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and on behalf of
the United States Superyacht Association
before the
House Small Business Subcommittee on Investigations, Oversight, and Regulations
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Mr. Chairman and Members of the Subcommittee, I am Kristina Hebert, President of the Marine Industries Association of South Florida. I am testifying today on behalf of this association and the United States Superyacht Association. I want to thank you, Congressman West and all of the members of this Subcommittee for holding this hearing on the important issue of making affordable workers compensation insurance available for the thousands of men and women who work in the recreational repair industry. An overwhelming majority of these workers are in business independently or work for a small business, and are not only in my home state of Florida, but across the entire country.

My family's business Ward's Marine Electric has been in Fort Lauderdale, FL since 1950. I am a third generation owner and operator. We provide electrical sales, service and engineering to the recreational marine industry. While we have technicians that travel outside of the area, South Florida is the yachting industry capital of the world. There is no other destination across the globe that has the concentration of skilled tradesmen, professionalism or climate to service the recreational marine industry. To give you an idea, the Tri-County/South Florida marine industry represents 107,000 jobs; an economic impact of $8.9 billion in gross output and $3.06 billion in wages and earnings.

The cost of workers' compensation insurance is a significant cost to small business. In the case of small businesses that are in the recreational boating industry, there is the added factor that in some instances the federal Longshore and Harbor Workers Compensation Act (LHWCA or Longshore Act) applies. Enacted at the beginning of the last century, the federal law was created to fill a gap between state and federal jurisdiction.

The National Council on Compensation Insurance, Inc. ("NCCI") manages the nation's largest database of workers compensation insurance information. NCCI develops and defines workers compensation classifications for the insurance industry. Currently there are only two LHWCA classifications for the recreational marine industry. One is for boatbuilding and the other is for boatyards. These classifications have both specific state compensation rates and LHWCA rates. None of the individual trades associated with recreational marine repair such as electric, plumbing, carpentry, etc. have a separate classification as their work is deemed

comparable to that of their land based counterpart. As such, each state has a LHWCA multiplier that is applied to the state compensation rate. In some cases this multiplier has been as high as 3.98 or roughly four times the state compensation rate. This is due to the simple economic principle that the group of insured is smaller than the group of insured under State law. Because there are fewer employees to spread the risk over, LHWCA coverage is dramatically more expensive for essentially the same coverage under State law. As a result, many workers engaged in the repair of recreational vessel went without buying LHWCA coverage because it is unaffordable. Needless to say this was not a good result. Additionally, the number of underwriters for LHWCA coverage is very small. Because the vast majority of the recreational marine industry is comprised of small businesses and premiums are generated by payroll, many businesses were unable to obtain LHWCA coverage. If the insurance company required a business to purchase LHWCA coverage it was not an option to purchase State compensation alone or separately.

Thus a solution was deemed necessary to ensure that all workers in the recreational boating industry were covered by affordable workers compensation insurance and an exemption was sought. The intent of Congress in 1984 in enacting the original exemption for recreational boating was to capture the recreational marine industry and exempt it from LHWCA coverage. It is important to underscore that those exemptions would apply only if the employees were covered under the applicable State compensation systems. In 1984 the largest boat built in the United States was 65 feet, thus the limitation of length in the original exemption.

Today longer recreational vessels are built and repaired. Nearly every U.S. manufacturer, as well as repairer, is working on boats both over and under 65 feet. Therefore, the key elements of status, as a maritime employee under the LHWCA, and situs, as a maritime employee working at a facility under the LHWCA, were difficult to decipher. Insurance providers were in need of clarification to be able to write the appropriate coverage. Small businesses were paying extraordinarily high premiums for duplicative and unnecessary coverage. Many independent workers were unable to purchase coverage and were going without. Those that were able to purchase the coverage were forced to have increased labor rates that were significantly higher than international competitors. This was especially difficult for South Florida with the Bahamas and Caribbean just off the coast as well as the Pacific Northwest and Great Lakes regions and their proximity to Canada. To keep jobs in America and achieve more workers covered under workers compensation, the recreational boating industry and the marine insurance industry once again sought to amend the LHWCA to provide the relief that the industry needed: affordable workers compensation insurance that covered all workers in the industry.

In 2009, Section 803 of the ARRA was passed and amended the LHWCA by altering the description of excluded employees in positions related to recreational vessels under the Longshore Act (33 U.S.C. 902(3)(F)). This was accomplished by

eliminating the length of vessel for which repairs are performed. The stated intent of Congress was to expand the number of employees exempted from the LHWCA. It must be emphasized that Congress did this fully knowing that the law required that exempted employees must be covered by State workers compensation laws to qualify for the exemption under the federal law. Again, no loophole was created whereby someone would be left without coverage under this change. This was intended to allow the insurance industry to provide coverage for the recreational marine repair industry under State law, thereby lowering costs and remaining competitive in this global industry.

This brings me to why I am here today. Ignoring stated Congressional intent, the Department of Labor ("DOL") explicitly limited, not expanded, the exemption for the repair industry. In implementing this expanded exemption, DOL issued a rule on December 30, 2011, that did just the opposite of what Congress intended by adopting a new definition of recreational vessel for a vessel being repaired or dismantled (20 Code of Federal Regulations §701.501(b)(2) and (c) (published at 76 Fed. Reg. 82128 (December 30, 2011)). Specifically, DOL has mandated a definition of recreational vessels that imposes unnecessary and cumbersome additional guidelines to determine how the exemption for recreational marine workers would apply. DOL incorporated a definition of "recreational vessel" used in the shipping laws and then needlessly superimposed a number of cross-referenced maritime statutes to further restrict the category. By incorporating a multitude of definitions not enacted by Congress for the LHWCA and apply them in a way that the exemption would be narrower, not more expansive, DOL created an exhausting and confusing list of vessels that would not be considered recreational vessels when undergoing repair work.

Needless to say, Congress never adopted this definition either in the plain language of the law or in its legislative history. The new rule has instead created confusion in both the recreational marine repair industry and the insurance industry. The misapplication of the exemption brought thousands of workers under the duplicative coverage or even worse left them without any coverage at all. For these reasons, the rulemaking seriously missed the mark and will serve only to cost American jobs and drive economic activity offshore.

Now over eight years after the effort to obtain relief started, the recreational boating industry is worse off than when we started. But the Department of Labor could correct the situation. President Obama has issued Executive Order 12866 tasking the Office of Management and Budget ("OMB") with ensuring that "regulations are consistent with applicable law." The Office of Information and Regulatory Affairs ("OIRA") in particular is required to provide guidance to agencies and review individual regulations. However, OIRA may review only those actions identified by the agency or by OIRA to be "significant regulatory actions," meaning those actions that are likely to result in a rule that may:

- Have an annual effect on the economy of $100 million or more;

- Have a material effect on the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities;
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

Unfortunately the DOL, in spite of the economic importance of the recreational boating industry in South Florida, not to mention throughout the entire United States, concluded that it was not a significant regulatory action, nor a major rule, and therefore did not take into account the rule's severe economic impact. Notwithstanding, Executive Order 12866 fortunately also states that the Vice President, in consultation with regulatory policy advisors of the President, may identify regulations that affect a particular group, industry, or sector of the economy for review by the appropriate agencies. Additionally, the Vice President may identify legislative mandates for Congress to reconsider.

We believe that this rule issued by the Department of Labor is a prime candidate for review under the Executive Order. Accordingly, the Administration and DOL should withdraw the rule as it applies to the repair industry in Section 701.501(b)(2) and (3) of title 20 of the Code of Federal Regulations and revise the rule as it applies to the recreational vessel repair industry. This is a narrow fix with a big economic benefit. We note, and emphasize, that the provisions of definition in the rule applicable to manufacturing or building of recreational vessels and public vessels was done correctly and should remain unchanged.

In taking this narrower action, a replacement of the definition can be formulated that will keep the cost of workers' compensation insurance low, allow for more workers to have coverage, and keep jobs and economic activity from going offshore. We recommend that a newly formulated rule contain a definition that applies to recreational vessel repair workers in the same manner that the rule applies to manufactures and public vessels. The definition we recommend is as follows:

> The term "recreational vessel" means—
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> (A) a vessel—
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> (I) Being manufactured or operated primarily for pleasure; or
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> (II) Leased, rented, or chartered to another for the latter's pleasure.
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> (B) In applying the definition in subparagraph (A) of this section, the following rules apply:
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> (I) A vessel being manufactured or built, or being repaired under warranty by its manufacturer or builder, is a recreational vessel if the vessel appears intended, based on its design and construction, to be for ultimate

recreational uses. The manufacturer or builder bears the burden of establishing that a vessel is recreational under this standard.

(II) A vessel being repaired, dismantled for repair, or dismantled at the end of its life is a recreational vessel if the vessel appears intended, based on its design and construction, to be for ultimate recreational uses and is not normally engaged significantly in a military, commercial, or traditionally commercial undertaking.

(C) Notwithstanding paragraph (B)(II) of this section, a vessel will be deemed recreational if it is a public vessel (a vessel owned or bareboat-chartered and operated by the United States, or by a State or political subdivision thereof) at the time of repair, dismantling for repair, or dismantling, if that vessel shares elements of design and construction with traditional recreational vessels and is not normally engaged in a military, commercial, or traditionally commercial undertaking.

This definition incorporates all of the elements of the definition for manufacturers and public vessels but applies them equally to the repair and dismantling segment of the recreational vessel industry. We believe this is only fair that all segments of the industry are treated the same and that no segment should be discriminated against by having to meet a different standard. This consistency and equal treatment plus elimination of the unnecessary elements contained in the current rulemaking will provide the recreational vessel industry with the needed relief it has long sought. More workers will be covered by workers compensation insurance and not have to take unnecessary risks to just make a living. We do not want to go another eight years without this needed relief. However, without a change in the rule, we face having to start over again and ask Congress to enact this change in the definition as part of the Longshore Act itself.

Thank you again for holding this important hearing. We appreciate having the opportunity to voice our viewpoint.

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