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Mr. Bryant L. VanBrakle, Secretary
Federal Maritime Commission
800 North Capitol Street, N. W.
Washington, DC 20573-0001

7th April 2003
OFFICE OF THE SECRETARY
FEDERAL MARITIME COMMISSION
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Federal Maritime Commission
46 CFR Part 540 - Docket No. 02-15
Passenger Vessel Financial Responsibility
Notice of Proposed Rulemaking

Dear Mr. VanBrakle,

I am directing this e-mail to you on behalf of the International Group of Protection and Indemnity Clubs in response to the Commission's request for comments concerning the captioned Notice of Proposed **Rulemaking**.

The International Group consists of thirteen mutual insurance **organisations** ("Clubs") that provide cover in relation to shipowners' **liabilities**. Over 90% of the world's ocean-going tonnage is entered in one or other of the Clubs in the International Group. The financial responsibility of shipowners for non-performance of transportation under Section 3 of Public Law 89-777 is **not** a risk covered by Clubs. The Sec. 3 Guaranties have accordingly been provided by the individual Clubs to their Members as a service, and only when the Clubs' Guaranty is fully secured by a Bank counter-guarantee.

The International Group respectfully submits the following comments in **response** to the Notice of Proposed **Rulemaking**:

(1) Unearned Passenger Revenue (UPR) ceiling of US\$ 15 million

The Clubs' authority to give such guaranties is currently limited to **US\$15 million**. However much the Clubs may want to accommodate their shipowner members, we do not believe that the Club Boards will agree to providing guaranties at the level proposed in the Notice of Proposed **Rulemaking**.

(2) **Construing P.L. 89-777 and the Fair Credit Billing Act**

The Group believes that the Notice of Proposed Rulemaking will hopefully eliminate once and for all the argument advanced by the credit card companies and their processors that it was the Commission's intention that they should be subrogated to the rights of the passengers against the Sec. 3 guaranties and bonds posted with the Commission. The Group was pleased to see that its position in this regard not only found favour with the United States District Court for the Southern District of New York in the decision rendered by Chief United States Bankruptcy Judge Stewart M. Bernstein in *Deluxe Corporation vs. Regency Cruises, Newcastle Protection and Indemnity Association, et al*, but in a decision rendered by the United States District Court, Middle District of Florida, in *NO VA Information Systems, Inc. vs. Greenwich Insurance Company, NAC Reinsurance Corporation*. In the latter case, United States District Judge Gregory A. Presnell cited, and discussed at length, the Commission's Notice of Proposed Rulemaking in support of his decision that the P.L. 89-777 Sec. 3 Bond posted by Greenwich/NAC was never intended to cover third-party credit card processors. As Judge Presnell found in his decision, "even under the broadest possible reading, plaintiff cannot be considered a 'passenger' because the legislature intended to cover purchases of passenger fares in advance of the cruise, not third-party processors who honoured charge backs after the fact of non-performance." This has always been the Clubs' position, and as the Commission has been advised, all of the Clubs' Sec. 3 Guaranties have been posted with the understanding they are only, and solely, for the benefit of the passengers themselves.

In the Background to his decision, Judge Presnell particularly noted the Commission's intention that:

"...[the new rule would not] create any right of subrogation to the UPR covered by the Commission's program by credit card issuers that have reimbursed passengers for transactions involving excepted passenger revenue. Whatever means credit card issuers use to cover risks posed by excepted passenger revenue or the FCBA is beyond the scope of this proceeding."

Notwithstanding Judge Presnell recognizing the Commission's intention, in order to ensure that the Commission's goal of having the Sec. 3 security available only for passengers, and not credit card companies, processors, et al, we would respectfully suggest that either Endnote 8, or any Regulation based on the Endnote, be amended by deleting the words "*for transactions involving excepted passenger revenue.*" The Endnote/Regulation would then read:

8. This proposed rule does not create any right of subrogation to the UPR security covered by the Commission's program by credit card issuers that have reimbursed passengers. Whatever means credit card issuers use to cover risks posed by excepted passenger revenue or the FCBA is beyond the scope of this proceeding.

The Clubs **make** this suggestion for, based on our experience, we expect that since the Fair Credit Billing Act **will** inevitably mandate the credit card companies expunge charges, or credit the cardholders' **accounts**, for charges outside the 60 day **pre-**embarkation period envisioned by the Notice of Proposed Rulemaking, as the **Endnote/Proposed Rule** currently reads the door may have been unwittingly left ajar, thus **potentially** reducing the security available for the public,

(3) Unearned Passenger Revenue

This term is defined under both Sections 540.2 (h) and (i) as including passenger revenue received for water transportation **'and all other accommodations, services and facilities relating thereto'**.

It is not made clear what the **latter** terms cover. We believe that they should be narrowly construed and confined to revenues directly connected to **the** water carriage. For instance we do not believe that they should encompass indirect costs such as airfares, hotel reservations, shore excursions etc.

Having said this we believe it would be **helpful** if the terms were more clearly **defined** to indicate exactly what revenues or costs do apply.

As always, the Group stands ready to assist the Commission in achieving its goals for security, but until the level of security for UPR that may be required, which is to say the amount over and above that is covered by the **FCBA**, is known, the Group cannot **make** any commitment to the Commission.

Yours sincerely


J.A.F. Stockdale

cc George **Freehill** Esq. – Freehill, Hogan & **Mahar**