DISCOVER FINANCIAL SERVICES

April 4, 2003

02-15

Mr. Bryant L. VanBrakle, Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Room 1046
Washington, D.C. 20573-0001

Dear Mr. VanBrakle:

Discover Bank, and its affiliate, Discover Financial Services, Inc. ("Discover Financial"), appreciate the opportunity to comment on the Notice of Proposed Rulemaking by the Federal Maritime Commission ("FMC") regarding the establishment of passenger vessel financial responsibility under Sections 2 and 3 of Public Law 89-777.

Discover Bank is the issuer of the Discover Card and ranks among the nation's largest issuers of general purpose credit cards. Discover Financial enters into Merchant Services Agreements that enable merchants to accept, and receive settlement payments for, Discover Card transactions. Discover Financial is presently the only entity that is permitted to offer Discover Card acceptance to merchants in the United States. Many Discover Cardmembers use their Discover Cards to reserve passage on cruise lines. If a cruise line that is a party to a Merchant Services Agreement ceases operations and thus fails to provide Discover Cardmembers with cruises, Discover Bank is generally required by the Truth-in-Lending Act to credit Discover Cardmembers' accounts. If the cruise line is insolvent or fails to repay such amounts, Discover Cardmembers have received credits from Discover Bank, but Discover Financial has no opportunity to recover such amounts from the cruise line. Accordingly, Discover Bank and Discover Financial are deeply concerned with the provisions for financial responsibility of cruise line operators mandated by Public Law 89-777.

Discover Bank applauds the FMC's efforts to hold thinly capitalized cruise operators responsible for defaults in performance (i) by lifting the $15 million ceiling in Pub. L. 89-777 on the amount of unearned passenger revenue used to calculate the bond that cruise operators are required to post to ensure

against non-performance, and (ii) by eliminating self-insurance as a means of establishing the financial responsibility of cruise line operators. Both of these changes are justified in light of recent cruise line failures in which cruise operators were unable to honor their reimbursement obligations under Pub. L. 89-777.

Discover Bank strongly objects, however, to the exclusion from unearned passenger revenue of consumer purchases by credit card. The FMC is likely aware of the extent to which consumers use credit cards to make purchases. The first effect of this change is that consumers who purchase cruises using credit cards would not be entitled to the statutory benefits and protection of Public Law 89-777. This creates a situation where Public Law 89-777 will unfairly discriminate against consumers who use credit cards by failing to protect their purchases.

Second, by excluding credit card purchases from the calculation of unearned revenue for which cruise line operators are required to, at least in part, provide coverage, the Notice will ultimately provide consumers with far less protection. By excluding purchases by credit card from unearned revenue, the amount of coverage provided by cruise line operators will decrease. Although this change will be applauded by the cruise line operators regulated by the FMC, the purpose of Public Law 89-777 is to protect consumers. The result of the change is to provide less consumer protection, contrary to the statutory intent.

Third, the effect of the proposed change would be to force credit card companies to subsidize losses by the cruise industry. Not only is this shift in responsibility for losses contrary to the statutory intent of Public Law 89-77, this major policy shift is not authorized by Pub. L. 89-777 or any other statute. Furthermore, this shift exceeds the FMC's rulemaking authority. A policy choice of this nature must be left to the courts or Congress.

In its rules governing cruise operators' establishment of financial responsibility under Pub. L. 89-777, the FMC has never referred to the rights of credit card users to obtain refunds for "billing errors" under the Fair Credit Billing Act ("FCBA"), 15 U.S.C. 1666-1666j. The stated premise for the proposed linkage of the two statutes is the following legal rationale, set out in supplementary information:

> There is a general presumption in the law that a subsequent statute and a prior statute should be construed in a reasonable manner that "makes sense." *See, e.g., United States v. Fausto, 484* U.S. 439,453 (1988) ("reconciling many laws enacted over time, and getting them to "make sense" in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute."). In Pub. L. 89-777, Congress intended to protect passengers from nonperformance of transportation by requiring the Commission to ensure that PVOs are able to reimburse passengers if voyages are not performed. In the FCBA, Congress intended to provide protection for consumers from a failure in the delivery of goods or services within 60 days of the transmission of a bill. Both Pub. L. 89-777 and the FCBA are consumer protection statutes, and should be construed so as to maximize the protections available to consumers.

But, with due respect, this is conjuring up policy from the sheer happenstance that one statute was enacted after the other. The two statutory schemes are totally unrelated. It strains credulity beyond the breaking point to imagine that Congress, in enacting the Fair Credit Billing Act, considered at all the integration of the consumer protections for credit card users with the cruise line financial responsibility provisions of Pub. L. 89-777. Nothing in the legislative history supports the notion that Congress considered the two statutes together in enacting the FCBA, much less intended the FCBA's billing error provisions to cover the cruise line industry's financial responsibility obligations under Pub. L. 89-777. On the contrary, Pub. L. 89-777 plainly makes cruise operators *themselves* responsible for insuring that passengers are reimbursed in the event of non-performance.

That some consumers who might otherwise be entitled to make claims against a performance bond could also obtain refunds under the FCBA does not justify the Commission's decreasing the scope of cruise operators' obligations

under Pub. L. 89-777. Rather than maximizing the protections available to consumers, the proposed change *limits* the total resources available in the event of a cruise operator's failure to perform.

The premise for the proposed rule is that card issuers should bear *primary* responsibility for repaying those purchases covered by the FCBA, even though the cruise operators would otherwise be required to establish their financial responsibility under Pub. L. 89-777. In fact, under the FCBA, card issuers are in effect payors of *last resort* for card users, so as to establish confidence in the card payment system by providing a refund source when a merchant fails to provide promised goods. The FCBA's structure does not support the conclusion that Congress intended this remedy to be a substitute for consumers' independent rights under Pub. L. 89-777.

The proposed sweeping exclusion from the definition of unearned passenger revenue of most credit card payments by passengers in effect would commandeer the credit card industry as forced subsidizers of the cruise industry, with no statutory authority whatsoever and contrary to Congress's intent that cruise lines bear the cost of establishing their own financial responsibility. Without statutory guidance, the balancing of the policies underlying these two statutory regimes, where they overlap, must be left to the courts.

The statement accompanying the proposed rule states "it also would appear that requiring PVOs to provide coverage for UPR from tickets purchased by credit card within 60 days of embarkation, given the existence of the FCBA, would be redundant and would impose a needless financial burden." But the financial burden is "redundant" and "needless" only because the proposed rule would impose that burden on the credit card industry. The FMC has no regulatory jurisdiction over the FCBA (the province primarily of the Federal Reserve Board) and no statutory mandate to authorize a marshalling of statutory consumer rights in a manner that subsidizes the cruise line industry at the expense of credit card issuers.

Furthermore, by proposing to drastically reduce the amount of coverage required under Section 3, the FMC threatens to lose sight of its mandate under Pub. L. 89-777. Congress enacted Pub. L. 89-777 after several cruise operators canceled cruises and left their passengers stranded, and Congress did so to "insure that these incidents do not occur in the future." S.R. Rep. No. 1483, *reprinted in* 1966 U.S.C.C.A.N. 4176, 4179. Now that several cruise operators have failed, the FMC has proposed a vast reduction in the amount of coverage available for such passengers, citing the cost of securing coverage under the current definition of UPR. But the only change in circumstances mentioned by the FMC since it last considered changing the amount of coverage required under Section 3 is the increasing number of cruise line failures where the performance bond has been insufficient to cover passenger deposits. Certainly, the increased risk that cruise operators will not meet their contractual obligations does not justify *decreasing* the amount of performance bond coverage. See *Greater Boston Television Corp. v. FCC, 444* F.2d 841, *852* (D.C. Cir.), *cert. denied, 403* U.S. 923, (1971) ("[A]n agency changing its course must apply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."). See *also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463* U.S. 29, 42, (1983) ("an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change"). The FMC's proposed change would be arbitrary, capricious, and contrary to Congress's mandate that cruise operators establish their own financial responsibility.

Finally, as much as the proposed rule evinces a bias toward assisting the cruise industry, one unintended consequence may be that cruise operators will be unable, or unwilling, to enter into merchant agreements with credit card companies. The negative business impact will be felt most by smaller cruise operators and new entrants, meaning that there will be lessened competition in the industry--and, inevitably, higher passenger fares. Another likely impact of the proposal is higher costs and fees to merchants and consumers as a result of the increased credit risk associated with the cruise industry. Consequently, consumers are most likely to be negatively impacted by the proposal.

Thank you for considering these comments. We would be pleased to provide any further information you may require.

Sincerely,

DISCOVER BANK

By: _____
Its: PRESIDENT

DISCOVER FINANCIAL SERVICES, INC.

By: Tom E. Dailey
Its: SR. VICE PRESIDENT