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BEFORE THE FEDERAL MARITIME COMMISSION
Washington, D.C.

Passenger Vessel Financial Responsibility : Docket No. 02-15

COMMENTS OF NORWEGIAN CRUISE LINE

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Date: May 30, 2003

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INTRODUCTION

Norwegian Cruise Line ("NCL" or the "Company") hereby submits these comments in response to the Notice of Proposed Rulemaking (the "Proposal" or "NPRM") published by the Federal Maritime Commission ("the Commission" or "FMC") on October 31, 2002.[1] The Proposal seeks to amend the Commission's regulations concerning how the financial responsibility of passenger vessel operators ("PVOs") is to be evidenced in a manner that will have an unprecedented adverse impact on the cruise industry. In addition, the Proposal would make significant changes to the manner in which passenger complaints are resolved.

NCL has serious concerns with the Proposal and does not believe that the suggested changes are warranted.* Should the Commission conclude otherwise after a complete and reasoned analysis of the relevant facts and the comments received, NCL suggests certain alternative measures for the Commission's consideration.

SUMMARY OF POSITION

Norwegian Cruise Line is committed to its passengers and is dedicated to providing them with a high quality vacation experience. Like the Commission, NCL believes that

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1 67 Fed Reg. 66,352 (Oct 31, 2002).

2 NCL hereby incorporates by reference its Comments previously filed in this Docket, dated Dec 2, 2002.

protecting consumers is a sound policy objective. It is also good business. However, the Proposal to eliminate the long-standing ceiling on coverage is neither sound policy nor good business. The Proposal raises serious legal and policy questions, does not adequately address the costs and the benefits of the proposed change, is not necessary, and fails to achieve the appropriate balance among the affected parties.

The underlying statutory authority, Public Law 89-777, was enacted in 1966 to address a narrow problem that arose in the early years of the cruise industry, namely where fly-by-night operators without an established business in the United States sold cruise tickets to American vacationers, but left them literally stranded at the pier when the ship failed to arrive. The Congressional response was to enact legislation requiring passenger vessel operators to establish their financial responsibility in advance of offering passage. The system has worked well, with the virtual elimination of these fly-by-night operators, and with passengers receiving reimbursements where failures within the Commission's jurisdiction did occur. In the intervening years, the industry has matured into a major business with a fleet of modern purpose-built cruise ships for the North American market and an established presence in the United States. Throughout this period both Congress and the Commission have continued to evidence their intention to require an adequate threshold test of financial responsibility, but not to require unlimited dollar-for-dollar coverage, as the Proposal to eliminate the current ceiling would now do.

Before reversing a well-established rule such as this one, the Commission is required to provide a reasoned analysis for the change. Yet the purported reasons cited by the Commission fall short. Of the identified recent cruise line failures, it now appears that most, if not all, passengers will receive reimbursements. Even the American Classic Voyages passengers, whose protection under the now-repealed self-insurance option was criticized by the Commission, will apparently be reimbursed. Adoption of the Proposal would have made no difference to the passengers of the failed cruise lines had it been in place. In short, more is needed to justify the reversal of the Commission's long-established position of maintaining a ceiling on coverage, particularly where adoption of the Proposal will have significant adverse impacts on the cruise industry.

The cruise industry has historically required payment to be made in advance of the services being offered. This practice is no different than many other transportation providers, schools and universities, and a wide variety of other businesses. The cruise industry, in turn, relies on those advance payments – Unearned Passenger Revenue ("UPR") – for its working capital needs. By proposing to eliminate the current $15 million ceiling on coverage, the Proposal would effectively remove as much as *$2 billion* of working capital from the cruise industry literally overnight. The consequences of such a dramatic step on the current financial structure of the cruise industry are far reaching, very harmful, and largely ignored by the Commission in the promulgation of this proposed rule.

Although the Commission has acknowledged that some operators may, as a result of adoption of the Proposal, face "tremendous cost and difficulty," the NPRM reflects a lack of information about the workings of the industry, credit card issuers, the real costs, and the enormous impact that the Proposal will have throughout the industry. The reasoned analysis required to be made by an agency before reversing long-standing regulations and policy is lacking in this case. While making an effort to address redundant coverage by accommodating some credit card purchases, the Proposal does not recognize other duplicative coverage, either from the additional collateral that may be required by credit card issuers or the availability of private sector insurance, as well as the statutory protections for consumers available under the bankruptcy laws.

Moreover, the Commission has not identified, or considered, a myriad of other factors that are relevant to consideration of implementation of the Proposal, beginning with the impact of the Proposal on competition in the cruise industry. The reduction in available working capital contemplated by the Proposal will leave less capital for new ships and improvements to existing ships. The burden is far greater for the small and mid-size lines in the industry than on Carnival, the dominant cruise line in this concentrated industry. Carnival will not feel the effects of the Proposal in the same way, as it has far more working capital and therefore will be able to continue its growth, increasing its market share while other lines weaken. Similarly, the Commission does not mention the potential effect of the Proposal in shifting cruise ships away from U.S. ports in order to escape the UPR calculation, resulting in economic harm to domestic ports, as well as to passengers who will then fall outside of the Commission's program. All of these issues have a direct bearing on the consumer protection objectives that are at the heart of this rulemaking, yet none are addressed in the Proposal. Even the need for a cost/benefit analysis, long an issue in earlier Commission proceedings on this subject, is ignored once again.

Finally, the Proposal seeks to expand the consumer protection provisions into uncharted territory with the requirement that passenger vessel operators consent to an alternative dispute resolution mechanism in an area where even the Commission recognizes it lacks "specific jurisdiction or responsibility." There has been no demonstration of need for such an unprecedented federal program, and in fact, the industry has devoted significant resources to addressing consumer issues and has an enviable record of satisfying passengers' concerns. What is most troubling, however, is the fact that participation by the cruise lines is mandatory. Passenger vessel operators are forced to use the program as a pre-condition to operating in the United States, whereas passengers are free to choose the program or pursue their remedies through the legal system. The passenger vessel operators are being required to give up rights to participate in the American judicial system as a prerequisite to doing business in the United States. This is not voluntary consent to alternative dispute resolution when the only alternative to not agreeing to these provisions is terminating business operations in the United States.

As an alternative to the Proposal that is the subject of this rulemaking, NCL urges the Commission to maintain the concept of a ceiling on coverage, adjusted for inflation since the current ceiling was established. This approach recognizes and accounts for the original Congressional objectives, the real and meaningful consumer protections that are now available, and the potentially adverse impact of any Commission action on the cruise industry. Because the ceiling on coverage has worked well in achieving the original statutory objective of weeding out fly-by-night operators, it should be retained. NCL supports a reasonable adjustment in the ceiling, tied to the consumer price index since the current ceiling was adopted in 1990.

NORWEGIAN CRUISE LINE AND THE CRUISE INDUSTRY

Miami-based Norwegian Cruise Line is a global cruise company and industry innovator that operates a fleet of eleven passenger cruise ships in the Caribbean, Bermuda, Alaska, Europe, Hawaii, New England, Canada, and Central and South America.

NCL was first established in 1966, the same year that Congress enacted Public Law 89-777. One of Norway’s oldest and most respected shipping companies, Oslo-based

Klosters Rederi A/S, acquired the *M/S Sunward* in that year and repositioned the ship from Europe to the then obscure Port of Miami. With the formation of a company called Norwegian Caribbean Lines, the cruise industry was changed forever. Until then, the industry – such as it was – had consisted largely of older foreign flag passenger ships offering the occasional cruise itinerary.[3] With the increased popularity of jet travel, these ships, which had been designed for trans-Atlantic and other transportation routes, were increasingly being displaced. Their foreign-based owners were experimenting with alternative deployments in warm weather climates where the focus was tourism, not transportation.[4] NCL based its operations in the United States and launched an entirely new concept with its regularly scheduled cruises to the Caribbean in a single-class atmosphere of informal luxury. No longer simply a means of transportation, the ship became a destination unto itself, offering guests year-round an exciting and affordable alternative to land-based resorts.

This was the beginning of the modern cruise industry, and in the years following new cruise lines were established and new ships were built to accommodate this burgeoning market, eventually making Miami the world's number one port of embarkation. Unlike the situation in the late 1960's where foreign-based companies were looking for the occasional warm water cruise for their increasingly obsolete passenger ships, today every major operator of cruises in North America has ships expressly designed or refitted for dedicated cruising and are either operating their entire business in the United States or have a significant physical and permanent presence in this country.

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[3] Most of the ocean gomg U.S. flag passenger ships had failed to make the transition to cruising and were sold to foreigners. See, *e g*, Publıc Law 92-296, § 1, May 16, 1972, 86 Stat. 140.

[4] Cudahy, Brian J., "The Cruise Ship Phenomenon in North America." Introductıon at pp xiii-xviii and Chapter 1. Cornell Maritime Press 2001.

NCL has called Miami home since the *M/V Sunward* started year-round cruising in 1966.[5] Since then, NCL has stood out as an innovator in the industry, with the first purpose-built Caribbean cruise ships, the first mega-cruise ship, the *SS* Norway, and the first cruise line-owned destination island in the Caribbean. In each case the industry has followed suit. A new era of innovation began in February 2000 when NCL's parent company, Norwegian Cruise Line Limited, was acquired by Star Cruises PLC of Malaysia. Since then, NCL has introduced "Freestyle Cruising," which leaves behind the formalities of conventional shipboard travel, offering passengers a more relaxed, resort-style cruise product with complete flexibility and non-intrusive service of the highest standard. In late 2001, NCL pioneered the concept of Homeland Cruising and now leads the industry in close-to-home sailings, offering regularly scheduled round-trip cruises from more U.S. and Canadian ports than any other cruise line. NCL was the first major cruise line to offer regular cruises from Seattle to Alaska and the first to offer year-round 7-day Hawaii cruises out of Honolulu. With the announcement earlier this year that the Company's newest ship, the *Norwegian Dawn,* will be based in New York year-round – another industry first – NCL's Homeland Cruising program now offers roundtrip Freestyle Cruising sailings from a total of 13 North American ports, departing seasonally from Baltimore, Boston, Charleston, New Orleans, Philadelphia, Orlando (Port Canaveral), San Juan, Seattle and Vancouver, and year-round from Miami, Houston and Honolulu as well as New York.

Heading the list of new innovations is the Company's recent announcement that it will bring back the U.S. flag to oceangoing cruise ships pursuant to new legislative

[5] NCL now employs approximately 1000 persons in its corporate headquarters in Miami.

authority.[6] This marks the first time that a major international cruise line has sought to establish U.S. flag operations. Last year, NCL purchased the partially completed hull for one new cruise ship, plus materials for a second, that had been under construction at the Ingalls Shipyard in Mississippi and had become available following the default of the previous owners. The new legislation allows the completion of the vessels overseas for operation in domestic coastwise operation in Hawaii, the originally intended market for the ships. This will be the first new U.S. flag oceangoing cruise ship in nearly 50 years, and will strengthen NCL's position as the leading cruise line in Hawaii. In addition, NCL has also purchased the *SS United States* and the *SS Independence* for potential conversion to modern cruise ships and eventual coastwise operation under U.S. flag. The first three ships alone will create over 20,000 jobs for Americans on land and at sea, and are projected on an annual basis to generate $828.7 million of expenditures in the U.S. economy, including crew payroll, cruise ship operating expenditures and passenger purchases.[7] The additional two ships will generate nearly 2000 more jobs at sea and another 5,000 on shore.

THE PROPOSED RULE

The Commission's Notice of Proposed Rulemaking[8] seeks to eliminate the ceiling for coverage of unearned passenger revenue that has existed at one level or another since the Commission first issued regulations under Public Law 89-777 in 1967.[9] The proposed rule mandates passenger vessel operators to cover 110% of their highest unearned passenger

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6 Pub. L. No 108-7 (Division B, Title II, General Provisions – Department of Commerce), 117 Stat 11 $2003).

"The Economic Impact of the Proposed Operation of Three U.S.-Flagged Cruise ships in the Hawaii Market" prepared by PricewaterhouseCoopers, L.L.P. (Jan. 30, 2003).

8 67 Fed. Reg. 66,352 (Oct 3 1, 2002).

9 32 Fed. Reg. 2,723 (Mar 10, 1967)

revenue during the prior two years, reduced by the amount received from credit card charges within 60 days of a sailing as such amounts are protected under the Fair Credit Billing Act. The Proposal also mandates that cruise operators consent to alternative dispute resolution processes, including binding arbitration, as part of the bond, guaranty, and escrow agreements required by the rule. Finally, the Proposal amends the Commission's reporting requirements, including a change from semiannual reporting to quarterly reporting, and would make other technical changes in the regulations.

DISCUSSION

I. THE PROPOSED RULE IMPOSES OBLIGATIONS ON PASSENGER VESSEL OPERATORS FAR EXCEEDING THE CLEAR LANGUAGE AND PURPOSE OF THE UNDERLYING STATUTE.

The statutory basis for the Commission's Proposal is Public Law 89-777, enacted in 1966 (the "Statute" or "P.L. 89-777"). 46 App. U.S.C. 817e. The Statute requires passenger vessel operators ("PVOs") to establish *evidence* of their financial responsibility or *in lieu* thereof, a bond or other security, before arranging, offering, advertising, or providing passage on a vessel having berth or stateroom accommodations for 50 or more passengers. *Id.* The Commission's current Proposal seeks to impose burdens on passenger vessel operators far exceeding the scope and purpose of the Statute. The Proposal departs from the text of the Statute, its history, established precedent, and industry norms.

A. Congress Did Not Intend to Require Dollar-for-Dollar Coverage for Advance Deposits and Fares.

The Commission's Proposal seems to be erroneously premised on the basis that the Commission needs to ensure dollar for dollar coverage for advance deposits and cruise fares. However, the text of the Statute, its legislative history, subsequent amendments to the

Statute, and the Commission's past implementation of the Statute all belie this premise. The original goal of the Statute was to require "evidence of *adequate* financial responsibility" rather than evidence of absolute financial security.[10]

1. The text of the Statute evidences Congress' decision not to require 100% financial collateralization from passenger vessel operators.

Contrary to the premise underlying the proposed rule, the Statute itself demonstrates that dollar-for-dollar coverage is neither necessary nor intended. Congress clearly knew it could require such absolute coverage, yet the language of the Statute indicates such coverage was not required. The relevant portion of the original Statute states:

> Sec. 3. (a) No person in the United States shall arrange, offer, advertise, or provide passage on a vessel having berth or stateroom accommodations for fifty or more passengers and which is to embark passengers at United States ports without there first having been filed with the Federal Maritime Commission such information as the Commission may deem necessary to establish the financial responsibility of the person arranging, offering, advertising, or providing such transportation, *or in lieu thereof* a copy of a bond or other security, in such form as the Commission, by rule or regulation, may require and accept, for indemnification of passengers for nonperformance of the transportation.
>
> (b) If a bond is filed with the Commission . . . such bond or other security shall be in an amount paid equal to the estimated total revenue for the particular transportation.

Statute § 3 (emphasis added).[11]

The plain language of Section 3(a) creates a system whereby a passenger vessel operator may demonstrate compliance with the Congressional mandate by utilizing one of two distinct avenues. First, the operator can comply with the system merely by *the filing of*

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[10] The title to Public Law 89-777 as originally enacted refers to the requirement that the evidence of financial responsibility be "adequate" the plain meaning of which is something less than a 100% guarantee. Any doubt on this point was settled by the 1993 amendments to the Statute discussed below.

[11] The Statute was subsequently amended as described more fully in Section I A (3) below.

information necessary for the Commission to determine whether the operator is sufficiently responsible so as not to leave passengers stranded. Second, and as an *alternative* to the first option, the operator can present a bond or other security *in lieu of* the filing of such information.

The inclusion of this clear choice demonstrates that Congress considered the options and decided that adequate consumer protection does not require passenger vessel operators to provide dollar-for-dollar collateralization.

2. The legislative history of the Statute more fully demonstrates Congressional intent not to require dollar-for-dollar collateralization from passenger vessel operators.

The Statute was enacted, in relevant part, for the express purpose of "protect[ing] against passengers being stranded when a vessel fails to make its contracted sailing." S. Rep. No. 1483, 89th Cong. 1st Sess. 1 (1966) (quote taken from the section titled "PURPOSES AND BRIEF SUMMARY"), *reprinted in* 1966 U.S.C.C.A.N. 4176. At the time Congress considered this legislation, the North American cruise business was in its infancy and in some cases "fly-by-night" foreign operators were offering cruises without delivering on the promised voyages.[12] In those circumstances, consumers would have no way to recover the cost of trips paid in advance. In justifying enactment of the Statute, Congress specifically pointed to two scheduled cruises for which "the passengers, mostly American citizens, were left on the dock without recourse to recover their passage moneys which had been paid in advance." *Id.* at 4 179.

Despite this knowledge of passengers being left stranded, Congress rejected the idea of requiring the cruise operators to post dollar-for-dollar coverage for all potential refunds.

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12 See Section titled "Norwegian Cruise Line and the Cruise Industry" *supra* for a more complete discussion of this history.

"This section provides for the filing of evidence of financial security *or in the alternative* a copy of an acceptable bond or other security because many persons operating in the cruise business are responsible and maintain sufficient assets in this country which could be proceeded against." *Id.* at 4182 (emphasis added). The goal was to protect United States citizens against "financially irresponsible operators." *Id.* at 4 184 (from a Statement by Rear Adm. John Harllee, then Chairman of the FMC, testifying in favor of the legislation which "resulted from the stranding of passengers in the past few years by vessel operators unable or unwilling to perform the transportation" *Id.* at 4187).

Congress' chief concern was to spare U.S. citizens from being left with no possible recourse in the event of booking with a fly-by-night operator. Accordingly, if a vessel operator sufficiently demonstrated financial responsibility through its submission of information to the FMC, then there was no need for a bond or other form of security at all. In such a case, U.S. cruise passengers would have some form of recourse available to them. The ability to seek such recourse was paramount, not the ability to be assured a full refund under any and all circumstances. Congress could have created a system whereby PVOs were required to collateralize 100% of all passenger voyages. It did not do so.

3. The 1993 amendment to the Statute reaffirms both the authority for a ceiling on coverage and the proposition that dollar-for-dollar protection is not a statutory requirement.

Despite the clarity of the original Statute, in 1993 the Commission recommended to Congress that it delete the only language that could arguably have been read to require full dollar-for-dollar coverage. Section 3(b) of the Statute as originally enacted read "such bond or other security shall be *in an amountpaid equal to the estimated total revenue for the particular transportation.*" Statute § 3(b) (emphasis added). Testifying on behalf of the entire Commission, then Chairman Hathaway confirmed in testimony before the House Subcommittee on Merchant Marine that the FMC did not view the Statute as requiring dollar-for-dollar coverage and urged Congress to delete this particular language from the Statute.

> We don't think that the Congress intended that [the bond could run to $100 million], because it gives us in section 3(a) discretion to determine reasonable security. If we felt that they were secure just by looking at their balance sheet, I suppose we could say, "Well, OK. You can go ahead."
>
> It has been our custom to accept a bond, but to require coverage of that amount – say, of $100 million – I think we would be far beyond what the Congress actually intended. And so last year all of us agreed – all the Commissioners and they are here today – that we could strike the last few words from section 3(b).[13]

Congress agreed with the position advanced by the Commission that the Statute did not require dollar-for-dollar coverage, and amended the Statute to delete the language referenced above. Pub. L. 103-206, Title III, Section 320, 107 Stat. 2427 (1993). This amendment removed any lingering questions as to Congressional intent – dollar-for-dollar coverage is not a requirement for establishing financial responsibility to operate passenger vessels in the United States. This amendment provides unambiguous statutory authority for establishing a ceiling on required coverage, as the Commission has done since first implementing the Statute and as it should continue to do now.[14]

[13] FMC and MARAD Authorizations, FY 1994, Hearmgs Before the Subcomm. On Merchant Marine of the House Comm. on Merchant Marine and Fisheries, 103d Cong., 1"' Sess. 7 (1993).

[14] As noted by the Director, Bureau of Tariffs, Certification and Licensing in a memorandum to the FMC dated March 3, 1995, this amendment "codified the Commission's practice of setting ceilings requirmg less than 100%, dollar-for-dollar coverage for UPR." ("March 3 Memorandum" at 7).

4. **The Commission's implementation of the Statute (both before and after the 1993 amendment) demonstrates that evidence of financial responsibility, rather than dollar-for-dollar financial collateralization, is the core requirement of the Statute.**

The Commission's past implementation of the Statute indicates that evidence of financial responsibility rather than unconditional dollar-for-dollar coverage fulfills the Congressional mandate. In fact, the Commission has examined this very issue numerous times since Congress first enacted the Statute. Each time the FMC's final decision re-affirmed that the Statute requires passenger vessel operators to demonstrate financial responsibility rather than dollar-for-dollar collateralization of total UPR. More specifically, as set forth below, the Commission has repeatedly rejected proposals to eliminate the ceiling on the amount of collateralized UPR.

The FMC first issued regulations to implement Section 3 of the Statute in 1967. At that time, the Commission determined that a bond or other security capped at $5 million would be adequate to demonstrate financial responsibility.[15] That ceiling was raised to $10 million in 1981 and was raised again to its current level in 1990.[16]

In the 1990 proceeding (Docket No. 90-O 1), the Commission considered eliminating the ceiling entirely and requiring passenger vessel operators to provide coverage of 110% of UPR regardless of the financial condition of the entity. 55 Fed. Reg. 1,850 (Jan. 19, 1990). In the end, the FMC recognized that removal of the ceiling in its entirety was not necessary to demonstrate adequate financial responsibility, and merely increased the ceiling to $15 million. However, as a result of the comments received during the proceeding, the Commission decided to begin an investigation, led by Commissioner Ivancie, to determine

15 32 Fed. Reg. 3,986 (March 11, 1967).
16 See 45 Fed. Reg. 23,429 (April 7, 1980) and 55 Fed Reg 34,564 (Aug. 23, 1990).

whether the pertinent rules needed further revision. 55 Fed. Reg. 34,610-6 11 (Aug. 23, 1990).

The investigation resulted in a full report by Commissioner Ivancie which included a statement that the record was "devoid of any compelling evidence that warrants an increase of our current $15 million ceiling."[17] More importantly with respect to the present NPRM, the Ivancie Report reiterated the following clear understanding:

> The Commission has always interpreted Section 3 as mandating *a reasonable ceiling* on the size of the security required of a cruise operator. . . . The Commission has consistently interpreted the statute as *requiringfinancial responsibility, not financial guaranty.* The Commission has also recognized that a dollar-for-dollar bonding requirement would unnecessarily increase an operator's cost of doing business.

Ivancie Report at 15 (emphasis added). As a result of the Ivancie Report, the Commission commenced another proceeding in 1992 to implement many of the Report's recommendations. During this proceeding, the FMC noted that even though the ceiling did not provide dollar-for-dollar coverage, "this ceiling appears to strike a reasonable balance between Public Law 89-777's objective of protecting passengers and the requirements this legislation imposes on the cruise line industry." *57* Fed. Reg. 19,097-098 (May 4, 1992). The resulting final rule again retained the UPR coverage ceiling, in clear recognition that dollar-for-dollar coverage was neither required by the Statute, nor necessary to fulfilling its purposes. 57 Fed. Reg. 41,887 (Sept. 14, 1992).[18]

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17 Fact Finding Investigation No. 19 -- Passenger Vessel Financial Responsibility Requirements, Report To The Commission at 25 (Apr 11, 199 1) ("Ivancie Report").

18 The Commission, as part of the final rule resulting from this proceeding, adopted a sliding scale to determine the proper ceiling for PVOs.

The next proceeding occurred after Congress amended the Statute as described above.[19] In that notice of proposed rulemaking, the Commission once again proposed to remove the UPR coverage ceiling "because some vessel operators now have UPRs significantly exceeding $15 million." 59 Fed. Reg. 15,149 (Mar. 31, 1994). In addition, the FMC was concerned about the involuntary bankruptcy of a particular cruise line, even though that company's cruise ships continued to operate through the transition to new owners and no passenger fares were ever jeopardized. *Id.* The Commission also noted an aggregate amount of about "$300 million in coverage presently on tile for what we estimate to be $1 billion in UPR subject to Public Law 89-777, leaving some $700 million in UPR without Section 3 coverage." *Id.* at 15,150. The Commission proposed a sliding scale for vessel operators whereby coverage of 110% would be required up to $25 million and coverage of 90% of UPR would be required for amounts exceeding $25 million. *Id.* Numerous comments were received expressing "virtually unanimous support for the Commission's existing UPR coverage requirements, and widespread questioning of the need for the Proposed Rule." March 3 Memorandum at 8.

As a result, the Commission left the $15 million ceiling intact, without moving to dollar-for-dollar coverage, pending an inquiry into alternative options. 59 Fed. Reg. 52,133 (Oct. 14, 1994). This inquiry led the Commission to issue yet another notice of proposed rulemaking in 1996. That proposal again called for the removal of the $15 million ceiling to be replaced with a sliding scale. 61 Fed. Reg. 33,059 (June 26, 1996). Once again, numerous comments were received in opposition, and the Commission discontinued the

[19] As then-Chairman Creel stated: "That amendment made that – there's implication by domg away wıth the 100 percent requirement that there is something – less is adequate." Statement of Chairman Creel at 2 1, FMC Meeting, Jan 30, 2002.

proceeding last year without making changes to the $15 million ceiling. 67 Fed. Reg. 19,535 (Apr. 22, 2002).

Overall, the Commission has considered eliminating the ceiling for UPR coverage on numerous occasions and yet has always maintained a ceiling and has never adopted a requirement for dollar-for-dollar coverage. The Statute does not require it, and the Commission repeatedly has found alternative forms of coverage sufficient for demonstrating financial responsibility for the protection of passengers.

B. The Statute Provides that Passenger Vessel Operators Submit Information to Establish Financial Responsibility *or* Post a Bond or Other Security to Protect Passengers *in Lieu of* Submitting the Information.

As set forth more fully in Section I A above, the Statute was designed to protect passengers in one of two ways. Either a PVO would provide information to the Commission sufficient to demonstrate its financial responsibility *or* it would post a bond or security. Statute § 3. The Commission's proposed change far exceeds its own past practice and the plain reading of the Statute. In effect, the FMC is seeking to rewrite the Statute to eliminate the option of filing information about the financial condition of the company (apparently under the theory that no amount of information will satisfy the FMC that an operator is financially responsible). In its place, the FMC substitutes a mandatory requirement to post a 110% bond or other security that is not contemplated by the Statute or its legislative history.

The Commission's Proposal runs counter to one of the fundamental principles of statutory interpretation – no provision of a statute should be read to be meaningless.[20] In

[20] *Halverson v. Slater*, 129 F. 3d 180, 185 (D.C. Cir. 1997) (citing "the cardinal canon of statutory construction that 'we must read the statutes to give effect to each if we can do so while preserving their sense and purpose."'); *Coyne & Delany Co v Blue Cross & Blue Shield of Virginia*, 102 F.3d 712, 715 (4th Cir. 1996)

other words, it is presumed that every section of a statute has meaning, and any interpretation seeking to nullify or render meaningless the plain language of a portion of a statute bears a heavy burden to establish why such an interpretation makes sense.

Assuming the Commission is not ignoring the plain language of the Statute, the only conclusion that can be drawn is that the Commission views the provision of 110% coverage as the sole means of demonstrating financial responsibility. This interpretation is not supported by the text of the Statute, Commission precedent, or by a fair look at the cruise industry. In fact, the only language that could have been interpreted as implying 100% security as one of the options for establishing financial security was expressly deleted in the 1993 amendments to the Statute.

The reality since the Statute was enacted is that passenger vessel operators have demonstrated financial responsibility through means less onerous than obtaining 110% coverage, and passengers have been protected. Throughout the Statute's implementation, passenger vessel operators demonstrated financial responsibility by posting a bond or other security in an amount capped at the then-current ceiling. Posting such security provided concrete, substantial evidence that the operator was financially responsible by being able to secure a bond for such a significant sum of money. Fly-by-night operators, unable to demonstrate that same level of responsibility, have been effectively weeded out of the United States cruise industry. In short, the Commission's program, relying on a ceiling on the amount of UPR coverage required, has been extremely effective at ensuring PVOs are financially responsible.

("Absent clear congressional intent to the contrary, we will assume the legislature did not intend to pass vam or meaningless legislation").

C. The Proposed Rule Seeks To Achieve UPR Coverage Levels Greater Than 100% Without Statutory Authority.

Despite the clarity with which Congress has established that 100% coverage of UPR is not a requirement for passenger vessel operators to evidence adequate financial responsibility, the proposed rule would now require UPR coverage at levels *even greater* than 100%. In fact, the Proposal would effectively require all passenger vessel operators to maintain coverage of *a minimum of 110%* of UPR. Such a position conflicts with the meaning and intent of the Statute and imposes unnecessary burdens on the cruise industry.

The proposed rule mandates this level of coverage by stating that the required coverage is to be in an amount "no less than 110 percent of the unearned passenger revenue of the applicant" at the highest level within the past two years. Proposed Rule at 46 C.F.R. § 540.6(b) and 540.5. This requirement may result in coverage far greater than 110% as even the excepted passenger revenue (attributable generally to credit card purchases) is not without its own collateralization requirements from the credit card processor (explained more fully below). The bottom line is that the requirement for the additional 10% "cushion" effectively pushes the required coverage well above 100%, a result for which there appears to be no statutory basis, particularly in light of the 1993 amendments to the Statute that deliberately deleted any language that could be read to require full coverage.

II. THE CEILING ON COVERAGE IS AN EFFECTIVE WAY OF IMPLEMENTING THE STATUTORY REQUIREMENTS AND SHOULD NOT BE CHANGED.

As discussed in the previous section, the concept of a ceiling on coverage has been a fundamental part of the Commission's implementation of the Statute since the beginning, and was further sanctioned by Congress with the 1993 amendments to the Statute. It has also been an effective mechanism for eliminating the "fly-by-night" operators as Congress originally intended.

A. The Ceiling for UPR Coverage Complies with the Statute's Framework.

The ceiling on coverage has been an integral part of the Commission's implementation of the Statute from the beginning.[21] Establishment of a ceiling on coverage is consistent with the statutory scheme which contemplates two ways for passenger vessel operators to demonstrate financial responsibility – either by providing information to the Commission sufficient to demonstrate such responsibility or by providing a sufficient bond or other security.[22] The 1993 amendment to the Statute made it clear that dollar-for-dollar coverage was not a statutory requirement. At that time, the Commission had in place a $15 million ceiling for UPR coverage. Congress was fully aware of this ceiling when it amended the Statute to remove the only language that arguably could have been read not to support such a ceiling. Thus, by enacting the 1993 amendment, Congress explicitly endorsed the Commission's past practice of utilizing a ceiling on coverage. That intent was underscored the following year when the Commission considered removing the ceiling, prompting a bipartisan response from the ranking members of the House committee and subcommittee of jurisdiction in a letter to the Commission which observed that: "Having both witnessed and participated in that process [enacting the 1993 amendments], we were surprised to learn of your current rulemaking. It appears to mark a sharp departure from the substance and trend

[21] See 32 Fed. Reg. 3,986 (Mar. 11, 1967) (ceiling initially set at $5 million); 45 Fed. Reg. 23,429 (Apr. 7, 1980) (ceiling raised to $10 million); 55 Fed. Reg. 34,564 (Aug. 23, 1990) (ceiling raised to $15 million)

[22] See Section *I* A *supra* for a more extended discussion on this point.

of these earlier initiatives by eliminating . . . the coverage ceiling. . . ."[23] If adopted, the current Proposal to eliminate the coverage ceiling would depart dramatically from the long-standing implementation framework developed by the Commission and expressly embraced by Congress.

B. The Ceiling on Coverage has Successfully Fulfilled the Statutory Purpose of Eliminating Fly-By-Night Operators and Financially Protecting Passengers.

The Statute was designed to screen passenger vessel operators to ensure they were financially responsible, and therefore unlikely to take a customer's money without providing the paid for cruise. The Commission has repeatedly acknowledged this purpose. As stated by the Chairman of the Commission writing to the Chairmen of the relevant Congressional authorizing committees: "The Commission's Pub. L. 89-777 program seeks to protect the traveling public from unscrupulous or financially irresponsible passenger vessel operators."[24]

Members of Congress have also recognized that "fly-by-night cruise operators" have been kept out of the United States cruise market, and that implementation of a UPR coverage ceiling has been highly successful in meeting this goal.[25] The last time that the Commission considered eliminating the ceiling, other Members summarized the impact of the Statute: "Nearly 30 years ago Congress enacted Public Law 89-777 to address a problem faced by

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23 Letter from Gerry Studds, Chairman, Comm. on Merchant Marine and Fisheries, Jack Fields, Rankmg Republican Member, Comm. on Merchant Marine and Fisheries, William Lipinski, Chairman, Subcomm. on Merchant Marine and Fisheries, and Herbert Bateman, Ranking Republican Member, Subcomm. on Merchant Marine and Fisheries to Joseph Polking, Secretary, FMC (June 24, 1994) ("House Chairmen Letter").

24 Letters from Chairman Harold J. Creel, Jr. to Senator Larry Pressler, Chairman, Comm On Commerce, Science and Transportation and the Honorable Bud Shuster, Chairman, Comm. On Transportation and Infrastructure (Oct. 2, 1996).

25 See Letter from Robert L. Livingston, Chairman, Appropriations Comm. to Joseph Polking, Secretary, FMC (Sept. 19, 1996) ("I also want to *protect vacationers from unscrupulous andfraudulent cruise operators* that may take a prospective vacationer's money without ever providing a cruise. This was a problem that prompted Congress to pass Public Law 89-777 in the 1960's. The Commission has successfully addressed this issue in implementing the Performance Certificate program." (emphasis added))

U.S. travelers who were literally left stranded at the dock when the foreign ships on which they had booked cruises failed to show up. The statute has worked very well in eliminating these fly-by-night operators."[26]

Fly-by-night cruise operators no longer operate from United States ports. In the nearly four decades since the Statute was first enacted, no potential cruise passenger has been left without some measure of recourse in the event that the cruise ship never showed up at the dock.

All passenger vessel operators embarking passengers at United States ports have been required to demonstrate financial responsibility by providing evidence of assets in the United States or by securing a specified level of UPR. The ceiling established by the Commission, as modified from time to time to keep current with inflation, provided a direct and effective means for weeding out the very type of cruise operator Congress sought to prohibit from offering cruises in the United States. There is no need to modify a system that has worked – and continues to work – so well to fulfill the Congressional mandate.

The UPR coverage ceiling has been successful in protecting passengers' deposits when undercapitalized and less financially stable PVOs leave the market. Once again, this is consistent with the original Congressional intent to protect consumers by requiring cruise lines to evidence a baseline of financial responsibility before the cruise line begins doing business in the United States. As a result, the existing system recognizes the lesser risk of consumers losing money posed by established, financially sound cruise lines.

Despite the success of this framework in the past, the NPRM attempts to justify the unwarranted elimination of the UPR coverage ceiling, in part, on the assertion that the risk of

[26] House Chairmen Letter, *supra* at note 23.

nonperformance has increased.[27] In particular, the Commission notes that "[s]ince September 2000, five cruise lines that participated in the Commission's program have ceased operations."[28] Yet as explained in greater detail below,[29] it appears as though the proposed elimination of the coverage ceiling would have made little difference to consumers in those cases because most, if not all, will be reimbursed. Passengers booking trips on the smaller, less established lines were covered by the Commission's program in full as Congress intended. Passengers booking on Canaveral were reimbursed by the company.[30] The majority of passengers prepaying for voyages on AMCV will be able to obtain full or partial reimbursements either through the Commission's coverage or through the bankruptcy proceeding.[31] In short, the existing program succeeded in meeting the goals set forth by Congress.[32] While there may be questions about the length of time it takes to get reimbursed, or about those passengers who schedule cruises departing from outside the United States or on small ships that are not covered by the Statute,[33] those are issues outside the scope of the proposed rule.

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27 "The risk of nonperformance appeared minimal. The past two years have seen a dramatic shift in that scenario." 67 Fed. Reg. at 66,353.

28 These lines were Premier Cruise Operations Ltd. ("Premier"), New Commodore Cruise Lines Limited ("Commodore"), Cape Canaveral Cruise Lines, Inc. ("Canaveral"), MP Ferrymar, Inc. ("Ferrymar"), and American Classic Voyages Company ("ACVC"). *Id* at 66,353.

29 See Section V A *infra*.

30 See Memorandum to the FMC from the Director, Bureau of Consumer Complaints and Licensing at 3-:'; (Apr. 10, 2002)

See Letter from Counsel to Royal Caribbean Cruises Ltd. to the Secretary of the Commission, dated May 27, 2003, detailing the reimbursement of AMCV passengers in the bankruptcy proceeding

32 The Commission's misplaced reliance on the need for enhanced coverage is discussed more extensively in Section V *infra*.

33 Cruises departing from ports outside the United States, or on ships with berth or stateroom accommodations for less than 50 are excluded by the language of the Statute and hence are not covered by the Commission's program.

C. Eliminating the Ceiling To Require Unlimited Dollar-For-Dollar UPR Coverage Creates A New Form of Consumer Insurance Never Intended by the Statute.

After 36 years of implementation of the Statute, designed to address a relatively narrow problem unique to the cruise industry, the Commission now proposes to re-write the Statute to effectively create a broad new consumer insurance program never envisioned by Congress. [34] When Congress intends such broad coverage, it does so explicitly, as with the long-established war risk insurance program[35] and more recently, the anti-terrorism insurance programs.[36] Congress clearly knows how to draft such an insurance requirement. However, that is not what Congress did in 1966 when it enacted the Statute, and it is not what Congress has done with respect to the Statute since that time.[37] The FMC should not now create *sua sponte* such a program administratively in the guise of implementing a clearly-defined 36-year old statute.

III. THE PROPOSED RULE IS ANTI-COMPETITIVE AND SHOULD BE REJECTED FOR THAT REASON ALONE.

While the Proposal does not directly regulate competition, it has a distinct – and entirely negative – effect on competition in the cruise industry. The negative competitive

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34 See Statement of Commissioner Brennan at 20, FMC Meeting, Jan. 30, 2002 ("And we know in the world we live one terrorist act on a cruise ship and no one is going on these things, and a lot of money will have been paid down. A lot of that money won't be coming back unless we do something to protect them."). See *also* Statement of Chairman Creel at 24, *zd.* ("And as Commissioner Brennan mentioned to me, an incident on a cruise ship or another terrorist event could be certainly the event which could propel some of these other carriers into bankruptcy overnight."). See *also zd* at 30 ("But my main concern . . . was making sure that those passengers that put deposits down get reimbursed, especially in this environment when you have demand going down and it could drop precipitously overnight. . . .").

35 46 App. U.S.C. § 1281 et seq.

36 See Terrorism Risk Protection Act of 2002, Pub. L. 107-297, Title I, §§ 101 to 108, 116 Stat. 2322 (Nov. 26, 2002).

37 The an-line industry provides a good analogy. Despite the risk that a terrorist attack or a prolonged war might dramatically impact the airline industry, causing massive cancellations and potential airline shutdowns, a risk of which passengers are fully aware, Congress has not required the industry to provide dollar-for-dollar collateralization of airline UPR.

effect of the Proposal will be more harmful to consumer welfare than any benefit the rule might achieve. Thus, the Proposal would frustrate the consumer welfare protections both the FMC and the antitrust laws seek to protect.[38]

The Proposal would require cruise companies to establish their financial responsibility by setting aside increased amounts of working capital to purchase a bond or other form of guaranty. Cruise companies currently use working capital to finance new ships, to fund improvements to existing ships, and to offer innovative products. The Proposal could divert up to $2 billion of working capital that could have been used for these purposes. As noted by the Federal Trade Commission in its Statement concerning the proposed Royal Caribbean Cruises/P&O Princess Cruises and Carnival Corporation/P&O Princess Cruises transactions, ". . .in this industry, new capacity is the most important form of product differentiation and quality competition."[39]

The abrupt change contemplated by the Proposal would limit the ability of cruise companies to add new capacity and to improve the quality of their cruise products, which would jeopardize the success and growth of the entire industry. As a matter of simple supply and demand, a reduction in capacity growth (i.e., a reduction in the supply of cruises) as a result of the Proposal, with steady or growing demand from potential cruisers, would likely result in increased prices on average for the consumers the FMC is attempting to protect with the Proposal.

Although the cruise industry as a whole would be adversely affected by the rule, the burden of the rule would not be borne equally by every cruise line. Small and mid-sized

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[38] *See Rothery Storage & Van Co v Atlas Van Lines, Inc* ,792 F.2d 210,218 (D D.C. 1986) ("the purpose of the antitrust laws: the promotion of consumer welfare").

[39] Statement of the Federal Trade Commission Concerning Royal Caribbean Cruises/P&O Princess Cruises and Carnival Corporation/P&O Princess Cruises, FTC File No. 021 0041 (Oct. 4, 2002).

lines will be affected by the reduction in working capital to a much greater extent than the largest line, Carnival, which will still have sufficient capital to fund new capacity. Because the smaller lines will not have capital available to fund new growth and expansion, they will not be able to sustain their market shares, much less compete with the growth and dominance of Carnival. Alternatively, no cruise line will add capacity (or such additions will be less than without the rule change) and prices will rise. In addition, the Proposal will lessen competition by erecting barriers to new entrants. See Attachment A, Affidavit of David Tabak, Ph.D. and Ramzi Zein, Ph.D. on behalf of National Economic Research Associates, Inc., in Support of Norwegian Cruise Line's Opposition to Proposed Rule ("NERA Affidavit") at § VII.[40] All of these effects are harmful to consumer welfare.

While the reduction in competition is clear and foreseeable, the benefits to the consumer from the Proposal are speculative. The Commission's rulemaking lacks any analysis of the harm to competition, the proposed benefit to the consumer, or whether there are other, less costly and less anticompetitive means of achieving the stated objectives.

A. The Cruise Industry Is Concentrated.

By any measure, the cruise industry is "concentrated." With the recent acquisition of Princess Cruises by the Carnival Corporation, two operators now have approximately 80% of the North American cruise market. NERA Affidavit at 15. In 200 1, the top four operators had in excess of 98% of worldwide sales. *Id.*

Moreover, the cruise industry is significantly increasing in concentration. The largest operator, Carnival, had the largest share of revenue in the market in 2001, and has

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40 This attachment is submitted under seal.

dramatically increased that share through its acquisition of Princess Cruises.[41] The Herfindal Hirschmann Index for the cruise industry will thereby increase from an already high 2800 to a very high 3800 through the merger. *Id.* at 15.

B. The Commission Has Not Considered the Impact On Competition from the Proposed Rule.

The NPRM does not consider the impact the Proposal would have on competition, and therefore on consumer welfare. Although the proposed rule does not, on its face, purport to affect competition, it will most definitely have such an impact. Therefore, the Commission needs to consider the Proposal's anticompetitive impact.

The Proposal will produce an anticompetitive result for several reasons. First, the rule will strengthen the dominant carrier in the industry in relation to its two principal competitors. Carnival is by far the dominant cruise line. With the completion of its acquisition of Princess, Carnival now controls the vast majority of the revenue for the cruise market. NERA Affidavit at 15. The Proposal will strengthen Carnival in relation to its competitors by further enhancing Carnival's already overwhelming financial advantage relative to the number two and number three companies in the industry.[42] NERA Affidavit § VII.

The NPRM acknowledges that the Proposal will adversely affect the cruise lines – "the Commission recognizes this could be costly to many in the industry." 67 Fed. Reg. at 66,353. However, in the NPRM the Commission does not examine the differential impact the rule will have on the different competitors in the industry. As would be expected, the industry leader, Carnival, will be affected far less detrimentally. NERA Affidavit § VII.

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41 NERA Affidavit at 15-l 6.

42 These competitive advantages are perhaps the primary reason why Carnival is not opposing removal of the ceiling on UPR coverage.

Under the Proposal, Carnival would have sufficient working capital to continue its growth while Royal Caribbean and Norwegian Cruise Line, and likely other smaller lines, could lose the ability to add new capacity to differentiate their products and compete with Carnival. If Carnival's proposal to exempt it altogether from the requirements of the Proposal were accepted, then the differential impact would be even greater.[43]

Second, the Proposal will adversely impact competition by making construction of new vessels more difficult for Carnival's competitors than for Carnival. By withdrawing a far greater proportion of working capital and cash or cash equivalents from Royal Caribbean and NCL than from Carnival, Carnival's competitors will have much less availability of funds to finance new buildings both in an absolute sense as well as a diminished ability in relation to Carnival. This reduction in working capital not only will enhance Carnival's ability to grow and become more dominant, it also will reduce overall industry growth. Therefore, consumer choices and price competition will be further reduced. Thus, the Proposal creates a barrier to entry for existing competitors on two levels – seeking to maintain current market share versus Carnival becomes more difficult, and trying to increase market share against Carnival becomes virtually impossible. This leads to decreased consumer choice and the likelihood of higher prices as Carnival's domination of the market increases.

Third, the Proposal is anticompetitive because it creates a barrier to entry for new competitors. The cruise industry already has high barriers to entry due to the high initial start up cost of new vessels, other infrastructure, and the current FMC bonding requirement. This is aggravated by the increasing concentration of the industry and Carnival's dominance. The

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43 See comments of Carnival Corp. submitted in Docket No. 02-07 in response to a NPRM at 67 Fed. Reg 19,730 (Apr. 23, 2002), received May 16, 2002.

Proposal adds another financial requirement to potential new entrants, reducing the likelihood that a new entrant would begin offering cruises covered by the Proposal and making it virtually impossible for new competitors to replace the companies that have left the industry in the past few years.

Fourth, the rule is anticompetitive because it elevates a single consideration – potential theoretical loss of advance payments by passengers – above all other competitive considerations. In the current market, NCL, being a much smaller player than Carnival and Royal Caribbean, seeks niche markets in which to compete. As a niche operator, it places a high premium on innovation and product differentiation.[44] By weakening it competitively in relation to the dominant industry player, the Proposal weakens the competitive abilities of the only player challenging the dominant player through innovation rather than imitation. As a result, the market will become even more homogenized and less competitive, harming consumers in the long-run by reducing their choice of cruise product.

Finally, the rule seriously undermines competition because it may well have the effect of eliminating competitors to the dominant player. By withdrawing such a significant percentage of the available working capital from Carnival's competitors, the Proposal potentially brings about the exact result against which it seeks to protect the public – competitors would lack the ability to challenge or even to maintain their position against Carnival. As Carnival grows and other lines weaken, it is likely that additional lines will be marginalized. At best, the Proposal weakens the ability of Carnival's competitors to compete with such a dominant player. At worst, it eliminates competition to Carnival as Carnival's competitors find it harder to raise working capital. The end result is less competition, higher prices, and fewer alternatives and protections for consumers.

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44 See discussion in section titled "Norwegian Cruise Line and the Cruise Industry" *supra* at 5-8.

C. There Are Many Less Anticompetitive Alternatives To the Proposal.

Any governmental rulemaking that will adversely affect competition must be examined to determine if less anticompetitive alternatives are feasible. See, e.g., The Department of Justice Manual, Vol. 3, Title 7, Ch. 5. The NPRM fails to even consider alternatives that might be far less anticompetitive.

The Proposal is anticompetitive because it drains cash and working capital out of the industry. This impacts the competitors of the dominant company far more adversely than the dominant company. Therefore, seeking the least anticompetitive rule requires seeking means to protect consumers other than making UPR unavailable for working capital and expansion.

As shown elsewhere in these Comments, there are other consumer protections against the loss of UPR through cruise line insolvency that would have a less severe anticompetitive impact than the proposed elimination of the coverage ceiling. First, there is the market solution in the form of private insurance described in the NERA Affidavit. Most regulation is imposed due to a perceived failure of the market to provide a solution to a perceived problem. But private insurance, already widely available and increasingly used, offers a "market solution" in lieu of the proposed regulation.[45] Customers who purchase travel insurance are seeking to protect themselves from the very same problem addressed by the Proposal. The Proposal substitutes a mandatory governmental regulatory scheme for the effective workings of the market. NERA Affidavit § V.

Moreover, there is no readily apparent need for a governmentally imposed mandatory scheme in place of the market. Because a large percentage of cruises are sold by travel agents, the public, through those agents, is likely to be informed of the available insurance

[45] The use of travel insurance is discussed in greater detail in Section VII B 2 *infra*.

option as well as the potential risk of default. Furthermore, the industry providing the insurance can and will evaluate perceived risks of default as it will be liable in the event of a default. Rates will be adjusted to account for any potential defaults. In short, the market can provide a much more finely tuned mechanism to monitor the risk of default and provide protection than the blunt requirements of the Proposal.

Second, the credit card industry provides protection for the vast majority of customers.[46] Like a customer's purchase of trip protection insurance, the credit card policies of issuers offer a market-based solution less anticompetitive than the Commission's Proposal. Because credit card processors stand behind the credit risk, they monitor the potential risk. They may, in fact, require exactly the type of cash collateral that the Commission requires. The cruise lines are in a position to present their financial data to the credit card processor and negotiate terms of any collateralization required. Rather than a mandatory removal of working capital from the industry, the credit card processor will be able to monitor and evaluate the perceived risk, and can offer a market based solution to their own credit risk.

Finally, the Proposal is anticompetitive because it not only effectively requires full cash collateralization, it also requires a minimum of 10% extra, and potentially a much greater doubling up of collateralization. If credit card processors require collateral to support their own obligations for unpaid passenger revenue, and the Commission also requires collateralization of the UPR, the anticompetitive effects of the Proposal are magnified greatly. The 10% extra protection the Commission proposes, together with the potential for double collateralization, could cause cruise companies to terminate early bookings. This would clearly distort the market and reduce price competition by restricting a form of output – advance bookings.

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46 See discussion in Section VII B 1 *infra.*

Therefore, insofar as the Commission does determine a need to enhance default protection in some manner, it should be done in the least anticompetitive manner possible.

IV. THE COMMISSION IS REQUIRED TO PROVIDE A REASONED ANALYSIS FOR THE PROPOSED REVERSAL IN LONG-STANDING POLICY AND REGULATION.

In the 36 years since Congress enacted Public Law 89-777, the Commission has implemented this law consistently with the express language of the Statute and with Congressional intent by not requiring 100% dollar-for-dollar UPR coverage. Although the Commission has considered proposals to require such coverage in the past, none have been adopted.[47] Before an agency can reverse such long-standing precedent, it is required to provide a reasoned analysis for the proposed change. As demonstrated below, the reasons now offered for this significant departure from the language of the Statute and decades of administrative practice and industry reliance are wholly insufficient.[48] Moreover, in proposing such a significant change, the Commission has not considered as part of its analysis other highly relevant factors, including existing consumer protections and the impact of the Proposal on competition in the industry.[49]

The Commission has developed comprehensive regulations and a consistent interpretation of the Statute in numerous rulemakings, hearings, an investigation, and even the Commission's own request for Congressional action, all of which long ago resolved the fundamental issue in this rulemaking. Specifically, dollar-for-dollar coverage was neither

47 See eg 55 Fed. Reg 1,850 (Jan 19, 1990), 59 Fed. Reg. 15,149 (Mar. 31, 1994).

48 See Section V *infra*.

49 Overall, the focus of the Commission's rulemaking should be on any real need for consumer protection in the existing cruise industry, rather than seeking to identify, and provide 110% coverage against every hypothetical circumstance of non-performance. When viewed in this light, existing protections are more than adequate

contemplated nor required by the Statute, nor by the Commission in implementing the Statute.

The Commission has expressly recognized, and long accepted, the industry practice of using advance ticket sales as a fundamental source of working capital and an acceptable component of a financially responsible passenger vessel operator. The ceiling on coverage established in the very first rulemaking, which continues as modified through this day, is an express acknowledgment that a significant portion of revenues from advance ticket sales need not be collateralized. As the cruise industry has expanded and matured, there has been enormous reliance on that principle in structuring the industry's growth. Billions of dollars of investment in new cruise ships and other infrastructure supporting the growth of the industry have been predicated on that principle.

The proposed rulemaking attempts to alter completely that well-settled regulatory framework by removing the coverage ceiling. The practical effect of this change, were it to be adopted, could be effectively to pull some two billion dollars of working capital out of the cruise industry in order to collateralize the new Performance Certificate requirements. This would cause a fundamental restructuring of the manner in which the modern cruise industry has done business since its inception some 40 years ago. Moreover, because the proposed rule has no specified phase-in period, it appears as though the requirements would take place immediately upon publication of the final rule. This would significantly increase the hardship on passenger vessel operators who would be facing very substantial cash collateralization requirements. Under these circumstances, the agency has a particular responsibility and obligation to demonstrate why such a change is warranted. Yet the statement accompanying the NPRM addresses the justifications in just over a page, with little more than a recital of potentially relevant facts, and virtually no analysis. 67 Fed. Reg. at 66,353. The cruise industry and the traveling public deserve more of an explanation – and the law requires a reasoned analysis – before the Commission's well-established interpretations of clear Congressional intent are summarily reversed.

The Supreme Court has acknowledged that an agency may change its course "'either with or without a change in circumstances."' *Center for Science in the Public Interest v Department of Treasury*, *797* F.2d 995,999 (D.C. Cir. 1986) ("*Center for Science")* (quoting *Motor Vehicle Mfg. Ass'n v. State Farm Mut. Auto. Ins. Co., 463* U.S. 29, 57 (1983)). However, an agency choosing to reverse a previously held position is "obligated to supply a reasoned analysis for the change." *Motor Vehicle Mfg. Ass'n*, *463* U.S. at *42; Global Crossing Telecomm , Inc* v *F.C.C., 259* F.3d 740,746 (D.C. Cir. 2001). The analysis should include "an explanation for the reversal which is supported by the record and a discussion of what alternatives were considered and why they were rejected." *Center for Science, 797* F.2d at 999 (citing *International Ladies' Garment Workers' Union v. Donovan, 722* F.2d 795, 817-18 (D.C. Cir. 1983).

The Supreme Court has further held that an agency has a "duty to explain its departure from prior norms," and that "whatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action." *Atchison, Topeka & Santa Fe Ry. Co v. Wichita Bd. of Trade,* 412 U.S. 800, *808* (1973) *("Atchison"); see also Congresso de Uniones Industriales de Puerto Rico* v. *N. L R. B.,* 966 F.2d 36, 39 (1 st Cir. 1992). In *Congreso,* in the context of an NLRB decision in which the Board "departed from precedent," then Judge Breyer explained that an agency "cannot depart *significantly* from prior precedent 'without explicitly recognizing that it is doing so and explaining why."' *Congreso,* 966 F.2d at 39 (emphasis in original) (internal citations omitted).

Under the standards set forth by the Supreme Court, the Commission "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made."' *Motor Vehicle Mfg. Ass'n, 463* U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States, 37* U.S. 156, 168 (1962)).

Here, the Commission examined the relevant data and articulated explanations for its actions over the course of many years. These actions include ordering the Ivancie Report and conducting the various rulemakings implementing the recommendations of that Report, which specifically include maintenance of the coverage ceiling, as reflected in the current rules. In contrast, when removal of the ceiling was last suggested, the underlying analysis was widely recognized as deficient and led to the Commission's decision to undertake a cost/benefit analysis.[50] Although the substance of that cost/benefit analysis has never been released, the rulemaking of which it was a part was subsequently terminated without any change in the regulations.[51] In short, the very long-standing Commission policy of maintaining a coverage ceiling has remained unaltered since the Statute was first enacted some 36 years ago. The Commission's current Proposal represents an abrupt about-face on this issue with no comparable review or analysis of the kind that was undertaken before

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[50] See 59 Fed. Reg 52,133-134 (Oct. 14, 1994) (holding prior proceedings m Docket No. 94-06, in which the Commission sought to eliminate the ceiling, in abeyance pending a further inquiry due to "virtually unanimous support for the Commission's existing UPR coverage requirements" and " a number of comments urg[ing] the Commission to perform a cost/benefit analysis on the Proposal Rule's impact "). See also comments received in response to Proposed Rule in Docket No. 94-06 urging the Commission to undertake a thorough analysis prior to implementing such a dramatic change; e g. Comments dated June 24, 1994 from ranking members of the House Committee and subcommittee of jurisdiction ("We urge you to undertake a thorough investigation of the impacts of such a proposal on the industry. . . "); Comments dated June 23, 1994 from the Passenger Vessel Association ("We urge the FMC to consider the impact of the rule change. . . ")

[51] 59 Fed. Reg. 52,133 (Oct. 14, 1994).

adopting the current rule or the kind of analysis that is required of an agency in these circumstances.

Under the standards applied by the Supreme Court, the Commission has failed to meet its burden of undertaking a thorough investigation before completely reversing a long-settled policy. The short statement of reasons offered to support this regulatory reversal simply do not justify ignoring the significant record and history over the years in support of the coverage ceiling.

V. THE FACTS SET FORTH IN THE NPRM IN SUPPORT OF THE REMOVAL OF THE COVERAGE CEILING DO NOT CONSTITUTE THE REQUIRED ANALYSIS FOR REVERSING LONG-STANDING COMMISSION POLICY AND REGULATIONS.

In determining whether the Commission has provided the required reasoned analysis for the Proposal, we examine below three basic questions. First, is there a problem that warrants reversal of the long-standing rule? Second, have all the relevant factors been analyzed? And third, if the proposed change were adopted, would the identified problem(s) be corrected, without creating a bigger problem, i.e., do the benefits of the proposed change outweigh the costs?

The NPRM offers four, recent factual developments in support of the proposed elimination of the coverage ceiling. These are: (1) five cruise lines have ceased operations; (2) consolidation in the cruise industry, with fewer, larger, players; (3) an increase in the size and number of cruise ships in the industry; and (4) an increased number of consumer complaints and Congressional inquiries. Yet, as discussed below, not only is the characterization of these events misleading, even assuming their accuracy, their nexus to the proposed elimination of the ceiling on coverage is neither explained nor analyzed.

A. Recent Cruise Line Failures, Where Few if Any Passengers Did Not Get Reimbursed, are an Insufficient Basis for Reversing the Current Rule.

The NPRM cites five cruise lines that have participated in the Performance Certificate program which have ceased operations since September 2000. Each of these failures is examined in more detail in the NERA analysis accompanying these comments. See NERA Affidavit at § IV. The most significant fact of this analysis is that in four of the five examples used by the Commission to justify elimination of the coverage ceiling, it does not appear as though there was *any* loss of consumer deposits or fares. NERA's independent research did not reveal any record of non-payment, nor does the NPRM state that fares were lost in any of these four circumstances.[52]

In only one case does the Commission assert that passengers failed to get reimbursed, i.e., the bankruptcy of American Classic Voyages Co. ("AMCV"). However, subsequent events have shown that the vast majority, if not all, of the passengers either have, or are likely to, receive reimbursements upon conclusion of the bankruptcy proceedings.[53] Notwithstanding the fact that reimbursement is likely for AMCV passengers, assuming *arguendo* that if the AMCV passengers were never to receive reimbursement, the AMCV example nonetheless provides no support for the proposed elimination of the coverage ceiling. This is because AMCV qualified as a self-insurer, an option already eliminated by the Commission. Moreover, the coverage ceiling has no application to self-insurers, whose

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[52] In addition to the examples cited by the Commission, it appears that no passengers lost deposits in connection with the recent bankruptcy of Regal Cruises. "There was good news for passengers awaiting refunds. The line had a $6.5 million bond, required by the Federal Maritime Commission, which appears to be in good standing and will cover all passenger claims." Cruise News Daily Headlmes, May 12, 2003. Thus, adoption of the Proposed Rule would have had no impact on the protection afforded passengers booking cruises aboard the company's single cruise ship Regal Empress.

[53] An important factor in providing for consumer reimbursement in this circumstance is the consumer protection provisions of the bankruptcy laws, which the Commission has not taken into account in fashioning the proposed rule. See discussion at Section VII B 3. See also Letter from Counsel to Royal Caribbean Cruises, Ltd. to the Secretary of the Commission, dated May 27, 2003 detailing the circumstances surrounding the bankruptcy of AMCV.

financial responsibility is measured by the ratio of net worth to UPR, irrespective of any ceiling on coverage.

In short, *none* of the cruise line failures cited by the Commission provides *any* support for the proposed elimination of the coverage ceiling. Simply put, had the Proposal been in place at the time of the five cited problem cases, the affect on consumers would be no different than under the current regulations.

Additionally, the fact that there have been multiple failures does not support the proposed change. The Commission has cited similar bankruptcies in prior rulemakings, involving smaller companies, with little or no loss of consumer fares, and has never before found those facts to be a sufficient basis to abolish the ceiling and impose dollar-for-dollar coverage.[54]

The bankruptcy discussion in the NPRM concludes with the statement that: "The bankruptcies we have seen are symptomatic of the economic circumstances of the past few years and the decline in tourism after the events of September 11,200 1." 67 Fed. Reg. at 66,353. That conclusory (and incorrect)[55] statement is the sum total of the Commission's analysis of the significance of these cruise line failures to the proposed regulatory action.

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54 See, *e* g Docket No. 94-06, 61 Fed. Reg. 33,509, 33,063 (June 26, 1996) (bankruptcies of Gold Star Cruises, Regency Cruises, and Palm Beach Cruises over an 18 month period) and 59 Fed. Reg. 15,149 (Mar. 3 1, 1994) (bankruptcy of American Hawaii Cruises); Docket No 90-O 1, 55 Fed. Reg. 34,564 (Aug. 23, 1990) (bankruptcies of Aloha Pacific Cruises, American Cruise Lines, Exploration Cruise Lines and Great Pacific Cruise Lines).

55 The Commission provides no evidence at all of the purported decline affecting the cruise industry. In fact, there has been a well-documented resurgence following the terrorist attacks, and a record number of passengers cruised in 2002. According to the Cruise Lines International Association, "[m]ore than 7.6 million North Americans are estimated to have cruised in 2002 . . . surpassing industry expectations and setting yet another record." Press Release, CLIA, Cruise News, CLIA Lines Host 8.66 Million Cruise Vacationers In 2002 (Mar. 4, 2003), available at www.cruising.org/cruisenews/news.cfm. According to Mark Conroy, CLIA Chairman, "[d]espite the challenges we faced in 2002, the industry not only met but exceeded its projections and easily bettered the record number of 6.9 million North Americans who cruised in 2001 " *Id.* In addition, "[t]he biggest jump showing up in the AAA national travel barometer in early May was a 17 percent increase in cruise bookmgs." "AAA Sees Interest m Travel Increasing," The Houston Chronicle at Travel Section p.2, May 25, 2003.

The Commission does not identify, let alone analyze the issue of what the impact on the cruise industry will be of a Proposal that will in effect require hundreds of millions of dollars of working capital to be taken out of the industry – apparently without even so much as a transition period – to collateralize the bonds or otherwise evidence the financial responsibility needed to accommodate the elimination of the coverage ceiling.

Whether such precipitous action could trigger the very cruise line failures that the Commission laments is not even mentioned as a potential issue. The Commission's silence on the impact of such an abrupt and dramatic forced recapitalization of an entire industry falls far short of the reasoned analysis required for the broad regulatory reversal contemplated by the Proposal.

B. Industry Consolidation is an Insufficient Basis for Reversing the Current Rule.

As a justification for the new Proposal, the NPRM cites recent consolidation in the cruise industry. While it is true that there has been – and continues to be – consolidation in the industry, the Commission makes no effort to analyze what that consolidation has to do with the proposed elimination of the coverage ceiling. There is no suggestion, for example, that the recent acquisition of Princess Cruises by Carnival Corporation will allow both companies to operate under the same bond, thus diluting existing coverage. In fact, the opposite has been the case, with Celebrity, for example, continuing to maintain its separate bond coverage even after its acquisition by Royal Caribbean.[56]

Of far greater concern is what this industry consolidation will mean for competition in the industry, particularly when coupled with the financial requirements of the Proposal that

[56] See, *e* g Corporate PV Fleet List (Nov. 18, 2002) (showing Celebrity Cruises with a surety bond and Royal Caribbean Cruises with a guaranty).

are so onerous that smaller and mid-sized competitors will be significantly disadvantaged in their ability to compete with the largest company. See discussion at Section III. This competitive impact is far more likely to harm consumers than to provide additional consumer protections.

C. The Increased Number of Cruise Ships is an Insufficient Basis for Reversing the Current Rule.

Apparently as a justification for eliminating the coverage ceiling, the NPRM also reports some 20 new cruise ships that have been ordered worldwide for delivery in the next two years, citing a web site as authority. Significantly, the analysis stops there. No effort is made to determine, for example, whether the ships are planned for itineraries within the Commission's jurisdiction (e.g., at least two of the ships identified on the web site are to be built for Norwegian Coastal Voyages which operates exclusively in Europe), whether they will be replacing existing tonnage, or even whether the orders are firm orders, or are subject to cancellation.[57] Once again, this anecdotal information, without any attempt to relate such information to the proposed change, is not the kind of reasoned analysis that is required for the Commission to reverse its long-standing policy of maintaining a ceiling on the amount of coverage that is required.

D. The "Increased Consumer Complaints" Provide No Basis for Reversing the Current Rule, and are Inconsequential Relative to the Total Number of Cruise Passengers Transported Without Complaint.

A final indicia of change since the last rulemaking cited in the NPRM is an increase in consumer complaints received by the Commission. Noting that few complaints were received for many years, the NPRM states that the Commission has been receiving "several

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[57] See NPRM, 67 Fed. Reg. at 66,353, n.7 (Oct. 31, 2002).

hundred complaints per year" as well as "an ever-increasing number of inquiries from members of Congress about problems experienced by their constituents." 67 Fed. Reg. at 66,353.

Once again, the "analysis" ends with these casual observations. There is no discussion of whether the complaints relate to matters within the Commission's rather limited jurisdiction, and therefore have any relevance at all to the proposed rulemaking, or how to measure their significance given the large number of passengers that take cruises annually.

An analysis of the complaints received by the agency reveals that the Commission's reliance on such complaints as a justification for the Proposal is misplaced. A review of complaints received by the Commission over the last 6 years shows that of the "several hundred" complaints, some 40% concerned issues outside of the Commission's jurisdiction. See Attachment B1. Of the 871 complaints arguably within the Commission's jurisdiction over the past 6 years, roughly 86% were related to cruise line bankruptcies, with some 62% of the total complaints within the FMC's jurisdiction involving a single company (Premier), all of whose passengers appear to have been reimbursed. See Attachment B2. If bankruptcy complaints are removed from the equation,[58] the number of complaints plummet to only 126 complaints over six years. In fact, once complaints related to bankruptcies are removed, data from the Commission indicates that it has not received more than 50 complaints related to matters within its jurisdiction in any of the past 6 years. See Attachments B 1 and B2. The significance of these numbers can best be measured as a function of the total pool of cruise passengers. The average number of passengers in the North American cruise market during this period was 6.28 million per year. See Attachment B1. Receiving less than 50

[58] As discussed *supra*, it appears that most, if not all, consumers who faced losses from cruise line bankruptcies were reimbursed with the current FMC program in place.

complaints out of a pool of over 6 million passengers per year is hardly evidence that a change is needed, and in fact is compelling evidence that the consumer protections in the cruise industry work remarkably well.

A similar analysis of the letters from Members of Congress, upon which the Commission relies in support of the proposed rule, is also unpersuasive. Over the same six-year period, Members of Congress received an average of just over 20 complaints per year. See Attachment B3. Of these, over 9 1% (113) concerned matters outside of the Commission's jurisdiction leaving 10 letters within a six-year span to Members of Congress complaining about matters within the Commission's jurisdiction. Once again, 10 complaints from over 37 million passengers is an enviable record, and one that does not support a change in the current rule.

In short, anecdotal references to a relative handful of consumer complaints largely outside of the Commission's jurisdiction is simply not a sufficient basis, let alone a "reasoned analysis," to support the reversal of long-standing Commission regulations setting a ceiling on coverage. If anything, these facts are compelling support of a consumer protection system that is working very well.

Perhaps most importantly, the NPRM does not suggest, nor provide any discussion or analysis, as to how these cited complaints might be reduced or eliminated by the proposed elimination of the existing coverage ceiling.

In sum, the facts set forth in the NPRM as support for the proposed change are insufficient to warrant a departure from the long-established policy. The NPRM provides no convincing evidence why the conclusion the Commission reached the only time it undertook a comprehensive review of the cruise industry should be different today than it was then when the conclusion was that, "[i]f the Commission were to require a dollar-for-dollar coverage for insurance, escrow, guaranty, or surety bonds, it would be departing from its established policy with no reasonable justification. Costs would be raised and the individual passenger's protection would not necessarily be increased." Ivancie Report at 15.

VI. THE NPRM ANALYSIS OF COSTS OF THE PROPOSED RULE IS BASED ON INCORRECT ASSUMPTIONS AND IS OTHERWISE DEFICIENT.

The NPRM makes no attempt to quantify, or even estimate, the cost of the proposed rule. It simply says first: ". . . the Commission recognizes this [Proposal] could be costly to many in the industry." 67 Fed. Reg. at 66,353. Subsequently, it states: "The Commission is mindful of the tremendous cost and difficulty that may be faced by some PVOs in covering all UPR (as currently defined). . ." *Id.* Beyond these two statements however, there is no attempt to determine what the cost would be, or how it would affect passenger vessel operators.

At the Commission meeting at which the NPRM was approved, discussion of the cost of the Proposal was limited. Significantly, the one question directly related to the cost of a bond was answered in such a way as to leave a misleading conclusion about the costs of the Proposal. The implication was that a bond could be obtained in any amount for the cost of the premium paid to the issuer, and in those circumstances where the bond was required to be collateralized, the collateral would be no more than the interest rate charged to borrow the face amount of the bond. The conclusion that was reached was that the only cost to the company would be the annual bond premium, plus the interest on the face amount of the bond.[59] [60] What is missed in this analysis is the very large dollar amounts at issue here and

59 Question – "what does a bond cost the [cruise] line? If they're using a bond?

the level of debt that cruise companies may already have given the very high capital cost of cruise ships, which means that other assets will have to be encumbered to collateralize the full amount of the new bond. Those assets may or may not be available, and will in any event certainly constrain the manner in which the company does business. For example, the required coverage could well be so redundant that many of the costs will in fact be doubled, thus exacerbating the "tremendous cost and difficulty" already associated with the Proposal.

A. Cruise Lines Collateralize the Security Used To Obtain Performance Certificates.

The economic cost of obtaining the requisite security is not measured by the cost of the fee paid to the surety nor the interest rate paid to borrow such funds. For example, NCL obtains its guaranty for its FMC Performance Certificate from The West of England Ship Owners Mutual Insurance Association (Luxembourg). It currently, and has since it first received a guaranty for compliance with the certification requirement, fully collateralized the requisite guaranty as per requirements from the guarantor (i.e. NCL currently collateralizes the full $15 million for its FMC Performance Certificate). NCL believes other operators, including those that are smaller than NCL, are required to fully collateralize their guarantees or surety bonds as well. Unsecured financial performance bonds of this nature are generally not available.

Answer – "I assume it can vary, but from the information we're getting, it normally is around 1.5 percent premium. There are also collateral requirements bond issuers may require, that is more likely to be related to the riskiness the bond issuer perceives of the particular line, as to what extent collateral is required. And so there's a cost to capital involved with any collateral that's put out as well.

But if you were taken and just, for example, just assume 100 percent collateral and the relatively high cost of capital in today's market of 8 percent, you're still talking less than 1 percent of total revenues for the major lines as a cost."

Transcript of Commission meeting held on Oct. 23, 2002 re: Revisions to the Federal Maritime Commission Passenger Vessel Regulations at 12.

[60] In NCL's experience, bonds of this size are not available to the cruise industry.

Collateralizing the guaranty of course effectively withdraws the amount of the security from available working capital. That generally requires additional borrowing to meet working capital needs, which borrowing in turn must be collateralized, while at the same time reducing the overall amount of working capital available for business purposes, including operating capital and funds available for expansion and new construction. As a result of the financial realities facing cruise lines, any increase in guaranty or other security requirements leads to an approximately equal amount (i.e. dollar-for-dollar) of funding being withdrawn from its working capital.

B. Credit Card Processors Also May Require Collateralization Without Regard To the Collateralization Required by the Proposed Rule.

The guaranty is not the only UPR amount that needs collateralization. Because credit card companies are potentially liable for refunds of unearned passenger revenue in the event of a cruise line default, they may require collateralization either through explicit agreement with the cruise line or through remittance practices that withhold payments to the cruise line.[61] Credit card processors believe they are responsible for reimbursing passengers for any charges made on credit cards for which the passenger does not receive the service or product purchased, regardless of whether the ticket was purchased within sixty days of sailing.[62] This requirement is the result of a combination of the Fair Credit Billing Act and the processor's contractual obligations with the credit card companies. To the extent that credit card processors require collateralization for their liability for unearned passenger revenue, the effect can be deemed the same as the proposed FMC rule – passengers are protected.[63]

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61 See Attachment D (Document submitted under seal).

62 See *e* g NERA Affidavit at 8.

63 Credit card processors examine the financial status of the cruise line and perform a risk assessment The requirements they impose will vary among operators, and will vary over time, depending on their

However, the credit card processors' requirement for collateralization is independent of and *in addition to* the collateralization that would be required by the Proposal. Because the credit card processors will determine their exposure based on the likelihood that they will be first payer in the event of default, any collateralization they require will be additive to the FMC's requirements. In essence, as demonstrated in Section VI D below, the credit card processors require collateralization of amounts for which the Commission's Proposal will also require collateralization, subjecting cruise lines to significant levels of redundant collateralization.

C. **The Proposed Rule Requires Collateralization of Unearned Passenger Revenue Far in Excess of the Amount of the Unearned Passenger Revenue Subject to Potential Loss in the Event of a Default.**

Beyond the requirement that the PVO fully collateralize all non-excepted UPR, the Proposal adds final insult to injury by requiring security in excess of the amount collected by the PVO. Without any analysis of the risk involved, the NPRM seeks to require that the PVO provide security based on 110% of the highest UPR balance during the prior two years.

There is no reasoned explanation of this additional 10% requirement in the NPRM. The only potential justification seems to be that it "doesn't hurt to be extra-careful." That is, of course, untrue. Such a requirement does impose harm. The requirement to secure an amount in excess of the actual amount at risk penalizes the PVO, yet provides no apparent benefit to the consumer. The sole result is to raise the cost of doing business, a cost which will ultimately work to the detriment of the consumer.

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assessment of the risk. Further, cruise companies are able to negotiate their terms of the arrangement with the processors, and are able to renegotiate as their financial situation warrants. Unlike the FMC's proposed rule, the credit card processors are unlikely to collateralize an amount significantly in excess of the risk. This process reflects a much greater real-time market-based assessment of exposure than the FMC Performance Certificate program provides.

The methodology for calculation of UPR also overstates the amount at risk. The Proposal bases the security requirement at 110% of the highest UPR during the past two years. Again, the NPRM offers no explanation for this methodology. Leaving aside the basis for the additional 1 0%, application of this methodology can require significantly more security than the amount of exposure the Commission seeks to protect against. Because of both seasonality and variations in year-to-year volume, using the highest amount of UPR over the last two years will never understate, but will often overstate, the amount of exposure at any given time.

D. In Aggregate, the Proposed Rule Significantly Inflates the Cost of Protecting Passengers Against Potential Defaults.

Although the rulemaking acknowledges the rule may impose "tremendous cost and difficulty" on the industry, the NPRM makes no effort to determine those costs, or to relate the costs to the purpose of the rule. However, when aggregated with the other collateralization requirements imposed by other business factors, the magnitude of the potential cost is both "tremendous" and unnecessary.

The following tables demonstrate the potential redundancy in collateralization and coverage likely under the Proposal. The tables assume $100 million in advance ticket sales, of which 80% is paid by credit card, half of that paid within the 60 days prior to sailing and half paid beyond the 60 days:

Paid by consumer	*Credit card*	*Collateral required*
$100 million	$ 80 million	• $ 80 million by credit card processor • $70 million by the FMC Proposal ($100 million - $40 million EPR + (10% * (UPR + EPR))
Total collateral required:		$150 million

At risk (under FMC rule)	*Total at Risk (under FMC rule):*
• $20 million paid by customers not by credit card • $40 million paid by customers by credit card more than 60 days in advance of sailing	$ 60 million
Less private insurance at 50% of total consumer purchases[64]	($ 50 million)
Total at risk:	$ 10 million

The FMC's proposal to collateralize 110% of the highest UPR within the past two years, other than that paid by credit card within 60 days of passage, will almost certainly result in redundant coverage. The proposed formulation does not reflect an understanding of the additive effect of the collateralization required by credit card processors based on their real-time assessment of the risk, it does not consider the impact of the private insurance market (discussed further below), and finally, it adds requirements that can only be justified on the basis of being cost free, when they are in fact anything but cost free. In relation to the risk posed, the additional costs are substantially disproportionate. In the example above, the

64 The use of fifty percent to represent the number of consumers who purchase travel insurance might be a conservative figure. As set forth more fully in Section VII B 2 *infra*, industry sources place this figure even higher.

Commission Proposal would result in the cruise line having to collateralize $150 million in order to protect against a maximum consumer loss of $ 10 million!

VII. THE COMMISSION SHOULD UNDERTAKE A COST/BENEFIT ANALYSIS AND CONSIDER THE EXTENT OF REDUNDANT COVERAGE AND OTHER RELEVANT FACTORS AS PART OF ITS REQUIRED ANALYSIS.

Before proposing to reverse a long standing policy and regulation, the Commission should complete a cost/benefit analysis as it had begun to do in earlier rulemakings, and should consider the extent to which the proposed rule would impose redundant coverage on cruise lines.

A. The Commission Should Assess the Impact of the Proposed Rule Under A Cost/Benefit Analysis or Similar Mechanism.

A fundamental deficiency in the Commission's analysis to date is the failure to consider the economic impact of the Proposal on the cruise lines and on consumers. Part of a reasoned analysis is not only a clearly articulated basis as to why long-standing rules should be reversed, but also what the impact of such a reversal would be on those who have relied on the rule. For the cruise industry, that means reliance on a policy that does not interfere with the accepted industry practice of using advance fares and deposits as working capital. This has been the industry practice for as long as there have been passenger vessels, and it has been the express policy of the Commission for more than 35 years. Over that time, cruise lines have relied on that policy in making literally billions of dollars of major capital investments. To reverse that policy requires more analysis than that contained in the single page of discussion devoted to the issue in the Federal Register that accompanied the proposed rule.

Missing from the NPRM discussion is a cost/benefit analysis of the impact of the Proposal on consumers and cruise lines alike. An assessment of the costs and benefits of any rulemaking is a fundamental element of the federal regulatory process. Executive Order 12866, as modified by Executive Order 13258, establishes the key principles of federal rulemaking and emphasizes the importance of evaluating the advantages and disadvantages of a rulemaking in advance:

> In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider.

Executive Order No. 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993), as modified by Executive Order 13258, 67 Fed. Reg. 9,385 (Feb. 26, 2002).[65]

The Executive Order specifically requires independent agencies, including the Commission, to prepare a Regulatory Plan of its "significant" regulatory actions and forward that Regulatory Plan to the Office of Information and Regulatory Affairs ("OIRA") of the Office of Management and Budget ("OMB") by June 1 of each year.[66] That Regulatory Plan requires a summary of "each planned significant regulatory action including, to the extent possible, alternatives to be considered and preliminary estimates of the anticipated costs and

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[65] Independent regulatory agencies like the Commission are exempt from portions of Executive Order 12866, as they were under predecessor order, Executive Order 12291 The Commission nonetheless chose to apply the analytical requirements of Executive Order 12291 in determining that its earlier rulemakings (pre-1994) in this area were not "major rules" requiring a cost/benefit analysis No similar determination could be made here since the current proposal will likely be "significant" as it will have an annual effect on the economy of $100 million or more, will increase the costs or prices for consumers and the cruise industry, and will have a significant adverse impact on competition, employment, investment, and productivity.

[66] For purposes of the Executive Order, a regulatory action is "significant" if it is one that will "have an annual effect on the economy of $100 million or more." 58 Fed. Reg. at 5 1,738.

benefits." 58 Fed. Reg. at 51,738. There is no evidence that the Commission has conducted this cost/benefit analysis with respect to the Proposal.[67]

The Commission came under considerable criticism for not having conducted a cost/benefit analysis the last time it considered removing the coverage ceiling.[68] At the time, the Commission received numerous comments from the industry and Members of Congress urging further investigations and a cost/benefit analysis.[69] As a result, the proceeding was suspended to allow time for an inquiry." After the inquiry, the FMC commenced yet another attempt to eliminate the ceiling, 61 Fed. Reg. 33,059 (June 26, 1996), again resulting in no change to the ceiling. Nothing has changed since the earlier proceedings that would suggest that conducting a cost/benefit analysis is any less important now than it was then.[71] As discussed above, the NPRM discussion of the reasons for removing the regulatory ceiling does not come close to a cost/benefit analysis sufficient to support the Proposal.

B. The NPRM Fails to Account Fully for Redundant Consumer Protection Coverage.

One of the principles underlying the Proposal is the Commission's recognition that there should not be redundant coverage of UPR because such redundancy would "impose a needless financial burden" on the industry. See Statement of Commissioner Won at 24-25,

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67 In fact, there is substantial evidence to the contrary The FMC's Final Annual Performance Plan for FY 2004, dated March 2003, Indicates the Commission aims to complete "a rulemaking by 9/30/*04* that makes the changes necessary to ensure that PVOs' financial responsibility requirements for nonperformance are providing appropriate protection for the public." *Id.* at 10 (emphasis added). The Commission's deadline for Fmal Action was further updated to December 2003 in a timetable issued on May 27, 2003. 68 Fed Reg. 31,381. However, the FMC has put forward the Proposal addressed in these Comments prior to any relevant cost/benefit analysis As a result, interested parties are unable to comment upon the Commission's analysis (as it does not exist) and therefore cannot provide the Commission with a more informed opinion.

68 The Commission proposed to remove the ceiling in Docket No. 94-06. 59 Fed. Reg. 15,149 (Mar 3 1, 1994).

69 See discussion in footnote 50 ***supra.***

70 59 Fed. Reg. 52,133 (Oct. 14, 1994).

71 Significantly, the last cost/benefit analysis was apparently never completed. In response to its FOIA request NCL received only heavily redacted sections of a draft version of a cost/benefit analysis.

FMC Meeting, Jan. 30, 2002 ("reluctant to require a PVO to provide coverage where coverage already exists. . . . You know I wouldn't want to see redundant coverage"). Accordingly, the NPRM includes the new concept of "excepted passenger revenue," which would allow for a reduction in the amount of UPR that would have to be covered by a bond or other collateral in an amount equal to ticket purchases made by credit card within 60 days of sailing. This formulation is based on the provisions of the Fair Credit Billing Act ("FCBA") requiring refunds for billing errors reported within sixty days of the charge. This coverage is expansive, and includes coverage for missed or cancelled cruises. It is appropriate to recognize the consumer protection afforded through the use of credit cards in understanding the level of risk to consumers and in understanding the practical costs to the cruise industry.

What apparently was not considered in fashioning the proposed rule, however, are those additional consumer protections, similar to those afforded through the use of credit cards, which have come about since the Statute was first enacted in 1966 that significantly increase protections for consumers. These include the increasing availability of private sector insurance and the consumer protection provisions of the bankruptcy code, all of which are significant factors in determining the potential for redundant coverage, and therefore the appropriate level of coverage to be imposed on the cruise industry.

1. The Scope of Current Credit Card Protections is Broader than that Recognized in the NPRM.

The Commission's acknowledgment of the protections afforded consumers paying by credit card under the Fair Credit Billing Act is a significant recognition of the importance of avoiding redundant, and potentially harmful, duplicative coverage. What is not recognized in the NPRM, however, is the full scope of the relationship among the bank that issues the credit card, the credit card processor, and the cruise line.

Credit card processors such as Paymentech are aware of their obligations, and risks, under the FCBA. Accordingly, credit card processors undertake their own risk analysis of the merchants with whom they do business. This involves an assessment of the industry in which they operate, as well as an analysis of the individual merchant's background, track record, and wherewithal to provide the goods and services offered to consumers.

The processor's analysis of risk is reflected in the terms of the agreement reached between the cruise line, in this case, and the credit card issuer. Significantly, the terms may vary substantially, even within the cruise industry. Among the variables used to reflect the processor's assessment of the level of risk are the rate charged the cruise line for using the card, the time that payment is made to the cruise line, and *whether the cruise line must post a bond, letter of credit, or otherwise collateralize the exposure* that the credit card processor faces should the company be unable to perform the cruises its customers have contracted for.

Industry practice, pursuant to the credit card processors' undertakings in agreements with the credit card companies, has been that once the credit card processor has made the financial responsibility evaluation of the cruise line, it will issue refunds for tickets purchased at any time as a matter of course, not just those that are purchased within 60 days of sailing.[72] In order to fulfill the Commission's stated goal of avoiding redundant UPR coverage, the Commission should take into consideration the full level of collateralization that credit card processors are requiring of individual cruise lines. The Commission should rely on this market place determination of risk in reaching a decision on the appropriate level of coverage

[72] See e g Attachment A at 8.

to require, rather than mechanically allowing "credit" only for those purchases made within 60 days of sailing.

Thus, once the credit card processor has made its own market-driven evaluation of risk, and has required what it deems sufficient collateral for such level of risk, all consumer credit card purchases are effectively covered against the risk of cruise line non-performance. Any additional coverage that the Commission might require would merely duplicate already provided coverage for passengers paying via credit card, and would lead to a substantial risk of double collateralization for the cruise line without any increased protection for passengers.[73]

2. Travel Insurance Provides Additional Consumer Protection that is not Recognized in the NPRM.

Consistent with its intention to avoid redundant consumer protection when cruises are purchased with credit cards, the Commission should also recognize and take into account the significant consumer protections that are otherwise available in the market place.[74] In particular, consumers readily have the option to purchase travel insurance that expressly covers cruise line defaults due to bankruptcy or other reasons. See Attachment C. The market place responded to concerns in the post 9/11 travel environment by providing insurance products to cover these risks. Such coverage is available from a variety of competing suppliers, and is well understood by travel agents who are the principal

[73] *See* Section VI D *supra* for an example of how this might work.

[74] "It's also my understanding that there is available some third-party insurance to protect [passengers]." Statement of Commissioner Won at 19, FMC Meeting, Jan. 30, 2002.

distribution channel for the sale of cruise tickets. In fact, most of today's cruise passengers purchase some kind of travel insurance.[75]

As explained in the attached NERA Affidavit, under traditional economic analysis, consumers are not made better off by forcing them to purchase a good that they would otherwise have the option to purchase (or more importantly, not to purchase). NERA Affidavit § V. Here, the NPRM would essentially replace a market mechanism giving consumers the choice of whether or not to pay for travel insurance with a requirement that they pay for this additional service through an increase in the cruise ticket price.[76]

The Commission should recognize and account for the fact that since the Statute was first enacted in 1966, the private sector has developed readily available insurance products to provide additional coverage for consumers in the event of carrier default. This is highly relevant in determining what additional requirements, if any, the Commission should consider imposing on the cruise lines in order to be satisfied that they have provided adequate evidence of financial responsibility.

3. Bankruptcy Priorities Also Provide Consumer Protection not Recognized in the NPRM.

Consumers also have special preferences under the U.S. bankruptcy laws that grant protections in a bankruptcy that are unavailable to most unsecured creditors. Section

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[75] In the weeks immediately following September 11, published reports estimated almost 50% of travelers booking cruises, land tours, and extended trips were purchasing travel insurance. Subsequent reports indicate this number continued to increase. See e.g "Travel Insurance Top of Mind for Americans Travelmg Over the Holidays," PR Newswire, Nov. 22, 2002 ("Through October [2002], Travel Guard's retail travel insurance sales are 78 percent higher over last at this time"). These numbers may in fact be on the conservative side. "Nancy Kelly, president of Kelly Cruises, a cruise-only agency in Oak Brook, Ill., . . . said that 85 percent of her clients buy travel insurance." "Cancellation Insurance Can Be A Cruise Lifesaver The Demise of Four Lines Shows How Easily Passengers Can Be Left Holding the Bag," *Orlando Sentinel*, March 25, 2001.

[76] "[T]he Commission's plan imposes a certain type of insurance on consumers and therefore reduces their choices." NERA Affidavit at 7. "By forcing the bundling of tickets and insurance, the Commission would eliminate this option from consumers, thereby hurting those consumers who do not want to pay for performance Insurance." *Id.* at 10.

507(a)(6) of the Bankruptcy Code provides consumer creditors a level of priority (currently up to $2 100) to cover any payment made prior to the business debtor's bankruptcy." The legislative history and commentary surrounding this provision clearly indicate the purpose of the provision is to protect consumers.[78]

As the House Report at the time noted, prior to this provision, although consumers "assumed [their] deposit was tantamount to a trust fund, [they] get nothing from the estate of the debtor, because the assets available provide little return to unsecured creditors. Because of [their] ignorance and [] inability to bargain with a retail merchant, [they are] unable to do a credit investigation or obtain special terms from the merchant, as a true creditor may do."[79] The consumer protection bankruptcy priority was the result of this concern. It is this provision that largely explains why it now appears that most, if not all, of the AMCV cruise passengers will receive their money back, at least up to the $2100 priority available to them under the bankruptcy laws. Significantly, the average cost of a cruise per person is $849, well within this priority provision.[80]

4. Company Practices Also Offer Consumer Protections.

In considering proposed changes to its policies and regulations, the Commission should not overlook the fact that the industry Congress sought to regulate in 1966 bears practically no resemblance to the modern cruise industry. In particular, there have been dramatic changes in fundamental aspects of the industry that go to the heart of the consumer protection purposes of the original Statute. Unlike the "start-up" companies with little

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77 The consumer priority was increased to $2100 in 2001 66 Fed. Reg 10,9 10 (Feb 20, 2001).

78 Consumers were generally viewed as being in an inferior bargaining position, as they deposit funds into what is perceived as "tantamount to a trust fund." The provision was to protect such consumers from the harsh realities of the bankruptcy system. See Schrag & Ratner, "Caveat Emptor, Empty Coffer The Bankruptcy Law Has Nothing to Offer," 72 Colum. L. Rev. 1147 (1972)

79 H.R. Rep. No. 595, 95th Cong 1st Sess. 188 (1977), *reprinted in* 1978 U.S.C.C.A N. 5787, 6149.

80 See Attachment A, Exhibit 3.

commitment to U.S. operations that characterized the nascent cruise business in the 1960s, the cruise business has now matured into a major industry with a long-term commitment to the North American cruise market. These companies have headquarters in Miami and other major cities, with office buildings, real estate, thousands of employees, and new, large cruise ships purpose-built for the North American market based year round out of an increasing number of United States ports. These ships must be filled every week, year in and year out.

Congress was originally prompted to intervene in 1966 precisely because the early "fly-by-night" operators had no presence in the United States. As a result, the normal commercial checks and balances and remedies seemed unavailable to consumers in the late 1960s. But today those circumstances have changed, and while the risk of fly-by-nights may always be there, the current FMC regulations have worked very well to keep them away. For the major lines, their commitment is clear, having established permanent and mature businesses in the United States that are directly tied to the North American cruise market. Simply put, they are not going anywhere, and they are not leaving passengers stranded at the dock. With a significant fleet of ships to fill on a regular basis, it is a fundamental matter of good business practice to make every effort to be responsive to consumer complaints.[81] Moreover, as discussed above, the number of consumer complaints is indicative of an industry responding to its customers' needs rather than an industry faced with significant numbers of serious complaints.

[81] As the Ivancie Report concluded, "passenger cruise operators generally successfully resolve any customer claims or disputes concerning nonperformance The operators are very aware that a reputation is a very valuable asset, and they seem to be willing to go beyond what is legally required to make sure that their passengers are satisfied." Ivancie Report at 5-6.

Like other major cruise lines, NCL devotes a significant number of full time employees to customer relations to ensure that passengers have a high quality vacation experience, and will become repeat cruisers on other NCL ships.

Unlike the other major cruise lines, NCL has recently made a significant commitment to develop a fleet of cruise ships operating under the U.S. flag. Under special authority enacted by Congress earlier this year, NCL is able to complete construction of two new cruise ships overseas, and to reflag an existing vessel, for coastwise service under U.S. flag in Hawaii.[82] In addition, NCL has acquired two existing U.S. flag passenger vessels for potential refurbishment for operation in coastwise service.[83] These vessels will be owned by entities established under the laws of the United States and the vessels will be permanently based in the United States, thus ensuring the continued presence in this market, which will inure to the benefit of American consumers.

C. The Commission Has Failed to Account for the Proposal's Impact On Competition.

As discussed more fully in Section III above, the Commission has failed to consider how this Proposal will impact competition. This is particularly troubling in an industry as highly concentrated as the cruise line business is today, where the Proposal is likely to negatively impact small and mid-size operators disproportionately.

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[82] Pub. L. No. 108-7, Division B, Title II, General Provisions – Department of Commerce, Sec. 2 11, 117 Stat. 11 (2003). See *also*, Magin, Janis L., "Federal spending bill clears way for cruise ships for Hawaii" Associated Press Newswires (Feb. 14, 2003).

[83] On April 14, 2003, NCL announced that it had purchased the *SS United States* and the SS *Independence* for potential refurbishment.

D. The Commission Has Failed to Consider the Adverse Impact of the Proposal on Consumers and Other Third Parties.

Also absent from the NPRM analysis is any consideration of the potential adverse impact the Proposal will have on consumers, particularly with respect to the likely increase in the cost of cruises that would result from imposing such significant additional costs on the cruise lines. This increase would likely occur in the short term as companies sought to recover some of the higher costs associated with the reduction in working capital that would necessarily result were the rule to be adopted as proposed. In addition, as discussed above in Section III, the adverse impact on competition among the cruise lines would work, over the longer term, to reduce choices and increase prices to the ultimate detriment of the consumer.

Adverse impacts on other parties can also be expected, in particular, the travel agents who comprise the principal distribution channel for most cruise purchases in this country. [84] The brunt of compliance with the proposed system, particularly as it relates to the mechanics of credit card purchases and the tracking of the proximity to the sailing date, and other practical issues, will necessarily increase their cost of doing business.

VIII. THE PROPOSED RULE WILL UNFAIRLY DISCRIMINATE IN FAVOR OF PORTS OUTSIDE THE UNITED STATES, DISADVANTAGE PORTS IN THE UNITED STATES, AND RESULT IN A REDUCTION IN CONSUMER PROTECTION FOR PASSENGERS.

As set forth above, NCL has historically been an industry innovator in the development of new cruise itineraries. NCL was the first major cruise line to expand to U.S. ports outside of the traditional Florida region. NCL's introduction of Homeland Cruising last year is a good example of that expansion, with NCL ships being based either year-round or

[84] See Comments of the National Association of Cruise Oriented Agencies (NACOA) in this docket, dated May 28, 2003.

seasonally in 12 domestic ports in all. Not only does the Proposal put this trend towards maximization of U.S. embarkation ports at risk, but it does so at the expense of the consumer protections the Proposal purports to increase. This is because the elimination of the ceiling on coverage creates a disincentive to embark passengers from U.S. ports. Because the UPR attributable to passengers embarking at non-U.S. ports is outside the scope of the Statute, it is not counted in determining the required UPR amount. Thus, cruise lines can effectively reduce the amount of collateral required to meet the proposed dollar-for-dollar coverage by simply embarking passengers at nearby foreign ports rather than at the U.S. ports they currently serve. Those lines that are considering basing new cruises out of U.S. ports will have to factor in the significant additional cost that the Proposal would impose on those plans. Of course, to the extent cruise lines relocate cruises to non-U.S. ports, the result will be the frustration of the very consumer protection that the proposed rule purports to achieve, because passengers embarking at those ports would be outside the Commission's jurisdiction and would therefore forfeit any protections they may have had under the Commission's program.

The most prominent example of this potential unintended consequence is found in the long sought development of Seattle as a home port for Alaska cruises. For many years, the Port of Seattle had been frustrated by its inability to develop any significant Alaska cruise trade, losing out to Vancouver for all but a few repositioning cruises at the beginning or end of the season. Determined to develop the market, Seattle eventually built a new passenger facility at a cost of millions of dollars. It did so entirely on speculation, and without any commitment from any cruise line, believing that if the passenger facility were built, the cruise lines would come.

NCL answered the call. In 2000, NCL inaugurated Seattle-Alaska cruising with a full season of Alaska cruises out of Seattle. NCL's new, faster vessel, the *Norwegian Sky,* was able to offer a seven-day itinerary departing from Seattle that was competitive with cruises out of Vancouver. Since then, other companies have followed suit, positioning vessels in Seattle for seasonal Alaska cruises.

As a result, this year Seattle is opening another cruise facility at Terminal 30.[85] "In 2003, the Port expects more than 100 cruise ships and over 400,000 passengers to come to Seattle."[86] According to Port of Seattle CEO M. R. Dinsmore, "[e]ach time a cruise ship makes a homeport call in Seattle, it injects a minimum of $750,000 directly into our local economy."[87]

Similar events have occurred in ports such as Houston, Boston, and San Diego." The Commission's proposed elimination of the coverage ceiling jeopardizes departures from these newly developing domestic ports of departure. The Proposal creates a potentially powerful incentive for cruise lines to shift operations to nearby foreign ports in order to reduce the UPR that would otherwise be required to be collateralized, dollar-for-dollar, were the coverage ceiling to be removed.

This potential consequence has long been identified as a serious problem with any proposal to eliminate the coverage ceiling. In response to the Commission's 1994 proposal to eliminate the coverage ceiling, a bi-partisan group of Congressmen from the authorizing committee of jurisdiction urged the Commission to:

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85 Press Release, Port of Seattle, 2003 Cruise Season Underway (May 5, 2003), available at http //www.portseattle.org/press/05 05 2003 66.htm (last viewed May 22, 2003) ("POS 2003 Press Release").

86 Press Release, Port of Seattle, Port Commission approves $16.5 million investment in second cruise terminal (Nov 12, 2002), available at http://www.portseattle.org/press/1 1 12 2002 65.htm (last viewed May 22, 2003).

87 POS 2003 Press Release.

88 See Comments of Port of San Diego in this docket, dated May 20, 2003.

> undertake a thorough investigation of the impacts of such a proposal on the industry, particularly to determine whether the new requirements will simply encourage the very same operators to shift their port of departure from the U.S. to a nearby Caribbean, Mexican or Canadian port for the purpose of avoiding the Commission's jurisdiction. Such a result would of course completely frustrate the purposes of the statute since, far from enjoying additional coverage, those same U.S. passengers would then be without <u>any</u> coverage at all.
>
> Moreover, at a time when members of this Committee have worked hard to draft legislation and explore other incentives to <u>attract</u> cruise operators to our ports, this consequence would be particularly disappointing, especially for those communities that would benefit from the new jobs and related economic growth. For those ports that will lose current business, the results will be even harder to take.

House Chairmen Letter (emphasis in original).[89]

Nearly a decade later, the Commission has yet to undertake the study that these Members of Congress urged them to do in 1994. The NPRM *does not even mention this issue*, let alone analyze the impact the Proposal would have on the increasing number of domestic ports served by the major cruise lines, nor the probable reduction in consumer protections that would result if the proposed rule were adopted.

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[89] See also, Letter to the Commission from Robert Gogerty, Chairman of the National Cruise Ship Alliance (June 23, 1994) in Docket No. 94-06 makmg a similar point:

> For some individual companies, these changes will require tens of millions of dollars to be set aside for no productive use. These costs can be completely avoided if the operator simply embarks a passenger at a port outside of the United States.
>
> Because of the proximity of Caribbean, Canadian and Mexican ports, we are concerned that existing cruise lines, as well as those we are trymg to attract to the U.S., will choose these foreign ports instead of those in the United States. The economic impact on our communities will be substantial. Moreover, the practical result for American cruise passengers will be a complete loss of even their existing coverage since the operator will no longer be subject to the Commission's jurisdiction at all.

IX. THE NPRM ALTERNATIVE DISPUTE RESOLUTION MECHANISM IS UNNECESSARY AND VIOLATES FEDERAL LAW.

The Commission's policy since 1993 has been to utilize alternative means of dispute resolution to the fullest extent of the law, consistent with the requirements of Section 3 of the Administrative Dispute Resolution Act ("ADRA"). See 5 U.S.C. § 571(3). The Commission's Office of Consumer Complaints ("OCC") facilitates informal dispute resolution services between passenger vessel operators and prospective or actual cruise vessel passengers, even though the Commission lacks specific jurisdiction or responsibility for many such claims.[90] The OCC has assisted passengers with complaints on a range of issues including: unexpected cancellation of scheduled port calls, missed air / vessel connections, allegations of substandard accommodations, unpleasant occurrences, misplaced luggage, and unprofessional personnel." Consistent with the ADRA and the Commission's rules, these alternative dispute resolution ("ADR") services are provided with the qualification that such informal dispute resolution procedures, including arbitration, are available only in those instances where "all parties consent." 46 C.F.R. § 502.406(a)(1).[92]

Now, the Commission seeks to upset the fundamental ADR framework by *requiring* one of the parties to consent to ADR proceedings, including binding arbitration, whereas other parties remain free to accept or reject such proceedings in their sole discretion. 67 Fed.

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[90] See http.//www.fmc.gov/Informal%20Inquiries%20&%20Complaints.htm (last viewed Apr. 1, 2003) (the Commission sets forth its role with respect to facilitating dispute resolution but expressly notes that it lacks "specific jurisdiction or responsibility" in some cases).

[91] The Commission's current program encourages passenger vessel operators to settle claims for nonperformance through various, voluntary alternative dispute resolution vehicles including conciliation, facilitation, mediation, fact-finding, and the use of ombuds

[92] The requirement of consent to ADR proceedings was an integral part of the Subpart U revisions put in place in 2001. See FMC Docket 01-05. The FMC noted in its statement of general authority that "[t]he Commission intends to consider using a dispute resolution proceeding for the resolution of an issue in controversy, *if the parties agree to a dispute resolution proceeding*." 46 C.F.R. § 502.403(a) (emphasis added). Further, "[a]lternative means of dispute resolution authorized under this subpart *are voluntary procedures* which supplement rather than limit other available agency dispute resolution techniques." 46 C.F.R. § 502.403(c) (emphasis added).

Reg. at *66,355.* Such a requirement is not only unnecessary, but more importantly, it violates the ADRA.[93]

Specifically, the Proposal provides for the following:

> 1) "allow passengers to seek arbitration through a private arbitrator or the Commission's Alternative Dispute Resolution ("ADR") program, 46 C.F.R. part 502, subpart U, if after six months their section 3 claims have not been settled by the PVO."
>
> 2) in addition to the current requirement for PVOs to provide indemnification to passengers within 2 1 days after a federal or state court issues a final judgment in the passenger's favor, the Proposal would "require that payment will also be due if the passenger has received an arbitration award through a private arbitrator or the Commission's ADR program."
>
> 3) "Moreover, consent to such a[n arbitration] proceeding would be provided as part of the PVO's proof of financial responsibility. Thus, if a passenger elects to initiate a request for resolution of its claim, *the PVO would be obligated to participate." The Commission would ensure such participation through the addition of "provisions consenting to arbitration to the bond, guaranty, and escrow agreement forms."*

67 Fed. Reg. at 66,355 (emphasis added).

Because passenger vessel operators must present the Commission a bond, guaranty, or escrow agreement in order to establish proof of financial responsibility, the consent of the PVOs to submit to arbitration becomes complete and inseparable from their ability to obtain a Performance Certificate. Thus, submission to binding arbitration is an essential requirement in order for the PVO to operate at all in the United States. Such a proposal makes a mockery of the statutory protection that the use of ADR is available only where all

[93] Significantly, the Commission does not explain the source of its authority to require consent to ADR.

parties consent to its use.[94] The Supreme Court has explicitly stated that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steel Workers of America v. Warrior and Gulf Navigation Co., 363* U.S. 574, 582 (1960).

The mandatory alternative dispute resolution provisions of the Proposal should be rejected for two reasons. First, the stated justification for the proposed change is insufficient. Second, the coercive nature of the proposal violates the provisions of the ADRA.

A. The Proffered Justification for the Proposed Change Is Insufficient.

The NPRM asserts that the proposed change is necessary to "encourage PVOs to settle claims for nonperformance and to provide protection to passengers who are otherwise unable to obtain relief. . . ." 67 Fed. Reg. at 66,355. Beyond this conclusory statement, the NPRM offers no evidence that such encouragement is needed, nor that passengers have been unable to obtain relief. Significantly, data provided by the Commission in response to a FOIA request listing complaints received by the FMC over the past several years provides no support for the Proposal's unprecedented attempt to expand the ADR program. Historically, as set forth more fully in Section V D *supra,* the FMC's ADR program would have applied to less than 50 passenger complaints per year out of a pool of over 6 million cruise passengers per year.[95]

[94] The Commission also fails to consider the impact such a mandatory ADR system would have on each cruise line's paperwork burden. The likelihood is that imposition of such a system would cause this burden to dramatically increase. See Comments Submitted by NCL m this Docket re. the paperwork burden imposed by the Proposal, dated Dec. 2, 2002, at 3, 8.

[95] Once bankruptcy-related complaints are removed from consideration, as all bankruptcy-related issues would be dealt with by the bankruptcy court, very few complaints subject to FMC jurisdiction remain. See Attachments B 1 and B2

As noted above, the OCC has successfully provided ADR services for passengers in the past.[96] In addition, the established passenger vessel operators have long recognized the importance of good customer relations. As the Ivancie Report concluded, "passenger cruise operators generally successfully resolve any customer claims or disputes concerning nonperformance. . . . The operators are very aware that a reputation is a very valuable asset, and they seem willing to go beyond what is legally required to make sure that their passengers are satisfied." Ivancie Report at 5-6. The Ivancie Report also noted with respect to complaints against cruise operators that "there are no pressing problems regarding nonperformance." *Id.* at 37. The Commission has offered no evidence or analysis to demonstrate that the circumstances present during the Ivancie investigation have changed in such a way to warrant adoption of the proposed ADR rule.

The NPRM also asserts that the proposed change allows passengers to obtain relief they otherwise could not obtain, yet offers no suggestion as to the circumstances in which passengers were not able to obtain relief.[97] In fact, the NPRM appears to concede that relief is available, even though it may not be as timely as one would like:

> [c]urrently the guaranty and escrow agreement forms contain language requiring the financial responsibility provider to make indemnification payments to the aggrieved passenger if, within 21 days after such passenger has obtained a "final judgment (after appeal, if any) against [the PVO] from a United States Federal or State Court of competent jurisdiction," the PVO has not paid the claim.

67 Fed. Reg. at 66,355. Accordingly, aggrieved passengers are already afforded an opportunity to seek redress for their claims in a judicial forum, and existing Commission rules ensure PVOs make good on the court judgments.

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[96] See *e g* http://www.fmc.gov/Informal%20Inquiries%20&%20Complaints.htm#Complaints%203 (last viewed Apr. 1, 2003).

[97] 67 Fed. Reg. at 66,355.

At its heart, the real justification for the proposed change appears to be more pragmatic in nature. The NPRM notes that "obtaining such a court judgment is time-consuming and can cost more than the monetary value of the underlying claim."[98] *Id.* Providing for the convenience of passengers who might, on occasion, face a longer than expected time period to receive payment on a successful claim is an insufficient basis upon which to deny passenger vessel operators their rights by requiring that they submit to mandatory arbitration.

B. The Proposed Change Violates the ADRA.

The Commission points to the Administrative Dispute Resolution Act, see 5 U.S.C. § 571 *et seq.,* as the basis of its ADR program. See Notice of Proposed Rulemaking, 46 C.F.R. part 502, 66 Fed. Reg. 27,921 (May 21, 2001). The Proposal as drafted, however, would violate the requirement of the ADRA that participation in alternative dispute resolution mechanisms such as arbitration must be voluntary.

The ADRA provides that "[a]n agency *may not require* any person to *consent to arbitration* as a condition of entering into a contract or obtaining a benefit." 5 U.S.C. § 575(a)(3) (emphasis added). Under the proposed rule, the Commission is requiring PVOs to consent as a condition to obtaining a benefit. Indeed, by the Commission's own admission, the express purpose of the change in the rule is to obligate PVOs to participate in arbitration proceedings to resolve outstanding section 3 claims.

There can be no dispute that the effect of the proposed rule is to impose such consent as a condition of a PVOs ability to secure a Performance Certificate, thereby establishing the

98 The Commrssion's claim is not supported with any evidence or even anecdotal information. The Commission merely makes a blanket assertion that such is the case. Similarly, the Commission's professional staff observed "We get quite a bit of inquiries, quite a bit of complaints, from passengers who have taken an extensive amount of time for their claims to be paid." FMC Meeting Transcript at 13, Jan. 30, 2002.

financial responsibility necessary to enjoy the "benefit" of operating out of U.S. ports. Without such "consent," a passenger vessel operator would be denied a Performance Certificate and would therefore be unable to obtain the benefit of operating cruises embarking in the entirety of the United States. Simply stated, the proposed rule, by design, denies PVOs a "real choice" and thus is violative of the ADRA.

As discussed above, today's cruise lines have invested billions of dollars in state-of-the-art cruise ships that have been purpose-built for operation in the North American cruise market, which comprises 78% of the revenues in the world cruise market.[99] It is not realistic to suggest that PVOs have any real choice if the alternatives are to submit to the ADR procedure or abandon the North American cruise market. *See Southern Pac. Transp Co. v. Interstate Commerce Comm'n*, 69 F.3d 583, 599 (D.C. Cir. 1995) (granting intervenor railroad company's petition for review and remand of ICC rule changes, which among other things, mandated arbitration as a condition for participation under the AAR's Code of Car Hire Rules, thereby, denying carriers a "real choice").

X. THE COMMISSION SHOULD CONSIDER MORE BALANCED ALTERNATIVES TO THE PROPOSED ELIMINATION OF THE COVERAGE CEILING.

Should the Commission decide to take final action in this docket, NCL strongly urges the Commission to consider other alternatives to the proposed changes, including those set forth below.

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99 Cruise Industry News, Annual 2002, Int'l Guide to the Cruise Industry, 15th ed., p.14.

A. The Commission Should Maintain the Coverage Ceiling and, if Increases Are to be Made, the Commission Should Follow Past Practice by Increasing the Ceiling to Reflect Changes in the Consumer Price Index.

Given the sound reasons for the ceiling on coverage which the Commission has had in place since the Statute was first enacted, NCL recommends that the Commission maintain a regulatory ceiling. The coverage ceiling has worked well as a mechanism to ensure a measurable level of financial responsibility without causing an undue financial burden on passenger vessel operators that could in turn potentially jeopardize sound operations. Just as the Commission has done in the past, NCL would not object to making an adjustment to the ceiling amount to account for inflation during the years since 1991, which would result in a more than 25% increase in the ceiling amount.[100]

B. The Commission Should Adopt a Provision in its Regulations Notifying Cruise Passengers of Additional Available Protections Against the Risks of Nonperformance.

In the 36 years since the Statute was first enacted, there have been significant changes not only in the cruise industry itself, as detailed in the first section of these Comments, but also in the manner in which passengers purchase cruise ship tickets and the protections that they are afforded outside the Performance Certificate program. As the NPRM makes clear, the fact that an increasing number of cruise tickets are purchased by credit card, combined with the protections of the Fair Credit Billing Act, means that substantial consumer protections are already in place, at least for purchases made within 60 days of sailing. As a practical matter, these protections are in place for most credit card purchases no matter when

[100] Adjustments to be made to the current ceiling for changes in the Consumer Price Index, as based on the Bureau of Labor Statistics calculator. See http:/data.bls.gov/cgi-bin/cpicalc.pl. (application of the calculator to the $15 million ceiling since it was established in 1991 would increase the ceiling by more than 25% i.e., $20.1 million).

the purchase is made.[101] In addition to these provisions, relatively new consumer protection provisions in the bankruptcy code provide an additional level of ultimate consumer protection that did not exist when the Statute was first adopted. Finally, the private market has responded to travel uncertainties in the aftermath of the September 11th terrorist attacks with a new range of travel insurance products available to cruise passengers as protection against financial loss resulting from a variety of causes, including the business failure of the cruise line.[102]

While the coverage ceiling, particularly as adjusted for inflation, provides a baseline protection against non-performance, these additional consumer protections can all help to reduce the potential risk of financial loss to prospective cruise passengers. The Commission should consider advising consumers of the availability of these protections as part of its regulations implementing the program on its website and in other Commission publications. This would provide additional information for those consumers who are more risk adverse and wish to protect against all possible contingencies. In this way, the additional protection is made available to all prospective passengers, and the cost of such protection is made their choice, not that of the cruise line or a federal agency.[103]

Such notification to cruise passengers that insurance coverage is available could be similar to the notification provided to those who rent cars of the availability of optional insurance coverage, which the consumer is free to accept or decline. Adoption of such notice would help accomplish the consumer protection objectives of the original Statute without forcing a financial restructuring of the cruise industry.

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101 See discussion at Section VII B.

102 See, e g Attachment C.

103 Similarly, this would ensure that those who do not want to purchase such additional insurance are not forced to pay for it through resultant cruise price increases. See NERA Affidavit.

C. If the Commission Proceeds with A Change to the Current Ceiling for UPR Coverage, the Commission Should Provide an Adequate Phase-in Period Designed to Minimize Disruption to the Cruise Industry.

Regardless of what action the Commission may or may not take with respect to the Performance Certificate program, it will be important for all concerned to have an adequate transition period to implement any new requirements. The NPRM contains no transition mechanism at all, and if its proposed changes were adopted for immediate application, it would have an obviously devastating impact on the entire industry. The more burdensome any new rule is on the cruise industry, the longer the implementation period should be. A forced financial restructuring of the industry in a short period of time could create the very instability – and risk to passenger deposits – that the rule is designed to protect against.

CONCLUSION

For the reasons stated above, NCL believes that the Commission has not provided the required reasoned analysis necessary to support the proposed reversal of Commission policy and regulations that have worked remarkably well for more than 35 years and that have been relied on by the cruise industry and its passengers since the earliest days of the modern North American cruise industry. Therefore, NCL respectfully requests the Commission not to adopt the proposed rule.

Respectfully Submitted,

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Attachments

ATTACHMENT A

REDACTED

ATTACHMENT B1

TOTAL NUMBER OF COMPLAINTS

	FMC JURISDICTION’	OUTSIDE FMC JURISDICTION*	NUMBER OF PASSENGERS IN NORTH AMERICAN CRUISE MARKET
1997	0	48	5.0 million
1998	4	81	5.4 million
1999	7	116	5.9 million
2000	535	138	6.9 million[3]
2001	224	91	6.9 million
2002	101	115	7.6 million
TOTALS	871 (60%)	589 (40%)	**37.7 million**

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[1] Categories of complaints include the following: Change of itinerary/cancellation of ports/curtailed cruise; bankruptcy related; cruises cancelled by a cruise line; passengers bumped; terrorism related.

[2] Categories of complaints include the following: Missed/Poor flight connections; rescheduling and cancellation issues; unsatisfactory cruises; port charges and taxes/passenger fees/cover charges/other surcharges; delayed/lost luggage; sanitation issues; injuries/illnesses/medical services and costs/ illnesses aboard the ship; safety concerns; general disputes; millennium cruise; various refunds/compensation (other than for change of itinerary and 9/11 related); medical cancellations; unprofessional/poor service; discrimination/handicapped issues; Jones Act; theft/criminal attacks/lost jewelry/harassment; fare issues; and miscellaneous/other.

[3] Actual number depends on source --- either 6.8 million or 6.9 million.

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ATTACHMENT B2

BANKRUPTCY RELATED COMPLAINTS

YEAR	CRUISE LINE	# OF COMPLAINTS
2000	Premier	485
2000	Commodore	13
2001	Premier	39
2001	Commodore	102
2001	Great Lakes	2
2001	AMCV	22
2001	Renaissance	14
2002	Premier	15
2002	Commodore	37
2002	AMCV	11
2002	Renaissance	4
2002	Delta Queen	1

Totals: **2000-498**
2001 – 179
2002 – 68
745[1]

[1] Thus, 745 out of 871 complaints arguably within the FMC's jurisdiction, per Exhibit 2A, were bankruptcy related. This equals 86% of the complaints within the Commission's jurisdiction.

ATTACHMENT B3

TOTAL NUMBER OF CONGRESSIONAL COMPLAINTS

YEAR	FMC JURISDICTION'	OUTSIDE FMC JURISDICTION*	NUMBER OF PASSENGERS IN NORTH AMERICAN CRUISE MARKET
1997	0	13	5.0 million
1998	0	10	5.4 million
1999	0	15	5.9 million
2000	0	30	6.9 million[3]
2001	2	17	6.9 million
2002	8	28	7.6 million
TOTALS	**10**	**113**	**37.7 million**

[1] Categories of complaints include the following: Change of itinerary/cancellation of ports/curtailed cruise; bankruptcy related; cruises cancelled by a cruise line; passengers bumped.

[2] Categories of complaints include the following: Missed/Poor flight connections; rescheduling and cancellation issues; unsatisfactory cruises; port charges and taxes/passenger fees/cover charges/other surcharges; delayed/lost luggage; sanitation issues; injuries/illnesses/medical services and costs/ illnesses aboard the ship; safety concerns; general disputes; millennium cruise; various refunds/compensation (other than for change of itinerary); medical cancellations; unprofessional/poor service; discrimination/handicapped issues; Jones Act; theft/criminal attacks/lost jewelry/harassment; fare issues; and miscellaneous/other.

[3] Actual number depends on source --- either 6.8 million or 6.9 million.

ATTACHMENT C

SAMPLE OF TRAVEL INSURERS OFFERING CRUISE SUPPLIER FINANCIAL DEFAULT COVERAGE

- **CSA TRAVEL PROTECTION** (www.csatravelprotection.com) 800.873.9855
  - CSA Gold plan premium service can be purchased through the web site, over the phone or through a travel agent.
  - Insurance cost for one passenger on a cruise costing $900 is $45, and for a $1,600 cruise, the cost is $97[1].

- **TRAVEL GUARD INTERNATIONAL** (www.travelquard.com) 800.862.8919
  - The ProtectAssist standard insurance plan can be purchased through the web site, over the phone or through a travel agent.
  - Insurance cost for one passenger on a cruise costing $900 is $62, and for a $1,600 cruise, the cost is $112.

- **TRAVELEX INSURANCE** (www.travelexinsurance.com) 800.228.9792
  - The Travel Lite standard insurance plan can be purchased through the web site, over the phone or through a travel agent.
  - Insurance costs for one passenger on a cruise costing $900 is $67, and for a $1,600 cruise, the cost is $117.

- **TRAVELSAFE INSURANCE** (www.travelsafe.com) 800.523.8020
  - The TravelSafe standard coverage plan can be purchased through the web site, over the phone or through a travel agent.
  - Insurance cost for one passenger on a cruise costing $900 is $35, and for a $1,600 cruise the cost is $75. TravelSafe will STILL OFFER coverage to cruise lines or travel providers that have already declared bankruptcy. There is no restrictive list of suppliers, HOWEVER, you must purchase your ticket through a travel agent and not directly from a cruise line or other provider.

- **TRAVEL INSURED INTERNATIONAL** (www.travelinsured.com) 800.243.3174
  - The Worldwide Trip Protector comprehensive coverage plan can be purchased through the web site, over the phone or through a travel agent.
  - Insurance cost for one passenger on a cruise costing $900 is $40, and for a $1,600 cruise the cost is $61.

- **ACCESS AMERICA** (www.accessamerica.com) 866.807.3982
  - The Travel With Ease Basic and Comprehensive coverage plans can be purchased through the web site, over the phone or through a travel agent.
  - Insurance cost for one passenger on a cruise costing $900 is $40 under the Travel With Ease Basic plan. For a $1,600 cruise, one passenger would have to purchase Comprehensive coverage at a cost of $76 to have default coverage of their total trip value.

- **HTH WORLDWIDE** (www.hthworldwide.com) 888.243.2358
  - The TripProtector premium coverage plan can be purchased through the web site, over the phone or through a travel agent.
  - Insurance cost for one passenger on a cruise costing $900 is $50, and for a $1,600 cruise the cost is $83. HTH Worldwide will refund the total cost of a trip as long as the insurance was purchased within 7 days of the initial deposit.

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[1] Prices for "one passenger" are based on online quotes for insurance products covering cruise line default (also defined as bankruptcy or total cessation of service) for a 35-year-old passenger residing in Washington, DC, embarking on a 7-day cruise.

ATTACHMENT D

REDACTED