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November 21, 2011

Ms. Karen V. Gregory, Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573-0001

Dear Ms. Gregory:

The Passenger Vessel Association (PVA) – the national trade association representing owners and operators of U.S.-flagged commercial passenger vessels of all types – submits these comments to the docket entitled "Passenger Vessel Operator Financial Responsibility Requirements for Nonperformance of Transportation," as published in the *Federal Register* of September 20, 2011 (Docket No. 11-16).

PVA opposes the rule as proposed because it does not sufficiently resolve the current rule's problem of unfair treatment of "small ship" operators and because it may actually impose unjustified additional economic costs on some small U.S.-flagged passenger vessel operators. However, PVA believes that a modification to the proposed rule could make it more palatable.

Several members of the Passenger Vessel Association operate "small ship" U.S.-flagged passenger vessels subject to the Commission's financial responsibility rule. In contrast to larger cruise ships carrying thousands of passengers, U.S.-flagged overnight cruise ships (with one exception operating in Hawaii) are smaller, mostly carrying between 50 and 250 passengers. These "small ship" vessels operate in coastwise trades (Alaska, on the Columbia, Sacramento, and Mississippi River systems, along the U.S. East and Gulf coasts, and on the Great Lakes).

Establishing a $30 million cap does not adequately address the existing rule's unfair impact on smaller U.S.-flagged passenger vessel operators.

The Commission proposes to raise the current regulatory cap for demonstration of financial responsibility required to protect passengers in the event of nonperformance. Currently, a covered passenger vessel operator must demonstrate financial responsibility of 110 percent of Unearned Passenger Revenue (UPR), but there is a regulatory maximum cap of $15 million. The Commission proposes to raise the cap over two years, first to $22 million and then to $30 million. In subsequent years, the cap could be adjusted to account for inflation.

As PVA has pointed out, and as the Commission has acknowledged, a smaller passenger vessel operator can comply with the existing financial responsibility rule only by committing a much greater percentage of its operating revenue to an acceptable method of demonstrating financial responsibility than does a larger passenger vessel operator. In the case of the latter, only a small portion of the large operator's UPR is considered in demonstrating financial responsibility because of the regulatory cap. Thus, the existing rule has a disproportionate economic impact on smaller passenger vessel operators, and since it is the "small ship" segment of the cruise industry that is served by coastwise-qualified U.S.-

flagged vessels, the rule has a disproportionate impact on U.S. companies that are fully subject to U.S. income taxes and U.S. labor laws and that operate vessels that are U.S.-built, U.S.-crewed, and U.S.-owned.

To the extent that the proposed rule will raise the regulatory cap to $30 million, the inherent unfairness of the proposed rule (and its disproportionate impact on operators of U.S.-flagged passenger vessels) will not be fundamentally changed.

Allowing alternative methods of financial protection for passengers is an appropriate step, but it may not provide the hoped-for relief for smaller vessel operators.

The Commission has attempted to ease the rule's impact on smaller passenger vessel operators by allowing such an operator to apply to the Commission to have its required amount of demonstration of financial responsibility reduced to account for other forms of protection for passengers in the event of voyage nonperformance. Such other forms might include travel insurance, legal rights providing protection to passengers that use credit cards, etc.

PVA acknowledges that this is a "good faith" effort by the Commission to address this problem. The Commission should understand, however, that it may or not provide "net relief" to the passenger vessel operator. For instance, if a credit card issuer perceives that the rule has resulted in an increase in its level of financial exposure in the event of nonperformance by the vessel operator, it may simply alter the terms of its contractual relationship with the operator to financially cover that perceived increase in risk. Thus, the relief that may be gained on the Commission side may be taken away on the credit card side.

Also, PVA notes that the proposed rule offers very little guidance to the passenger vessel operator and the Commission as to the factors governing how such requests for relief should be considered by the Commission. On balance, however, PVA supports inclusion of this provision in the proposed rule, since it provides an option to the passenger vessel operator.

Some "small ship" passenger vessel operators will incur a higher economic burden as a result of the proposed rule.

Under the Commission's proposed rule, covered passenger vessel operators will fall within one of three categories:

- An operator with UPR of no more than $15 million;

- An operator with UPR that falls within the range between the existing cap of $15 million and the eventual cap of $30 million (plus subsequent adjustments for inflation); and

- An operator with UPR that exceeds the revised higher regulatory cap.

A passenger vessel operator in the first category (UPR of no more than $15 million) may see no adverse economic impact from the proposed rule. In fact, to the extent that such an operator successfully takes advantage of the proposed rule's provision for consideration of alternative types of financial protection for passengers, the operator might be permitted to demonstrate a lower level of financial responsibility than under the current rule.

Unfortunately, a passenger vessel operator in the second category (UPR in the range between the existing cap of $15 million and the eventual cap of $30 million, plus subsequent adjustments for inflation) is likely to suffer an unnecessary adverse financial impact under the proposed rule. Such an operator will have to set aside even more resources to satisfy the new required higher level of financial responsibility. These resources will be removed from the operating funds of the company and will be unavailable for capital investments. Thus, the unfair economic impact of the current rule will be exacerbated. At least one PVA member operating U.S.-flagged vessels is likely to be so affected.

The Commission must comply with federal law and seriously analyze the proposed rule's impact on smaller entities.

PVA objects to the Commission's "presumption" (issued in 2003) that no small businesses (as defined by U.S. Government criteria) are passenger vessel operators subject to the Commission's jurisdiction. This is simply not true. The following PVA members are most definitely small businesses with current vessel operations:

American Cruise Lines
Blount Small Ship Adventures
Lindblad Expeditions
InnerSeas Discoveries/American Safari Cruises

Two other companies (Great American Riverboat Company, Alaskan Dream Cruises) have recently purchased U.S.-flagged "small ship" cruise vessels with passenger capacities subject to the Commission's financial responsibility rule and currently operate or will operate them next season on coastwise routes. PVA believes that both entities meet the "small business" criteria of the U.S. Small Business Administration.

Thus, the Commission errs when it declares, "Therefore, no small entities will be affected by the proposed rule." Furthermore, the Commission also errs when it makes a finding under the Regulatory Flexibility Act that "[T]he proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."

The small entities described above are all operators of U.S.-flagged vessels. To the extent that they have, or will soon have, UPR in the range between the existing cap of $15 million and the eventual cap of $30 million, plus subsequent adjustments for inflation, the economic impact is likely to be substantial. If one looks at the subset of covered passenger vessel operators that have U.S.-flagged vessels, there may be a "substantial number" (in percentage terms) that will incur a significant economic impact.

Under the Small Business Regulatory Enforcement Fairness Act amendments to the Regulatory Flexibility Act, the Commission is legally obligated to make a good faith analysis of the economic impact of the proposed rule on small entities. The Commission cannot fulfill its legal obligation by pointing to the incorrect 2003 "presumption" that no passenger vessel operator is a small business or by making a bare statement (with no supporting analysis) that "the proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."

PVA urges the Commission to correct this omission before making a decision on the proposed rule. It would be appropriate for the Commission to consult with the Office of Advocacy of the U.S. Small Business Administration regarding the proper application of the Small Business Regulatory Enforcement Fairness Act amendments to the Regulatory Flexibility Act.

PVA suggests an alternative to the proposed rule.

By making an alteration to the proposed rule, the Commission could address the identified problem of the economic impact on a passenger vessel operator with UPR that falls within the range between the existing cap of $15 million and the eventual cap of $30 million (plus subsequent adjustments for inflation). The suggested alteration is as follows:

- If a passenger vessel operator has UPR of up to $30 million, its demonstration of financial responsibility is retained at 110 percent of UPR, up to a cap of $15 million. This would ensure that the new rule does not impose a significant economic impact on a U.S.-flagged "small ship" operator whose UPR might grow to exceed $15 million in the next few years. Unlike the proposed rule, this alternative would not inhibit potential company growth by a "small ship" vessel operator. In addition, the consideration of alternative types of financial protection would be available with respect to an operator in this category; and

- If a passenger vessel operator has UPR of more than $30 million, its demonstration of financial responsibility would be set at 110 percent of UPR, up to a cap of $30 million.

This proposed alteration would enable the Commission to provide increased financial protection for passengers of large vessel operators with UPR far in excess of $30 million while still shielding U.S.-flagged "small ship" operators from the adverse economic impact of a revised rule.

Thank you for the opportunity to comment on this regulatory proposal and for your consideration of PVA's observations.

Sincerely,

Edmund B. Welch

Edmund B. Welch
Legislative Director