August 26, 2021

By e-mail to – passengervesselcharters@dot.gov

U.S. Maritime Administration
1200 New Jersey Avenue, SE
Washington, D.C. 20590

Re: July 30 "Passenger vessel charter" Document

Ladies and Gentlemen:

The undersigned submit the following comments in response to the U.S. Maritime Administration's request for comments in a July 30 document posted on its website entitled "Passenger vessel charter."

Based on what MARAD has revealed so far, we believe that MARAD's confirmation of the October 22, 2019 request was wrongfully decided and that the charter offered is not a genuine "time charter." MARAD must withdraw its letter of December 20, 2019 advising that the form of charter River 1 submitted is a time charter covered by the general regulatory approval of 46 C.F.R. § 221.13(a) action.

Each of the undersigned companies plays by the U.S. citizenship and other Jones Act rules. Those rules require vessels engaged in the U.S. coastwise trade, including cruise and passenger vessels, to be owned and operated by U.S. citizens. Those rules also provide that "a person may not, without the approval of the Secretary of Transportation . . . sell, lease, charter, or in any other manner transfer, or agree to sell, lease, charter, deliver, or in any other manner transfer, to a person not a citizen of the United States, an interest in or control of" a U.S.-flag vessel. The penalties for violating this provision are both criminal for knowing violations and civil for any other violation including potential forfeiture of the vessel. 46 U.S.C. § 56102(e). Moreover, any "charter … in violation of th[at] section is void." *Id.* § 56102(d).

Foreign companies seeking to enter the U.S. coastwise trade are always testing the limits of this non-transfer provision. One way they do that is to enter into a charter of a U.S.-flag vessel with many of the attributes of a bareboat or demise charter but with the label "time charter" on it. However, a close analysis of who bears the costs, who bears the risks, and who controls virtually everything about the vessel's service often indicates that the owner is compensated by the foreign time charterer for most expenses, is responsible for virtually everything, and oversees every aspect of the service. Anything like that is, in fact, a bareboat or demise charter, not a time charter.

The U.S. Jones Act cruise vessel market first became officially aware of a potential transaction involving a large foreign cruise line operator seeking entry into the Jones Act market

with a public posting of a U.S. Coast Guard letter of December 27, 2019. This confirmed that the vessel owned by the special purpose entity would qualify for a coastwise endorsement. That Coast Guard letter indicates that the vessel owner had sought approval of its time charter to the foreign cruise line from MARAD, which had issued a confirmation dated December 20, 2019.

We would expect that this foreign cruise line—which provides luxury touring services in Europe—would insist on similarly controlling its U.S. operations to protect its world-wide brand and reputation. Therefore, it is unlikely that any arrangement with a U.S. citizen would meet the requirements of U.S. citizenship law where control must remain in the hands of a U.S. citizen. Nothing we have seen to date dissuades us from the expectation.

Congress stepped in to provide the public more input into such actions by the National Defense Authorization Act for Fiscal Year 2021, § 3502(b), Pub. L. 116-283 (Jan. 1, 2021) ("NDAA"). This requires MARAD to provide "a detailed summary of" an "approval, or confirmation that a vessel charter for a passenger vessel is encompassed by the general approval of time charters issued pursuant to section 56101 of title 46." It also prohibits "final action" on "such request" until "after the provision of notice and opportunity for public comment." *Id.* Unfortunately, MARAD did not on July 30 provide a "detailed summary" of the proposed time charter, or the reasons for its earlier action. No standard is articulated for how MARAD did or could confirm that the charter was, in fact, a "time charter." Instead, the December 20 letter is a form letter MARAD uses whenever it confirms that a charter is a "time charter."

When Congressional representatives pressed MARAD for its reasons and the standard not contained in the confirmation, MARAD did not produce a contemporaneous decision memorandum to support the form letter. MARAD had every incentive to provide this since it might have ended the inquiry. Rather, MARAD presented explanations which changed over time. This is a sure sign that MARAD was engaged in *post hoc* rationalizations and not communicating the pre-decisional reasons and record relied upon.

We understand that MARAD also waffled on the standard it applied. This should have been a very easy question to answer. Instead, MARAD pointed to "black letter law" which is too general to be of any use in distinguishing time charters from bareboat charters in a control or citizenship context. MARAD also pointed to its large fishing vessel regulations. These do not even apply to all fishing vessels, much less cruise or cargo vessels. We expect that MARAD understands that it cannot write a set of regulations very specifically and explicitly meant for a narrow segment of the industry, then apply those standards elsewhere in secret. Implicit in the specific application of those regulations to particular vessels is the presumption that they are *not* intended for general application.

In any event, MARAD has failed to make the standard, whatever it is, publicly available so that affected persons understand what is permissible and what is not. Nor, in violation of the NDAA and Administrative Procedure Act, has MARAD given that to the public to allow for meaningful notice and opportunity to comment.

In prior analogous citizenship situations, MARAD has focused on many factors to determine whether a charter is a time charter. These include whether the charterer had the right

directly or indirectly to cause the vessel to be sold, whether the owner had the right to undertake competing business, whether the owner was shielded from economic risk via pass through plus type charter hire payable on a "hell or high water" basis, whether there is a commercial or non-commercial allocation of liabilities, whether the charterer could interfere with employer-employee relations on the vessel, and other factors. No facts were detailed addressing these factors in the document posted on July 30, 2021.

In addition, there is no indication that MARAD considered and compared the charter submitted to commercially available charters, such as the BIMCO published "CRUISEVOY" form. Moreover, we understand that MARAD disapproved at least one prior charter with the same foreign cruise line. When a "new policy rests upon factual findings that contradict those which underlay its prior policy … [i]t would be arbitrary and capricious to ignore such matters." *F.C.C. v. Fox*, 556 U.S. 502, 515 (2009). There is, however, no articulation of how the charter approved changed from the one disapproved.

Without having those contemporaneous reasons, and without having a public standard for MARAD to apply when making these determinations, neither the public and affected persons, nor a reviewing court for that matter, can understand MARAD's actions, meaningfully comment on them, or review them to determine if the actions are arbitrary and capricious or contrary to law. *See* 5 U.S.C. § 706. Every agency must apply a discernible standard in its decision-making where it distinguishes situations with economic or other significant consequences. And members of the U.S.-flag cruise industry have "serious reliance interests that must be taken into account" before MARAD acts to change the standards and processes it has historically applied in "time charter" determinations. *Fox*, 556 U.S. at 515. Here, the economic consequences are substantial, since approval of the charter means entry into the Jones Act coastwise passenger market by a large foreign cruise line.

To rectify the situation, we request that MARAD immediately provide public notice that it is withdrawing the notice of July 30, 2021, and will instead undertake further proceedings before issuing a "final action" on the River 1 request of October 22, 2019. *First*, MARAD must promulgate a clear regulatory standard for differentiating time charters from bareboat/demise charters in the cruise industry, after permitting public comment on that regulatory standard. *Second*, MARAD can then apply that standard to the already submitted River 1 charter of October 22, 2019, and any newly submitted charters, showing publicly for comment its application of that standard and reasons for doing so. This must occur prior to "final action," consistent with NDAA § 3502(b).

MARAD has frequently claimed confidentiality as a reason it cannot undertake such a public process. Now, however, Congress has *mandated* public process. It requires "detailed" public disclosure of the facts and reasoning for MARAD's decisions. *Id.* MARAD should also note that both the U.S. Coast Guard and Customs and Border Protection issue coastwise trade-related decisions which are understandable. These can serve as precedents without any significant confidentiality disputes. MARAD's situation is not unique, although MARAD's lack of transparency and accountability is. MARAD is not presently performing its duties as proscribed by law and does a disservice to the industry to treat every bit of information as if it was confidential

at the expense of the public seeing and understanding of what MARAD is approving or disapproving so as to guide future conduct.

Through the NDAA and the APA, Congress requires MARAD to share with the affected U.S.-flag cruise industry—which has played by the U.S. citizenship rules—its standard for differentiating time charters from bareboat/demise charters and to apply that diligently and thoroughly to the proposed charter. The public is entitled to a "detailed summary of each request" and a meaningful "notice and opportunity for public comment" *before* any "final action" by MARAD. To do otherwise would potentially open the door of the U.S. cruise market to foreign companies which skirt U.S. citizenship laws. Those laws were written for the protection of the country and the existing market. MARAD should be a vigilant guardian.

Sincerely,

David Allen
President
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Hunter McIntosh
President
The Boat Company

Charles B. Robertson
President & CEO
American Cruise Lines

Dan Blanchard
Owner & CEO
UnCruise Adventures

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