

**Comments of
LINDBLAD EXPEDITIONS, INC.**

to

**Federal Maritime Commission
Notice of Proposed Rulemaking**

**Regarding Passenger Vessel Operator
Financial Responsibility Requirements
For Nonperformance of Transportation**

November 17, 2011

Comments of

LINDBLAD EXPEDITIONS, INC.

Regarding Passenger Vessel Operator Financial Responsibility Requirements For Nonperformance of Transportation

Lindblad Expeditions, Inc. submits these comments in response to the Federal Maritime Commission's Notice of Proposed Rulemaking regarding the financial responsibility requirements for passenger vessel operators under P.L. 89-777 and 46 C.F.R. Part 540. Lindblad supports the proposal of the Commission to consider alternate forms of protection available to passengers when establishing the level of financial security to be provided by a passenger vessel operator in satisfaction of Part 540.

Background

Lindblad operates two U.S. flag passenger vessels in trades subject to P.L. 89-777 and Part 540. The comments submitted herein in support of the proposed rulemaking are based on Lindblad's experience as a passenger vessel operator ("PVO") in complying with the Part 540 regulations and its familiarity with general industry practice. In particular, Lindblad considers it appropriate and timely for the Commission to consider the extent to which a PVO's financial responsibility for passenger deposits is separately assured for deposits made by credit card.

Unlike cash payments, credit card remittances have a safety net of protections provided directly to the consumer by and through the credit card system. Just as any customer charging a purchase is protected against a defaulting merchant, a cruise passenger

who pays for a cruise by credit card is protected against non-performance by the credit card system. Subject to compliance with basic notice and diligence criteria, and to certain limits generally not germane, a passenger paying by credit card in effect receives a guarantee from the credit card issuer against non-performance by the PVO. These guarantees are embodied in the terms of the cardholders' contracts with their credit card issuers and by applicable law.¹

Although details may vary depending upon the particular card and issuer, all credit card users receive protection in case of "billing error" disputes with a merchant or vendor.² Among other things, there is a "billing error" whenever a consumer does not receive what was paid for by credit card.³ In all such cases, the consumer is fully protected.⁴ For a cruise line passenger who paid by credit card for a cruise that did not sail because of non-performance by the PVO, there would be nothing less than full recourse against the credit card issuer for the entire amount paid the PVO.⁵ Thus, for those passengers paying by credit card, it would be far simpler and faster to obtain a full refund from their credit card issuer in

¹ *Fair Credit Billing Act*, 15 U.S.C. § 1666(a); 1666(i).

² 15 U.S.C. § 1666(a).

³ 15 U.S.C. § 1666(b).

⁴ *See, Citibank v. Mincks*, 135 S.W. 3d 545, 552-4 (Mo. Ct. App. 2004).

⁵ *Nova Information Systems, Inc. v. Greenwich Ins. Co.*, 365 F. 3d 996 (11th Cir. 2004).

the event a PVO did not perform rather than to seek recovery against the PVO or its Part 540 escrow.⁶

Whether measured by dollar volume or by number of passengers, remittances by credit card account for most deposits, with payment by cash or check representing only a small portion of Lindblad's UPR for voyages subject to Part 540. Because of this widespread use of credit cards as a medium of payment, the additional security for passenger deposits provided through credit card usage should no longer be ignored in assessing a PVO's financial responsibility. For Lindblad and other PVOs, the fact that most passenger deposits are already protected by the credit card system means that PVO overall financial responsibility is already substantially secured as far as risk to the passenger's deposit is concerned.

The effect of the added security provided for passenger deposits made by credit card is to make Part 540 security provided by PVOs such as Lindblad grossly over-funded. This is because, as a practical matter, it would only be those passengers who paid cash who would seek a Part 540 recourse in the event of non-performance. At present, a PVO's funding at more than 100% of total UPR vastly over-secures the small portion of UPR representing cash receipts; with the Part 540 security being academic – if not irrelevant – to the overwhelming majority of passengers who pay by credit card.

The security provided by the credit card system is not simply a matter of benevolence on the part of the card issuers. It is the PVO itself who pays, through the fees assessed on

⁶ Indeed, the Commission in the past has encouraged passengers of defunct PVOs to seek recovery, where available, through credit card channels. *See, infra*, at pp. 4-5.

each credit card transaction, for the added security that passengers who pay by credit card receive on an annual basis. In addition, PVOs such as Lindblad are required to maintain a sizable cash reserve on deposit with a third party as a condition to participation in the most commonly used credit cards. The amount of this reserve deposit typically exceeds 10% of high UPR. The cost of the added security that credit card-paying passengers receive is thus borne by PVOs in the form of fees and the required reserve account. In effect, each PVO pays for the protection of passenger deposits made by credit card just as if it had purchased insurance and paid premiums for the protection of those passengers.

Just as the Commission would recognize a surety bond in contributing to the required financial responsibility of a PVO, so there should be recognition of the financial security for passenger deposits provided through the credit card system. To do so would be entirely consistent with the legislative intent of PL 89-777. As RADM John Harlee, USN (Ret.), then Chairman of the Commission, testified in 1966 in support of the legislation that was enacted as PL 89-177, the objective of the financial responsibility requirement was to require that each cruise line operator “establish, to the satisfaction of the Federal Maritime Commission, that sufficient funds are available, by bond or otherwise, to indemnify passengers for nonperformance.” 1966 USCCAN at 4187 (*emphasis added*). It is particularly noteworthy that it was neither the intent of the original drafters, nor ever a requirement of the legislation, that financial responsibility be determined only on the basis of assets held by, or committed to the benefit of, the PVO. To the contrary, the statute’s intention of ensuring that passengers are not “left stranded on the pier . . . without recourse to recover their passage moneys” (1966 USCCAN 4179) is served as well by the guarantees of the credit card system as it would be

by any of the third-party guarantors or sureties currently recognized by the Regulations (*cf.* 46 C.F.R. 540.5(c), 540.6).

Moreover, the Commission has publicly recognized the unique role of the credit card system in protecting passengers who charged their cruise deposits to a credit card. In the case of the collapse of Premier Cruise Lines, the Commission advised passengers who had paid Premier by credit card to pursue reimbursement directly from credit card companies (*see, Nova Information Systems, supra* at 1002). More recently, in connection with the failures of Royal Olympia Cruises in 2004 and American Rivers Cruise Line in 2006, press releases issued by the Commission noted that passengers who paid by credit card had recourse outside the PVO's Part 540 security arrangements. Having acknowledged the availability of recourse through the credit card system, it is entirely consistent for the Commission to factor this added security into its evaluation of a PVO's financial responsibility.

Also relevant is the fact that passengers booking with Lindblad and many other PVOs are protected by travel industry bonds such as are provided by USTOA. The cost of these bonds for the protection and assurance of the traveling public is paid for by the PVO itself (*e.g., Lindblad*), and provides another level of security for UPR.⁷

Providing and maintaining Part 540 security is a very real cost and burden for PVOs who are not able to take advantage of the cap on required performance security. Lindblad supports increasing the cap to a level that would be commensurate with the UPR exposure of

⁷ Many ticket holders are also protected against non-performance through individual or group travel insurance policies.

all PVOs. This would be best accomplished by eliminating the cap altogether. An increase to \$30 Million, as proposed, would be a step in the right direction.

CONCLUSION

As one of the very few remaining U.S. flag operators, Lindblad already is shouldering legal and financial burdens avoided by other carriers, and which are proportionally much greater than those borne by large, foreign lines. For the reasons stated, the burden associated with PL 89-777 can and should be reduced to reflect the true nature of the financial security for UPR by considering the alternate protections available to passengers.

Dated: November 17, 2011

Respectfully submitted,

LINDBLAD EXPEDITIONS, INC.