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DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD 2015–0049]

Application of Cargo Preference Requirements to the Federal Ship Financing Program

AGENCY: Maritime Administration (MARAD)

ACTION: Final Policy Clarification.

SUMMARY: On April 22, 2015, the Maritime Administration (MARAD) published a Notice of Proposed Policy Clarification (80 FR 22611) seeking comments on a proposed policy clarifying the application of the Cargo Preference Act of 1954 (CPA 1954), 46 U.S.C. § 55305, to applications, commitments, and guarantees under MARAD’s Federal Ship Financing Program (Title XI), 46 U.S.C. Chapter 537. This Notice finalizes MARAD’s policy clarification.

DATES: This policy is effective on the date of publication, including for all pending Title XI applications.

FOR FURTHER INFORMATION CONTACT: Owen J. Doherty, Associate Administrator for Business and Finance Development, Maritime Administration, 1200 New Jersey Avenue SE,

Washington, DC 20590, (202) 366-9595, owen.doherty@dot.gov.

SUPPLEMENTARY INFORMATION: MARAD received ten (10) public comments in response to its Notice of Proposed Policy Clarification. In addition, on July 9, 2015, MARAD held a meeting with interested stakeholders, a transcript of which was published on the public docket folder at www.regulations.gov under docket number MARAD–2015–0049. The public comments ranged from full support for the Proposed Policy Clarification as published to complete opposition to the application of the CPA 1954 to the Title XI program.

Numerous comments focused on the application of the CPA 1954 to mortgage-period financing. Some commenters asserted that the application of the CPA 1954 to mortgage-period financing would result in such a severe administrative and cost burden that it would render compliance with the CPA 1954 impracticable and deter future Title XI applications. Commenters also asserted that the Proposed Policy Clarification was a significant deviation from MARAD’s prior practice of not applying the CPA 1954 to mortgage-period financing. Relatedly, virtually all commenters were concerned about the timing for application of the CPA 1954, with particular focus on mortgage-period applications, contending that cargo preference would add costs without any assurance of an application’s approval.

MARAD has revisited the text of the CPA 1954 and its regulations at 46 C.F.R. 381.7 and determined that cargo preference will not be applied to mortgage-period financing. This decision required conscientious consideration of all public input and is focused on the project scope under Title XI mortgage-period financing and that of construction-period financing. MARAD bases its decision upon the statutory text, which provides in relevant part that the CPA 1954 applies when

the U.S. Government “provides financing in any way for... equipment, materials, or commodities...which may be transported on ocean vessels.” 46 U.S.C. § 55305(b). In mortgage-period financing, separate and distinct from construction-period financing, MARAD is only providing financing for the completed, delivered vessel. Financing is not provided for any actual vessel construction activities or vessel components prior to the completed vessel’s delivery, which in turn are privately financed. It is further compelling that in admiralty, a vessel, once completed and delivered, is a distinct legal entity that is, for example, “treated in other connections as an entity capable of entering into relations with others, of acting independently and of becoming responsible for her acts.” Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co., 254 U.S. 1, 9 (1920). This position is also consistent with MARAD’s existing regulations, applying the CPA 1954 to “cargoes... which are generated by U.S. Government Grant, Guaranty, Loan and/or Advance of Funds Programs.” 46 C.F.R. § 381.7. Thus, it is MARAD’s conclusion that because no financing is provided for equipment or materials which may be transported on ocean vessels, the CPA 1954 is not applicable to mortgage-period financing.

Consistent with the above analysis, MARAD notes that a narrow exception to the inapplicability of the CPA 1954 to mortgage-period financing may exist. Specifically, the CPA 1954 may apply if a vessel is financed with a mortgage-period guarantee and the completed vessel is to be delivered at a location other than the shipyard. For example, if MARAD provides a mortgage-period guarantee for a completed vessel and the shipyard places that vessel on a heavy lift ship for final delivery to the Title XI recipient, the ocean transportation for that final

delivery may be subject to the CPA 1954. MARAD will review this exceptional circumstance on a case-by-case basis and may apply the contents of this Notice as appropriate.

Separate from mortgage-period financing, and consistent with the project scope analysis described above, the CPA 1954 does apply to all cargoes under Title XI construction-period financing, without regard to the timing of the Title XI application or approval. In construction-period financing, when an application is approved, MARAD is providing financing based upon the “Actual Cost” of the vessel as defined by 46 C.F.R. § 298.2 and further described in 46 C.F.R. § 298.13(b). In providing construction-period financing, MARAD is therefore financing all discrete equipment and materials that will be incorporated into the vessel and included in the Actual Cost, regardless of when an application is submitted or approved. In this manner, equipment and materials purchased and transported prior to the approval and issuance of a Title XI guarantee but included in Actual Cost is akin to using Federal assistance to finance pre-award costs. *See* 2 C.F.R. 200.458 (“Pre-award costs are those incurred prior to the effective date of the Federal award directly pursuant to the negotiation and in anticipation of the Federal award where such costs are necessary for efficient and timely performance of the scope of work. Such costs are allowable only to the extent that they would have been allowable if incurred after the date of the Federal award and only with the written approval of the Federal awarding agency.”). Therefore, all equipment and materials that are transported by ocean and included in the Actual Cost of a vessel built with Title XI construction-period financing will be included in determining compliance with the CPA 1954.

It is further noted that the above analysis regarding construction-period financing will also

generally apply to Title XI financing for vessel reconstruction or reconditioning. Therefore, absent evidence to the contrary for a particular project, the CPA 1954 is applicable in the same manner to cargoes for vessel reconstruction or reconditioning projects financed through a Title XI guarantee.

Beyond the applicability to different types of financing, MARAD also received multiple comments asserting that the submission of bills of lading was overly burdensome. Bills of lading are the sole basis by which MARAD can assess what cargo has been transported and whether program participants have complied with the CPA 1954. The requirement to submit bills of lading under Federal acquisitions and Federal financing agreements is long established. *See* 48 C.F.R. § 52.247-64; 46 C.F.R. § 381.3; and 46 C.F.R. § 381.7. The requirement to submit bills of lading within thirty (30) days is consistent with MARAD's existing regulations and is routinely met by shippers across all industries, often with little expertise of marine transportation. Administrative requirements found in Section 2 of this Final Policy Clarification therefore remain unchanged.

Commenters also expressed concern regarding the submission of transportation plans, specifically that there was a lack of clarity for what needs to be contained in a transportation plan. In response, MARAD has included example transportation plan contents below in Section 3 of this Final Policy Clarification. It is also noted that while a transportation plan is required to be submitted at the time of application, MARAD views transportation plans as cooperative documents that should be updated as construction progresses. This process ensures that all parties, including MARAD, the Title XI participant, and the shipyard have a continuing

understanding of the participant's CPA 1954 compliance as the project evolves.

A number of commenters also expressed concern regarding the process used to determine U.S.-flag vessel availability and the related issue of determining when an offered rate is fair and reasonable. The comments often incorrectly cited the cost differential between U.S.-flag and foreign-flag vessels. The statute unambiguously states that availability is based upon “fair and reasonable rates for commercial vessels of the United States.” 46 U.S.C. § 55305 (emphasis added). *See also Administration of Cargo Preference Act [50-50 Law: Hearing on Public Law 664 Before the H. Comm. on Merchant Marine and Fisheries, 83d Cong. 178 (1955)* (“It may be noted at the outset that only rates ‘for United States-flag commercial vessel’ are considered in determining a fair and reasonable rate, so that foreign-flag rates do not enter into the determination.”). The comments generally go beyond the scope of this policy clarification to the general administration of the CPA 1954; however, understanding that there are significant commercial concerns, MARAD has expanded Section 4 of this Final Policy Clarification to provide additional insight into the criteria that MARAD may consider in determining vessel availability and fair and reasonable rates. Furthermore, it is anticipated that coordination and regular dialogue between MARAD and vessel reconstruction, reconditioning, or construction-period financing applicants, which typically submit applications early in the vessel construction, reconstruction, or reconditioning process, will alleviate many of the concerns expressed by the commenters.

Finally, some commenters disagree with the potential remedies listed in Section 5 of the Notice of Proposed Policy Clarification and expressed doubt that MARAD possesses the

requisite authority to impose such remedies. MARAD disagrees and affirms that it possesses the discretion to impose the remedies in Section 5. If MARAD chooses to impose civil penalties under 46 U.S.C. § 55305(d) as a result of a violation of the CPA 1954 by a Title XI participant, MARAD would also follow applicable procedures to afford all protections under the Administrative Procedure Act. *See* 5 U.S.C. §§ 554-558. Therefore, Section 5 is unchanged; however, MARAD remains of the view that early planning and close coordination by vessel reconstruction, reconditioning, or construction-period financing participants will ensure that no CPA 1954 violations will occur.

Section 1: What is Cargo Preference?

The CPA 1954 mandates that shippers use U.S.-flag vessels to transport a portion of Government-impelled, ocean borne cargoes. Through statutory amendments in 2008 to 46 U.S.C. § 55305(b), the CPA 1954 was clarified to state that the statute applies whenever the U.S. Government provides financing in any way with Federal funds for the account of any person. MARAD, as the agency charged with implementing and overseeing compliance administration of the CPA 1954, previously determined that “financing in any way” includes Federal loan guarantee programs, such as Title XI.

Section 2: What are the Cargo Preference requirements?

There are both transportation and administrative requirements associated with the CPA 1954:

Transportation: For vessel reconstruction, reconditioning, or construction-period financing, at least 50 percent of the gross tons of the equipment or materials which are transported by ocean

and included in the Actual Cost of vessel in accordance with 46 CFR § 298.13(b) must be transported on privately-owned commercial vessels of the United States, to the extent those vessels are available at fair and reasonable rates. To ensure a fair and reasonable participation of U.S.-flag vessels, MARAD's established definition of the undefined term "gross ton" means a revenue ton (metric ton or cubic meter of cargo, by whichever measure the number is greater). This greater number is the standard by which compliance with the CPA 1954 will be evaluated.

Administrative: For each covered shipment, consistent with 46 CFR § 381.3, within thirty (30) days of the foreign export loading, the shipper (Title XI participant or its representative) must submit a legible copy of a rated on-board ocean master bill of lading to MARAD. This requirement exists whether the particular shipment was transported aboard a U.S.-flag or a foreign-flag vessel to establish a correct denominator on which CPA 1954 compliance is calculated. The bills of lading must be submitted to the Office of Cargo and Commercial Sealift, Maritime Administration, 1200 New Jersey Avenue SE, Washington, DC 20590 or via email to cargo.marad@dot.gov. The bills of lading or the transmittal cover must clearly state the Title XI project to which they apply and must contain the following information: (1) The name of the vessel carrying the cargo(s); (2) The carrying vessel's International Maritime Organization (IMO) number; (3) The carrying vessel's flag of registry; (4) The date of cargo loading; (5) The port of loading; (6) The port(s) of trans-shipment (if any); (7) The port of final destination; (8) A description of the cargo(s); (9) The gross weight of the cargo(s) in kilograms and the volume of the cargo(s) in cubic meters; and (10) The total ocean freight revenue in U.S. dollars.

Section 3: To what cargoes does Cargo Preference apply?

For vessel reconstruction, reconditioning, or construction-period financing, the cargo preference requirements apply to all foreign components that are transported by ocean and included in the “Actual Cost” of the project in accordance with 46 CFR § 298.13(b). Consistent with the statutory mandate, given that MARAD is providing financing for all equipment included in Actual Cost, including equipment transported prior to approval, the total revenue tonnage of all foreign equipment transported by ocean will serve as the denominator from which the at-least-50-percent-U.S.-flag transportation calculation will be made.

At the time of application, all vessel reconstruction, reconditioning, or construction-period financing applicants are required to submit a transportation plan for review by MARAD to ensure that sufficient planning has occurred to meet the CPA 1954 requirements. This requirement will be discussed with each applicant and potential applicant at the earliest possible time. A transportation plan generally contains a description of each shipment cargo including weight and volume, country of origin, date of shipment, the flag of the vessels that will carry the cargo, and, to the extent known, the vessel and/or carrier that will be engaged for future shipments. Ideally, the U.S.-flag portion is shipped first under a transportation plan to ensure compliance with the CPA 1954; however, a plan that does not conform to this principle may still be acceptable. Furthermore, understanding that schedules will change as the project develops, MARAD anticipates that the Title XI participant and the shipyard constructing the vessel will continuously engage with MARAD to update the transportation plan as necessary. By reviewing the shipping plan early in the application process, or prior to submission of any application if possible, MARAD can work with Title XI participants and their respective shipyards to help

identify and work with them to mitigate challenges to CPA 1954 compliance.

Section 4: What if an available U.S.-flag vessel cannot be found or the total ocean freight rate appears too expensive?

Only MARAD can issue a determination that no U.S.-flag vessels are available at fair and reasonable rates. If a Title XI participant, through demonstrably diligent efforts, is unable to find U.S.-flag service, without MARAD's issuance of a determination of the non-availability of qualified U.S.-flag carriage, the participant's due diligence alone will not excuse that applicant from CPA 1954 requirements. Title XI participants must communicate with U.S.-flag carriers at the earliest possible time to ensure the greatest degree of coordination and to obtain the best freighted rates. In the event that a Title XI participant experiences difficulty obtaining U.S.-flag service, or if it can only find partial U.S.-flag service, the participant must contact MARAD without delay at cargo.marad@dot.gov or (202) 366-4610, so as to provide MARAD with an undiminished opportunity to assist in locating U.S.-flag service. Ideally, MARAD will be able to locate available U.S.-flag service, for the Title XI participant's potential engagement to meet its U.S.-flag carriage requirement. Alternatively, if MARAD is unsuccessful in locating available U.S.-flag service, a determination of non-availability will be issued. With proper planning, U.S.-flag service can generally be obtained at fair and reasonable rates. Early planning and coordination are the key factors to meeting cargo preference requirements in Title XI, as in all Federal programs.

In evaluating whether U.S.-flag vessels are available at fair and reasonable rates, MARAD may consider, at its discretion: (1) U.S.-flag rates offered in response to the shipper's

solicitation; (2) U.S.-flag commercial rates being offered on the same trade route under similar circumstances taking into account, as available, information obtained from interviews with U.S.-flag carriers, historic rates, published rates, and applicable index rates; (3) As available and applicable, guideline rates calculated under 46 C.F.R. Part 382; and (4) Whether the shipper has made a demonstrably diligent effort to obtain U.S.-flag service, including evidence of advanced planning and requests for proposals for ocean transportation issued by the shipper. Vessel availability is assessed in consideration of shipper's reasonable required laycan and delivery dates.

Section 5: What if non-compliance with Cargo Preference requirements occurs?

At MARAD's direction, as the administrator of the Title XI program, non-compliant parties may be denied a letter commitment or, consistent with 46 U.S.C. § 55305(d)(2)(B), may be required to provide make-up cargoes for carriage aboard U.S.-flag vessels to offset the lost cargo carriage supporting work under the Title XI financing application. Where knowing and willful violations occur, consistent with 46 U.S.C. § 55305(d)(2)(C), MARAD may issue a civil penalty of not more than \$25,000 for each violation, with each day of a continuing violation following the date of shipment counting as a separate violation. Additionally, CPA 1954 requirements are incorporated into Title XI letter commitments; therefore, failure to properly adhere to cargo preference requirements could impact MARAD's ability to close on a Title XI guarantee because the recipient has not met its obligations under the letter commitment. However, with early planning and coordination with MARAD, no CPA 1954 violations need occur.

Section 6: What is the purpose of Cargo Preference?

The CPA 1954 provides cargo that helps to retain and encourage a privately-owned and operated U.S.-flag merchant fleet. The U.S.-flag fleet is a vital resource, providing essential sealift capability to globally project and sustain the U.S. Armed Forces or support other national emergencies, maintaining a cadre of skilled seafarers available in time of national emergencies, and helping to protect U.S. economic interests. The U.S. maritime industry also supports thousands of sea-going, shore-based, and secondary, associated jobs, supporting the Nation's economic growth. It is imperative that Federal programs, such as Title XI, and beneficiary Title XI applicants and shipyards, as members of the U.S. maritime industry, support this national priority through proper adherence to cargo preference requirements. Therefore, while the use of U.S.-flag vessels to carry 50 percent of the gross tons of ocean borne cargoes is the statutory minimum, MARAD, as the agency charged with administering both Title XI and the CPA 1954, encourages the use of U.S.-flag vessels for greater than the minimum whenever possible.

(Authority: 46 U.S.C. 55305; 46 U.S.C. Ch. 537)

By Order of the Maritime Administrator

T. Mitchell Hudson, Jr.

Secretary

Maritime Administration

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