

**FEDERAL MARITIME COMMISSION****46 CFR Parts 501 and 540**

[Docket No. 11–16]

RIN 3072–AC45

**Passenger Vessel Operator Financial Responsibility Requirements for Nonperformance of Transportation**

September 13, 2011.

**AGENCY:** Federal Maritime Commission.**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Maritime Commission proposes to amend its rules regarding the establishment of passenger vessel financial responsibility for nonperformance of transportation. Currently the amount of coverage required for performance shall not exceed \$15 million. The amendments would modify the current cap on required performance coverage from \$15 million to \$30 million over a two year period; adjust the amount of coverage required for smaller passenger vessel operators by providing for consideration of alternative forms of protection; revise the application form; add an expiration date to the Certificate (Performance); and make some technical adjustments to the regulations. Comments and suggestions are particularly sought regarding consideration of duplicative forms of protection without creating gaps that could leave consumers vulnerable.

**DATES:** Submit comments on or before November 21, 2011.

**ADDRESSES:** Address all comments concerning this proposed rule to: Karen V. Gregory, Secretary, Federal Maritime Commission, 800 North Capitol Street, NW., Washington, DC 20573–0001.

Phone: (202) 523–5725.

E-mail: [secretary@fmc.gov](mailto:secretary@fmc.gov).

**FOR FURTHER INFORMATION CONTACT:**

Sandra L. Kusumoto, Director, Bureau of Certification and Licensing, 800 North Capitol Street, NW., Washington, DC 20573–0001.

Phone: (202) 523–5787.

E-mail: [bcl@fmc.gov](mailto:bcl@fmc.gov).

**SUPPLEMENTARY INFORMATION:**

**Submit Comments:** For non-confidential comments, submit an original and five (5) copies, and if possible, send a PDF of the document by e-mail to [secretary@fmc.gov](mailto:secretary@fmc.gov). Include in the subject line: Docket No. 11–16 Comments on PVO Financial Responsibility. Confidential filings must be submitted in the traditional manner on paper, rather than by e-mail. Comments submitted that seek confidential treatment must be

submitted in hard copy by U.S. mail or courier. Confidential filings must be accompanied by a transmittal letter that identifies the filing as “confidential” and describe the nature and extent of the confidential treatment requested. When submitting comments in response to the NPRM that contain confidential information, the confidential copy of the filing must consist of the complete filing and be marked by the filer as “Confidential-Restricted,” with the confidential material clearly marked on each page. When a confidential filing is submitted, an original and one additional copy of the public version of the filing must be submitted. The public version of the filing should exclude confidential materials, and be clearly marked on each affected page, “confidential materials excluded.” The Commission will provide confidential treatment to the extent allowed by law for those submissions, or parts of submissions, for which the parties request confidentiality. Questions regarding filing or treatment of confidential responses to this NPRM should be directed to the Commission’s Secretary, Karen V. Gregory, at the telephone number or e-mail provided above.

Section 3 of Public Law 89–777 (Section 3),<sup>1</sup> 46 U.S.C. 44101–44106, requires passenger vessel operators to establish financial responsibility to indemnify passengers for nonperformance of transportation.

On December 3, 2009, the Commission issued a Notice of Inquiry (NOI)<sup>2</sup> to solicit information and comments on whether the passenger vessel financial responsibility regulations in 46 CFR Part 540, Subpart A, should be amended. The NOI focused on three subjects: (1) The Cost of Complying with Nonperformance Regulations; (2) Adequacy of Nonperformance Coverage; and (3) Practices of Sureties, Credit Card Companies and Others. On March 3, 2010, the Commission held a public

<sup>1</sup> Section 3 provides, in pertinent part:

(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 their 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.

<sup>2</sup> Federal Maritime Commission, Notice of Inquiry Regarding Passenger Vessel Responsibility, 74 FR 65125 (December 9, 2009).

hearing to receive further information regarding passenger vessel operators’ financial responsibility.<sup>3</sup>

A number of comments received in response to the NOI contend that the \$15 million cap disproportionately affects small U.S.-flagged PVOs and gives preferential treatment to larger PVOs who are only required to cover a small percentage of unearned passenger revenue (UPR) versus the 110% of coverage required for small PVOs with UPR below the \$15 million cap. Several PVOs suggested that the Commission examine the financial health of a PVO to assess its risk of nonperformance and adjust the required coverage accordingly. Several respondents requested that the Commission consider travel insurance and protection for credit card payments to offset the required financial coverage for nonperformance. The Commission now proposes to amend its current rules.

**Background**

The \$15 million cap currently set forth at 46 CFR 540.9(j) has been in place since 1991, when it was raised from \$10 million.<sup>4</sup> In 1994, the Commission proposed to remove the \$15 million cap. Following receipt of comments opposing this proposal, the Commission revised its proposal by proposing a sliding scale requirement that would increase the amount of coverage required for those PVOs exceeding \$15 million in UPR, without requiring coverage of the total amount of UPR.<sup>5</sup> The Commission later discontinued Docket No. 94–06 without making any revisions to its regulations.<sup>6</sup>

Since the cap was raised in 1991, UPR of many cruise lines has increased substantially. Since September 2000, fifteen PVOs that had been covered by the Commission’s regulations have ceased operations: Premier Cruise Operations Ltd. (Premier), New Commodore Cruise Lines Limited (New Commodore), Cape Canaveral Cruise Lines, Inc., MP Ferrymar, Inc., American Classic Voyages Company (American Classic), Royal Olympic, Regal Cruises, Ocean Club Cruise Line, Society Expeditions, Scotia Prince, Glacier Bay, Great American Rivers,

<sup>3</sup> Federal Maritime Commission, Notice of Public Hearing, Passenger Vessel Financial Responsibility, 75 FR 7599 (February 22, 2010).

<sup>4</sup> See Docket No. 90–01, Security for the Protection of the Public, Maximum Required Performance Amount, 55 FR 34563 (August 23, 1990).

<sup>5</sup> See Docket No. 94–06, Financial Responsibility Requirements for Nonperformance of Transportation, 59 FR 15149, March 31, 1994.

<sup>6</sup> Docket No. 94–06, Financial Responsibility Requirements for Nonperformance of Transportation, 67 FR 19535 (April 22, 2002).

RiverBarge Excursion Lines, Inc., Majestic America Line, and West Travel, Inc. d/b/a Cruise West.

Of those, three had UPR in excess of the present \$15 million cap at the time their operations ceased: Premier, New Commodore, and American Classic. Premier and New Commodore passengers were reimbursed through a combination of credit card refunds and surety bond payments. Without credit card reimbursement, the surety bonds in place at the time would have covered roughly two-thirds of outstanding UPR. The third line, American Classic had the highest UPR at \$51 million. It is estimated that approximately 60% of its passengers were reimbursed through credit card issuers and travel insurance. After ten years of bankruptcy proceedings, the remaining 40% of passengers who had paid by cash or check finally received some reimbursement, up to \$2,100 each. American Classic fares for their standard-length cruises were up to \$3,435 per person, and were required to be paid sixty days in advance.<sup>7</sup>

#### Level of Unearned Passenger Revenue

There has been no increase in the coverage cap level since the present cap was established in 1991. The amount of coverage required of a PVO is 110% of its highest UPR earned within the most current two year period, up to the cap. In 1990, total two year high UPR for all PVOs regulated by the Commission exceeded \$1 billion. Total financial coverage provided at that time was slightly more than \$250 million. Thus, approximately 25% of outstanding UPR was protected by financial instruments filed with the Commission in 1990. Since then, total two-year high UPR for all PVOs in the Commission's program has more than tripled to \$3.7 billion, while total financial coverage for all such PVOs under the Commission's program has increased to only \$308 million, providing coverage for approximately 8% of the total UPR now in the hands of PVOs.

The Commission is required to ensure adequate financial responsibility to reimburse passengers in the event of nonperformance. The concern is the availability of funds to reimburse passengers for nonperformance of cruises, as the amount of passenger funds collected by PVOs well before scheduled voyages continues to increase. Moreover, as the size of vessels deployed by these PVOs increases, failure to perform a single voyage could have a significantly bigger impact.

While the risk of some cruise lines' failing may be low, the potential losses could be high, the risk of which is determined by the premiums charged to PVOs by their sureties. The more financially viable a given PVO, the less an issuer of bonds or guaranties would presumably charge for providing coverage. This concept is reflected in the responses to the Commission's NOI last year, which indicated that the largest PVO incurs premiums substantially less than other lines. Moreover, as with insurance policies, coverage may be available only when the client is of sound health. Premiums can increase exponentially with increased risk, to the point where coverage is no longer available for clients that are not financially or operationally sound. Once there appears to be significant risk of failure, the ability to increase coverage becomes problematic as increased coverage may not be available, or may be so costly as to tip the PVO over the financial brink and create the very nonperformance the Commission seeks to prevent.

#### The \$15 Million Cap

The Commission has examined its current \$15 million cap in light of the above circumstances. Since 1967, when the cap was set at \$5 million, the Consumer Price Index has increased more than five-fold. Simply keeping pace with that index would require a cap of over \$25 million if adjusted from the last increase in 1990 or to approximately \$33 million if adjusted from 1967 (In 1967, 100% of all UPR was covered). Yet the cruise industry itself and the amount of UPR outstanding at any one time have increased to a much greater degree. A coverage requirement capped at \$25 million (much less \$15 million) would be far less than 100% coverage for cruise lines whose fleets consistently have outstanding UPR in the hundreds of millions of dollars.

Finally, recent experience has demonstrated that increased coverage requirements should be put in place *before* a PVO begins to experience financial difficulty. It appears that once a PVO becomes financially unstable, any Commission action requiring a certificant to increase its coverage may not be possible.

For these reasons, therefore, the Commission now proposes to increase the cap on required evidence of financial responsibility in 46 CFR 540.9(j) from \$15 million to \$30 million. In order to allow the industry time to adjust, the proposed rule includes a phase-in period of two years for the adjustment. By the end of the first year,

the limit will adjust to \$22 million, and by the end of the second year it will adjust to \$30 million. Every two years after the limit on required financial responsibility reaches \$30 million, the limit shall automatically adjust to the nearest \$1 million based on changes as reflected in the Consumer Price Index.

Prior to any change in the amount of financial responsibility, the proposed rule would require that notice be provided. This notice will be published on the Commission's Web site and in the **Federal Register**, affording PVOs time to post the correct amount of financial responsibility.

In recognition of the disparity between small and large cruise lines in the percentage of unearned passenger revenue for which evidence of financial responsibility is required, the proposed rule also includes a provision whereby the Commission may, on a case by case basis, recognize additional protections submitted by an applicant in consideration of a reduction in the amount required to be furnished. This proposal would provide that PVOs with UPR not exceeding 150% of the cap may request relief from coverage requirements otherwise provided for in these rules by substituting alternative forms of protection. The PVO would submit its request to BCL, which would coordinate with the applicant, evaluate the request, and submit the request with its analysis for Commission consideration. The Commission invites comments on how this regulatory relief proposal could be improved to most effectively avoid duplicative coverage without creating gaps that leave cruise passengers vulnerable.

The Commission also invites comments on other proposals that will ensure adequate financial responsibility of cruise vessels in the event of nonperformance, such as modeling nonperformance financial responsibility requirements on current financial requirements for casualty administered by the Commission by: (1) Calculating the revenue generated by the top two rate tiers of berths on a first-class or premium voyage for an appropriate number (for example the five largest vessels) of each PVO's fleets; and (2) applying appropriate discount factors to prevent coverage that exceeds UPR.

The proposed rule also includes updates and improvements to the Commission's existing financial responsibility rules and forms.

#### The \$30 Million Cap

Each time the Section 3 cap has been increased by the Commission, the pressure inflation places on passenger tickets was raised as a primary

<sup>7</sup> See American Classic Voyage Co. Prospectus Statement at S-31. S-33 (Feb. 16, 2000).

concern.<sup>8</sup> In Docket No. 90–01, when the present Section 3 coverage cap was set at \$15 million, the Commission stated that the increase was “predicated, for the most part, upon the increase in the consumer price index.”<sup>9</sup> The Bureau of Labor Statistics’ Consumer Price Index for all Urban Consumers (CPI–U) is the most widely used measure to track changes in prices by federal agencies and financial institutions.

It is common practice for federal agencies to adjust user fees, fines and penalties using an inflation calculator on two or four year cycles.<sup>10</sup> The proposed automatic adjustment based on the widely published and freely accessible CPI–U would provide PVOs with certainty as to their ongoing responsibilities to comply with the regulations. The proposed rule would thereafter automatically adjust the \$30 million cap every two years based on changes in prices as measured by the CPI–U to the nearest \$1 million.

#### Technical Changes

A number of other revisions are also proposed. These changes would better refine the rules, based on the Commission’s recent experience. For example, Section 540.4(b) and Section 540.23(a) would be modified to direct applicants to file application form FMC–131 with the Bureau of Certification and Licensing instead of with the Office of the Secretary. The current regulations in 46 CFR part 540 contain a sample Form FMC–131 (Application for Passenger Vessel Certificate) as well as a sample surety bond, guaranty, and escrow agreement. As proposed, Form FMC–131 would no longer be included within the regulations, but would be available from the Bureau of Certification and Licensing and the Commission’s Web site. The sample escrow agreement would also be revised. The Commission also proposes to revise the application form to more closely comport with the information needed in an application and ultimately allow for the form to be completed electronically. Although the current rules require the submission of an application form, the current version for many years has not been useful to either the applicants or staff reviewing the filing, and rarely is completed. The new form will be streamlined and include a section that captures vessel

information. Additionally, the Commission proposes a 5-year expiration period for each Certificate (Performance) issued. This proposed change would harmonize the Commission’s PVO certificates with international certificates, such as those issued under The Safety of Life at Sea Convention and the International Convention on Load Lines, as well as with domestic certificates such as the U.S. Coast Guard’s Certificate of Inspection.<sup>11</sup> An expiration date would also provide clarity to U.S. Customs and Border Protection in determining the validity of a certificate, and would ensure that the Commission periodically confirms PVO information previously submitted to the Commission. Further, the proposed rule would also provide that the Commission, for good cause, could issue a certificate with an expiration date less than 5 years, which would provide for issuance of short-term certificates to PVOs that operate from U.S. ports for a short period.

#### Voluntary Resolution of Passenger Claims in the Event of Nonperformance

Though not part of this rulemaking, we desire to call the attention of the public to the services provided by the Commission’s Office of Consumer Affairs and Dispute Resolution Services (CADRS), which provides a number of services designed to assist passengers with difficulties in dealing with cruise operators through its Ombudsman Service. The CADRS staff is trained to serve as third-party neutrals in a facilitative manner.

#### Regulatory Impact

In 2003, the Commission adopted a presumption that PVOs generally are not small businesses under the Small Business Regulatory Enforcement Fairness Act amendments to the Regulatory Flexibility Act because they are generally large companies with more than 500 employees, the measure used by the North American Industrial Classification System published by the Office of Management and Budget.<sup>12</sup>

<sup>11</sup> On October 31, 1988, the International Maritime Organization (IMO) convened the International Conference on the Harmonized Systems of Survey and Certification to adopt the Protocol of 1988 relating to the International Convention for Safety of Life at Sea (SOLAS), 1974, and the Protocol of 1988 relating to the International Convention on Load Lines, 1966. By adopting these 1988 Protocols, IMO standardized the term of validity for certificates and intervals for vessel inspections required by the Conventions. These 1988 Protocols entered into force as international law on February 3, 2000. See also 65 FR 6494 (February 9, 2000).

<sup>12</sup> See FMC Policy and Procedures Regarding Proper Consideration of Small Entities in Rulemakings (February 7, 2003).

Therefore, no small entities will be affected by the proposed rule.

Any potential impact from the proposed rule would be relatively small. While the rule as proposed would require some PVOs to furnish an increased amount of proof of financial responsibility, the estimated cost of that increase is not significant. Additionally, Section 540.9(j)(ii) of the proposed rule would enable those PVOs with UPR not exceeding 150% of the coverage cap to request that the Commission consider alternative forms of financial protection.

The proposed rule would increase total net financial protections for cruise passengers by approximately \$144 million while likely providing approximately \$37 million in reduced bond requirements for smaller PVOs. Surety companies have informed the Commission that bond premiums typically range from 0.5% to 3% of a bond’s face value, depending on a company’s financial health, which results in a total net increase in premium costs of between \$685,000 and \$4.1 million. This includes a likely reduction in premium costs of between \$186,000 and \$1.1 million for small PVOs.

Accordingly, the Chairman of the Commission certifies, pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, that the proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. Members of the public may comment on this certification.

This rule is not a “major rule” under 5 U.S.C. 804(2).

The collection of information requirements contained in this proposed 46 CFR Part 540 have been submitted to the Office of Management and Budget for review under section 3504(h) of the Paperwork Reduction Act of 1980, as amended. Send comments regarding the burden estimate or any other aspect of the collection of information, including suggestions for reducing this burden, to Managing Director, Federal Maritime Commission, 800 North Capitol Street, NW., Washington, DC 20573, e-mail: [OMD@fmc.gov](mailto:OMD@fmc.gov), or fax: (202) 523–3646; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Federal Maritime Commission, 17th Street and Pennsylvania Avenue, NW., Washington, DC 20503, e-mail: [OIRASubmission@OMB.EOP.GOV](mailto:OIRASubmission@OMB.EOP.GOV), or fax: (202) 395–5806.

<sup>8</sup> See Docket No. 79–93, Final Rule, 45 FR 23428 (April 7, 1980), and Docket No. 90–01, Final Rule, 55 FR 34564 (August 23, 1990).

<sup>9</sup> Docket No. 90–01, Final Rule, 55 FR 34564, 34566 (August 23, 1990).

<sup>10</sup> See 35 CFR 138.240 (procedure for calculating limit of liability adjustments for inflation).

List of Subjects

46 CFR Part 501

Administrative practice and procedure, Authority delegations, Organization and functions, Seals and insignia.

46 CFR Part 540

Insurance, Maritime carriers, Reporting and recordkeeping requirements, Surety bonds.

For the reasons stated in the supplementary information, the Federal Maritime Commission proposes to amend 46 CFR parts 501 and 540 as follows.

PART 501—THE FEDERAL MARITIME COMMISSION—GENERAL

1. Revise the authority citation for Part 501 to read as follows:

Authority: 5 U.S.C. 551–557, 701–706, 2903 and 6304; 31 U.S.C. 3721; 41 U.S.C. 414 and 418; 44 U.S.C. 501–520 and 3501–3520; 46 U.S.C. 301–307, 40101–41309, 42101–42109, 44101–44106; Pub. L. 89–56, 70 Stat. 195; 5 CFR Part 2638; Pub. L. 104–320, 110 Stat. 3870.

2. Revise § 501.5(g)(2) to read as follows:

§ 501.5 Functions of the organizational components of the Federal Maritime Commission.

\* \* \* \* \*

(g) \* \* \*

(2) Through the Office of Passenger Vessels and Information Processing, has responsibility for reviewing applications for certificates of financial responsibility with respect to passenger vessels, reviewing requests for substitution of alternative forms of financial protection, managing all activities with respect to evidence of financial responsibility for OTIs and passenger vessel owner/operators, and for developing and maintaining all Bureau database and records of OTI applicants and licensees.

\* \* \* \* \*

§ 501.26 [Amended]

3. In § 501.26, amend the introductory text by removing the word “redelgated” and adding the word “re delegated” in its place.

PART 540—PASSENGER VESSEL FINANCIAL RESPONSIBILITY

4. The authority citation for Part 540 continues to read as follows:

Authority: 5 U.S.C. 552, 553; 31 U.S.C. 9701; 46 U.S.C. 305, 44101–44106.

§ 540.1 [Amended]

5. In § 540.1(b), add the phrase “by the Department of Homeland Security” after the phrase “clearance”.

6. Amend § 540.2 by revising paragraphs (a) and (i) to read as follows:

§ 540.2 Definitions.

\* \* \* \* \*

(a) Person includes individuals, limited liability companies, corporations, partnerships, associations, and other legal entities existing under or authorized by the laws of the United States or any State thereof or the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands or any territory or possession of the United States, or the laws of any foreign country.

\* \* \* \* \*

(i) Unearned passenger revenue means that passenger revenue received for water transportation and all other accommodations, services, and facilities relating thereto not yet performed; this may include port fees and taxes, but excludes such items as airfare, hotel accommodations, and tour excursions.

\* \* \* \* \*

7. Revise § 540.4 to read as follows:

§ 540.4 Procedure for establishing financial responsibility.

(a) In order to comply with section 3 of Public Law 89–777 (46 U.S.C. 44101–44102, 44104–44106) enacted November 6, 1966, there must be filed with the Federal Maritime Commission an application on Form FMC–131 for a Certificate of Financial Responsibility for Indemnification of Passengers for Nonperformance of Transportation. Copies of Form FMC–131 may be obtained from the Commission’s Web site at http://www.fmc.gov, or from the Bureau of Certification and Licensing, Federal Maritime Commission, Washington, DC 20573.

(b) An application for a Certificate (Performance) shall be filed with the Bureau of Certification and Licensing, Federal Maritime Commission, by the vessel owner or charterer at least 60 days in advance of the arranging, offering, advertising, or providing of any water transportation or tickets in connection therewith except that any person other than the owner or charterer who arranges, offers, advertises, or provides passage on a vessel may apply for a Certificate (Performance). Late filing of the application will be permitted without penalty only for good cause shown.

(c) All applications and evidence required to be filed with the Commission shall be in English, and any monetary terms shall be expressed in terms of U.S. currency.

(d) The Commission shall have the privilege of verifying any statements

made or any evidence submitted under the rules of this subpart.

(e) An application for a Certificate (Performance), excluding an application for the addition or substitution of a vessel to the applicant’s fleet, shall be accompanied by a filing fee remittance of \$2,767. An application for a Certificate (Performance) for the addition or substitution of a vessel to the applicant’s fleet shall be accompanied by a filing fee remittance of \$1,382. Administrative changes, such as the renaming of a vessel will not incur any additional fees.

(f) The application shall be signed by a duly authorized officer or representative of the applicant with a copy of evidence of his or her authority.

(g) In the event of any material change in the facts as reflected in the application, an amendment to the application shall be filed no later than fifteen (15) days following such change.

For the purpose of this subpart, a material change shall be one which: (1) results in a decrease in the amount submitted to establish financial responsibility to a level below that required to be maintained under the rules of this subpart, or (2) requires that the amount to be maintained be increased above the amount submitted to establish financial responsibility.

(h) Notice of the application for issuance, denial, revocation, suspension, or modification of any such Certificate will be published on the Commission’s Web site at http://www.fmc.gov.

8. Amend § 540.5 as follows:

a. Revise paragraph (a)(1)(i) to read as follows; and

b. Amend paragraph (c) by adding a sentence at the end of the paragraph to read as follows.

§ 540.5 Insurance, guaranties, and escrow accounts.

\* \* \* \* \*

(a) \* \* \*

(1) \* \* \* (i) Until notice in writing has been given to the assured or to the insurer and to the Bureau of Certification and Licensing at its office in Washington, DC 20573, by certified mail or courier service, and

\* \* \* \* \*

(c) \* \* \* Copies of Form FMC–133A may be obtained from the Commission’s Web site at http://www.fmc.gov or from the Bureau of Certification and Licensing.

\* \* \* \* \*

9. Amend § 540.6(a) by adding a sentence at the end of the paragraph to read as follows:

**§ 540.6 Surety bonds.**

(a) \* \* \* Copies of Form FMC-132A may be obtained from the Commission's Web site at <http://www.fmc.gov> or from the Bureau of Certification and Licensing.

\* \* \* \* \*

10. Revise § 540.7 to read as follows:

**§ 540.7 Evidence of financial responsibility.**

Where satisfactory proof of financial responsibility has been established:

(a) A Certificate (Performance) covering specified vessels shall be issued evidencing the Commission's finding of adequate financial responsibility to indemnify passengers for nonperformance of water transportation.

(b) The period covered by the Certificate (Performance) shall be five (5) years, unless another termination date has been specified thereon.

11. Amend § 540.8 by revising paragraphs (a) and (b)(3) to read as follows:

**§ 540.8 Denial, revocation, suspension, or modification.**

(a) Prior to the denial, revocation, suspension, or modification of a Certificate (Performance), the Commission shall notify the applicant of its intention to deny, revoke, suspend, or modify and shall include with the notice the reason(s) for such action. If the applicant, within 20 days after the receipt of such notice, requests a hearing to show that the evidence of financial responsibility filed with the Commission does meet the rules of this subpart, such hearing shall be granted by the Commission. Regardless of a hearing, a Certificate (Performance) shall become null and void upon cancellation or termination of the surety bond, evidence of insurance, guaranty, or escrow account.

(b) \* \* \*

(3) Failure to comply with or respond to lawful inquiries, requests for information, rules, regulations, or orders of the Commission pursuant to the rules of this subpart.

\* \* \* \* \*

12. Amend § 540.9 by revising paragraphs (c), (e), (h), (j), and (k) to read as follows:

**§ 540.9 Miscellaneous.**

\* \* \* \* \*

(c) The Commission's bond (Form FMC-132A), guaranty (Form FMC-133A), and application (Form FMC-131) forms may be obtained from the Commission's Web site at <http://www.fmc.gov> or from the Bureau of

Certification and Licensing at its office in Washington, DC 20573.

\* \* \* \* \*

(e) Each applicant, insurer, escrow agent and guarantor shall furnish a written designation of a person in the United States as legal agent for service of process for the purposes of the rules of this subpart. Such designation must be acknowledged, in writing, by the designee and filed with the Commission. In any instance in which the designated agent cannot be served because of death, disability, or unavailability, the Secretary, Federal Maritime Commission, will be deemed to be the agent for service of process. A party serving the Secretary in accordance with the above provision must also serve the certificant, insurer, escrow agent, or guarantor, as the case may be, by certified mail or courier service at the last known address of them on file with the Commission.

\* \* \* \* \*

(h) Every person who has been issued a Certificate (Performance) must submit to the Commission a semi-annual statement of any changes with respect to the information contained in the application or documents submitted in support thereof or a statement that no changes have occurred. Negative statements are required to indicate no change. These statements must cover the 6-month period of January through June and July through December, and include a statement of the highest unearned passenger vessel revenue accrued for each month in the 6-month reporting period. Such statements will be due within 30 days after the close of every such 6-month period. The reports required by this paragraph shall be submitted to the Bureau of Certification and Licensing at its office in Washington, DC 20573 by certified mail, courier service, or electronic submission.

\* \* \* \* \*

(j) The amount of:

(1) The insurance as specified in § 540.5(a),

(2) The escrow account as specified in § 540.5(b),

(3) The guaranty as specified in § 540.5(c), or

(4) The surety bond as specified in § 540.6 shall not be required to exceed \$15 million for one year after the effective date of this rule. Twelve (12) months after the effective date of this rule, the amount shall not exceed \$22 million, and twenty four (24) months after the effective date of this rule, the amount shall not exceed \$30 million.

(i) Every two years, on the anniversary after the cap on required financial

responsibility reaches \$30 million, the cap shall automatically adjust to the nearest \$1 million based on changes as reflected in the U.S. Bureau of Labor Statistics' Consumer Price Index.

(ii) A certificant whose unearned passenger revenue at no time for the two immediately prior fiscal years has exceeded 150% of the required cap may submit a request to the Commission to substitute alternative forms of financial protection to evidence the financial responsibility as otherwise provided in this part. The Commission will consider such requests on a case by case basis. In determining whether and to what level to reduce the required amount, the Commission may consider the extent to which other statutory requirements provide relevant protections, the certificant's financial data, and other specific facts and circumstances.

(k) Every person in whose name a Certificate (Performance) has been issued shall be deemed to be responsible for any unearned passage money or deposits held by its agents or any other person authorized by the certificant to sell the certificant's tickets. Certificants shall promptly notify the Commission of any arrangements, including charters and subcharters, made by it or its agent with any person pursuant to which the certificant does not assume responsibility for all passenger fares and deposits collected by such person or organization and held by such person or organization as deposits or payment for services to be performed by the certificant. If responsibility is not assumed by the certificant, the certificant also must inform such person or organization of the certification requirements of Public Law 89-777 and not permit use of its vessel, name or tickets in any manner unless and until such person or organization has obtained the requisite Certificate (Performance) from the Commission. Failure to follow the procedures in this paragraph means the certificant shall retain full financial responsibility for indemnification of passengers for nonperformance of the transportation.

13. Remove Form FMC-131 to Subpart A of part 540.

14. Revise Form FMC-132A to Subpart A of Part 540 to read follows:

FORM FMC-132A TO SUBPART A OF PART 540

FORM FMC-132A

FEDERAL MARITIME COMMISSION

Passenger Vessel Surety Bond (Performance)

Surety Co. Bond No. \_\_\_\_\_  
FMC Certificate No. \_\_\_\_\_

Know all men by these presents, that we \_\_\_\_\_ (Name of applicant), of \_\_\_\_\_ (City), \_\_\_\_\_ (State and country), as Principal (hereinafter called Principal), and \_\_\_\_\_ (Name of surety), a company created and existing under the laws of \_\_\_\_\_ (State and country) and authorized to do business in the United States as Surety (hereinafter called Surety) are held and firmly bound unto the United States of America in the penal sum of \_\_\_\_\_, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents. Whereas the Principal intends to become a holder of a Certificate (Performance) pursuant to the provisions of subpart A of part 540 of title 46, Code of Federal Regulations and has elected to file with the Federal Maritime Commission such a bond to insure financial responsibility and the supplying transportation and other services subject to subpart A of part 540 of title 46, Code of Federal Regulations, in accordance with the ticket contract between the Principal and the passenger, and

Whereas this bond is written to assure compliance by the Principal as an authorized holder of a Certificate (Performance) pursuant to subpart A of part 540 of title 46, Code of Federal Regulations, and shall inure to the benefit of any and all passengers to whom the Principal may be held legally liable for any of the damages herein described. Now, therefore, the condition of this obligation is such that if the Principal shall pay or cause to be paid to passengers any sum or sums for which the Principal may be held legally liable by reason of the Principal's failure faithfully to provide such transportation and other accommodations and services in accordance with the ticket contract made by the Principal and the passenger while this bond is in effect for the supplying of transportation and other services pursuant to and in accordance with the provisions of subpart A of part 540 of title 46, Code of Federal Regulations, then this obligation shall be void, otherwise, to remain in full force and effect.

The liability of the Surety with respect to any passenger shall not exceed the passage price paid by or on behalf of such passenger. The liability of the Surety shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penalty of the bond,

but in no event shall the Surety's obligation hereunder exceed the amount of said penalty. The Surety agrees to furnish written notice to the Federal Maritime Commission forthwith of all suits filed, judgments rendered, and payments made by said Surety under this bond.

This bond is effective the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, 12:01 a.m., standard time at the address of the Principal as stated herein and shall continue in force until terminated as hereinafter provided. The Principal or the Surety may at any time terminate this bond by written notice sent by certified mail, courier service, or other electronic means such as email and fax to the other and to the Federal Maritime Commission at its office in Washington, D.C., such termination to become effective thirty (30) days after actual receipt of said notice by the Commission, except that no such termination shall become effective while a voyage is in progress. The Surety shall not be liable hereunder for any refunds due under ticket contracts made by the Principal for the supplying of transportation and other services after the termination of this bond as herein provided, but such termination shall not affect the liability of the Surety hereunder for refunds arising from ticket contracts made by the Principal for the supplying of transportation and other services prior to the date such termination becomes effective.

The underwriting Surety will promptly notify the Director, Bureau of Certification and Licensing, Federal Maritime Commission, Washington, DC 20573, of any claim(s) or disbursements against this bond.

In witness whereof, the said Principal and Surety have executed this instrument on \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

#### PRINCIPAL

Name \_\_\_\_\_  
By \_\_\_\_\_  
(Signature and title)  
Witness \_\_\_\_\_

#### SURETY

[SEAL]  
Name \_\_\_\_\_  
By \_\_\_\_\_  
(Signature and title)  
Witness \_\_\_\_\_

Only corporations or associations of individual insurers may qualify to act as surety, and they must establish to the satisfaction of the Federal Maritime Commission legal authority to assume

the obligations of surety and financial ability to discharge them.

15. Revise Form FMC-133A to Subpart A of Part 540 to read follows:

FORM FMC-133A TO SUBPART A OF PART 540

FORM FMC-133A

FEDERAL MARITIME COMMISSION

Guaranty in Respect of Liability for Nonperformance, Section 3 of the Act

Guaranty No \_\_\_\_\_  
FMC Certificate No. \_\_\_\_\_

1. Whereas \_\_\_\_\_ (Name of applicant) (Hereinafter referred to as the "Applicant") is the Owner or Charterer of the passenger Vessel(s) specified in the annexed Schedule ("the Vessels"), which are or may become engaged in voyages to or from United States ports, and the Applicant desires to establish its financial responsibility in accordance with section 3 of Pub. L. 89-777, 89th Congress, approved November 6, 1966 ("the Act") then, provided that the Federal Maritime Commission ("FMC") shall have accepted, as sufficient for that purpose, the Applicant's application, supported by this Guaranty, and provided that FMC shall issue to the Applicant a Certificate (Performance) ("Certificate"), the undersigned Guarantor hereby guarantees to discharge the Applicant's legal liability to indemnify the passengers of the Vessels for nonperformance of transportation within the meaning of section 3 of the Act, in the event that such legal liability has not been discharged by the Applicant within 21 days after any such passenger has obtained a final judgment (after appeal, if any) against the Applicant from a United States Federal or State Court of competent jurisdiction, or has become entitled to payment of a specified sum by virtue of a compromise settlement agreement made with the Applicant, with the approval of the Guarantor, whereby, upon payment of the agreed sum, the Applicant is to be fully, irrevocably and unconditionally discharged from all further liability to such passenger for such nonperformance.

2. The Guarantor's liability under this Guaranty in respect to any passenger shall not exceed the amount paid by such passenger; and the aggregate amount of the Guarantor's liability under this Guaranty shall not exceed \$\_\_\_\_\_.

3. The Guarantor's liability under this Guaranty shall attach only in respect of events giving rise to a cause of action against the Applicant, in respect of any of the Vessels, for nonperformance of

transportation within the meaning of Section 3 of the Act, occurring after the Certificate has been granted to the Applicant, and before the expiration date of this Guaranty, which shall be the earlier of the following dates:

(a) The date whereon the Certificate is withdrawn, or for any reason becomes invalid or ineffective; or

(b) The date 30 days after the date of receipt by FMC of notice in writing delivered by certified mail, courier service or other electronic means such as email and fax, that the Guarantor has elected to terminate this Guaranty except that:

(i) If, on the date which would otherwise have been the expiration date under the foregoing provisions (a) or (b) of this Clause 3, any of the Vessels is on a voyage whereon passengers have been embarked at a United States port, then the expiration date of this Guaranty shall, in respect of such Vessel, be postponed to the date on which the last passenger on such voyage shall have finally disembarked; and

(ii) Such termination shall not affect the liability of the Guarantor for refunds arising from ticket contracts made by the Applicant for the supplying of transportation and other services prior to the date such termination becomes effective.

4. If, during the currency of this Guaranty, the Applicant requests that a vessel owned or operated by the Applicant, and not specified in the annexed Schedule, should become subject to this Guaranty, and if the Guarantor accedes to such request and so notifies FMC in writing or other electronic means such as email and fax, then, provided that within 30 days of receipt of such notice, FMC shall have granted a Certificate, such Vessel shall thereupon be deemed to be one of the Vessels included in the said Schedule and subject to this Guaranty.

5. The Guarantor hereby designates \_\_\_\_\_, with offices at \_\_\_\_\_, as the Guarantor's legal agent for service of process for the purposes of the Rules of the Federal Maritime Commission, subpart A of part 540 of title 46, Code of Federal Regulations, issued under Section 3 of Pub. L. 89-777 (80 Stat. 1357, 1358), entitled "Security for the Protection of the Public."

\_\_\_\_\_  
(Place and Date of Execution)

\_\_\_\_\_  
(Type Name of Guarantor)

\_\_\_\_\_  
(Type Address of Guarantor)

By \_\_\_\_\_  
(Signature and Title)

Schedule of Vessels Referred to in Clause 1

Vessels Added to This Schedule in Accordance With Clause 4

16. Revise Appendix A to Subpart A of Part 540 to read as follows:

**Appendix A to Subpart A of Part 540—  
Example of Escrow Agreement for Use  
Under 46 CFR 540.5(b)**

**ESCROW AGREEMENT**

THIS ESCROW AGREEMENT, made as of this \_\_\_\_ day of (month & year), by and between (Customer), a corporation/company having a place of business at ("Customer") \_\_\_\_\_ and (Banking Institution name & address) a banking corporation, having a place of business at ("Escrow Agent").

Witnesseth:

WHEREAS, Customer wishes to establish an escrow account in order to provide for the indemnification of passengers in the event of non-performance of water transportation to which such passengers would be entitled, and to establish Customer's financial responsibility therefore; and

WHEREAS, Escrow Agent wishes to act as Escrow Agent of the escrow account established hereunder;

NOW, THEREFORE, in consideration of the premises and covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. Customer has established on (month & year) (the "Commencement Date") an escrow account with the Escrow Agent which escrow account shall hereafter be governed by the terms of this Agreement (the "Escrow Account"). Escrow Agent shall maintain the Escrow Account in its name, in its capacity as Escrow Agent.

2. Customer will determine, as of the date prior to the Commencement Date, the amount of unearned passenger revenue, including any funds to be transferred from any predecessor Escrow Agent. Escrow Agent shall have no duty to calculate the amount of unearned passenger revenue. Unearned Passenger Revenues are defined as that passenger revenue received for water transportation and all other accommodations, services and facilities relating thereto not yet performed. 46 CFR 540.2(i).

3. Customer will deposit on the Commencement Date into the Escrow Account cash in an amount equal to the amount of Unearned Passenger Revenue determined under Paragraph 2 above plus a cash amount ("the Fixed Amount") equal to (10 percent of the Customer's highest Unearned Passenger Revenue for the prior two fiscal years. For periods on or after (year of agreement (2009)), the Fixed Amount shall be determined by the Commission on an annual basis, in accordance with 46 CFR Part 540.

4. Customer acknowledges and agrees that until such time as a cruise has been completed and Customer has taken the actions described herein, Customer shall not

be entitled, nor shall it have any interest in any funds deposited with Escrow Agent to the extent such funds represent Unearned Passenger Revenue.

5. Customer may, at any time, deposit additional funds consisting exclusively of Unearned Passenger Revenue and the Fixed Amount, into the Escrow Account and Escrow Agent shall accept all such funds deposit and shall manage all such funds pursuant to the terms of this Agreement.

6. After the establishment of the Escrow Account, as provided in Paragraph 1, Customer shall on a weekly basis on each (identify day of week), or if Customer or Escrow Agent is not open for business on (identify day of week) then on the next business day that Customer and Escrow Agent are open for business recompute the amount of Unearned Passenger Revenue as of the close of business on the preceding business day (hereinafter referred to as the "Determination Date") and deliver a Recomputation Certificate to Escrow Agent on such date. In each such weekly recomputation Customer shall calculate the amount by which Unearned Passenger Revenue has decreased due to (i) the cancellation of reservations and the corresponding refund of monies from Customer to the persons or entities canceling such reservations; (ii) the amount which Customer has earned as revenue as a result of any cancellation fee charged upon the cancellation of any reservations; (iii) the amount which Customer has earned due to the completion of cruises; and (iv) the amount by which Unearned Passenger Revenue has increased due to receipts from passengers for future water transportation and all other accommodations, services and facilities relating thereto and not yet performed.

The amount of Unearned Passenger Revenue as recomputed shall be compared with the amount of Unearned Passenger Revenue for the immediately preceding period to determine whether there has been a net increase or decrease in Unearned Passenger Revenue. If the balance of the Escrow Account as of the Determination Date exceeds the sum of the amount of Unearned Passenger Revenue, as recomputed, plus the Fixed Amount then applicable, then Escrow Agent shall make any excess funds in the Escrow Account available to Customer. If the balance in the Escrow Account as of the Determination Date is less than the sum of the amount of Unearned Passenger Revenue, as recomputed, plus an amount equal to the Fixed Amount, Customer shall deposit an amount equal to such deficiency with the Escrow Agent. Such deposit shall be made in immediately available funds via wire transfer or by direct transfer from the Customer's U.S. Bank checking account before the close of business on the next business day following the day on which the Recomputation Certificate is received by Escrow Agent. The Escrow Agent shall promptly notify the Commission within two business days any time a deposit required by a Recomputation Certificate delivered to the Escrow Agent is not timely made.

7. Customer shall furnish a Recomputation Certificate, in substantially the form attached

hereto as Annex 1, to the Federal Maritime Commission (the "Commission") and to the Escrow Agent setting forth the weekly recomputation of Unearned Passenger Revenue required by the terms of Paragraph 6 above. Customer shall mail or fax to the Commission and deliver to the Escrow Agent the required Recomputation Certificate before the close of business on the business day on which Customer recomputes the amount of Unearned Passenger Revenue.

Notwithstanding any other provision herein to the contrary, Escrow Agent shall not make any funds available to Customer out of the Escrow Account because of a decrease in the amount of Unearned Passenger Revenue or otherwise, until such time as Escrow Agent receives the above described Recomputation Certificate from Customer, which Recomputation Certificate shall include the Customer's verification certification in the form attached hereto as Annex 1. The copies of each Recomputation Certificate to be furnished to the Commission shall be mailed to the Commission at the address provided in Paragraph 25 herein. If copies are not mailed to the Commission, faxed or e-mailed copies shall be treated with the same legal effect as if an original signature was furnished. No repayment of the Fixed Amount may be made except upon approval of the Commission.

Within fifteen (15) days after the end of each calendar month, Escrow Agent shall provide to Customer and to the Commission at the addresses provided in Paragraph 25 below, a comprehensive statement of the Escrow Account. Such statement shall provide a list of assets in the Escrow Account, the balance thereof as of the beginning and end of the month together with the original cost and current market value thereof, and shall detail all transactions that took place with respect to the assets and investments in the Escrow Account during the preceding month.

8. At the end of each quarter of Customer's fiscal year, Customer shall cause the independent auditors then acting for it to conduct an examination in accordance with generally accepted auditing standards with respect to the weekly Recomputation Certificates furnished by Customer of the Unearned Passenger Revenues and the amounts to be deposited in the Escrow Account and to express their opinion within forty-five (45) days after the end of such quarter as to whether the calculations at the end of each fiscal quarter are in accordance with the provisions of Paragraph 6 of this Agreement. The determination of Unearned Passenger Revenue of such independent auditors shall have control over any computation of Unearned Passenger Revenue by Customer in the event of any difference between such determinations. To the extent that the actual amount of the Escrow Account is less than the amount determined by such independent auditors to be required to be on deposit in the Escrow Account, Customer shall immediately deposit an amount of cash into the Escrow Account sufficient to cause the balance of the Escrow Account to equal the amount determined to be so required. Such deposit shall be completed no later than the business day after receipt by the

Escrow Agent of the auditor's opinion containing the amount of such deficiency.

The opinion of such independent auditors shall be furnished by such auditors directly to Customer, to the Commission and to the Escrow Agent at their addresses contained in this Agreement. In the event that a required deposit to the Escrow Agent is not made within one Business Day after receipt of an auditor's report or a Recomputation Certificate, Escrow Agent shall send notification to the Commission within the next two Business Days.

9. Escrow Agent shall invest the funds in the Escrow Account in Qualified Investments as directed by Customer in its sole and absolute discretion. "Qualified Investments" means, to the extent permitted by applicable law:

(a) Government obligations or obligations of any agency or instrumentality of the United States of America;

(b) Commercial paper issued by a United States company rated in the two highest numerical "A" categories (without regard to further gradation or refinement of such rating category) by Standard & Poor's Corporation, or in the two highest numerical "Prime" categories (without regard to further gradation or refinement of such rating) by Moody's Investor Services, Inc.;

(c) Certificates of deposit and money market accounts issued by any United States bank, savings institution or trust company, including the Escrow Agent, and time deposits of any bank, savings institution or trust company, including the Escrow Agent, which are fully insured by the Federal Deposit Insurance Corporation;

(d) Corporate bonds or obligations which are rated by Standard & Poor's Corporation or Moody's Investors Service, Inc. in one of their three highest rating categories (without regard to any gradation or refinement of such rating category by a numerical or other modifier); and

(e) Money market funds registered under the Federal Investment Company Act of 1940, as amended, and whose shares are registered under the Securities Act of 1933, as amended, and whose shares are rated "AAA", "AA+" or "AA" by Standard & Poor's Corporation.

10. All interest and other profits earned on the amounts placed in the Escrow Account shall be credited to Escrow Account.

11. This Agreement has been entered into by the parties hereto, and the Escrow Account has been established hereunder by Customer, to establish the financial responsibility of Customer as the owner, operator or charterer of the passenger vessel(s) (see Exhibit A), in accordance with Section 3 of Public Law 89-777, 89th Congress, approved November 6, 1966 (the "Act"). The Escrow Account shall be held by Escrow Agent in accordance with the terms hereof, to be utilized to discharge Customer's legal liability to indemnify the passengers of the named vessel(s) for non-performance of transportation within the meaning of Paragraph 3 of the Act. The Escrow Agent shall make indemnification payments pursuant to written instructions from Customer, on which the Escrow Agent may rely, or in the event that such legal liability

has not been discharged by Customer within twenty-one (21) days after any such passenger has obtained a final judgment (after appeal, if any) against Customer from a United States Federal or State Court of competent jurisdiction the Escrow Agent is authorized to pay funds out of the Escrow Account, after such twenty-one day period, in accordance with and pursuant to the terms of an appropriate order of a court of competent jurisdiction on receipt of a certified copy of such order.

As further security for Customer's obligation to provide water transportation to passengers holding tickets for transportation on the passenger vessel(s) (see Exhibit A) Customer will pledge to each passenger who has made full or partial payment for future passage on the named vessel(s) an interest in the Escrow Account equal to such payment. Escrow Agent is hereby notified of and acknowledges such pledges. Customers' instructions to Escrow Agent to release funds from the Escrow Account as described in this Agreement shall constitute a certification by Customer of the release of pledge with respect to such funds due to completed, canceled or terminated cruises. Furthermore, Escrow Agent agrees to hold funds in the Escrow Account until directed by Customer or a court order to release such funds as described in this Agreement. Escrow Agent shall accept instructions only from Customer, acting on its own behalf or as agent for its passengers, and shall not have any obligations at any time to act pursuant to instructions of Customer's passengers or any other third parties except as expressly described herein. Escrow Agent hereby waives any right of offset to which it is or may become entitled with regard to the funds on deposit in the Escrow Account which constitute Unearned Passenger Revenue.

12. Customer agrees to provide to the Escrow Agent all information necessary to facilitate the administration of this Agreement and the Escrow Agent may rely upon any information so provided.

13. Customer hereby warrants and represents that it is a corporation in good standing in its State of organization and that is qualified to do business in the State of. Customer further warrants and represents that (i) it possesses full power and authority to enter into this Agreement and fulfill its obligations hereunder and (ii) that the execution, delivery and performance of this Agreement have been authorized and approved by all required corporate actions.

14. Escrow Agent hereby warrants and represents that it is a national banking association in good standing. Escrow Agent further warrants and represents that (i) it has full power and authority to enter into this Agreement and fulfill its obligations hereunder and (ii) that the execution, delivery and performance of this Agreement have been authorized and approved by all required corporate actions.

15. This Agreement shall have a term of one (1) year and shall be automatically renewed for successive one (1) year terms unless notice of intent not to renew is delivered to the other party to this Agreement and to the Commission at least 90 days prior to the expiration of the current term of this

Agreement. Notice shall be given by certified mail to the parties at the addresses provided in Paragraph 25 below. Notice shall be given by certified mail to the Commission at the address specified in this Agreement.

16. (a) Customer hereby agrees to indemnify and hold harmless Escrow Agent against any and all claims, losses, damages, liabilities, cost and expenses, including litigation, arising hereunder, which might be imposed or incurred on Escrow Agent for any acts or omissions of the Escrow Agent or Customer, not caused by the negligence or willful misconduct of the Escrow Agent. The indemnification set forth herein shall survive the resignation or removal of the Escrow Agent and the termination of this agreement.

(b) In the event of any disagreement between parties which result in adverse claims with respect to funds on deposit with Escrow Agent or the threat thereof, Escrow Agent may refuse to comply with any demands on it with respect thereto as long as such disagreement shall continue and in so refusing, Escrow Agent need not make any payment and Escrow Agent shall not be or become liable in any way to Customer or any third party (whether for direct, incidental, consequential damages or otherwise) for its failure or refusal to comply with such demands and it shall be entitled to continue so to refrain from acting and so refuse to act until such conflicting or adverse demands shall finally terminate by mutual written agreement acceptable to Escrow Agent or by a final, non-appealable order of a court of competent jurisdiction.

17. Escrow Agent shall be entitled to such compensation for its services hereunder as may be agreed upon from time to time by Escrow Agent and Customer and which shall initially be set forth in a separate letter agreement between Escrow Agent and Customer. This Agreement shall not become effective until such letter agreement has been executed by both parties hereto and confirmed in writing to the Commission.

18. Customer may terminate this Agreement and engage a successor escrow agent, after giving at least 90 days written termination notice to Escrow Agent prior to terminating Escrow Agent if such successor agent is a commercial bank whose passbook accounts are insured by the Federal Deposit Insurance Corporation and such successor agrees to the terms of this agreement, or if there is a new agreement then such termination shall not be effective until the new agreement is approved in writing by the Commission. Upon giving the written notice to Customer and the Commission, Escrow Agent may terminate any and all duties and obligations imposed on Escrow Agent by this Agreement effective as of the date specified in such notice, which date shall be at least 90 days after the date such notice is given. All escrowed funds as of the termination date specified in the notice shall be turned over to the successor escrow agent, or if no successor escrow agent has been named within 90 days after the giving of such notice, then all such escrowed funds for sailing scheduled to commence after the specified termination date shall be returned to the person who paid such passage fares upon written approval of the Commission. In the

event of any such termination where the Escrow Agent shall be returning payments to the passengers, then Escrow Agent shall request from Customer a list of passenger names, addresses, deposit/fare amounts and other information needed to make refunds. On receipt of such list, Escrow Agent shall return all passage fares held in the Escrow Account as of the date of termination specified in the notice to the passengers, excepting only amounts Customer is entitled to receive pursuant to the terms of this Agreement for cruises completed through the termination date specified in the notice, and all interest which shall be paid to Customer.

In the event of termination of this Agreement and if alternative evidence of financial responsibility has been accepted by the Commission and written evidence satisfactory to Escrow Agent of the Commission's acceptance is presented to Escrow Agent, then Escrow Agent shall release to Customer all passage fares held in the Escrow Account as of the date of termination specified in the notice. In the event of any such termination where written evidence satisfactory to Escrow Agent of the Commission's acceptance has not been presented to Escrow Agent, then Escrow Agent shall request from Customer a list of passenger names, addresses, deposit/fare amounts and other information needed to make refunds. On receipt of such list, Escrow Agent shall return all passage fares held in the Escrow Account as of the date of termination specified in the notice to the passengers, excepting only amounts Customer is entitled to receive pursuant to the terms of this Agreement for cruises completed through the termination date specified in the notice, and all interest which shall be paid to Customer. Upon termination, Customer shall pay all costs and fees previously earned or incurred by Escrow Agent through the termination date.

19. Neither Customer nor Escrow Agent shall have the right to sell, pledge, hypothecate, assign, transfer or encumber funds or assets in the Escrow Account except in accordance with the terms of this Agreement.

20. This Agreement is for the benefit of the parties hereto and, accordingly, each and every provision hereof shall be enforceable by any or each or both of them. Additionally, this Agreement shall be enforceable by the Commission. However, this Agreement shall not be enforceable by any other party, person or entity whatsoever.

21. (a) No amendments, modifications or other change in the terms of this Agreement shall be effective for any purpose whatsoever unless agreed upon in writing by Escrow Agent and Customer and approved in writing by the Commission.

(b) No party hereto may assign its rights or obligations hereunder without the prior written consent of the other, and unless approved in writing by the Commission. The merger of Customer with another entity or the transfer of a controlling interest in the stock of Customer shall constitute an assignment hereunder for which prior written approval of the Commission is required, which approval shall not be unreasonably withheld.

22. The foregoing provisions shall be binding upon undersigned, their assigns, successors and personal representative.

23. The Commission shall have the right to inspect the books and records of the Escrow Agent and those of Customer as related to the Escrow Account. In addition, the Commission shall have the right to seek copies of annual audited financial statements and other financial related information.

24. All investments, securities and assets maintained under the Escrow Agreement will be physically located in the United States.

25. Notices relating to this Agreement shall be sent to Customer at (address) and to Escrow Agent at (address) or to such other address as any party hereto may hereafter designate in writing. Any communication sent to the Commission or its successor organization shall be sent to the following address: Bureau of Certification and Licensing, Federal Maritime Commission, 800 North Capitol, N.W., Washington, D.C. 20573-0001.

26. This agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which when taken together shall constitute one and the same instrument.

27. This Agreement is made and delivered in, and shall be construed in accordance with the laws of the State of \_\_\_\_\_ without regard to the choice of law rules.

IN WITNESS WHEREOF, the undersigned have each caused this Agreement to be executed on their behalf as of the date first above written.

By: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Title: \_\_\_\_\_

#### EXHIBIT A

ESCROW AGREEMENT, dated \_\_\_\_\_ by and between (Customer) and (Escrow Agent).

Passenger Vessels Owned or Chartered

#### ANNEX 1

#### RECOMPUTATION CERTIFICATE

To: Federal Maritime Commission  
And To: ("Bank")

The undersigned, the Controller of \_\_\_\_\_ hereby furnishes this Recomputation Certificate pursuant to the terms of the Escrow Agreement dated \_\_\_\_\_, between the Customer and ("Bank"). Terms herein shall have the same definitions as those in such Escrow Agreement and Federal Maritime Commission regulations.

I. Unearned Passenger Revenue as of ("Date") was:

\$ \_\_\_\_\_  
a. Additions to unearned Passenger Revenue since such date were:

1. Passenger Receipts: \$ \_\_\_\_\_  
2. Other (Specify) \$ \_\_\_\_\_  
3. Total Additions: \$ \_\_\_\_\_

b. Reductions in Unearned Passenger Revenue since such date were:

1. Completed Cruises: \$ \_\_\_\_\_  
2. Refunds and Cancellations: \$ \_\_\_\_\_  
3. Other (Specify) \$ \_\_\_\_\_  
4. Total Reductions: \$ \_\_\_\_\_

II. Unearned Passenger Revenue as of the date Of this Recomputation Certificate is: \$ \_\_\_\_\_

a. Excess Escrow Amount \$ \_\_\_\_\_

III. Plus the Required Fixed Amount: \$ \_\_\_\_\_

IV. Total Required in Escrow: \$ \_\_\_\_\_

V. Current Balance in Escrow Account: \$ \_\_\_\_\_

VI. Amount to be Deposited in Escrow Account: \$ \_\_\_\_\_

VII. Amount of Escrow Account available to Operator: \$ \_\_\_\_\_

VIII. I declare under penalty of perjury that the above information is true and correct.

Dated: \_\_\_\_\_

(Signature)

Name:

Title:

(Signature)

Name:

Title:

By the Commission.

**Karen V. Gregory,**

*Secretary.*

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**BILLING CODE 6730-01-P**