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COMMITTEE ON TRANSPORTATION AND
INFRASTRUCTURE

SUBCOMMITTEES

COAST GUARD AND
MARITIME TRANSPORTATION

HIGHWAYS AND TRANSIT

WATER RESOURCES AND ENVIRONMENT



Congress of the United States

House of Representatives

Washington, DC 20515

September 10, 2012

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AND INSULAR AFFAIRS

Richard A. Lidinsky, Jr., Chairman
Federal Maritime Commission
800 North Capital Street, N.W.
Washington, D.C. 20573-0001

Re: Federal Maritime Commission Meeting Scheduled for September 12, 2012
Docket No. 11-16: Passenger Vessel Operator Financial Responsibility
Requirements for Nonperformance of Transportation

Dear Mr. Lidinsky:

Attached is a letter from counsel for American Cruise Lines, Inc. concerning the meeting of the Federal Maritime Commission scheduled for September 12. I would appreciate your consideration of the points raised in the letter prior to the meeting. It seems reasonable to me that information in response to comments about the Commission's need to comply with the Regulatory Flexibility Act and gathered after the original comment period and relating to small business passenger vessel operators should be shared with the industry and opened for public comment so that the views of the affected industry may be considered by the Committee before a Final Rule is enacted.

Small business is an important engine of economic recovery. We enacted the Regulatory Flexibility Act specifically to protect small businesses from the unnecessary adverse effects of regulation. It is incumbent upon us, especially in these times, to ensure that new regulations do not inadvertently strangle growth.

I appreciate your consideration of this matter and look forward to hearing from you.

Yours truly,

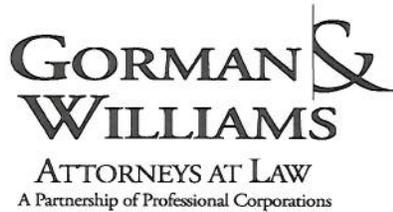
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September 10, 2012

VIA EMAIL AND FIRST CLASS MAIL

Chairman Richard A. Lidinsky, Jr.
Commissioner Joseph E. Brennan
Commissioner Rebecca F. Dye
Commissioner Michael A. Khouri
Commissioner Mario Cordero

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Federal Maritime Commission
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Washington, D.C. 20573-0001

Re: Federal Maritime Commission Meeting Scheduled for September 12, 2012
Docket No. 11-16: Passenger Vessel Operator Financial Responsibility
Requirements for Nonperformance of Transportation

Dear Commissioners:

It has recently come to our attention that the referenced Proposed Rule will be addressed at meeting of the Federal Maritime Commission (the "Commission") scheduled for Wednesday, September 12, 2012. I write to express our concern that the Commission not adopt a Final Rule at the meeting given that our client, American Cruise Lines, Inc. ("ACL"), and other small business passenger vessel operators ("SBPVOs") have not been afforded an opportunity to comment on (i) the data collected pursuant to the Commission's February 23, 2012 Notice of Request for Additional Comments and Information ("Notice"), and (ii) any changes to the Proposed Rule to reflect the incorporation of the collected data.

By way of background, a Notice of Proposed Rule Making was issued on September 13, 2011 (76 Fed. Reg. 58227-58236 (Sept. 20, 2011) ("NPRM"). ACL, the Passenger Vessel Association, and others responded to the NPRM pointing out that the NPRM failed to address the economic impact of the proposed regulations on SBPVOs, as required under the Regulatory Flexibility Act ("RFA"). We were encouraged by the Commission's subsequent issuance of the Notice soliciting additional information on the potential economic impact of the Proposed Rule on SBPVOs. ACL responded to the Notice on March 29, 2012. Since then, ACL has awaited publication of the data collected by the Commission and notice of how that data affected the Commission's analysis and proposed regulations. The Commission has not published the data it collected, nor has it indicated if or how that data has been incorporated into the Proposed Rule.

We believe the law requires publication of (i) the data collected by the Commission relating to SBPVOs, (ii) how that data has or has not been incorporated into the Proposed Rule, and (iii) the Commission's analysis of the impact of the Proposed Rule on SBPVOs. Further, we believe the law requires the Commission to establish a comment period to afford interested parties an opportunity to consider the validity of the data collected and the conclusions reached with respect to that data.

The Administrative Procedures Act ("APA") requires that an agency make a decision with respect to rule making only after affording interested persons notice and an opportunity to comment. *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979). A comment period is required under the law to vet the information relating to SBPVOs obtained, and relied on, by the Commission prior to enactment of the Final Rule. "It is antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later." *Paulsen v. Daniels*, 413 F.3d 999, 1004-05 (9th Cir. 2005).

It is unknown how and to what extent the new information has affected the Commission's analysis and Proposed Rule. "An agency contemplating a change between its proposed and final rules cannot deny commenters . . . their first occasion to offer new and different criticisms which the Agency might find convincing." *Solite Corp. v. U.S. E.P.A.*, 952 F.2d 473, 499 (D.C. Cir. 1991) (citations omitted). ACL and other SBPVOs have been denied the opportunity to inform the Commission's consideration of changing its Proposed Rule based on the information it obtained relating to SBPVOs after the close of the comment period.

Under the law, the Commission is obligated to reveal its basis for subjecting SBPVOs to a standard which clearly discriminates against the small business coastwise passenger vessel operators as compared to the larger businesses with which they compete. "An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary." *Id.* at 484 (citations omitted). The Commission has a "duty to identify and make available . . . data that it has employed in reaching the decisions to propose particular rules." *Id.* The Commission correctly determined that additional fact gathering was necessary but has so far failed to make the data available for review and comment. Under the law, "[i]f an agency determines that additional fact gathering is necessary, then notice and comment are typically required." *Chamber of Commerce of U.S. v. S.E.C.*, 443 F.3d 890, 899-901 (D.C. Cir. 2006) (collecting cases).

Specifically, the additional data collected is critical factual material pertinent to the Commission's position on the Proposed Rule with respect to SBPVOs and its analysis of the economic impact on SBPVOs, which is required by the RFA. No information has been published establishing that the Proposed Rule now complies with the RFA. Reliance on this critical factual material requires the Commission to establish a comment period. *See, e.g., Chamber of Commerce of U.S. v. S.E.C.*, 443 F.3d 890, 899-901 (D.C. Cir. 2006) (citations omitted). Because no information previously was collected specifically pertinent to SBPVOs, the information recently collected after the comment period is unique and distinct from

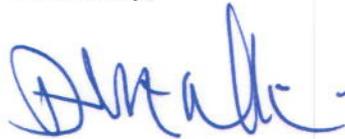
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previously published data and integral to the Commission's consideration of the Proposed Rule and its impact on SBPVOs. For these reasons the law requires additional notice and an opportunity for public comment. *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1403) (9th Cir. 1995). See also *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 201-02 (D.C. Cir. 2007) (changes to methodology requires notice and comment).

In short, American Cruise Lines, Inc. and other small business overnight passenger vessel operators will be sharply prejudiced by the issuance of a Final Rule if one is issued without an opportunity to examine and comment on the data collected by the Commission relating to the economic impact of the Proposed Rule on small businesses and the Commission's analysis of that data. American Cruise Lines, Inc. respectfully requests that the information the Commission collected, considered and/or incorporated into the Proposed Rule, pursuant to the Notice, be published and a comment period be established before the Rule is made final.

We appreciate your time and attention.

Yours truly,



David McL. Williams, P.C.

DMW/mrn

Cc: Karen V. Gregory, Secretary
American Cruise Lines, Inc.

secretary@fmc.gov