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December 21, 2007

Mr. W. Ralph Basham
Commissioner
U.S. Customs and Border Protection
Department of Homeland Security
1300 Pennsylvania Avenue, NW
Washington, DC 20229

Re: Proposed Interpretation Docket Number USCBP-2007-0098

Dear Commissioner Basham:

On behalf of the U.S. Chamber of Commerce (Chamber), we would like to present our comments for the record on the proposed interpretation of the Passenger Vessel Services Act (PVSA) by the Department of Homeland Security's Bureau of Customs and Border Protection (CBP).

The Chamber is the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region. These members include companies at the heart of America's travel and tourism industry—including cruise lines—one of our Country's most profitable and important. The proposed interpretation of the PVSA would cause severe economic harm to the U.S. tourism industry, as well as the U.S. port industry. Furthermore, CBP did not even conduct the initial regulatory flexibility analysis (IRFA) in direct violation of the Regulatory Flexibility Act.

In essence, CBP's proposed interpretive rule changes the standard that makes "a stop at a foreign port" legitimate, to one that must meet the following criteria:

- 1) The stop lasts at least 48 hours at a foreign port;
- 2) The amount of time at the foreign port is more than 50 percent of the total amount of time at the U.S. ports of call; and,
- 3) The passengers are permitted to go ashore temporarily at the foreign port.

CBP states that this is merely an interpretive rule introduced in response to a request by the U.S. Department of Transportation's Maritime Administration (MARAD). CBP argues that MARAD sought information on the effect of foreign flag cruise ships on the two remaining U.S.

flag cruise ships serving Hawaii and guidance on the legality of some itineraries of foreign flag cruises also serving Hawaii.

Meanwhile, the proposed rule goes beyond Hawaii and the original inquiry to state that: “any cruise itinerary that does not include a foreign port of call that satisfies each of these three criteria” will be found in violation of 19 CFR 4.80a(b)(1).¹ These new legal requirements would have severe economic impacts on many regions of the country outside the “Hawaiian Coastwise Cruises” that the proposed rule purports is its concern.²

For example, 119 foreign flag ships carried over 750,000 passengers from Seattle to Alaska accounting for \$112 million dollars in annual revenues directly into the Alaskan economy.³ The Seattle-Alaska routes satisfy the current PVSA by making a short stop in Canada. Under the proposed rule, these foreign flag cruise ships must spend 48 hours in Canada and have the passengers spend 50 percent of their time at a Canadian port to avoid violating PVSA—with fines of up to \$300 per passenger.⁴

The effects of this proposed rule are not limited to America’s northwest corridor; it will also have dire effects on the travel industry, port industry, and the overall economies of Maine, Florida, and many other popular American cruise ship destinations.

The proposed rule has also been constructed with no real input from the private sector and the industries it would so gravely affect. The median port call visit for any cruise ship is roughly 8 hours in duration.⁵ Creating a 48 hour mandate on these stops greatly increases the cost of operating a cruise ship in the continental United States. In most cases, the 48 hour mandate would make it implausible to maintain the popular three to five days cruises. Strikingly, the proposed rule is written to protect a monopoly of foreign-built ships that are allowed to operate under U.S. Flag through a suspension of the PVSA that took place in 2003.

Finally, CBP has failed to address their obligations under the Regulatory Flexibility Act (RFA). Indeed, the agency has not even offered an explanation as to why they do not believe the RFA applies or why they do not need to perform the analyses specified under the Act. In general, the RFA requires agencies to prepare and publish an initial regulatory flexibility analysis (IRFA) when proposing a regulation, and a final regulatory flexibility analysis (FRFA) when issuing a final rule unless the agency can certify that the regulation will not have “a significant economic impact on a substantial number of small entities.”⁶

The purpose of the RFA is to ensure that agencies both consider the economic impact of regulations on small businesses and look at alternatives that would minimize the economic

¹ *Hawaiian Coastwise Cruises*, 72 Fed. Reg. 65487, 65489 (November 21, 2007) (emphasis added).

² *Id.*

³ Comments submitted by Alaska State Senator Bert K. Stedman (December 18, 2007).

⁴ *Hawaiian Coastwise Cruises*, 72 Fed. Reg. 65487, 65488 (November 21, 2007).

⁵ Internal Cruise Lines International Association statistics (December 20, 2007).

⁶ 5 U.S.C. 603, 604, 605(b).

impact.⁷ Because the CBP does not even provide a discussion on why they believe they do not have to comply with the RFA, we are left to believe that they are not aware of the RFA. CBP is required to at least certify, supported by a factual basis, that the proposed regulation will not have a “significant economic impact on a substantial number of small entities.”⁸

The only conclusion we can draw from the preamble’s absence of a discussion regarding the RFA is that CBP believes that asserting that this regulation is an interpretation of current law is sufficient to dispose of the agency’s obligations under the RFA.⁹ However, a rule is not “interpretive just because the agency says it is.”¹⁰ The proposed rule’s complete overhaul of the current legal environment for the cruise ship industry makes clear that it is not an interpretive rule that “only ‘reminds’ affected parties of existing duties,” but instead a substantive rule with which CBP “intends to create new law, rights or duties.”¹¹ Thus, we expect the agency to provide an appropriate quantitative analysis if they intend to certify this regulation as not triggering the requirements of the Regulatory Flexibility Act.

We wish to reiterate our deep concern with the proposed rule and urge you to fully engage the business community and the industries most affected by it to avoid the unintentional grave negative impact that the proposed rule would have on our economy.

Sincerely,



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⁷ Thomas Sullivan, Chief Counsel for Advocacy, U.S. Small Business Administration, Statement to the House Committee on Small Business, December 6, 2007.

⁸ *Id.*

⁹ *Hawaiian Coastwise Cruises*, 72 Fed. Reg. 65487 (November 21, 2007).

¹⁰ *Chamber of Commerce v. OSHA*, 636 F.2d 464, 468 (D.C. Cir. 1986); see also Lubbers, Jeffrey S., *A Guide to Federal Agency Rulemaking* (4th ed.), pp 73-105, for a complete discussion of the difference between interpretive rules/policy statements versus substantive/legislative rules.

¹¹ *General Motors Corp. v. Ruckelhaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc); see also *Chamber of Commerce v. OSHA*, *supra* note 10 at 469.