Passenger Vessel Association
103 Oronoco Street, Suite 200
Alexandria, VA 22314
Phone (703) 518-5005
FAX (703) 518-5151
Toll Free 1-800-807-8360
pvainfo@passengervessel.com
www.passengervessel.com

October 25, 2021

Ms. Rachel E. Dickon
Secretary
Federal Maritime Commission
800 North Capitol Street, NW
Washington, DC 20573

RE: Docket No. 20-15, Comments on Financial Responsibility Rulemaking

Dear Ms. Dickon:

The Passenger Vessel Association (PVA) – the national trade association that represents owners and operators of U.S.-flagged passenger vessels of all types, including "small ship" overnight cruise ships – respectfully submits these comments in response to the Notice of Proposed Rulemaking on Passenger Vessel Financial Responsibility, as published in the *Federal Register* of August 25, 2021.

PVA's membership includes five companies that operate U.S.-flagged "small ship" overnight cruise vessels that are subject to the Commission's financial responsibility regulations and that therefore will be affected by the proposed rule. These American companies not only register most of their vessels under the American flag, their vessels are U.S. built (as required by U.S. cabotage laws), their crews are American citizens (also as required by U.S. law), and they pay U.S. income taxes. Many cruise operators subject to the Commission's financial responsibility rules cannot make these statements. The Commission must be especially cognizant of the impact of its proposed regulation on these U.S. operators. Will adoption of the proposed rule result in major cost increases to PVA members when they purchase required financial instruments? Will the companies that have traditionally provided these instruments choose to exit the market?

PVA acknowledges that the Commission has responded favorably to some of the comments submitted in response to the Advance Notice of Proposed Rulemaking (ANPRM) of October 24, 2020. In particular, the proposed definition of "nonperformance of transportation" is more reasonable than what had been advanced previously. Thank you for this change. Nonetheless, PVA believes that the proposed rule should be reconsidered because:

- The proposed rule goes beyond the authorizing statute's grant of legal authority to the Commission; and

Passenger Vessel Association
103 Oronoco Street, Suite 200
Alexandria, VA 22314
Phone (703) 518-5005
FAX (703) 518-5151
Toll Free 1-800-807-8360
pvainfo@passengervessel.com
www.passengervessel.com

- The proposed rule threatens to impose substantial and harmful costs to covered passenger vessel operators. Even worse, it very likely will cause existing issuers of financial responsibility documents to withdraw from the business.

No legal authority for the Commission to issue a rule on "nonperformance of transportation" and refund policy

In its submission of November 13, 2020, responding to the Advance Notice of Proposed Rulemaking, the Passenger Vessel Association raised a fundamental point, one that must be answered satisfactorily before the Commission can proceed to the development of a rule: whether there exists legal authority for the Commission to issue a rule on "nonperformance of transportation" and refund policy.

In the Notice of Proposed Rulemaking published in the *Federal Register* of August 25, 2021, the Commission took note of the issue raised by PVA. The Commission characterized the PVA comment as follows: "PVA maintains that the regulatory changes proposed in the ANPRM are outside the Commission's jurisdiction and believes that while the statutory provision at 46 U.S.C. 44102 imposes duties on a covered PVO to file with the Commission evidence of financial responsibility to indemnify passengers for nonperformance of transport, it does not grant legal authority to the Commission to address the matter of what constitutes nonperformance."

Since the Commission failed to respond to this fundamental question, PVA is obligated to raise the issue once more. The Commission must respond to it substantively.

The Commission's authority to issue regulations must derive from statutory authority granted by Congress and signed into law by the President. The Commission cannot regulate simply because it may conclude that a particular policy is desirable or justified. The Commission has regulatory authority pertaining to certain commercial vessels that embark passengers in U.S. ports for overnight cruises. See section 44101 of title 46 *United States Code*. However, there are some commercial vessels that embark no more than 50 passengers in U.S. ports for overnight cruises. These vessels are beyond the regulatory authority of the Commission. If the Commission were to conclude that its rules related to evidence of financial responsibility of larger overnight cruise passenger vessels should also apply to these small overnight cruise passenger vessels, it would not be able on its own authority to extend the scope of its rules. It would have to recommend to Congress that a change in law is needed and await possible Congressional action before it could regulate.

Passenger Vessel Association | 103 Oronoco Street, Suite 200 Alexandria, VA 22314 | Phone (703) 518-5005 FAX (703) 518-5151 Toll Free 1-800-807-8360 | pvainfo@passengervessel.com www.passengervessel.com

The Fact-Finding Officer for Fact-Finding Investigation No. 30 acknowledges this fundamental question of "Statutory Authority." In two paragraphs briefly touching on the issue, he notes, "the question has arisen as to whether the Commission has the authority to issue an enforcement notice concerning sailings cancelled due to the CDC No Sail Order …." He further observes, "the Commission does not possess the same type of direct authority over PVO [passenger vessel operator] policies that DOT has with respect to air carrier policies ...." He also acknowledges, "Unlike DOT's statutory authority, the Commission has limited authority over PVO commercial practices ...." However, he suggests that the Commission could use its "wide discretion in establishing the information or type of bond or other security necessary to meet the financial responsibility requirements … to facilitate passengers' ability to obtain refunds from a PVO's financial instrument when a PVO cancels a voyage, makes a significant schedule change, or significantly delays a voyage."

With all due respect to the Fact-Finding Officer's suggestion, the Passenger Vessel Association asserts that the Commission lacks the legal authority to issue a rule mandating when and how passenger refunds are payable in the event of "nonperformance of transportation."

The Commission's statutory provision is found in section 44102 of title 46 *United States Code*. It reads:

> *§44102. Financial responsibility to indemnify passengers for nonperformance of transportation*
>
> > *(a) Filing Requirement. -A person in the United States may not arrange, offer, advertise, or provide transportation on a vessel to which this chapter applies unless the person has filed with the Federal Maritime Commission evidence of financial responsibility to indemnify passengers for nonperformance of the transportation.*
> >
> > *(b) Satisfactory Evidence. - To satisfy subsection (a), a person must file-*
> > > *(1) information the Commission considers necessary; or*
> > > *(2) a copy of a bond or other security, in such form as the Commission by regulation may require.*
> >
> > *(c) Authorized Issuer of Bond. - If a bond is filed, it must be issued by*
> > *a bonding company authorized to do business in the United States.*

A careful review of this provision shows that it contains no grant of authority to the Commission. Instead, it imposes two related duties upon a

Passenger Vessel Association
103 Oronoco Street, Suite 200
Alexandria, VA 22314
Phone (703) 518-5005
FAX (703) 518-5151
Toll Free 1-800-807-8360
pvainfo@passengervessel.com
www.passengervessel.com

covered PVO: (1) to file with the Commission evidence of financial responsibility to indemnify passengers for "nonperformance of transportation" and (2) to make the filing with such information as the Commission deems necessary and in such form as the Commission requires.

The purpose of the statute is to ensure that in the event of "nonperformance of transportation" by a covered PVO, there exists adequate financial resources, as determined by the Commission, from which indemnification can be made. But section 44102 does not specify what constitutes nonperformance, nor does it prescribe how or when indemnification is to be made. These questions are simply not addressed by this particular statute. Nor is there a statutory grant of authority (either express or implied) to the Commission to address these matters by regulation. Other laws (not section 44102) control, and other entities (perhaps courts, but not the Commission) are to decide.

By analogy, the Commission also has statutory authority to issue a rule to ensure that a PVO has financial means to reimburse a passenger in the event liability for death or injury. See section 44103 of title 46 *United States Code*. However, section 44103 says absolutely nothing as to when such liability might exist. Nor does it authorize the Commission to make that determination. The question of whether liability for death or injury exists or not is governed by other statutes (either federal or state) and is determined by entities other than the Commission (for example, courts with jurisdiction). The Commission has no statutory basis to issue a regulation specifying when liability for death or injury exists, or how much that liability might amount to. Nor does the Commission have legal authority to set by regulation when a claim for liability for death or injury is to be submitted, or when a judgment of liability is to be paid. So, it is with questions related to PVO liability for nonperformance of transportation.

The Passenger Vessel Association respectfully suggests that the Commission lacks statutory authority to issue a proposed rule defining "nonperformance of transportation" or establishing a procedure for resolving claims by permitting direct action against the issuer of the required financial instrument.

Without in any way conceding that the Commission has legal authority to issue a rule on nonperformance, PVA submits the following observations on the text of the proposed rule and the questions posed by the Commission in the *Federal Register* document:

Passenger Vessel Association
103 Oronoco Street, Suite 200
Alexandria, VA 22314
Phone (703) 518-5005
FAX (703) 518-5151
Toll Free 1-800-807-8360
pvainfo@passengervessel.com
www.passengervessel.com

"Nonperformance of Transportation" definition (proposed section 540.2(m))

PVA observes that the Commission has moved away from its prior suggestion that a mere 24-hour delay in sailing will constitute nonperformance of transportation. PVA's submission of November 13, 2020, explained why that shortened timeframe was unfair and inappropriate. The proposed rule embraces a more reasonable standard: a delay in sailing "by three (3) or more calendar days, if the passenger elects not to embark on the delayed voyage or a substitute voyage." PVA thanks the Commission for that change. The Commission should resist any calls to compress that standard.

PVA also thanks the Commission for excluding from the "nonperformance of transportation" definition a scenario in which a passenger voluntarily cancels a booking at any time in advance of the scheduled sailing. If the PVO's vessel in fact sails, there is no "nonperformance of transportation."

Sample web page of instructions of how to obtain refunds

The Commission asks whether it should develop a template that a PVO could use to comply with the proposed rule that the PVO post on its company website instructions for how a passenger might file a claim asserting "nonperformance of transportation." PVA agrees with this suggestion.

Definition of Unearned Passenger Revenue (UPR) (proposed section 540.2(i))

The Commission proposes to amend its current definition of UPR to include ancillary fees that may have been collected by the PVO, such as airfare, hotel reservations, and third-party tours. PVA urges the Commission not to take this step.

Broadening the definition will cause the UPR of a PVO to go up and thereby increase how much financial responsibility must be demonstrated. This will have no consequence for a PVO that can currently take advantage of the regulatory "cap" for financial responsibility (now at $32 million). But for smaller PVOs for which the "cap" does not come into play, it will increase their costs for obtaining instruments attesting to their financial responsibility. More specifically, this change will increase the costs of the five PVOs that operate "small ship" U.S.-flagged overnight cruise vessels.

Furthermore, travel providers that offer land-based package trips with advance collection of fees for airfare, hotel accommodations, and third-party tours will not be subject to this requirement; these land-based travel companies

Passenger Vessel Association
103 Oronoco Street, Suite 200
Alexandria, VA 22314
Phone (703) 518-5005
FAX (703) 518-5151
Toll Free 1-800-807-8360
pvainfo@passengervessel.com
www.passengervessel.com

often compete directly with "small ship" U.S.-flagged PVOs in Alaska and elsewhere. And in the rare instances of "nonperformance of transportation," the passengers are not without remedies – the PVO is likely to provide voluntary refunds (or if the customer agrees, credits for future travel) or the customer can obtain reimbursement from a credit card company.

The proposed rule jeopardizes providers of financial responsibility instruments and could very well cause them to withdraw from this line of business

The Commission itself acknowledges that the current system demonstration of financial responsibility works satisfactorily. Footnote five on page 47442 of the *Federal Register* document states, "Refund payments under the PVO financial responsibility instruments are rare and usually only occur if the PVO ceases operations and declares bankruptcy." The existing regulation has demonstrated its adequacy in such infrequent events over many decades.

Had it not been for the unforeseen event of the coronavirus pandemic and the consequent U.S.-government-issued industry-wide No Sail Order for larger overnight cruise vessels, the issue of adequacy of the current regulation would never have arisen. Neither the passenger vessel industry nor the Commission ever contemplated such a scenario. How likely is it that an industry-wide cancellation of cruises over an extended time will occur in the future?

PVA and its members are greatly troubled by comments from the issuers of financial security instruments. These financial companies have wide-ranging business issuing financial bonds and guarantees to all types of business. The cruise vessel sector is a very small portion of their customer base; it could easily be "sloughed off" if the financial companies conclude that the regulatory requirements are too onerous. Already, report PVA operators, their financial issuers are "spooked" by the uncertainties introduced by the proposed regulation (especially the prospect of direct claims from passengers), and it is all the operators can do to convince them to keep issuing the necessary instruments.

As the Commission itself observes, "[The Surety & Fidelity Association of America] believes the proposed definition of nonperformance would cause sureties to require PVOs to have more cash on hand or larger lines of credit and ultimately decrease the number of PVOs eligible to receive a surety bond." The Commission observes that SFAA states that many issuers will likely exit the market. This would be a disastrous result for everyone, including passengers, PVOs, and the Commission itself.

The Commission was clearly concerned about this possible abandonment of the market by financial instrument providers, so much so that it conducted

meetings with them after the close of the comment period on the ANPRM. On page 47447, the Commission describes its further outreach to representatives of companies that issue financial responsibility instruments and notes their prediction that there "likely would be an abandonment of the PVO program by many of the financial instrument providers due to the possible direct interaction with passengers and the lack of a formal judgement." The Commission stated, "It was surprising to learn that [one insurance company], and likely other travel insurance providers, would have little interest in providing financial coverage to PVOs in the event of nonperformance."

A contraction of the market will most certainly lead to an increase in prices to obtain required financial instruments, as the Commission itself acknowledges. On page 47451, the Commission states that it "believes that the proposed rule could increase the cost of UPR coverage to PVOs by 25 percent." It "estimates the cost of UPR coverage to range from $75,000 for the smallest of PVOs to around $600,000 for the largest…. Breaking down the costs increases by size of PVOs, the total increase for small PVOs would be $425,000 for a total cost of $2,125,000 …."

For U.S.-flagged "small ship" overnight cruise operators, these are staggering sums. Does the Commission really wish inflict such annual costs on smaller PVOs when it acknowledges that "In practice, passengers generally receive refunds for canceled cruises from the PVOs directly or, if the passenger paid by credit card, from the credit card issuer. Refund payments under the PVO financial responsibility instruments are rare and usually only occur if the PVO ceases operations and declares bankruptcy"? The problem that the proposed rule seeks to address (i.e., canceled cruises for which passengers do not readily receive refunds or credits from the PVOs themselves or from credit card companies) happens so infrequently that the Commission should think long and hard as to whether there is justification for adding these costs on PVOs.

The Commission has asked for data from commenters that would better enable it to estimate the added costs that would be absorbed by PVOs. But PVA and its members have no such data (nor does the Commission). PVA can only rely on statements from the providers of financial instruments as to how they will likely react if the proposed rule (especially the provision for direct claims from passengers) goes into effect.

PVA cannot believe that the Commission wants to see providers of financial instruments exit the market. Nor does PVA think that the Commission wants U.S.-flagged "small ship" operators to have to pay hundreds of thousands of dollars more per year to obtain the evidence of financial responsibility needed to comply with the regulations. The proposed rule was developed in response to an event that is not likely to occur again. The proposed solution threatens to

Passenger Vessel Association
103 Oronoco Street, Suite 200
Alexandria, VA 22314
Phone (703) 518-5005
FAX (703) 518-5151
Toll Free 1-800-807-8360
pvainfo@passengervessel.com
www.passengervessel.com

completely upend the existing regulatory system that has worked well over many years.

Conclusion

The Commission's authorizing statute provides no legal basis for the issuance of the proposed rule. The proposed expansion of the scope of the definition of UPR will lead to unnecessary higher costs for U.S.-flagged "small ship" overnight cruise operators. Adoption of the proposed rule could lead to added annual costs for smaller PVOs in the hundreds of thousands of dollars. Even worse, it could drive issuers of financial instruments out of the cruise ship market. For these reasons, and despite the improved definition of "nonperformance of transportation," the Passenger Vessel Association respectfully urges the Commission to suspend further action on the proposed rule. Thank you!

Sincerely,

Colleen Stephens
PVA President, 2020-2021