained from professional employee organizations (head-count and full-time equivalents). Do not include these totals in (a) through (d) above.

Response 9(f): Total number of staff obtained from professional employee organizations during the most recent 12 calendar months is ***.

Question 10. Which passenger vessel operators (brand(s)) do you consider your closest competitor(s) in U.S.-based markets?

Response 10: ACL's closest competitors in U.S.-based markets are believed to be: ***.

Question 11. What was the average revenue generated by each passenger who embarked on your U.S.-based cruises in 2011?

Response 11: The average revenue generated by each ACL passenger who embarked on U.S.-based cruises in 2011 was ***.

Question 12. How many passengers did you embark in 2011 at:

(a) U.S. ports.

Response 12(a): *** passengers embarked at U.S. ports in 2011. It is important to note that our passengers not only embark at U.S. ports but also only travel to and among U.S. ports. Because of the requirements of the Jones Act and U.S. coastwise trade applicable to only U.S. flag vessels, the cost to the PVO of providing coastwise overnight passenger carriage is higher on a per passenger berth basis than are the costs associated with non-coastwise overnight passenger carriage to foreign ports.

(b) Non-U.S. ports.

Response 12(b): *** passengers embarked from non-U.S. ports in 2011.

Question 13. Please provide any other comments or information that you believe would assist the Commission in analyzing the economic or competitive impact of the Proposed Rule in this proceeding.

Response 13: ACL submits that the Commission should study more closely the alternatives that have been outlined by ACL and the PVA in written comments submitted in response to the NPRM on the Proposed Rule. The Proposed Rule would unquestionably increase the burden and discriminate against the cruise industry segment consisting of small entity U.S. flag coastwise trade PVOs subject to Commission regulation. Alternatives which would accomplish the stated objectives of 46 USC § 44102 are available which would minimize the significant adverse economic impact which the Proposed Rule would have on the small entity members of the relevant industry segment. Those alternatives should be more specifically defined and offered for comment by the industry.

a. There is no evidence that an increase in the cap on nonperformance security is needed.

The Proposed Rule would not increase the burden on small entity U.S. flag coastwise trade PVOs if it did not double the current $15 million cap to $30 million. There is no adequate showing in the record that there actually is a need for such an increase, nor that the $30 million proposed new cap has any specific justification, as opposed to an increase to any other amount.

The only possibly relevant justification for doubling the cap from $15 million to $30 million would be reasons pertinent to the industry segment consisting of small entity U.S. flag PVOs, not to the industry generally. For larger foreign flag PVOs, the increase in the cap from $15 million to $30 million is an increase in such a small percentage of UPR as to be essentially inconsequential.

It is therefore not sufficient to justify the Proposed Rule on any general basis such as a contention that as a general matter the numbers of cruise vessels and passengers per voyage have increased over time, or that the UPR of many cruise lines generally has increased substantially. *See* 76 Fed. Reg. at 58227. While such a general increase in passenger cruising and UPR might impact the size of the industry and the growth of the larger, foreign-flag PVOs, it is no justification for an increase in the cap for 110% financial protection which adversely affects only the industry segment consisting of small entity U.S. flag coastwise trade PVOs. The evidence collected by the Commission for the Proposed Rule was rebutted in ACL's written comments to the Commission dated November 21, 2011.

Notably, other protections in addition to those under 46 USC § 44102 are in place for passengers in the event of nonperformance of transportation by a PVO, including coverage under the Fair Credit Billing Act, 15 USC § 1666, and the U.S. Bankruptcy Code, 11 USC § 507(a)(7). These protections are in addition to the 110% financial protection up to the amount of the cap that the Commission requires and result in duplicative coverage for those passengers whose advance deposits are also protected at the rate of 110%.

If the Commission determines it must increase the cap on nonperformance security to $30 million in order to fulfill the regulatory purpose of Public Law 89-777, it should take advantage of the logical available alternatives which would at least reduce the discriminatory effect and disproportionality of the Proposed Rule against small entity U.S. flag coastwise trade PVOs such as ACL. Possible ways that could be done while accommodating the regulatory purpose of Public Law 89-777 include the recognition of "alternate protections" available, limitation of the cap to $15 million for these small entity PVOs whose UPR is less than $30 million, or use of a sliding scale for PVOs with UPR between $15 million and $30 million.

b. Mitigation of adverse economic impact by the provision for recognizing "alternate protections" is appropriate.

As discussed in Response 1(b), ACL is in favor of suitable proposals for alternate protections, including the Commission's proposal to recognize the protection given credit card payments under the Fair Credit Billing Act, that might mitigate the adverse economic effect of the Proposed Rule on small U.S.-flag coastwise trade PVOs such as ACL.

The Commission must recognize that while the Proposed Rule correctly notes that the proposal for "ultimate forms of protection" recognizes the "disparity between small and large cruise lines," in fact this proposal may not actually serve to relieve the discrimination against small U.S. flag PVOs as suggested but may instead have the effect of simply substituting a credit card issuer for the Commission as the party to which the collateral must be committed. *See* Response 1(b). For this reason, this "alternate protection" should not be the only mitigation included in any new regulation.

c. Retain $15 million cap for PVOs with UPR less than $30 million.

The Commission should seriously study and offer for comment an alternative previously offered by the PVA. *See* PVA Comment Letter dated Nov. 21, 2011. This is to retain for PVOs with UPR up to $30 million at the current time, the requirement to demonstrate financial responsibility at 110% of UPR up to a cap of $15 million. This would ensure that the Proposed Rule does not impose a significant adverse economic impact on a U.S.-flagged small entity PVOs whose UPR might grow to exceed $15 million in the next few years. Importantly, this alternative would not inhibit potential company growth by a small entity PVO. In addition, the consideration of alternative types of financial protection would be available with respect to a PVO in this category.

d. Mitigation of adverse economic impact by a sliding scale of security requirements is also appropriate.

If the Commission is persuaded that an increase in the bonding requirement is necessary at this time, it does not follow that the increase need be on a dollar-for-dollar basis with the amount of a PVO's UPR in excess of $15 million. As an alternative to address the discriminatory effect of an increase in the required cap for operators with UPR between $15 million and $30 million, a sliding scale has merit to reduce the discriminatory effect of the nonperformance financial requirement by decreasing the additional amount over $15 million required to be posted in a manner proportionate to the decreasing risk of the PVO's nonperformance as its UPR increases.

Although not mentioned in the Proposed Rule, sliding scales have previously been considered and one such scale was implemented by the Commission. In 1992 the Commission proposed and then finalized regulations implementing a sliding scale for PVOs with UPR of up to $35 million with financial protection requirements capped at $15 million. 57 Fed. Reg. 19097 (May 4, 1992) (Docket 92-19, NPRM); 57 Fed. Reg. 41891 (Sept. 14, 1992) (Docket 92-19, Final Rule); 57 Fed. Reg. 51887 (Sept. 14, 1992). This sliding scale remained in effect until 2002, when it was abandoned with little comment. 67 Fed. Reg. 44774 (July 5, 2002) (Docket 02-07). Different sliding scales up to a greater amount of bonding cap were proposed by the Commission in 1994, 59 Fed. Reg. 15149 (Mar. 31, 1994), and 1996, 61 Fed. Reg. 33059 (June 26, 1996). The last of these proposed, *inter alia,* a sliding scale bonding requirement for UPR over $15 million. 61 Fed. Reg. at 33065.

A sliding scale with respect to the nonperformance security requirement above $15 million would be a helpful addition to the Proposed Rule, providing passengers with increased financial protection while reducing the discriminatory effect from that which the Proposed Rule would impose on small entity U.S. flag PVOs whose UPR is between $15 million and $30 million. At a minimum the Commission should adopt such a sliding scale to minimize the adverse economic impact of the Proposed Rule on small entities carrying overnight passengers in U.S. flag coastwise trade.

e. Eliminate the 10% administrative fee for PVOs with UPR below $30 million is appropriate.

Requiring small entity PVOs to post financial security at a rate of 110% of UPR is intended to cover the cost of administration of the nonperformance financial security program. At least the 10% administrative fee portion of this requirement should be eliminated.

The requirement to post financial security on even a dollar-for-dollar basis with UPR is unduly burdensome for small entity U.S. flag coastwise trade PVOs. There is no sound basis to aggravate this unfair discrimination with an additional 10% administrative fee. The administrative fee should be eliminated or if not eliminated, another basis for collection of the necessary administrative costs, such as a much smaller percentage fee based on a percentage of total UPR without regard to any cap on the amount to be bonded, should be substituted.