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May 21, 2002

Bryant L. VanBrakle
Secretary
Federal Maritime Commission
800 North Capitol Street, NW
Room 1046
Washington, DC 20573-0001

Re Docket No. 02-07 – Financial Responsibility Requirements for Nonperformance of Transportation – Discontinuance of Self-Insurance and the Sliding Scale, and Guarantor Limitations -- 67 Fed. Reg. 19730 (April 23, 2002)

Dear Mr VanBrakle:

I am the Chief Executive Officer and Chairman of the Board of West Travel, Inc , d/b/a Cruise West and Alaska Sightseeing Tours (“Cruise West” or the “Company”) and am writing in response to the Notice of Proposed Rulemaking (“NPRM”) published by the Federal Maritime Commission (“Commission” or “FMC”) with respect to proposed changes in the financial responsibility requirements for issuance of Performance Certificates. These proposed changes would eliminate the availability of self-insurance and the sliding scale coverage as potential evidence of financial responsibility. Because our Company utilizes the self-insurance option we have a significant interest in the proposed rulemaking and appreciate the opportunity to submit these comments.

1. Background: Cruise West is an Established Passenger Vessel Operator

Cruise West is a family owned cruise and tour company, which I founded in 1973 together with my father, Chuck West, a pioneer of Alaska tourism. My Dad started the first tours to Alaska in 1946, and is well known in the travel industry as “Mr. Alaska”. He is the founder of Westours, which he sold to Holland America Line in 1972.

Cruise West operates and markets a fleet of eight small passenger vessels that carry between 54 and 114 guests. Our Company also operates shore-based tours and excursions in Alaska under the Alaska Sightseeing Tours brand. The vessels operate in Alaska during the
“The Leader in Small-Ship Cruising”

summer months – May to September, and during the rest of the year in British Columbia, on the Columbia and Snake Rivers, in the California Wine Country and in Mexico’s Sea of Cortez. The Company also has an exclusive sales and marketing agreement with the owner of a ninth vessel located in Central America and operating cruises to Costa Rica, Panama and Belize

Cruise West has experienced sustained growth, acquiring seven vessels since 1989, and now employs over 500 American citizens. Unlike its larger foreign competitors, the Company pays U.S. and state income tax on all earnings. Cruise West has received several industry awards for customer service, including the 2001 Partner of the Year award for national AAA Travel, one of the largest travel agencies in the world.

Ever since we began operating passenger vessels, Cruise West has complied with FMC Performance Certificate regulations, including the requirements for self-insurance since beginning that coverage in 1997. Cruise West has a strong balance sheet with vessel market value far in excess of debt, resulting in far more than sufficient net equity located in the United States. Based on this good faith compliance with FMC regulations, we have structured our **long-term business affairs** in reliance on the ability to maintain substantial net worth in capital assets, rather than more liquid cash-based assets.

2. **Overview of Cruise West Position**

For nearly thirty years, our Company has built a proven track record of providing Alaskan cruise and other vacation alternatives to our customers. We have a consistently higher level of customer satisfaction than our competitors and have never faced an unsatisfied claim that we failed to provide the contracted for transportation to our passengers. Like all segments **of the** travel industry, however, we too have felt the adverse impact of the tragic events surrounding the terrorist activities of September 11, 2001. But unlike some of our competitors in the cruise business, we have been able to restructure our operations to meet these challenges and continue to provide our customers with reliable vacation options.

We have a strong commitment of service to our passengers and share the Commission's concern that they be adequately protected. One of the best ways that can be accomplished is to be sure that companies like ours are in a sound operating position and are not overburdened by abrupt changes in long-standing regulations or unnecessary requirements that either (1) are so restrictive as to threaten our operating stability, or (2) put us at a competitive disadvantage with respect to larger companies who are competitors in the overall cruise market.

We appreciate that the Commission is mindful of the careful balance that must be struck in adopting new regulations in this area and that precipitous action could cause the very nonperformance that the Commission seeks to prevent.¹ In accepting evidence of financial responsibility to implement the Performance Certificate program, the Commission should have maximum flexibility to evaluate particular operators and to accept appropriate evidence of financial responsibility as circumstances warrant.

By responding to recent developments in the industry with the proposed total elimination of self-insurance and the sliding scale, we are concerned that the Commission is unnecessarily limiting its own options -- tying its own hands -- when it comes to fashioning the appropriate coverage for any given situation. Under current regulations, evidence of financial responsibility can be established in several ways, but by eliminating self-insurance and the use of the sliding scale, the proposed rule forces the industry into a narrowing set of options to evidence financial responsibility. This proposal comes just at a time when developments in the industry suggest that **increasing** flexibility, rather than limiting flexibility, will best enable the Commission to strike the appropriate balance of having adequate coverage, while not requiring such burdensome coverage as to **cause** the very nonperformance that the Commission seeks to prevent. As outlined in greater detail below, we urge the Commission to keep its options open.

3. Discussion

¹ 67 Fed. Reg. 19730 at 19731 (April 23, 2002).

a. The Proposed Rule Could Jeopardize Smaller American Operators by Putting them at a Competitive Disadvantage with respect to Larger Foreign Operators

A significant consequence of the proposed rule will be the enhancement of the competitive position of the large foreign cruise lines at the expense of American operators. The most significant adverse impact of the proposed rule will be on smaller American companies, like Cruise West. Our U S flag vessels already operate at a significant competitive disadvantage against foreign-flag vessels because of higher capital costs, higher crew rates and unfavorable tax treatment. The proposed rule will only increase that competitiveness gap. It will have no impact on the largest cruise lines that already dominate the North American cruise market because they do not have U S based assets, and therefore can not qualify for the self-insurance program. Similarly, these operators have unearned passenger revenues (“UPR”) that significantly exceed the level that makes the sliding scale of any use to them.

(1) The Sliding Scale

The sliding scale provides experienced smaller operators with at least some modest relief from the regulatory advantage enjoyed by the larger operators. The disparity is significant. A major cruise line with a fleet of several large cruise ships could easily have a UPR figure in the hundreds of millions dollars, yet because of the \$15 million ceiling under current regulations, that cruise line would be required to cover only a small fraction of its UPR with a bond or other collateral. By comparison, a smaller operator that has a total UPR of \$15 million would have to cover a full 100% of its UPR.² The relative burden on the smaller company is obvious and puts it at a significant competitive disadvantage over its larger competitor.

The sliding scale was intended to help in some small way to address that competitive disadvantage. The proposed rule offers no explanation as to why the sliding scale should now be totally eliminated as a mechanism to address this disparity, particularly when the \$15 million

² That Congress did not intend to require 100% coverage is clear from the 1993 amendment to the underlying statute deleting the only language that could be read to require full coverage. Pub. L. 103-206, Title III, Section 320, 107 Stat. 2427 (1993).

ceiling is unaffected. There appears to be no relationship between use of the sliding scale and any failure of passengers to receive their fares with respect to the cruise line failures cited in the NPRM.³

(2) Self-Insurance

The ability to self-insure to meet Performance Certificate requirements is one of the few existing advantages to maintaining a U S based cruise line because self-insurance is expressly tied to ownership of U S based assets. The proposed rule would give no significance to these U S based assets, even though Congress believed them to be important at the time Public Law 89-777 was enacted.⁴

The failed cruise line cited in the NPRM, whose passengers are likely to receive little reimbursement, was self-insured but involved a highly unique situation where the net worth requirements overestimated the value of certain vessels under construction that were never completed. This particular problem could be dealt with by requiring closer examination of how net worth requirements are met, with additional coverage required as appropriate, rather than eliminating self-insurance altogether.⁵

The presence of U S based assets is a wholly appropriate basis for evaluating an operator's financial responsibility and should not be thrown out with the bathwater of a single bad experience. At a minimum, the existence of U S based assets should be a factor that the Commission is allowed to consider in its analysis as to whether there are **sufficient** resources available to cover potential passenger claims for non-performance.

³ The preamble to the NPRM makes no mention of whether any of the four companies utilized the sliding scale. It appears as though the only passengers that are unlikely to receive reimbursement are those associated with the one self insured company, which by definition, did not rely on the sliding scale to establish coverage levels. 67 Fed. Reg. at 19731 (April 23, 2002).

⁴ The legislative history of Public Law 89-777 places particular significance on the existence of U S based assets as one of the protections that should be considered in determining whether an operator was financially responsible. See S Rep No 1483, 89th Cong., 1st Sess (1966), reprinted in 1966 U S C C.A.N 4176, 4182 ("many persons operating in the cruise business are responsible and *maintain sufficient assets in this* country which could be proceeded against.") (emphasis added).

⁵ The cited company, American Classic Voyages Co ("AMCV"), had embarked on a highly leveraged expansion involving an ambitious billion dollar new multiple vessel construction program. It was able to meet the net worth requirements by valuing several hundred million dollars of vessels under construction at a level that relied on completion of the vessel. When the company filed for bankruptcy following the events of September 11, the actual value of the partially completed vessels was far less, resulting in the short fall.

b. The Commission Should Retain the Option to Accept Self-Insurance and Sliding Scale Coverage on a Case-by-Case Basis

There is no question that the events of last September had a disproportionate affect on the travel industry as a whole and on the cruise business in particular. Our Company has worked to meet these challenges by making operational and financial changes to lower our debt burden, increase operational efficiencies and strengthen our position in a changing market. This has also resulted in a substantial amount of our net worth reflected in capital assets, rather than more liquid cash-based assets that would be necessary to collateralize a surety bond. Other companies will no doubt face different circumstances.

The Commission's task in this climate is a challenging one. By being too lenient in the evidence of financial responsibility that it requires, the Commission may be leaving passengers vulnerable to lost fares. On the other hand, imposing new financial responsibility requirements too suddenly, or that are too burdensome on the operator, the Commission action could result in the operator's inability to meet its commitments thereby causing the very nonperformance that the agency is charged with guarding against.

We believe that under these circumstances the Commission should maintain maximum flexibility to accept alternative evidence of financial responsibility in order to strike the appropriate balance in any given situation. Accordingly, we urge the Commission to maintain both self-insurance and the sliding scale as optional methods of establishing financial responsibility. As long as acceptance of either one is left to the discretion of the Commission, situations that have proven difficult in the past could be avoided, without forcing the agency and the industry into a narrow set of prescribed options that may not be able to meet the challenges facing the industry without causing the very problem that the Performance Certificate program is intended to prevent.

At a minimum, we recommend that the self-insurance and sliding scale options be left in place as discretionary with the Commission for the time being. Should it be determined that they

are appropriate for elimination, that should only be done as part of a comprehensive rulemaking re-evaluating the ceiling, so that in the regulatory interim, small U S operators are not disadvantaged with respect to their large foreign competitors

c. **The Commission Should Provide An Appropriate Transition Period to Avoid Causing the Very Non-Performance that the Performance Certificate Program is Intended to Guard Against**

For the past five years, Cruise West has utilized self-insurance to meet the FMC financial responsibility requirements. Our long-term business arrangements were structured in good faith reliance on those requirements. Similarly, those companies that have relied on the sliding scale coverage have likely structured their business arrangements accordingly. As with any regulatory change upon which parties have relied, due process requires an orderly transition. This is particularly true where to do otherwise would frustrate the very purpose of the regulatory regime.

An immediate and complete transition to the proposed rulemaking cannot be accomplished quickly without having significant, and potentially devastating, effects on the organization. For instance, cash may need to be raised through sale of company assets or equity in order to provide alternate evidence of financial responsibility, resulting in a long-term impact on the company. Such drastic and unusual measures are due in part to the unavailability of traditional alternatives in the aftermath of September 11th. Whatever regulatory change the Commission decides to make, we strongly recommend that the Commission provide sufficient time for **affected** parties to transition into the new scheme. Because circumstances will likely be different depending on the particular company we urge the Commission to give itself **sufficient** latitude to handle these matters on a case-by-case basis so as to allow for an orderly transition.

4. **Conclusion**

For the reasons outlined above, we strongly urge the Commission to maximize its ability to implement the Performance Certificate program and to retain the flexibility to use both **self-**insurance and the sliding scale, both subject to the Commission's discretion that they are appropriate methods of establishing financial responsibility for a particular operator. Should the Commission decide otherwise, however, we strongly encourage that an ample transition period be allowed to ensure that operators, like Cruise West, that have relied on current regulations in structuring their affairs, be allowed a sufficient transition time, to bring their operations into compliance. To do otherwise could jeopardize their ability to perform the transportation at all.

We appreciate this opportunity to provide comments in connection with the proposed rulemaking.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard G. West". The signature is fluid and cursive, with a large initial "R" and "W".

Richard G. West

Chairman/Chief Executive Officer