BEFORE THE FEDERAL MARITIME COMMISSION
Washington, D.C.

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

COMMENTS OF AMERICAN CRUISE LINES, INC.

November 21, 2011

American Cruise Lines, Inc. ("ACL") respectfully submits the following comments to the Federal Maritime Commission ("Commission") on the Notice of Proposed Rulemaking ("NPRM") 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 U.S.C. 44101-44106)[1] with amendments (the "Proposed Rule") to 46 CFR part 540.

AMERICAN CRUISE LINES

ACL is a privately held operator of a limited number of small overnight passenger cruise ships specializing in small ship cruising on close coastal and inland waterways and rivers of the United States. ACL owns five small vessels all built after 2002 comprising, we believe, the world's newest fleet having berth or state room accommodations for 50 or more passengers. ACL's ships typically carry about 100 or more overnight passengers on coastal and inland itineraries in the Pacific Northwest, Maine, New England Islands, Hudson River, Chesapeake Bay, the Historic South & Golden Isles, Florida, and, coming in 2012 on a new vessel, the Mississippi River.

Passenger cruising with ACL is focused on a narrow market of well-educated and culturally discriminating clientele and is intentionally contrary to the experience offered by mass-market operators carrying thousands of passengers per voyage and offering extravagances such as onboard casinos and swimming pools. The hallmark of cruising with ACL Is the ability of its small vessels to reach deep into smaller and shallower U.S. ports where larger cruise ships cannot go, allowing our passengers the opportunity to explore the cultural benefits and history of America's unique smaller towns and attractions without the crowds and clamor of the typical mass-market cruise setting.

ACL has maintained an unblemished record of financial responsibility to passengers, having always fulfilled all legal requirements and having never been subject to any default on any security posted with the Commission. In fact, ACL is, we believe, the most profitable cruise line in the world, measured by net profit margin, ROI, ROE, etc. and with the highest net yield per passenger per day. By comparison, Carnival

[1] Pub. L. No. 89-777, 80 Stat. 1356 (1966).

(clearly a superb company), and other large cruise lines are on a percentage basis less than half as profitable as ACL.

SUMMARY OF POSITION

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 passenger vessel operators (PVOs) such as ACL by requiring them to tie 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 will only 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. There is no evidence in the record that such an increase will serve any useful purpose. For the larger foreign flag PVOs the doubling of the UPR cap from $15 million to $30 million is so small a percentage of their total UPR as to be inconsequential. Accordingly, the current $15 million cap should be retained.

If an increase in the current $15 million cap is determined to be necessary, ACL supports mitigation of the unfair discriminatory effect of the increase on small entity U.S. flag coastwise trade PVOs such as ACL. ACL specifically supports the Commission's recognition, on a case-by-case basis, of alternative protections submitted by certain applicants in consideration of a reduction of the security against non-performance to be furnished. In addition, for entities whose UPR is between $15 million and $30 million, the Commission should require financial security only on a sliding scale basis in order to reduce the non-performance security requirement to a level more proportionate to the risk of PVO non-performance.

In addition, modeling the nonperformance security requirements on the current financial requirements for casualty may have merit, but additional information on the Commission's proposal would be helpful. In all events, the 10% administrative fee for PVOs with UPR below $30 million is appropriate.

DISCUSSION

1. A distinct industry segment subject to Public Law 89-777 –U.S. flag coastwise trade PVOs – share common economic and operating concerns as small businesses.

By the applicable legal standards, ACL is a "small entity" for purposes of the Regulatory Flexibility Act ("RFA") as amended by the Small Business Regulatory

Enforcement Fairness Act ("SBREFA").[2] As such, ACL is within a distinct segment of the cruise line industry consisting of small U.S. flag coastwise trade PVOs which are both subject to the requirements of 46 U.S.C. § 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 build, ownership, and operation applicable to 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").

Not only ACL, but all the operators in this industry segment, are believed to be "small entities" within the applicable definitions and share common economic and operating concerns. In addition to ACL several other small U.S. flag PVOs are members of the Passenger Vessel Association ("PVA") a national trade association representing owners and operators of U.S. flag passenger vessels of all types. The Legislative Director of the PVA previously provided the Commission Chairman with a letter dated September 7, 2011, explaining that not only ACL, but also two other PVA members, are small cruise ship operators and would qualify as "small entities" under the relevant criteria. Two other entities not currently affiliated with PVA were also identified as likely in the same class. A copy of the PVA's September 7, 2011 letter is attached.

2. **The Proposed Rule would have significant adverse economic impact on small entity U.S. flag coastwise trade PVOs.**

The implementation of the Proposed Rule would inhibit the ability of small U.S. flag coastwise trade PVOs such as ACL to make future capital investment in ships necessary to generate revenue, thereby causing significant adverse impact on the competitive stance of these small entities, particularly as compared with the large foreign flag PVOs competing with them for the overnight cruise market.

The current regulations are already discriminatory against small U.S. flag coastwise trade PVOs such as ACL. Posting financial security at the rate of 110% of unearned passenger revenue (UPR) up to a limit or cap of $15 million of UPR means that small U.S. flag PVOs must commit a substantial portion of their capital to financial security whereas the larger foreign flag PVOs carrying perhaps thousands of passengers

[2] In accordance with the FMC Policy and Procedures Regarding Proper Consideration of Small Entities and Rulemakings (Feb. 7, 2003) 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," currently employees 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, public version copy attached.

per voyage and having "hundreds of millions of dollars" of UPR outstanding, 76 Fed. Reg. 58228, need only post a security that is a tiny percentage of their UPR. 76 Fed. Reg. 58227.

The adverse impact of the current regulations on small entity U.S. flag coastwise trade PVOs is very real. In addition to the cost of the necessary bond, the devotion of capital to the bonding requirements specifically limits the ability of the small U.S. flag PVOs to invest in building more revenue-generating ships. Debt financing for both new ship building and for letters of credit or bonds required under 46 U.S.C. § 44102 is usually only available to U.S. flag PVOs on specific loan-to-value ratios and is subject to certain financial covenants. Collateral values devoted to securing financing for a letter of credit to support a bond in favor of the Commission is therefore not available as collateral for financing to fund new construction of a second or third ship. This in turn means the small U.S.-flag PVO providing greater nonperformance protection as a percentage of assets has fewer new berths to sell and less opportunity to earn revenue, regardless of operational profitability, than the larger foreign-flag lines with which they compete. Thus the requirement of the allocation of capital to the FMC bond at a rate of 110% of UPR results in not only greater operating expenses but also greater loss revenue and profits than is experienced by the larger competitors.

The changes to the present regime now incorporated in the Proposed Rule will only aggravate this unfair discrimination against the small U.S. flag PVOs. Specifically, the presently discriminatory cost and burdens are directly increased by the Commissions proposed decision to double the $15 million cap to $30 million. The collateral values needed to support financing of the additional nonperformance security for PVOs with UPR of up to $30 million is drastically increased. Even more capital must be devoted to financing the nonperformance security instead of new shipbuilding and growth. The direct result of the proposed rule is simply and even more unfair increase in the discriminatory burden on the small entity U.S. flag PVOs as compared to the larger foreign flag cruise lines.

3. **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 operators 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 small entity U.S. flag coastwise trade PVOs.

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 cruise line, including coverage under the Fair Credit Billing Act, 15 U.S.C. § 1666, and the U.S. Bankruptcy Code, 11 U.S.C. § 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%.

The allegedly justifying evidence for an increase in cap cited in the Proposed Rule is that since September 2000, fifteen PVOs that had been covered by the Commission's regulations have ceased operations, and of those, three had UPR in excess of the present $15 million cap at the time its operation ceased. 76 Fed. Reg. at 58227-28.

Of course, the cessation of operation of the twelve PVOs with UPR below the $15 million cap caused no passenger loss and does not support any claim of need for an increase in the cap at this time. The same is true of the cessation of two of the three cruise lines with UPR in excess of the $15 million cap, as in both cases passengers were fully reimbursed "through a combination of credit card refunds and surety bond payments." The evidence of all these cases is that the $15 million cap is sufficient.

With regard to the case of the third cruise line, American Classic Voyages Company, its UPR was $51 million at the time it ceased operations. 76 Fed. Reg. at 58228. Notably, American Classic was self-insured, which was allowed at that time in lieu of a $15 million bond but is no longer allowed. Simple arithmetic reveals that had American Classic Voyages posted a $15 million bond at the time, as currently is required, all of its passengers would have been fully reimbursed.

The NPRM notes that sixty percent of American Classic's passengers were fully reimbursed through credit card issuers and third-party travel insurance. The remaining 40% of passengers who paid by cash or check received reimbursement of up to $2,100 each,[3] leaving a shortfall of about $1,335 per person or about $7.96 million total.[4] After the American Classic bankruptcy the Commission discontinued self-insurance entirely. 67 Fed. Reg. 19730, 19731 (Apr. 23, 2002) (citing American Classic bankruptcy as justification for discontinuance of self-insurance); 67 Fed. Reg. 44774 (July 5, 2002) (Final Rule).

Because American Classic had UPR of $51 million and the shortfall in American Classic passenger reimbursement was less than $8 million, if the current $15 million cap had been required at the time instead of self-insurance, the evidence is that all of the American Classic passengers would have been reimbursed for every dollar paid into UPR. See 76 Fed. Reg. at 58228. Therefore, using American Classic's bankruptcy and its inability to fully reimburse passengers as the basis for the proposed increase in cap amount from $15 million to $30 million is without merit. The $15 million cap has proved to be a more than sufficient amount to date in that all PVOs subject to the Commission's nonperformance financial protection requirements which were not self-insured when they ceased operations <u>fully</u> reimbursed their passengers.

The NPRM also purports to justify the $30 million amount for an increase based on the CPI since 1967, or alternatively, since 1990. No explanation is given why those dates of origin are chosen, however, other than that prior caps were set in those years. The purported justification fails to address the fact that no CPI escalator was included in those prior rulemakings. As noted above, there is no evidence for an increase in the cap, nor even any evidence for the need for a CPI escalator in the amount of the cap for the future. If a need for a CPI escalator nevertheless is perceived at the present time, there is no justification for not implementing that CPI escalator from the present time, rather than retroactively as the Proposed Rule provides.

4. **ACL supports mitigation of the adverse economic impact of the Proposed Rule**.

If the Commission determines it must double 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 discriminatory effect and disproportionality of the Proposed Rule against small entity U.S. flag PVOs such as ACL. Possible ways that could be done without interfering with the regulatory purpose of Public Law 89-777 include the recognition of "alternate

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[3] Section 507(a)(7) of the Bankruptcy Code (11 U.S.C. § 507(a)(7)) provides a consumer deposit priority for services that are not provided. At the time of the American Classic bankruptcy, the law allowed claims up to $2,100 but the allowed claim amount has since been reduced to $1,800 for each individual.

[4] The shortfall amount of $7.96 million was calculated by taking 40% of $51 million, which equals $20.4 million. Then, $2,100 (amount reimbursed to 40% of passengers) divided by $3,435 (estimated full fare amount of those passengers), equals 61%. That means that 39% of the $20.4 million, which equals $7.96 million, was not reimbursed to the passengers.

protections" available and use of a sliding scale for PVOs with UPR between $15 million and $30 million. The first of these is included in the Proposed Rule; the second is not but should be.

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

In the Proposed Rule the Commission suggests that the "disparity between small and large cruise lines" in the percentage of UPR for which evidence of financial responsibility is required is addressed by "a provision whereby the Commission may, on a case by case basis, recognize additional protections submitted by an applicant in consideration of a reduction in the amount required to be furnished [in a bond]." 76 Fed. Reg. at 58228. Recognition of these alternative forms of protection is to be available under § 540.9(j)(4)(ii) for those PVOs with UPR not exceeding, at any time in the prior two years, 150% of the required cap. 76 Fed. Reg. at 58231. The suggestion is that the small operator (whose UPR, for instance, does not exceed $45 million), could have the amount to be bonded reduced by considerations of such things as "the extent to which other statutory requirements provide relevant protections, the certificant's financial data, and other specific facts and circumstances" 76 Fed. Reg. at 58231.

ACL is in favor of suitable proposals, including this proposal recognizing alternate protections, that might mitigate the adverse economic effect of the Proposed Rule on small U.S.-flag coastwise trade PVOs such as ACL. What is apparently primarily intended in the present proposal, however, is to permit reduction of the UPR to be bonded by an amount determined on the basis of the proportion of the UPR paid by credit card. The theory is that the deposits paid by passengers by credit card would be subject to refund under the Fair Credit Billing Act, 15 U.S.C. § 1666, in the event of nonperformance. While ACL would applaud the implementation of such a policy by the Commission, ultimately it means that the third party credit card issuer must assume the risk of a PVO's nonperformance which the Commission would otherwise require the PVO to bond to the extent of 110% UPR up to the cap. Although they have not done so to ACL, in the past, credit card companies have refused to provide a merchant agreement to other PVOs unless the PVO provides collateral to secure that risk of nonperformance undertaken by the credit card issuer.[5]

Thus while correctly noting that the proposal for "ultimate forms of protection" recognizes the "disparity between small and large cruise lines," in fact this proposal may

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[5] American Express commented on the 2002 FMC Proposed Rule on PVO Financial Responsibility, 67 Fed. Reg. 66352 (Oct. 31, 2002) (Docket No. 02-15), which proposed to eliminate the cap all together and to exclude from UPR amounts paid by credit card, by stating: "Credit card companies will then require PVOs to post collateral that covers *all unearned passenger revenue* charges with the company's credit cards…." Letter, Jason Halpren, Counsel, American Express Travel Related Services Company, Inc. to Bryant L. VanBrakle, Secretary, Federal Maritime Commission, May 29, 2003, at 4.

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. For this reason, this provision should not be the only mitigation included in any new regulation.

b. 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. 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 NPRM, sliding scales have previously been considered and one such scale 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.

c. Modeling nonperformance financial security requirements on current requirements for casualty may have merit.

One alternative to the Proposed Rule on which comments are invited in the NPRM is to model nonperformance financial responsibility requirements on current financial responsibility requirements for casualty under 46 U.S.C. § 44103. 76 Fed. Reg. at 58228.

As this alternative is explained in the NPRM, the nonperformance financial responsibility requirements would be determined by (1) calculating the revenue generated by the top two rate tiers of berths on a first-class or premium voyage for an appropriate number (for example, the five largest vessels) of each PVO's fleets; and (2) applying appropriate discount factors to prevent coverage that exceeds UPR. Particularly for small entity U.S. flag coastwise trade PVOs whose ships are smaller and have less diversity in pricing than that offered by the larger vessels of foreign flag PVOs, it would seem that the calculation based on the revenue generated by the top two tiers of berths on a first-class or premium voyage apparently could dramatically exceed UPR. The application of a discount to prevent coverage that exceeds UPR might simply mean that in most cases, the nonperformance financial responsibility requirement would be based on the PVO's UPR.

As presented in the NPRM this proposal apparently would eliminate the cap on the amount of UPR for which PVOs would be obligated to bond and thus would subject all PVOs, both large and small, to the same economic impact. This might not foster growth in the industry but would have the salutary effect of eliminating the unfair economic discrimination against small entity U.S. flag coastwise PVOs. ACL would support the latter objective but notes that the intent of the proposal in the NPRM is not entirely clear in this respect. Additional explanation of this proposal by the Commission would be helpful.

d. Eliminating 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.

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September 7, 2011

The Honorable Richard A. Lidinsky, Jr.

Chairman Federal Maritime Commission

Washington, DC.

Dear Mr. Chairman:

The Passenger Vessel Association (PVA), the national trade association representing owners and operators of U.S.-flagged passenger vessels of all types, wishes to clarify the status of operators of U.S. "small ship" cruise vessels subject to the financial responsibility requirements of the Federal Maritime Commission. These entities constitute "small businesses" under the criteria established by the U.S. Small Business Administration (SBA).

At the Commission's most recent public meeting on August 17, you and several Commissioners indicated a desire that any new rulemaking take into account that U.S.-flagged "small ship" cruise companies (whose vessels have a capacity of a few hundred passengers at the most) have a different level of resources than do operators of fleets of large ships that can carry thousands of passengers on each voyage. PVA appreciates this awareness. However, there were statements made at that meeting that indicated uncertainty as to whether there were entities affected that are classified as "small businesses" under U.S. Government criteria. The answer to this question will affect how the Commission complies with executive orders and its own guidelines as to the analysis of proposed regulatory actions to determine their impact on small businesses.

PVA can confidently assure the Commission that operators of U.S.-flagged "small ship" cruise vessels are small businesses under the U.S. Government's criteria. PVA members so classified include:

American Cruise Lines

Blount Small Ship Adventures

Lindblad Expeditions

Two other companies not currently affiliated with PVA 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 each such entity is a small business pursuant to SBA criteria.

Thank you for this opportunity to clarify this point about affected small businesses in advance of the Commission's scheduled meeting to vote to propose a revised regulation on demonstration of financial responsibility in the event of nonperformance.

Sincerely,

Ed Welch

Edmund B. Welch

Legislative Director

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November 16, 2011

Via First Class Mail and Electronic Mail

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

PUBLIC VERSION -- CONFIDENTIAL MATERIALS EXCLUDED

c/o Karen V. Gregory, Secretary
Federal Maritime Commission
800 North Capitol St. NW
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Re: FMC Policy and Procedures Regarding Proper Consideration of Small Entities in Rulemakings, February 7, 2003, as applied to American Cruise Lines, Inc.

Dear Chairman Lidinsky and Members of the Commission:

On behalf of American Cruise Lines, Inc., President and CEO Charles Robertson and I want to thank you for your consideration of Mr. Robertson's comments in prior letters and by testimony at the hearing on March 3, 2010, in response to the Notice of Inquiry, 74 Fed. Reg. 65125-26 (Dec. 9, 2009) regarding Passenger Vessel Financial Responsibility. As a smaller U.S.-flag coastwise trade passenger vessel operator ("PVO") with vessels having berth or stateroom accommodations for 50 or more passengers, American Cruise Lines does expect to submit a letter of comment on or before November 21, 2011 regarding the most recent Notice of Proposed Rulemaking, 76 Fed. Reg. 58227-36 (Sept. 20, 2011).

On a separate but related matter, this letter is to address American Cruise Lines' concern pertaining to the refutable presumption as to small entities announced in Commission's above-referenced FMC Policy and Procedures Regarding Proper Consideration of Small Entities in Rulemakings[1] ("FMC Policy"). The FMC Policy states that the Commission makes "a refutable

[1] FMC Policy and Procedures Regarding Proper Consideration of Small Entities in Rulemakings (effective February 7, 2003), available at http://www.fmc.gov/assets/1/Page/SBREFA_Guidelines_2003.pdf (last visited Sept. 1, 2011).

presumption that ... PVOs ... are not small businesses encompassed within the programs and policies mandated by SBREFA [(Small Business Regulatory Enforcement Fairness Act)]." We ask that the Commission accept the rebuttal of that presumption submitted here and recognize that American Cruise Lines in fact is a "small business" as defined in the FMC Policy and should be treated as a "small entity" for purposes of the SBREFA. [2]

The FMC Policy refers to the SBA determination that a PVO qualifies as a small business for SBA purposes if it has fewer than 500 employees. FMC Policy at 3.[3] It is the Commission's policy to use SBA determinations of what qualifies as a "small business" in its review of the impact of its regulatory undertakings on small businesses. FMC Policy at 4.

By this standard, American Cruise Lines is a small entity PVO because it now employs and always has employed fewer than 500 employees. In fact, in an attestation submitted on a confidential basis with the confidential version of this letter, Susan K. Renner, Treasurer of American Cruise Lines, attests, *inter alia*, that the payroll register of employees of American Cruise Lines does not now and has not ever equaled or exceeded 500 employees.

We further note that the factual basis for the refutable presumption announced in the FMC Policy as it applies to PVOs, based on data pertinent to PVOs operating in NAICS 2002 class 483112, "Deep Sea Transportation of Passengers," is inapposite to small U.S.-flag coastwise trade PVOs, which are now separately classified in NAICS 2007 class 483114, "Coastal and Great Lakes Passenger Transportation." PVOs engaged in the deep sea transportation of passengers within NAICS 2002 class 483112, which include very large foreign flag vessel PVOs carrying thousands of passengers, are stated to be "generally very large companies with far in excess of 500 employees." FMC Policy at 4. Subsequent to the 2007 modification by the Office of Management and Budget, NAICS 2007 class 483114, "Coastal and Great Lakes Passenger Transportation" now excludes those very large foreign flag PVOs, which cannot engage in coastwise trade. Accordingly, the data pertinent to NAICS 2002 class 483112 cannot properly support any presumption that PVOs such as American Cruise Lines and other small U.S.-flag coastwise trade PVOs now in the separate NAICS 2007 class 483114 are not small businesses for purposes of the SBREFA.

Accordingly, we ask that the Commission treat American Cruise Lines, Inc., as a "small entity" encompassed within the programs and policies mandated by SBREFA. If anything more formal than this letter and related confidential attestation is required, please inform me so that we may comply.

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[2] Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (amending Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164) (codified at 5 U.S.C. §§ 601 *et seq.* and 801 *et seq.*).

[3] The FMC Policy refers to the February 2002 NAICS guidelines for class 483112, Deep Sea Transportation of Passengers – Passenger Vessel Operators ("PVOs") The 2007 NAICS guidelines now distinguish "Coastal and Great Lakes Passenger Transportation" separately as class 483114. The SBA currently considers an entity within either class 483112 or 483114 and employing less than 500 employees to be a "small business" for SBA purposes. *See* SBA Table of Small Business Size Standards Matched to NAICS Codes, p.25 (effective November 5, 2010), available at http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf (last visited Nov. 14, 2011).

Thank you in advance for your attention to this request. As always, we appreciate your time and consideration.

Yours truly,

David McI. Williams, P.C.

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September 7, 2011

The Honorable Richard A. Lidinsky, Jr.

Chairman Federal Maritime Commission

Washington, DC.

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At the Commission's most recent public meeting on August 17, you and several Commissioners indicated a desire that any new rulemaking take into account that U.S.-flagged "small ship" cruise companies (whose vessels have a capacity of a few hundred passengers at the most) have a different level of resources than do operators of fleets of large ships that can carry thousands of passengers on each voyage. PVA appreciates this awareness. However, there were statements made at that meeting that indicated uncertainty as to whether there were entities affected that are classified as "small businesses" under U.S. Government criteria. The answer to this question will affect how the Commission complies with executive orders and its own guidelines as to the analysis of proposed regulatory actions to determine their impact on small businesses.

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Lindblad Expeditions

Two other companies not currently affiliated with PVA 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 each such entity is a small business pursuant to SBA criteria.

Thank you for this opportunity to clarify this point about affected small businesses in advance of the Commission's scheduled meeting to vote to propose a revised regulation on demonstration of financial responsibility in the event of nonperformance.

Sincerely,

Ed Welch

Edmund B. Welch

Legislative Director

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November 16, 2011

Via First Class Mail and Electronic Mail

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

PUBLIC VERSION --
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c/o Karen V. Gregory, Secretary
Federal Maritime Commission
800 North Capitol St. NW
Washington, DC 20573-0001

Re: FMC Policy and Procedures Regarding Proper Consideration of Small Entities in Rulemakings, February 7, 2003, as applied to American Cruise Lines, Inc.

Dear Chairman Lidinsky and Members of the Commission:

On behalf of American Cruise Lines, Inc., President and CEO Charles Robertson and I want to thank you for your consideration of Mr. Robertson's comments in prior letters and by testimony at the hearing on March 3, 2010, in response to the Notice of Inquiry, 74 Fed. Reg. 65125-26 (Dec. 9, 2009) regarding Passenger Vessel Financial Responsibility. As a smaller U.S.-flag coastwise trade passenger vessel operator ("PVO") with vessels having berth or stateroom accommodations for 50 or more passengers, American Cruise Lines does expect to submit a letter of comment on or before November 21, 2011 regarding the most recent Notice of Proposed Rulemaking, 76 Fed. Reg. 58227-36 (Sept. 20, 2011).

On a separate but related matter, this letter is to address American Cruise Lines' concern pertaining to the refutable presumption as to small entities announced in Commission's above-referenced FMC Policy and Procedures Regarding Proper Consideration of Small Entities in Rulemakings[1] ("FMC Policy"). The FMC Policy states that the Commission makes "a refutable

[1] FMC Policy and Procedures Regarding Proper Consideration of Small Entities in Rulemakings (effective February 7, 2003), available at http://www.fmc.gov/assets/1/Page/SBREFA_Guidelines_2003.pdf (last visited Sept. 1, 2011).

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presumption that ... PVOs ... are not small businesses encompassed within the programs and policies mandated by SBREFA [(Small Business Regulatory Enforcement Fairness Act)]." We ask that the Commission accept the rebuttal of that presumption submitted here and recognize that American Cruise Lines in fact is a "small business" as defined in the FMC Policy and should be treated as a "small entity" for purposes of the SBREFA. [2]

The FMC Policy refers to the SBA determination that a PVO qualifies as a small business for SBA purposes if it has fewer than 500 employees. FMC Policy at 3.[3] It is the Commission's policy to use SBA determinations of what qualifies as a "small business" in its review of the impact of its regulatory undertakings on small businesses. FMC Policy at 4.

By this standard, American Cruise Lines is a small entity PVO because it now employs and always has employed fewer than 500 employees. In fact, in an attestation submitted on a confidential basis with the confidential version of this letter, Susan K. Renner, Treasurer of American Cruise Lines, attests, *inter alia*, that the payroll register of employees of American Cruise Lines does not now and has not ever equaled or exceeded 500 employees.

We further note that the factual basis for the refutable presumption announced in the FMC Policy as it applies to PVOs, based on data pertinent to PVOs operating in NAICS 2002 class 483112, "Deep Sea Transportation of Passengers," is inapposite to small U.S.-flag coastwise trade PVOs, which are now separately classified in NAICS 2007 class 483114, "Coastal and Great Lakes Passenger Transportation." PVOs engaged in the deep sea transportation of passengers within NAICS 2002 class 483112, which include very large foreign flag vessel PVOs carrying thousands of passengers, are stated to be "generally very large companies with far in excess of 500 employees." FMC Policy at 4. Subsequent to the 2007 modification by the Office of Management and Budget, NAICS 2007 class 483114, "Coastal and Great Lakes Passenger Transportation" now excludes those very large foreign flag PVOs, which cannot engage in coastwise trade. Accordingly, the data pertinent to NAICS 2002 class 483112 cannot properly support any presumption that PVOs such as American Cruise Lines and other small U.S.-flag coastwise trade PVOs now in the separate NAICS 2007 class 483114 are not small businesses for purposes of the SBREFA.

Accordingly, we ask that the Commission treat American Cruise Lines, Inc., as a "small entity" encompassed within the programs and policies mandated by SBREFA. If anything more formal than this letter and related confidential attestation is required, please inform me so that we may comply.

[2] Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (amending Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164) (codified at 5 U.S.C. §§ 601 *et seq.* and 801 *et seq.*).
[3] The FMC Policy refers to the February 2002 NAICS guidelines for class 483112, Deep Sea Transportation of Passengers – Passenger Vessel Operators ("PVOs") The 2007 NAICS guidelines now distinguish "Coastal and Great Lakes Passenger Transportation" separately as class 483114. The SBA currently considers an entity within either class 483112 or 483114 and employing less than 500 employees to be a "small business" for SBA purposes. *See* SBA Table of Small Business Size Standards Matched to NAICS Codes, p.25 (effective November 5, 2010), available at http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf (last visited Nov. 14, 2011).

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Thank you in advance for your attention to this request. As always, we appreciate your time and consideration.

Yours truly,

David McI. Williams, P.C.

DMW/maa

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