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Update on the Cargo Preference Act of 1954 and Other Statutes

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I
INTRODUCTION

A 2008 article published in the Journal of Maritime Law and Commerce, entitled, "The Cargo Preference Act of 1954 and other Statutes"[1] by this author, became a primer for many on the history and application of preferences provided by law to U.S.-flag vessels for carriage of U.S. Government-sponsored civilian[2] cargoes. The article was made available (with the permission of the Journal of Maritime Law and Commerce) on the Maritime Administration's website.[3]

The 2008 article described the genesis of civilian cargo preference requirements in the foreign aid programs following the end of World War II, and the broad application of U.S.-flag preference to both government-assisted export cargoes and government-impelled import cargoes. Also discussed were the

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[1]See Murray A. Bloom, *The Cargo Preference Act of 1954 and Related Legislation,* 39 J. MAR. L. & COM. 289 (July 2008).

[2]Military cargoes are subject to a 100% U.S.-flag preference under the Military Cargo Preference Act of 1904, 10 U.S.C. § 2631.

[3]http://www.marad.dot.gov/wp-content/uploads/pdf/JOURN001.pdf.

rulemaking authority gained by the Secretary of Transportation[4] through the Merchant Marine Act of 1970[5] and the increase in percentage of U.S.-flag requirements for certain agricultural export programs established by the Food Security Act of 1985.[6]

However, soon after publication of the 2008 article, Congress made significant changes to civilian agency cargo preference requirements to broaden the scope of coverage and to add enforcement authority.[7] This article updates the 2008 article.

II
AMENDED SCOPE OF COVERAGE

Amended Section 55305(b) of Title 46, United States Code, now provides:

> When the United States Government procures, contracts for, or otherwise obtains for its own account, or furnishes to or for the account of a foreign country, *organization, or persons* without provision for reimbursement, any equipment, materials, or commodities, or *provides financing in any way with Federal funds for the account of any persons unless otherwise exempted*, within

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[4]The Secretary of Transportation has delegated the authority under this provision and its predecessor to the Maritime Administrator (49 C.F.R. §1.66(e)). The Maritime Administration regulations governing administration of cargo preference are located at 46 C.F.R. Part 381.

[5]Pub. L. No. 91–469.

[6]The Food Security Act of 1985, Pub. L. 99–198, represented a compromise that exempted certain agricultural market development programs from cargo preference while increasing the U.S.-flag share of agricultural donation programs to 75 percent. See H.R. Conf. Rep. No. 99–447, Dec. 17, 1985. However, §§55314(a) and (c), of title 46, United States Code, mandating the increase in U.S.-flag carriage were repealed in 2012, by the Moving Ahead for Progress in the 21st Century Act, Pub. L. 112–141, §100124(a). §55313, of Title 46, United States Code, mandating the exemption of certain market development programs was not disturbed.

[7]§55305 of Title 46, United States Code, is the current repository of the Cargo Preference Act of 1954. It was amended by the Duncan Hunter National Defense Authorization Act for fiscal Year 2009, Pub. L. 110–417, 122 Stat. 4769 (2008), §3511(a). ("2008 Amendments")

> or without the United States, or advances funds or credits, or guarantees the convertibility of foreign currencies in connection with the furnishing *or obtaining* of the equipment, materials, or commodities, the appropriate agencies shall take steps necessary and practicable to ensure that at least 50 percent of the gross tonnage of the equipment, materials, or commodities (computed separately for dry bulk carriers, dry cargo liners, and tankers) which may be transported on ocean vessels is transported on privately-owned commercial vessels of the United States, to the extent those vessels are available at fair and reasonable rates for commercial vessels of the United States, in a manner that will ensure a fair and reasonable participation of commercial vessels of the United States in those cargoes by geographic areas. (Amendatory language italicized).

The 2008 Amendments' path to enactment took an unusual route. The Senate-reported and passed version of the Defense Authorization bill did not address cargo preference.[8] Nor did the House passed bill contain any cargo preference provision.[9] Without a conference, the managers of the Senate and House bills agreed to amend the Senate-passed Defense Authorization bill and included the ultimately-enacted cargo preference provisions.[10] The Senate thereafter agreed to the bill with the House amendment.[11]

Thus, the only legislative history directly linked to the bill enacted into law is contained in the Statement of Managers that was presented to the House in its final action on the legislation. The relevant passage of the Statement of Managers reads as follows:

> Joint Explanatory Statement on S. 3001, the Duncan Hunter National Defense Authorization Act of Fiscal Year 2009.
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[8]S. 3001, 110th Cong. (2008).
[9]H.R. 5658, 110th Cong. (2008).
[10]S. 3001, 110th Cong. (2008), 154 Cong. Rec. H9231 (daily ed. Sept. 24, 2008).
[11]S. 3001, 110th Cong. (2008), 154 Cong. Rec. S9979 (daily ed. Sept. 27, 2008).

> Transportation in American vessels of government personnel and certain cargoes (sec. 3511). The agreement includes a provision to amend section 55305 of title 46, United States Code, to clarify the requirements of that section with respect to the transportation of government personnel and cargo in American vessels.[12]

Although the Statement of Managers only speaks of "clarification" of existing requirements, there are other, fuller, statements of legislative intent that explain the enacted provisions when they appeared in earlier bills. The cargo preference amendments at issue here were originally contained in S. 2997, the Maritime Administration Authorization Act for Fiscal Year 2009. Senate Report No. 110–457 (2008), which accompanied S. 2997, states, with regard to scope of coverage:

> The bill would strengthen existing rules that govern cargo preference requirements, clarifying that all federally financed cargoes are subject to cargo preference laws (which require that certain percentages of government-sponsored freight be transported on U.S. flag vessels).[13]

It might be argued that statements made on earlier bills are entitled to little or no weight, and might not be reflective of the views of Congress as a whole. Nevertheless, Report No 110–457 is the only discussion of the broad reach of the new language.

When interpreting a statute, courts must give effect to the legislature's intent; this determination begins with the statute and if the text is plain, the court need not inquire further.[14]

The amendments to section 55305(b) seemingly resulted less in plain text, but in more of an awkward syntax, complicating exegesis. For example, the inserted language, "provides financing in any way with Federal funds for the account of any persons unless otherwise exempted," does not stand alone; it is

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[12]154 Cong. Rec. H8718, H9025 (daily ed. Sept. 23, 2008).

[13]Senate Report No. 110-457 (2008), p.4.

[14]See, e.g., MRL Development I, LLC v. Whitecap, Inv. Corp., 823 F.3d 195, 204–205 (3d Cir. 2016).

structurally attached to language dealing with foreign assistance. Placed where it is, it could be argued that the phrase only addresses the types of government-assisted exports that trigger its coverage and does not modify the requirements as to imports.

However, the best conclusion is that the language of the legislation worked two major revisions to enlarge the scope of cargo preference as to the covered participants and the covered Federal programs. The new language adopted in 2008, on its face, broadly applies U.S.-flag preference to cargoes that are financed "in any way with Federal funds for the account of any persons. . . ." That language defies any suggestion that it references or is limited to foreign accounts or exports. Rather, by its terms, syntax, and grammar, the new language clearly establishes an additional "category" of cargo subject to the Cargo Preference Act independent of those found in the prior version of the provision.

Moreover, a contrary interpretation would strip the amendment to §55305(b) of any purpose.[15] The expansion of cargo preference to "cargo financed in any way with Federal Funds for the account of any persons" does not affect the first category of cargo procured, contracted for, or otherwise obtained for the account of the Federal Government, because the Federal Government is not a "person." Nor would the amendment affect the second category by expanding any export cargo, because foreign assistance cargoes are already covered by Cargo Preference whether provided to foreign governments or foreign persons.[16] In order for the amendment to have effect, it can only be interpreted to establish a new, third, category of cargoes that are financed in any way by "Federal Funds" for any persons. This third category should oblige previously resistant programs and agencies to start shipping cargo on U.S.-flag vessels.

The legislation also has the effect of overruling a Justice Department memorandum restricting the applicability of cargo preference with regard to Federal grants to states. This opinion

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[15]Courts attempt to give full effect to all words contained within that statute or regulation, thereby rendering superfluous as little of the statutory or regulatory language as possible. Sullivan v. McDonald, 815 F.3d 786, 790 (Fed. Cir. 2016).

[16]See Opinion of Robert Kennedy, 42 U.S. Op. Atty. Gen. 203 (Aug. 29, 1963).

was issued by the Office of Legal Counsel (OLC) on February 2, 1988, to the Office of Management and Budget, in response to the Department of Transportation exercising authority to require compliance with the Cargo Preference Act of 1954 by the States when importing cement and clinker for use in construction of highways.[17] OLC ruled that the 1954 Act applied domestically only to material acquired for the account of the Federal Government; it did not apply to material acquired for the account of state or local government or private persons as such persons were not defined recipients under the Cargo Preference Act of 1954.

However, the 2008 Amendments extend cargo preference requirements to cover parties other than the United States inasmuch as the statute applies when an agency "provides financing in any way with Federal funds *for the account of any person.*" (Emphasis added.) Accordingly, the 1988 OLC decision was rendered a nullity by the 2008 Amendments.

A cautionary note is warranted for contractor-owned equipment that is brought in to complete a federally financed project (and may be moved to a different project afterwards) but is not paid for by the Federal Government. Despite the broadened coverage mandated by the 2008 Amendments, there still must be an outer limit on the application of cargo preference. Otherwise, any unrelated thing bought by any recipient of federal funds could be considered subject to cargo preference. It is, therefore, understood that there must ordinarily be a direct connection between the funds provided and the cargo obtained (i.e., specific contractual references to identified cargo) for cargo preference requirements to apply to equipment owned by a private contractor.[18]

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[17]This opinion is no longer listed on the Office of Legal Counsel website (justice.gov/olc/opinions). But, see discussion of the opinion in Murray A. Bloom, *The Cargo Preference Act of 1954 and Related Legislation*, 39 J. MAR. L. & COM. 289, 297 (July 2008).

[18]See Council of American Flag Ship Operators v. United States, 596 F. Supp. 160 (D.D.C. 1984), aff'd, 782 F.2d 278 (D.C. Cir. 1986); see also Matter of C.G. Caras, U.S. Department of Commerce, B-196704 Comp. Gen. (Aug. 11, 1980).

A further cautionary note is warranted for application of cargo preference requirements to subcomponents imported for inclusion in vessels constructed under the Title XI Ship Financing program.[19] If a loan guarantee is provided to assist future vessel construction, then any imported components could be considered "financed" and subject to cargo preference.[20] However, under a mortgage period loan guarantee for a completed vessel, the thing being financed is the vessel itself, and the connection between the financing and the importation of components is diminished. Also, it may not be "practicable" to apply cargo preference requirements to a shipyard during construction of a vessel prior to grant of a loan guarantee, if grant of the loan guarantee is uncertain, because there may end up being no federal "financing."[21]

III
NEW ENFORCEMENT PROVISIONS

The 2008 Amendments also strengthened the Secretary of Transportation's oversight role in the administration of cargo preference by adding the (italicized) provisions below to 46 U.S.C. § 55305(d)(1):

> Each department or agency that has responsibility for a program under this section shall administer that program with respect to this section under regulations *and guidance* issued by the Secretary of Transportation. *The Secretary, after consulting with the department or agency or organization or person involved, shall have the sole responsibility for determining if a program is subject to the requirements of this section.*

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[19]46 U.S.C. Ch. 537; 46 C.F.R. Part 298.

[20]See Notice, Maritime Administration Docket No. 2011–0082, 76 Fed. Reg. 37402 (June 27, 2011).

[21]See generally, Jean McKeever/Murray Bloom, Comments Submitted in MARAD Docket No. 2013–0049 (the Maritime Administration's policy proposal to broaden the application of cargo preference requirements to the Title XI Ship Financing program).

The 2008 Amendments also provided new enforcement authority, including the ability to levy civil fines for non-compliance in a new §55305(d)(2), which reads as follows:

> **(2)** The Secretary--
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> **(A)** shall conduct an annual review of the administration of programs determined pursuant to paragraph (1) as subject to the requirements of this section;
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> **(B)** may direct agencies to require the transportation on United States-flagged vessels of cargo shipments not otherwise subject to this section in equivalent amounts to cargo determined to have been shipped on foreign carriers in violation of this section;
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> **(C)** may impose on any person that violates this section, or a regulation prescribed under this section, a civil penalty of not more than $25,000 for each violation willfully and knowingly committed, with each day of a continuing violation following the date of shipment to be a separate violation; and
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> **(D)** may take other measures as appropriate under the Federal Acquisition Regulations issued pursuant to section 25(c)(1) of the Office of Federal Procurement Policy Act (41 U.S.C. 421(c)(1)) or contract with respect to each violation.

As explained by Senate Report No. 110-447:

> . . . Also, the bill would establish civil penalties for violations of such laws by shipping companies. Enacting the bill could result in an increase in civil penalties collected by MARAD from violators of cargo preference laws, but CBO estimates that any such increases would be minimal. Based on information provided by MARAD and other federal agencies, we estimate that other changes to the cargo preference law would have no significant impact on the federal budget because most federal agencies already comply with the law.

The enforcement powers created by the 2008 Amendments go far beyond anything available under the previous enforcement regime. In prior years, the Secretary of Transportation's main recourse in the face of a recalcitrant executive agency had been to

appeal to the Attorney General.[22] When the Secretary of Transportation was unable or unwilling to persuade other government agencies to ship on U.S.-flag vessels, the shipping companies affected could, and did, file private law suits.[23]

However, the authorities contained in §55305(d) should not be applied until such time as the Secretary of Transportation issues specific implementing regulations.[24] The 2008 Amendments provide, "The Secretary *shall* prescribe such rules as are necessary to carry out section 55305(d) of title 46, United States Code." (Emphasis added).[25] Promulgation of new rules appears necessary, for the sake of due process, to bring some specificity to the broad parameters of the new authority and for other issues.

For example, the 2008 Amendments may imply that the Attorney General, who is authorized to determine legal matters for executive branch agencies,[26] does not have a role to play in a cargo preference dispute between the Secretary of Transportation and another agency. Also, the authority of the Secretary of Transportation to levy civil fines on "any person" should be spelled out.

This provision also has potential to raise jurisdictional issues with the Department of Defense. The Maritime Administration's cargo preference regulations[27] list the Department of Defense as being subject to the Cargo Preference Act of 1954. The Defense Acquisition Regulations Supplement[28] also provides that: "The 1954 Act is applicable to DoD, but DFARS coverage is not

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[22]See e.g., MARAD Rulemaking Authority Under Cargo Preference Laws, Op. Off. Legal Counsel (April 19, 1994).

[23]See e.g., Victory Maritime, Inc. v. Pressley, No. 01cv00381RWR (U.S.D.C. filed Feb. 16, 2001); Maersk Line Ltd. v. Vilsack, No. 1:09cv747 (E.D. Va. filed July 6, 2009).

[24]The Secretary of Transportation has general authority to levy civil penalties under 49 U.S.C. §336. However, this provision does not provide guidance as to how the civil penalty will be applied.

[25]46 U.S.C. §55305 note.

[26]Under 28 U.S.C. §512, the Attorney General may be called upon to advise on questions of law arising in the administration of an executive department.

[27]46 C.F.R. §381.2(c),

[28]48 C.F.R. §247.570(a)(1)(b).

required because compliance with the 1904 Act historically has resulted in DoD exceeding the 1954 Act's requirements . . ."

At the time of this writing, no proposed regulations have been published.[29] The Maritime Administration should publish proposed regulations to implement the 2008 Amendments, and with regard to imposition of civil penalties, such regulations should be consistent with notions of due process. The regulations would do well to provide the purported violator with notice of a violation, an opportunity to contest the charges and a process for appeal of an adverse decision.[30]

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[29]The Federal Highway Administration (but not MARAD) issued a legal memorandum, on Dec. 8, 2015, requiring that agency to follow MARAD's cargo preference regulations in deference to the 2008 Amendments. (www.fhwa.dot.gov/construction/cqit/cargo/151208.cfm).

[30]This is not to say that the Maritime Administration is unable to proceed by informal adjudication, but it must still provide adequate notice and allow interested parties an opportunity to comment meaningfully. See generally, Marine Transportation Services Seabarge Group, Inc. v. Busey, 786 F. Supp. 21 (D.D.C. 1992).