FEDERAL MARITIME COMMISSION

Docket No. 20-15

Passenger Vessel Financial Responsibility

STATEMENT OF CRUISE LINES INTERNATIONAL ASSOCIATION

Cruise Lines International Association ("CLIA") hereby responds to the Commission's request for comments with respect to the Commission's proposed development of regulations (the "Proposed Rules") regarding cruise vessel operators' financial responsibility to make refunds to passengers for cancelled cruise voyages, providing new detail as to the situations in which cruise lines must pay refunds, and administrative procedures regarding the timing and amount of refunds.

I. Introduction

CLIA thanks the Commissioners and Staff, and in particular Commissioner Sola, for the Commission's attention to the cruise community and cruise passenger issues during such challenging times. CLIA appreciates the opportunity to comment on the concepts for the Proposed Rule.

CLIA is the world's largest cruise industry trade association with representation in North and South America, Europe, Asia and Australasia. CLIA was established and exists pursuant to Agreement No. 10071, filed with the Commission in accordance with the Shipping Act of 1984 (the "CLIA Agreement"). CLIA's purposes and scope of activity covered by the CLIA Agreement include study of the cruise industry and communication with government regulatory agencies regarding matters affecting operation of cruise vessels.

CLIA's 42 ocean going cruise line members, listed in Appendix "A," encompass over 95 percent of global cruise line capacity, and a significant portion of all cruise vessels embarking passengers at U.S. ports, including vessels operating in all major cruise markets, providing both international voyages and U.S. domestic itineraries. These companies are subject to the Commission's existing regulations under 46 CFR §540 and would be governed by the Proposed Rules. CLIA also represents 15,000 travel agencies, 40,000 travel agents, and more than 300 businesses that provide products and services to cruise lines.

II. CLIA's Comments

CLIA wishes to comment on two significant elements of the Proposed Rules – (i) the new requirement that cruise lines must provide "lookback" refunds to passengers who cancelled their bookings without refund rights within 60 days prior to the scheduled sailing date of a cruise cancelled by the passenger vessel operator ("PVO") due to a declaration of a nationwide health emergency, and (ii) the definition of what passenger prepayments constitute "unearned passenger revenue" for which refunds must be guaranteed and provided.

A. Scope of 60-Day Passenger Cancellation Lookback

(1) Background

As reported in the Commission's Fact Finding No. 30 commentary, cruise lines generally require passengers to pay cruise fare and deposits for their voyage upon booking or in installments to be completed by a specified date prior to sailing. The cruise lines' rules for refunds, stated in the passenger cruise ticket and on the company's website, generally allow partial refunds upon request up to a final no-refunds date, which may be 30 to 60 days prior to the scheduled sailing date. This restriction on late refunds is necessary because passengers typically plan cruise vacations many months in advance, and the cruise line will not likely be able to re-sell a cancelled cabin at full rates immediately prior to sailing, if at all. In mitigation of this refund limitation, cruise lines generally offer passengers certain cancellation or rescheduling rights for an additional fee, or assist the passengers in purchasing third party cruise cancellation insurance policies that will provide a full refund.

During the months-long evolution of the COVID-19 crisis, with widespread impact throughout the entire industry, a number of passengers, increasingly uncomfortable about the growing threat, chose to cancel their bookings after their refund dates. However, due to the uncertainty surrounding the COVID events, the cruises on which they were scheduled to sail were not cancelled until sometime later, after the eventual issuance of the U.S. Center for Disease Control's "No Sail Order".

(2) The Commission's Request for Comments

To address this situation, based on the Fact Finding No. 30 recommendations, the Commission proposes to include in its Proposed Rule a "lookback" provision that passengers will be entitled to a refund if they cancel their booking no more than 60 days prior to said governmental action and the commensurate scheduled sailing date of a cruise cancelled by the PVO as the result of a governmental order or declaration. The Commission requests comment on this provision, including:

- The types of governmental orders or declarations that would make a passenger eligible for a refund when they cancel their booking.

- Should these include only U.S. federal, state, and local orders or declarations, or should foreign government orders and declarations also trigger the longer refund payment period?

- What types of governmental orders and declarations qualify, i.e., should this be limited to governmental orders and declarations that expressly prohibit embarking passengers and suspend passenger operations like the CDC No Sail Order? If not, what other types of governmental orders and declarations should qualify?

(3) The Type of Government Orders that Reasonably Require Refund Protection

CLIA recommends that the lookback portion of the Proposed Rule should only apply to a cancelled cruise for passengers who had themselves canceled their booking for the same cruise within 60 days prior to said governmental action and the commensurate scheduled sailing date due to:

> (i) a declaration by *the Secretary of Health and Human Services of a nationwide Public Health Emergency* that
>
> (ii) *results from events that were public knowledge prior to the passenger's cancellation.*

The purpose of the proposed 60-day lookback is to protect passengers who reasonably cancel a booking for a future sailing based on ominous developing circumstances that may not have yet resulted in declaration of a nationwide emergency or caused cruise lines themselves to cancel sailings, but which eventually evolve into government action that does cause the cruise line to cancel the booked sailing. The Commission's rationale for including this refund lookback concept is clearly that the passengers' discomfort with the news, causing them to cancel without refunds, later proves to have been well-founded. In fairness, such passengers should get refunds, just as the other passengers still holding tickets at the time the cruise line cancels the sailing.

CLIA believes that the correct standard for the type of emergency that triggers this lookback is a federal nationwide Public Health Emergency declaration, affecting most or all of the country and the cruise industry. This would cover a situation such as the current COVID-19 pandemic, where the circumstances are slow-developing and uncertain, eventually leading to a nationwide government declaration. Local or regional events such as storms that might lead to a federal emergency declaration develop quickly and the cruise line sailing cancellations usually occur prior to the federal action. While cancellation by the cruise line under these circumstances will give rise to a refund for passengers who were booked on the scheduled sailing, these situations do not lead to anticipatory passenger cancellations as much as 60 days before the sailing date.

There is also no basis to conclude that as a rule, state or local declarations might foreseeably have this same effect as a nationwide declaration of a Public Health Emergency. Under the United States' federal structure, state and local authorities' jurisdiction to affect cruise sailings extends only to localized or regional situations. These might include natural disasters, *e.g.,* storms, floods, fires, earthquakes or transport infrastructure disruptions within a single political jurisdiction. These events arise much more suddenly, being unlikely to cause passengers to cancel bookings far in advance of the cruise line itself announcing a sailing cancellation. They are also more likely to be limited in geographic scope, *e.g.*, a highway, bridge or waterway obstruction problem that might temporarily disrupt traffic to a cruise port. Such state and local governmental actions are also more likely to address only short-term circumstances, affecting a small number of sailings in a single port or limited number of regional ports for a few days or a week.

Again, cancellation of a cruise due to these circumstances will give rise to a refund for booked passengers, but these kinds of events are not likely to give rise to reasonable passenger concerns over the passengers' own health and safety such that they would foreseeably cancel bookings some two months in advance. Conversely, the federal government is charged with nationwide protection of health and safety in situations in which a slowly-developing sequence of events involving considerable uncertainty and unpredictability could result in passengers becoming concerned about their own well-being and reasonably cancelling bookings *en masse* in advance of the cruise lines themselves announcing sailing cancellations.

CLIA does not believe there is any rationale for inclusion of international organizations' actions (*e.g.,* the World Health Organization) or foreign government orders in the category of developments that would trigger this justifiable 60-day lookback. Generally, international bodies do not have authority to take steps that could prevent sailings of cruise vessels from U.S. ports. Only national governments can take actions to block international vessel navigation. Cruise lines are not likely to cancel U.S. sailings based on a multinational organizations' warnings unless the U.S. government also decides to issue an order. Even if a foreign government took action to prevent cruise vessels embarking passengers at U.S. ports from calling in their jurisdiction, affected cruise lines could change their itineraries or omit calls along the route, but this would not likely result in cancellation of the sailing or anticipatory passenger cancellations.

In sum, only a federal declaration of a nationwide Public Health Emergency by HHS, that leads to cancellation of a cruise, based on events that were public knowledge at the time of the passenger's cancellation, should trigger passenger lookback refund rights. Inclusion of emergencies that do not at some point directly require cancellation would give rise to subjective interpretations as to whether the passengers were acting reasonably when they cancelled bookings due to the advent of the situation. This would also create incentives for passengers who had terminated bookings for personal reasons to try to capitalize on fortuitous later cancellation rationales that had no bearing on their decision to cancel.

Accordingly, based on the proposed language in the FMC's Fact-Finding recommendations, CLIA suggests formulation of the "lookback" portion as follows (suggested change shown in red):

> *When a sailing is cancelled or consumer boarding is delayed by twenty-four (24) hours or more due to a governmental order or declaration, full refunds must be paid within one hundred eighty (180) days following a passenger refund request. This includes all consumers who, at their own discretion, cancelled their booking within sixty (60) days prior to the PVO cancelling the sailing due to (i) a declaration by the Secretary of Health and Human Services of the United States of a nationwide Public Health Emergency that (ii) results from events that were public knowledge prior to the passenger's cancellation.*

B. Definition of "Unearned Passenger Revenue" and Nature of Refunds

The Commission is also seeking comments on whether to expand the definition of "unearned passenger revenue," which defines the amount of security cruise lines must provide, and the scope of the "ancillary fees" (i.e., items other than basic cruise fare) to be included in any revised definition.

CLIA urges the Commission to clarify that "unearned passenger revenue" and the nature of required passenger refunds – which the Proposed Rule would define for the first time – should include cruise passage fare and related cruise line goods and services amounts collected by the cruise line, such as port charges and taxes, pre-paid on-board purchases, gratuities and shore excursions at the cruise line's own or affiliated destinations. However, "unearned passenger revenue" should not include deposits for airfare, non-affiliated shore excursions or other third party provider costs for which the cruise line is not still holding the passenger's deposit or is contractually obligated to pay such deposit over to a third-party provider.

(1) Background – Historical Commission Regulations and Practices

The statute which provides for the cruise passenger refund program administered by the Commission, Public Law 89-777, 46 U.S. Code §§44101-44106, is silent on the issue of whether protected refunds are for cruise fare only, or cover additional payments which a passenger may make to a cruise line to cover airfare, shore excursions and other non-fare costs. The only hint as to the legislative intent about what must be refunded found in the statute itself is the requirement, at §44102, that the cruise line provide security to: "…indemnify passengers for nonperformance of the transportation." This implies that coverage is limited to the passenger vessel transportation only, and does not extend to other goods or services for which passengers might make advance payments to a cruise line.

Historically, the Commission's regulations at 46 CFR §540.5 and .6 have only required cruise lines to provide financial security for amounts based on "unearned passenger revenue." This is defined at 46 CFR §540.2(i) as:

> "*Unearned passenger revenue* means that passenger revenue received for water transportation and all other accommodations, services, and facilities relating thereto not yet performed; this includes port fees and taxes paid, ***but excludes such items as airfare, hotel accommodations, and tour excursions***." [Emphasis added].

The liability secured by the cruise line's surety, guaranty or other form of credit is described generally in the Commission's administrative forms as to provide for repayment of the "passage price" (e.g., Form 132A) or to indemnify the passenger for "non-performance of transportation…." (e.g., Form 133A).

(2) Refunds Fairly Should Include Only Cruise Passage Fare, Tax and Port Charges and Voyage-Related Items Provided by the Cruise Line, and Unpaid, Unobligated Deposits for Third-Party Items

Clearly the statute requires refunds for cruise fare. Voyage and vessel-related items included in passenger deposits, such as port fees and taxes, logically should be included in such refunds. In

most instances, if the voyage does not take place, the cruise line would not be required to pay these costs.

CLIA also suggests refunds of prepaid on-board purchases and gratuities, and shore excursions at destinations owned or operated by the cruise line or its affiliates should be included. These items are cruise-related services to be provided by the cruise line, its employees or affiliates, and are clearly extensions of the cruise itself.

(3) Cruise Lines Should Not Be Required to Indemnify for Non-Refundable Third Party Payments

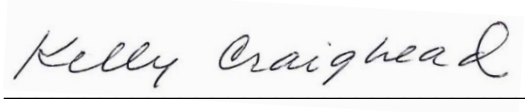
Conversely, if the cruise line contracts with an airline, shore hotel resort, attraction or other unaffiliated arm's length third party services provider, legally the cruise line would be acting as an agent for the passenger in booking such accommodations or activities for the passenger's benefit. In such instance, under applicable state common law the cruise line would be deemed to hold any deposits for such items in constructive trust for the passenger. If such funds have not yet been paid or contractually committed to such third-party providers, the cruise line may refund them to the passenger. However, if these funds have been paid or contractually committed, the cruise line will have paid or will have to pay these funds to the third party providers on behalf of the passengers, who will have contractual booking rights for such accommodations or activities. Passengers may be entitled to seek refunds directly from such third parties.

CLIA notes that most if not all cruise passengers, when making their booking, will have been offered cancellation insurance arrangements or other means of protecting such third-party refunds.

III. Conclusion

For the foregoing reasons, CLIA contends that the Commission should limit the 60-day refund lookback to only a U.S. federal declaration of a nationwide Public Health Emergency and/or orders related thereto, and that required refunds should exclude third-party payments such as non-refundable airfares.

Respectfully submitted,



Kelly Craighead
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