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Chair

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U.S. Maritime Administration
U.S. Department of Transportation
1200 New Jersey Avenue SE
Room W12-140
Washington, DC 20590

Re: **Request for Information: Administration of the Cargo Preference Act of 1954, 88 Fed. Reg. 13,010 (Mar. 1, 2023)**

Ladies and Gentlemen:

I am writing on behalf of the undersigned organizations belonging to the USA Maritime Coalition in response to the Maritime Administration's Request for Information regarding the administration of the Cargo Preference Act of 1954. USA Maritime is a coalition whose membership includes shipping companies operating U.S.-flag, U.S. citizen-crewed vessels in our nation's foreign trades, maritime labor unions representing the licensed and unlicensed men and women who crew these vessels, and their related American maritime associations. Included among our members are virtually every one of the privately owned, U.S.-flag oceangoing commercial vessels operating regularly in the U.S. foreign trade that depend on cargo preference.

Introduction

USA Maritime supports and calls for the immediate and strongest possible enforcement of the cargo preference laws, and urgently requests an implementing regulation to 46 U.S.C. § 55305, which would give the Maritime Administration ("*MARAD*") the necessary enforcement tools to strengthen the economic viability of the U.S.-flag internationally-trading fleet in this time of great national need. Cargo preference is a necessary and cost-efficient way to sustain the privately owned U.S.-flag commercial fleet, which is both a critical national defense asset and a critical component of domestic supply-chain resilience. Without cargo preference, the U.S. Government would have to spend far in excess of the cost of cargo preference in direct spending to replicate the national security capabilities of the privately owned U.S.-flag commercial fleet.

The history of cargo preference administration indicates that cargo preference reservation requirements are often not self-enforcing and strict MARAD oversight is necessary to ensure that the law is followed. Now, more than ever, rigorous enforcement of cargo preference requirements is needed to preserve and grow the existing fleet of militarily useful U.S.-flag oceangoing vessels.

Through this regulatory review, MARAD has an opportunity to improve its oversight of cargo preference requirements and thereby achieve its mission of promoting the U.S. Merchant Marine by increasing the amount of U.S. Government-impelled cargo carried by U.S.-flag vessels.

USA Maritime is pleased to provide a statement for the record in response to MARAD's March 1, 2023 Request for Information: Administration of the Cargo Preference Act of 1954 (the "*RFI*").[1] The RFI "requests comments and information from the public to assist MARAD in understanding individuals' experience with civilian federal agencies' implementation of the CPA [Cargo Preference Act of 1954] requirements." USA Maritime offers the following overview of members' experience with civilian federal agencies' implementation of the Cargo Preference Act of 1954 ("*CPA*") and suggestions with respect to MARAD's implementation of the CPA.

1. Implement the 2008 Duncan Hunter National Defense Authorization Act Cargo Preference Authority

All too often, cargo preference is either not complied with at all or applied in a way as to make it ineffective. This is not a new phenomenon. For example, the U.S. Senate Commerce Committee found in 1962 that

> Controversy within the United States usually has evolved from decisions by departmental or agency officials adverse to cargo preference, based on what they considered to be "special circumstances," or on the contention that the statutory requirements as to "availability" of U.S.-flag vessels were not being met. . . . All too often, the committee has felt, there has been evidenced in at least several of the administrative departments an apparent desire on the part of those responsible for shipping arrangements to evade the cargo preference requirement whenever opportunity offered. . . . . Cargoes alone can cure the ills that beset the U.S. merchant marine. In properly administering the cargo preference laws, Government will be giving a much needed helping hand to this strategic segment of our economy.[2]

Unfortunately, the 1962 Senate Commerce Committee Report could have been written today. In that report, the Committee found, among other things, that shipping agencies "had revised certain procedures [charter terms] for the handling of Government-financed cargoes, to the detriment of U.S.-flag vessel owners"; that petroleum had been purchased on a "destination delivered basis" that excluded U.S.-flag carriers; and that U.S.-flag ship owners were not given sufficient opportunity to bid for the carriage of materials sent overseas by the U.S. Government for overseas construction of aid projects.

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[1] 88 Fed. Reg. 13,010 (Mar. 1, 2023).
[2] S. Rep. 87-2286 (1962).

Another congressional conference report accompanying the enactment of MARAD's cargo preference authority states clearly that Congress placed these responsibilities on MARAD for two reasons: (1) to ensure uniform administration of cargo preference agency-by-agency, and (2) to ensure that the purpose of promoting the U.S. Merchant Marine via cargo preference was fulfilled. Specifically, the conference report provided that

> There is a clear need for a centralized control over the administration of preference cargoes. In the absence of such control, the various agencies charged with administration of cargo preference laws have adopted varying practices and policies, many of which are not American shipping oriented. *Since these laws were designed by Congress to benefit American shipping, they should be administered to provide maximum benefits to the American merchant marine.* Localizing responsibility in the Secretary [of Transportation] to issue standards to administer these cargo preference laws gives the best assurance that the objectives of these laws will be realized.[3]

The Department of Justice ("*DOJ*") has opined that "[t]his legislative history confirms that Congress intended the Secretary [of Transportation acting through MARAD] to have substantial authority and leeway in imposing a degree of uniformity upon other departments and agencies in the administration of their cargo preference programs."[4] Moreover, the DOJ concluded that "MARAD may regulate the administration of cargo preference programs with a view to achieving recognized goals of the [Merchant Marine Act] and the CPA: developing a merchant fleet that is at "parity with foreign competitors," reducing the costs of the cargo preference program, and eradicating divergent agency practices in the preference trade that are "not American shipping oriented."[5]

From 1970 to 2008, the CPA provided that any "agency having responsibility under this section shall administer its programs with respect to this section under regulations prescribed by the Secretary of Transportation." In 2008, Congress made it even clearer that it was MARAD's responsibility to enforce the CPA by adding this language:

> 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*

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[3] Conf. Report No. 91-1555 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4260 (emphasis added).
[4] Dep't of Justice Office of Legal Counsel, MARAD Rulemaking Authority Under the Cargo Preference Laws, 18 U.S. Op. Off. Legal Counsel 78, 1994 WL 810697 (Apr. 19, 1994).
[5] *Id.* (internal citations omitted).

> *responsibility* for determining if a program is subject to the requirements of this section.[6]

Yet, despite this clear congressional direction, MARAD has failed—*for 14 years*—to deploy its cargo preference enforcement authority. MARAD claims that it cannot apply the law as Congress directed because it must first promulgate a rule—yet it has failed to do so over the entire 14-year period since Congress took action to empower the agency and restore the U.S.-flag Merchant Marine that is dependent upon cargo preference. This is inexcusable.

In May 2020, President Biden wrote to the Presidents of the maritime unions acknowledging the importance of cargo preference:

> I understand that merchant ships do not sail, and U.S. merchant mariners do not work, unless they have cargo to carry. I strongly support America's cargo preference laws and the Cargo Preference Act. Americans have big hearts while also caring deeply about defending democracy and America's allies around the world. The surest expression of America's commitment to these values is to ensure that the U.S. flag flies over the U.S.-built and U.S.-crewed vessels that are delivering either humanitarian aid or military supplies to countries around the world.[7]

In September 2022, the Government Accountability Office ("*GAO*") released a congressionally mandated report, *Maritime Administration—Actions Needed to Enhance Cargo Preference Oversight*,[8] regarding MARAD's enforcement of cargo preference laws. In its report, the GAO recommends that MARAD take steps to develop regulations to oversee and enforce cargo preference requirements, including the long-neglected enforcement authority provided by Congress in 2008.

The James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 requires that MARAD issue its final rule to implement and enforce its cargo preference authority by September 23, 2023, with annual reports to Congress on the administration of cargo preference rules.[9] MARAD should respect the clear will of Congress and promulgate a rule forthwith, implementing its cargo preference authority to enforce cargo preference to the fullest extent of the law.

2. Curb Abuse of "Notwithstanding" and "Non-Availability" Waivers

International food aid programs, especially Food for Peace (PL 480), are an important source of preference cargo for the U.S.-flag fleet trading internationally—the largest source of

[6] Duncan Hunter Pub. L. No. 110-417, § 3511, 122 Stat. 4356, 4769-70 (2008) (emphases added).
[7] Letter from J. Biden to D. Marcus (May 26, 2020).
[8] GAO-22-105160.
[9] Pub. L. No. 117-263, § 3502.136 Stat. 2395.

cargoes by tonnage in many years and second only to Department of Defense ("<u>*DOD*</u>") by value.[10] As the U.S. Maritime Administrator testified in 2015, "I will note that although the revenue base is about 15% for food aid, in terms of tonnage its about 50%. It's tonnage that fills ships, not revenue."[11]

The Yemen program has grown to <u>40%</u> of all PL 480 cargoes, but the shipping agency has prevented all U.S.-flag ships from participating in the program since 2019, using blanket authority under the Food for Peace Act to administer the program "notwithstanding any other provision of law."[12] Variously, the shipping agency also uses its authority to ship cargoes on foreign-flag vessels instead of U.S.-flag vessels when it determines, unilaterally, that U.S.-flag vessels are not available at fair and reasonable rates under the CPA, a so-called "non-availability" waiver.

Making matters worse, when the agency ships foreign using its "notwithstanding" authority or "non-availability" waivers, it does not count those cargoes as shipped foreign for purposes of calculating compliance with cargo preference requiring at least 50% U.S.-flag shipping. The shipping agency simply pulls those cargoes out of the denominator as if they never happened. The result: The shipping agency's cargo preference compliance for FY20, FY21, and FY22 was only 42%, 31%, and 40% U.S.-flag, respectively, but it claimed 88%, 89%, and 100% compliance in those years. Cumulatively, U.S.-flag carriers have lost at least 485,000 tons of cargo since 2019.

The shipping agency has said its reasons for preventing use of the entire U.S.-flag fleet from Yemen are alternatively because (a) Yemen is safe enough for foreign carriers but not safe enough for the American mariners who have reliably delivered war materiel to conflict zones since the birth of the Republic—or (b) several years ago there were minor incidents where a U.S.-flag ship or ships underperformed. The shipping agency has admitted its reasons for excluding U.S.-flag carriers from Yemen are contained in an undisclosed memo it has refused to release.

MARAD is the agency with the "sole responsibility for determining if a program is subject to the requirements" of the CPA.[13] Yet, the PL 480 shipping agency has unilaterally exempted 40% of cargoes from the CPA for reasons hidden from the public in an undisclosed memo and articulated as either prejudicing the entire U.S.-flag fleet for one or two isolated events over four years ago, or because the shipping agency unilaterally deems the U.S. mariner unfit to be trusted to execute America's foreign policy objectives in potentially hostile waters. MARAD should immediately seize control of its authority and reverse this damaging policy, which has directly and

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[10] United States Maritime Administration, A Report to Congress: Impacts of Reductions in Government Impelled Cargo on the U.S. Merchant Marine (Apr. 21, 2015); *Hearing Before the Subcomm. on Livestock and Foreign Agriculture, H. Agriculture Comm., and Subcomm. on Coast Guard and Maritime Transportation, H. Transp. & Infrastructure Comm.*, 114th Cong. (Nov. 17, 2015) (Statement of Paul N. Jaenichen, United States Maritime Administrator) (food aid constitutes half of all preference cargo shipped).

[11] *Hearing before the Subcomm. on Livestock and Foreign Agriculture, H. Agriculture Comm. and Subcomm. on Coast Guard and Maritime Transportation, H. Transp. & Infrastructure Comm.*, 114th Cong. (Nov. 17, 2015) (Statement of Paul N. Jaenichen, United States Maritime Administrator).

[12] 7 U.S.C. § 1722(a).

[13] 46 U.S.C. § 55305(d).