



Alliance of the Ports of Canada, the Caribbean, Latin America and the United States

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Mr. Glen E. Vereb
Border Security Regulations Branch
Office of International Trade, Customs and Border Protection
1300 Pennsylvania Avenue, NW (Mint Annex)
Washington, DC 20229

SUBJECT: Docket Number USCBP-2007-0098

Dear Mr. Vereb:

This letter is in response to a solicitation for comments from the Bureau of Customs and Border Protection (CBP) within the Department of Homeland Security on a proposed interpretation related to coastwise cruise itineraries. 72 Fed. Reg. 65487 (November 21, 2007). The American Association of Port Authorities (AAPA) represents public port authorities who are land-side cruise facility owners and operators throughout the Western Hemisphere. Our comments today are made on behalf of our United States member ports.

The impact of the cruise market on the U.S. economy is significant. According to a 2006 study commissioned by the Cruise Lines International Association, 9 million cruise passengers began their cruises from a U.S. port, with these ports handling 75% of all global cruise embarkations. The total economic benefit of the cruise industry in the U.S. is \$35.7 billion. There are positive economic impacts in all 50 states since over 70% of cruise industry expenditures are made with U.S. businesses, including airlines, travel agents, food and beverage, and ship maintenance and refurbishing. Any criteria that CBP develops should include an evaluation of the negative impacts on the U.S. economy including the impact of jobs at U.S. ports.

The very limited 30 day comment period makes it difficult to provide a full and complete analysis of the proposal. As shown in these comments, the proposal would **cause immediate, significant economic harm to the U.S. port industry**. It is not appropriately issued as an interpretative rule but is a substantive change in regulation which should receive full and complete consideration under the Administrative Procedure Act, 5 U.S. Code 553.

We urge CBP to withdraw the proposed interpretation in order to give the affected parties time to resolve the issue of concern in the Hawaiian trade. If CBP still perceives a need to develop criteria for a legitimate foreign port call under the Passenger Vessel Services Act, it should be done with a full notice and comment process under the Administrative Procedure Act. CBP should also consider the use of a negotiated rulemaking process.

Background

As indicated in the Federal Register Notice, the Passenger Vessel Services Act of 1886 (PVSA) provides that no foreign flag ship shall transport passengers between ports or places in the U.S., subject to penalty. Under a 2003 statute, a special exemption was provided for three foreign-

built ships to be documented as U.S. flag vessels in order to operate in the Hawaiian Islands. The effect was to give Norwegian Cruise Lines (NCL) an effective monopoly for cruises around the Hawaiian Islands. The ships were put into service in 2004, 2005 and 2006 and NCL is planning to reflag one of them and redeploy it in Europe.

The proposal at hand was issued by CBP in response to a request from the Maritime Administration (MarAd). MarAd expressed concern that the three NCL U.S. flag ships were facing “economic hardship” as a result of competition from vessels departing U.S. West Coast ports, calling at several Hawaiian islands, Ensenada, Mexico, and then returning to the originating port.

The proposed interpretive rule states the CPB would conclude that an U.S. based cruise itinerary would violate the Passenger Services Act, unless the stop at the foreign port is a legitimate object of the cruise. To qualify as a legitimate foreign stop, CPB proposes that the following three criteria must be met:

- 1) The stop lasts at least 48 hours at the 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.

There is no rationale offered for the 3 criteria selected, or explanation as to why CBP might believe them to be the appropriate test for a legitimate foreign port call.

Although the Federal Register Notice states that the purpose of the interpretative rule is to address the issue in the Hawaiian trade, the notice indicates that draft criteria to determine a legitimate foreign port call will be applied to “any cruise itinerary.”

CBP Is Circumventing the Administrative Procedure Act by Making Substantive Changes to Regulations under the Guise of an Interpretative Ruling

A federal agency cannot make substantive changes to regulations through an interpretative ruling. American Hospital Association v. Bowen, 834 F.2d 1037 (D.C. Cir. 1987). The DC Circuit noted that “[s]ubstantive rules are ones which ‘grant rights, impose obligations, or produce other significant effects on private interests.’” Id. at p. 1045. A rule is not interpretative if (1) in its absence there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) it is published in the Code of Federal Regulations, (3) the agency has specifically invoked its general legislative authority in issuing it, and (4) if it effectively amends a prior legislative rule. American Mining Congress v. Mine, Safety & Health Administration, 995 F.2d 1106, 1112 (D.C. Cir. 1993). The proposed CBP “interpretation” amends the clear wording of the current regulations, which distinguish between (1) voyages “solely to one or more coastwise ports,” (2) voyages “to one or more coastwise ports and a nearby foreign port or ports,” and (3) voyages “to one or more

coastwise ports and a distant foreign port or ports.”¹ According to the Notice, CBP is changing the definition of the first type of itinerary referenced above.

Specifically, CBP interprets a voyage to be “solely to one or more coastwise ports” even where it stops at a foreign port, unless the stop at the foreign port is a legitimate object of the cruise.

72 Fed. Reg. 65489. In addition, CBP is adding completely new criteria, never previously applied, which it will use to determine whether a stop at a foreign port is or is not a legitimate object of the cruise.

Customs has never previously stated that it would consider a voyage that includes a stop at a nearby foreign port as a voyage “solely to one or more coastwise ports” unless the stop is a legitimate object of the cruise. In fact, through letter rulings, Customs has previously ruled that a non-coastwise qualified vessel’s voyage between several California ports with a one hour stop in Ensenada, Mexico was NOT a violation of the PVSA. HQ 112039 re M/V SOUTHWARD, January 6, 1992.

The regulations that CBP is supposedly “interpreting” have been in effect for years (last amended in 1985²) and parties have made significant business investments in reliance on the current interpretation.

¹ The PVSA addresses the transportation of passengers “beginning at one port or place in the United States and ending at another port therein.” 29 O.A.G. 318 (February 12, 1912). Customs has long ruled that voyages to nowhere that go beyond U.S. territorial waters and leave from and return to the same U.S. port are not governed by the statute. *Id.* Customs has also consistently held that voyages solely to one or more coastwise ports are predominantly coastwise in their nature and object and therefore passengers temporarily going ashore at a coastwise port of call have been deemed to disembark in violation of the statute. 50 Fed. Reg. 26981, 26982 (July 1, 1985).

² From at least 1960 to 1985, Customs prohibited a non-coastwise qualified vessel from offering a voyage including coastwise and nearby foreign ports if the vessel remained in any U.S. port of call for more than 24 hours. In its 1985 amendments to the regulations, Customs eliminated the 24-hour restriction, which was thought to disadvantage U.S. ports of call compared to foreign ports of call. 50 Fed. Reg. 26981, 26982 (July 1, 1985).

Prior to 1985, the lengthy (24 hour) U.S. port call was deemed a disembarkation and thereby triggered the prohibition against transporting passengers from one U.S. port to another. While Customs considered the number of hours in the U.S. port of call relevant to determine whether a voyage triggered the prohibition against transporting a passenger from one port in the U.S. to another port in the U.S., it has not required that a foreign port call be a “legitimate object” of a voyage or set a minimum number of hours or other criteria for a foreign port call. In fact, in 1985, Customs stated that the revised regulations (still in effect today), would permit “foreign-flag, foreign-built vessels on voyages **touching** nearby foreign ports to allow passengers who embarked at U.S. ports to go ashore temporarily at other U.S. ports” so long as the passengers disembark at the port of embarkation. (emphasis added) 50 Fed. Reg. 26981, 26983 (July 1, 1985). In that rulemaking, Customs stated that it did not believe that the elimination of the 24 hour rule would disadvantage any U.S. flag vessels that might be built in the future “capable of successful economic competition with foreign flag vessels in voyages touching nearby foreign and U.S. ports” but that if that occurred, Customs would reconsider its regulations. *Id.* The NCL ships referred to previously have a monopoly for large intra-Hawaiian cruises and are not competing against foreign flag cruise lines in the West Coast-Hawaii-Mexico-West Coast market.

Although notice was given and a 30 day comment period provided, CBP did not undertake the notice and comment under section 533 and therefore did not conduct a regulatory flexibility analysis as required by the Regulatory Flexibility Act (RFA).

Although Meant to Address an Issue in the Hawaiian Trade, the Proposal is Drafted to Apply to All Itineraries Subject to the Passenger Vessel Services Act

Although the interpretative ruling is reportedly being issued to address a specific concern in the Hawaiian trade, it has been drafted to apply to any itinerary that includes more than one U.S. port (i.e. that might be subject to review under the PVSA). The potential impact is widespread, affecting, for example, port calls from the Pacific Northwest to Alaska, the northeast United States to Canada, or a cruise that departs any U.S. port and makes another U.S. port, such as Key West, FL, a port of call.

Even if CBP wanted to redraft the rule to narrow its application to the Hawaiian trade, it would be difficult to justify the application of criteria in one geographic region but not another. If CBP is to consider a voyage to be “solely to one or more coastwise ports” even where it stops at a foreign port, unless the stop at the foreign port is a legitimate object of the cruise, and develops criteria to define whether the foreign port call is a legitimate object of the cruise, any party might approach CBP to request that that standard and those criteria be applied uniformly throughout the U.S. In addition, under judicial review, CBP would find it difficult to justify selective enforcement of the standard and criteria without its actions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under the Administrative Procedure Act, 5 U.S.C. 706.

The Criteria are Extremely Onerous and Completely Out of Line with Industry Practice

CBP has not offered any justification or analysis for the proposed criteria, and apparently no research was done to determine the current market conditions and practices. As many of the comments filed in this record indicate, a 48 hour vessel call is extremely rare in any U.S. passenger cruise market. Many cruises (3-5 days) are too short to justify a 48 hour vessel call anywhere and most longer cruises (7 days or more) have 3 or 4 port of call stops, also making a 48 hour call in any port difficult if not impossible.

The criteria drafted by CBP are punitive and not reflective of normal cruise operations. If imposed on the Hawaiian trade, they would likely result in the elimination of the cruises from the United States mainland to Hawaii and result in the loss of U.S. jobs at the West Coast homeports. If applied uniformly across the United States, application of the criteria would turn the U.S. cruise market on its head, resulting in the loss of thousands of jobs in port communities.

Given the extremely onerous nature of the criteria, it appears that their goal is not to establish appropriate criteria for a “legitimate” foreign port call or for any purpose related to the enforcement of the Passenger Vessel Services Act. (Parties concerned with the legitimacy of a short, late-night call in Ensenada could have followed the normal procedure of requesting a ruling from Customs on that particular itinerary instead of seeking a wholesale regulatory change.) Rather, it appears that the proposal was crafted for the sole purpose of eliminating all West Coast to Hawaii cruise itineraries in an effort to protect the NCL U.S. flag ships.

The U.S. Port Industry Will Sustain the Greatest Economic Harm

Few North American cruises could meet all three of these criteria; especially those related to the length of a foreign stop and the ratio of time at the foreign port. The effect of the rule as drafted would be to limit the cruise market to itineraries with a single US port call, driving all Alaska business to Canada, Hawaiian business to Mexican ports and eliminating Key West, numerous NE ports and Gulf ports as ports of call.

The Port of Seattle worked hard to get into the Alaska market, which is available to it due to vessel call stops in Victoria, BC. Gulf ports have benefited from itineraries using one US port as the home port and another as a port of call. In the Northeast, cruise lines could avoid the application of the criteria by using a U.S. port as a home port, eliminating all U.S. ports of call (using only Canadian ports for ports of call). Key West could be effectively eliminated as a port of call from South Atlantic and Gulf ports. **The attachment outlined the impacts of the proposal on several U.S. cruise markets.**

Protecting What Jobs and at What Price?

Cabotage laws in the United States are generally designed to promote the use of U.S. shipyards, and to ensure availability of U.S. flag vessels and skilled merchant mariners for national defense needs.³ MarAd has expressed concern that one of the NCL vessels is being reflagged and redeployed to Europe with a loss of “1,100 crewmember jobs.” 72 Fed. Reg. 65487, 65488 (November 21, 2007).

The U.S. build requirement was waived for the three NCL ships and they have limited, if any, utility for national defense. The vast majority of jobs on the cruise ships (80-85%) are hotel-type positions, not skilled merchant mariner jobs needed for national defense. The result of the proposal could be the loss of thousands of jobs throughout the United States in an effort to protect a few hundred skilled merchant mariner jobs.⁴

Conclusion

As the comments filed in this docket by the Hawai'i Tourism Authority clearly show, the state benefits significantly from both international and domestic cruise line operations, and the operations appeal to different visitor demographics. International cruise operations have existed

³ According to the Maritime Administration's policy paper on U.S. cabotage laws, “The provisions of these laws must be maintained as an essential element of U.S. maritime policy that provides important economic and national security benefits to the nation such as support of U.S. shipbuilding and repair industries and maintenance of a labor force of skilled American mariners.” <http://www.marad.dot.gov/Policy%20Papers/CabotageLaws.pdf>

⁴ It is not even clear that eliminating the West Coast to Hawaii itineraries would accomplish the goal of financial security for these three ships. No analysis was done of the reason for their problems, and the degree to which other factors, such as service complaints or increasing air fares to Hawaii, may be more important issues. Other comments in this docket suggest that the intra-Hawaiian and West Coast to Hawaii cruises cater to completely different markets.

long before the three NCL ships came into the market, and we believe that they can co-exist in the future without the loss of the remaining two U.S. flag ships in the Hawaiian market.

The American Association of Port Authorities appreciates the opportunity to comment on this proposal. We urge you to reevaluate the need for criteria and work closely with affected parties to work on a solution that meets the intent of the Passenger Vessel Services Act while avoiding harming U.S. ports that service the vibrant cruise industry.

Attachment

Sincerely yours,

A handwritten signature in black ink, appearing to read "Kurt J. Nagle", with a long horizontal flourish extending to the right.

Kurt J. Nagle
President

ATTACHMENT

Examples of the Impact of the Proposal on Ports

HAWAII TRADE

The primary ports that would be affected by the CBP proposal in the Hawaii trade are Los Angeles, San Diego, and ports in the Hawaiian Islands.

Port of Los Angeles

Overview:

38 cruises to Hawaii in 2007

77,300 passengers

\$33.8 million in total spending

- \$24.1 million in cruise line spending
- \$ 5.8 million in passenger spending
- \$ 3.9 million in crew member spending

1900 Longshore daily jobs in 2006

\$15 million in income to workers and local businesses

In 2007, the Port of Los Angeles was the home port for five vessels providing cruise service to Hawaii. These vessels traveled on 38 cruises in 2007, serving 77,300 passengers.

Each cruise provides economic benefits to the Los Angeles region in three ways:

- 1) the ship requires locally-purchased goods and services;
- 2) the ship's crew makes local purchases of goods and services;
- 3) the passengers purchase goods and services (meals, hotel stays, transportation) locally before and after the cruise.

A study of the Los Angeles cruise industry in 2006 revealed that spending for the ship's needs averaged approximately \$634,000 per call. An average crew member spent \$107 per stay at the port, which means an average crew of 970 spends \$104,000 per call. The average passenger spent \$74.50 while in Los Angeles, which means a ship call of 2,000 passengers generates \$149,000 in passenger spending. All totaled, the average ship call represents almost \$890,000 in local spending. The 38 cruises to Hawaii, therefore, spent an estimated \$33.8 million in the Los Angeles region.

Meeting the needs of the ships, crew, and passengers generates jobs in the local economy. Cruise activity in 2006 generated approximately 2,500 jobs in the Los Angeles region, or over eleven jobs for every ship call. The 38 Hawaii cruises at risk are estimated, then, to generate over 418 jobs in the Los Angeles region, over half of which are located in the economically disadvantaged communities of San Pedro and Wilmington. Each cruise call generates 50 daily longshore jobs, totaling 1800 daily longshore union jobs in 2006.

Port of San Diego

Over the last five years, San Diego's cruise business has more than tripled. The Hawaii business from San Diego ranges from 22 - 26 calls a year, which is a large part of the Port of San Diego's cruise business. These are seasonal, 15-day deep-ocean going voyages, capturing a totally distinct market place that differs from the 7-day inter-island cruises. Also impacted would be the shorter 3-5 day cruises with calls at a Mexican port and other West Coast ports as part of repositioning voyages.

A recent economic impact analysis shows that the Hawaii bound cruise calls generate \$35 million in direct economic benefit to the San Diego Metro area. These ships bring almost 70,000 passengers in and out of San Diego who patronize the city's airport, hotels, restaurants, transportation companies and attractions. The total value of these passengers' expenditures is \$14 million. Additionally, the cruise lines buy \$26 million in goods and services from local suppliers. On an average, 55 longshoremen work a cruise ship, and these jobs have tripled over the last five years in the port in a large part due to the increase in cruise calls. The port is also in the midst of a major investment to improve its cruise facility, currently estimated at \$75 - \$160 million. This action potentially will cause San Diego to have a significant revenue shortfall that may preclude this infrastructure investment.

ALASKA TRADE

Affected ports would include Seattle, San Francisco, Port of Hueneme and several Alaskan ports.

Port of Seattle

The Seattle-based cruise industry is a major economic driver throughout Washington State. In 2007, the cruise business represented a minimum of \$318 million in annual business revenue, more than 2,087 direct jobs and at least \$6.7 million in state and local taxes.

If the current proposal were broadly implemented, the most likely scenario would be the complete elimination of the Seattle-based Alaska service.

Port of San Francisco

The cruise industry in San Francisco generates an estimated \$60 million in economic impact to the city and the region. The cruise industry provides significant employment in the Bay Area. In 2008, the port has 59 scheduled cruise calls, 32 of which are homeport/roundtrip calls (18 Alaska, 9 Mexico, 5 Pacific Northwest). If the new CBP rule were implemented, it would lose the 23 Alaska/PNW calls (40% of our calls and more than 50% of our passengers). Furthermore, many of our 27 repositioning calls would be in jeopardy as well. This would result in the loss of over 150 International Longshore and Warehouse Union (ILWU) jobs.

U.S. NORTH EAST/ NEW ENGLAND TRADE

The CBP proposal would affect the ports of Norfolk, Boston, Connecticut, Baltimore, New York, Rhode Island, and several in Maine. Most cruises stop at different locations along the East Coast of the U.S. and then go to several ports in Canada.

Maine

According to the Cruise Lines International Association (CLIA), the impact of the cruise business to Maine is \$24 million annually. Bar Harbor and Portland get the most port calls, but a new port, Rockland, will open in 2009, and the state is actively marketing other destinations as well. The ports of Portland and Bar Harbor hosted 120 cruise ship visits during the 2007 season. These visits brought more than 150,000 tourists to the state as well. As the comments filed in this docket by Cruise Maine show, in Bar Harbor, economic activity associated with the cruise industry supports 174 full- and part-time jobs and provided \$3.7 million in labor income. In Portland, the cruise industry supported 96 full- and part-time jobs and provided \$1.8 million in labor income.

New York

The proposal would be extremely damaging to the Canadian/New England market which mostly consists of quick turns in a lot of different ports along the Canadian-New England shore. Although New York serves as a home port for most of its ships, the proposal would require the cruise lines to revamp their itineraries significantly and could affect New York as a home port. New York would also be affected as a port of call. In NY Harbor, the city has spent more than 200 million dollars on the Brooklyn and Manhattan Cruise Terminals, and that investment might be jeopardized by the CBP proposal.

Rhode Island

Newport, Rhode Island currently has 40 plus ship calls and 60,000 plus passengers a year. Implementation of the proposal would bring and end to its cruise business.

SOUTHEAST AND GULF COAST

Ports in the Southeast U.S. and Gulf are home ports and ports of call for trips to Bermuda, the Caribbean and other locations. Several ports in Florida, especially Key West, would be impacted by the change in criteria. This could also impact Gulf cruises and coastal cruises including those that leave or stop in ports such as Galveston, New Orleans and Charleston.

Key West

Application of the proposal would likely eliminate cruises to Key West, Florida, which is one of the nation's busiest ports-of-call. In fiscal year 2006/2007, 831,063 cruise passengers called at the Port of Key West. Unlike homeports, which count passengers twice (as they embark and disembark from the ship), this figure reflects the actual passengers moving through the port

annually. As the letter filed in this docket by the City of Key West states, cruise tariffs constitute approximately 12% of the city's general revenue fund.

Tampa

The cruise industry contributed \$79.8 million and created 1,681 jobs in 2005 in the Tampa Bay area. The proposal would be extremely detrimental to the Port of Tampa and the cruise business it has built over the last three decades. Currently, Key West is an important port of call for some of the cruises from Tampa and historically New Orleans has also been important. The proposal would essentially eliminate Key West as well as New Orleans and other Gulf ports as viable port options.

Charleston

The Port of Charleston averages 45-50 cruise ship calls a year. The total number of passengers for CY 2006 was more than 107,000. The projected number of passengers for CY 2007 will be even higher. The ruling would jeopardize the port's 20-25 port of call visits, which generally originate in another U.S. port, as well as the vast majority of its 38 home port voyages, most of which stop at a second U.S. port.

New Orleans

The economic impact of the cruise industry in New Orleans is about \$1 million per ship call, including passenger and crew spending and pre/post packages. Although the port does not currently have any home ported ships that call at other U.S. ports, it has had such cruises in the past and would like that market opportunity to remain a viable option. New Orleans also serves as a port of call on voyages beginning at other U.S. ports, and is concerned that the proposal would force the cruise lines to eliminate U.S. ports of call.

Given the 30-day comment period, these examples are not exhaustive but illustrate the significant negative impact that the proposal would have on locations throughout the United States. Cruising is a dynamic industry, with itineraries changing each season to provide new vacation experiences for Americans. Over the past decade, many U.S. ports have made investments in facilities to attract cruises to their cities and these vacationers as visitors.

The proposal would, in many cases, simply eliminate these ports' ability to develop a market as a home port, a port of call or to attract repositioning cruises. The impact would be felt, however, not only by the ports who have made significant investments to attract these cruises but also by the U.S. consumer.