BEFORE THE
UNITED STATES DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD
AND THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
MARITIME ADMINISTRATION
WASHINGTON, D.C.

Docket No. USCG-2003-14472
Docket No. MARAD-2003-15171

Vessel Documentation: Lease-Financing For Vessels Engaged in the Coastwise Trade; Second Rulemaking

COMMENTS OF THE MARITIME CABOTAGE TASK FORCE

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VESSEL DOCUMENTATION: LEASE-FINANCING FOR VESSELS ENGAGED IN THE COASTWISE TRADE; SECOND RULEMAKING

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The Maritime Cabotage Task Force ("MCTF" or "Task Force") is one of the largest transportation coalitions ever assembled in the United States, comprised of more than 400 members including brown and blue water carriers, seafaring and shoreside labor, shipyards, defense organizations and representatives from other modes of transportation.[1] The Task Force appreciates very much the opportunities the Coast Guard and the Maritime Administration have afforded to provide input into the development of regulations implementing the lease financing provision.[2]

Members of the Task Force have invested billions of dollars in the U.S. domestic maritime industry. A fundamental assumption underlying all of that investment is the

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[1] The Task Force was formed almost ten years ago. A list of the Task Force's members is attached hereto as Exhibit 1.

[2] Section 1113(d) of Public Law 104-324, the Coast Guard Authorization Act of 1996; 46 U.S.C. § 12106(e) (hereinafter called "Section 12106(e)" or the "lease financing provision"). The Task Force and many of its members have participated in every phase of these rulemaking proceedings.

integrity of the U.S. citizen ownership requirement of the Jones Act. That critically important requirement advances important security interests and assures that all who provide service in the domestic maritime trades compete with each other on a level playing field. As the Coast Guard and MarAd have recognized, misuse of the lease financing provision in a manner that permits foreign companies to compete in Jones Act trades completely undermines that assumption. This in turn compromises American security interests, subjects American maritime companies to potentially unfair competition in our domestic markets, and fosters uncertainty that chills additional investment by Americans in the maritime industry. It is therefore crucial that these regulations decisively prevent such misuse, and that these proceedings be completed as quickly as possible.

The Task Force recognizes that this is a complex issue, and believes the right decision was made to break it into different parts in separate proceedings so that each part could be analyzed properly. The primary objective for each and all of these proceedings remains the same. As stated by the Task Force in comments almost three years ago –

> Congress enacted the lease financing provision in 1996 as a very limited liberalization of the U.S. citizen ownership rule intended to reduce capital costs and thereby *strengthen* the American maritime industry. It clearly did not intend to create a loophole through which non-citizen maritime interests could enter U.S. domestic trades. Congress delegated the task of distinguishing between legitimate and illegitimate use of the lease financing provision primarily to the Coast Guard. The rules developed as a result of this proceeding will guide the Coast Guard in carrying out its duty to facilitate the use – and prevent the misuse – of that provision.[3]

No issue is more important to the domestic maritime industry.

I. BACKGROUND

One of the core principles of the Task Force is that the U.S. domestic maritime industry, which provides services that are essential to the entire American economy, must

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[3] DOT Docket No. USCG-2001-8825 ("Docket No. 8825") item no. 30 at p. 1.

remain under the control of American citizens. Permitting real foreign control over the large, mobile and capital intensive assets required to provide maritime services within our borders would substantially diminish our homeland security interests. American economic interests also would be harmed if foreign concerns could withdraw or manipulate the availability or cost of this essential transportation service – not because of market conditions but in order to advance their home government's political, military or economic objectives. Moreover, vessels used in the domestic maritime industry serve formally or informally in America's auxiliary military sealift reserve.[4] In short, America's homeland, economic and military security interests are best advanced by maintaining real American control over those vessels.

For these reasons, it has been the law for most of this Nation's history, and remains so today, that the domestic maritime industry must genuinely be controlled by American citizens.[5] The last comprehensive Congressional review of that policy produced the Jones Act, which includes one of the most thorough restrictions on foreign investment in U.S. law.[6] As a result, the subsidies and tax advantages that foreign governments have given to foreign carriers,

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[4] Vessels in the domestic maritime industry provide approximately 30 percent of the total lift capacity committed to the VISA (Voluntary Intermodal Sealift Agreement) program, the U.S. military's primary source of privately-owned vessel capacity to deploy and sustain U.S. Armed Forces on a global basis. Moreover, fully 75 percent of all oceangoing vessels in the Jones Act fleet are classified as militarily useful by the Department of Defense (DOD), including many, such as product tankers, that are not eligible for enrollment in VISA. Beyond these direct contributions to national defense, the Jones Act fleet and domestic marine transportation system comprise an essential part of the domestic transportation system. In 1998, a Presidential Commission characterized domestic transportation as one of eight "critical infrastructures" upon which the functioning of the U.S. economy depends. Maintaining the physical security of, and operating economic control over, those infrastructures by U.S. citizens is vital to U.S. economic and long-term national security.

[5] America is not alone in insisting that its own citizens control its domestic maritime industry. The most recent Maritime Administration study found that 30 countries had comparable ownership and control restrictions. Maritime Administration, U.S. Department of Transportation, By the Capes Around the World: *See* A Summary of World Cabotage Practices (1991).

[6] As discussed below, the cabotage restrictions commonly known as the Jones Act are reflected in several statutes that were the product of numerous hearings and floor debate. *See* pp. 11 - 12, infra. In contrast, not a single hearing was held in connection with the lease financing provision.

and which those carriers have used to drive more efficient American carriers almost completely out of the U.S. international trades, have had no effect on U.S. domestic maritime trades. Hundreds of American maritime businesses, large and small, public and private, compete with each other on a level playing field in U.S. domestic trades. They are fully subject to all U.S. laws, including labor and employment laws; civil and criminal liabilities; environmental and energy laws; antitrust, corporate, securities, and intellectual property laws; and so on. They pay taxes to the U.S. government on their income, and they receive no subsidies for their services.[7] Because the Jones Act's prohibition on foreign direct investment (by definition) prevents foreign competitors from entering U.S. domestic maritime trades, laws in the modern era that protect all other U.S. companies against unfair foreign competition generally do not apply to domestic maritime services.[8]

Viewed in its proper context, the lease financing provision was intended to be a very narrow exception to the Jones Act's U.S. citizen ownership requirement, as both the statute and its legislative history confirm. The Coast Guard clearly recognized this in discussing the Final Rule:[9]

> Because of the rich history of the Jones Act, the protections it has traditionally extended to American citizens, and the lack of any indication in either the statute or the legislative history in favor of an intended repeal of the Jones Act, we reject the conclusion of those who construe the law so as to accomplish such a repeal. Instead,

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[7] United States government promotional programs for the maritime industry are generally targeted to the international trades, and are not conditioned on U.S. citizen ownership of the maritime business. In the domestic maritime trades, there is no federal subsidy for maritime operations (except for certain passenger ferry services). Modest federal assistance (in the form of limited loan guarantees and income tax deferral) is available to support the construction of vessels eligible to operate in domestic trades.

[8] *See* 19 U.S.C. §1671 (1999) (regarding countervailing duties) *and* 19 U.S.C. § 1673 (regarding antidumping duties). Foreign direct investment, as distinguished from foreign portfolio investment, occurs where a non-citizen gains substantial control over the management of a business or the use of its assets by virtue of its financial investment. *See* fn. 28, infra.

[9] "Vessel Documentation: Lease Financing for Vessels Engaged in the Coastwise Trade" 69 Fed. Reg. 5390 (Feb. 4, 2004) (the "Final Rule").

> we conclude that the lease financing provisions were intended to accomplish a narrow relaxation of the restrictions formerly applicable to owners who desired to engage in lease financing, as opposed to mortgage financing, of vessels. Furthermore, we believe that, when implementing the statute through regulations, as Congress directed us to do, Congress sought to apply the lease financing provisions as consistently as possible with the existing provisions of the Jones Act.

69 Fed. Reg. at 5394. The Task Force strongly supports the approach taken by the Coast Guard as reflected in this statement. It is also clear from this and other statements that the Coast Guard fully understands the importance of this proceeding to the American maritime industry. It recognizes that failure to place sturdy boundaries around the lease financing exception to the Jones Act "could eviscerate the principles that Congress enunciated in the cabotage restrictions contained in the Jones Act, and might even effectuate an implicit repeal of that statute." 69 Fed. Reg. at 5393.

As discussed below, the Coast Guard made considerable progress in the Final Rule toward establishing such boundaries. It focused primarily on which entities are eligible or not eligible to own a vessel under the lease financing provision. It absolutely disqualified from ownership foreign maritime companies that fail the "aggregate revenues test".[10] It also made clear that the aggregate revenues test is not a safe harbor. Thus, while failing that test absolutely disqualifies a foreign maritime company from ownership, a foreign company that passes the test may nevertheless be ineligible to own vessels under the lease financing provision because its investment interest is not passive, *i.e.*, its economic interest in the vessel is in the operation or management of the vessel instead of in the revenue produced by lease financing (instead of mortgage financing) that vessel.[11] The Coast Guard added a series of definitions

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[10] 46 C.F.R. §67.20(a)(7).

[11] As stated in the commentary, "Using the aggregate revenue test in this way is one measure, although not necessarily the only measure, of determining whether the owner, the owner's parent, or the owner's group is primarily engaged in vessel operation or management." 69 Fed. Reg. at 5397.

that elucidate and make such a bar effective, including definitions for "Affiliate", "Group", "Operation or management of vessels", "Parent", "Person", and "Subsidiary". Other changes are consistent with the overall objective of assuring that the non-citizen owner's interest in the vessel is passive. This includes the requirement that the vessel "was financed with lease financing"[12], and that the ownership of the vessel "is primarily a financial investment without the ability and intent to *directly or indirectly* control the vessel's operations . . . ." 46 C.F.R. §67.20(a)(6)(emphasis added).

The Coast Guard thus made it abundantly clear in the Final Rule that implementation of the lease financing provision would be properly circumscribed and limited as Congress intended. As articulated in numerous comments to Docket No. 8825, however, and as the Coast Guard itself recognized, its new regulations may not provide clear enough guidance with respect to sophisticated chartering arrangements that could be employed to misuse the lease financing provision. For example, a foreign maritime company that happens to be part of a conglomerate that derives less than 50% of its revenues from the maritime business (a "non-maritime conglomerate") might argue that because it meets the aggregate revenues test, the shipping company (or its leasing affiliate) is therefore entitled to obtain a coastwise endorsement under the lease financing provision *even though* the shipping company fully intends to use the vessel itself to compete with American carriers in U.S. domestic trades. To do this, and in the most naked example of abuse, the bareboat charter of the vessel from the owner to a third party will be explicitly conditioned on the third party time chartering the vessel back to the shipping company. This charter-back transactional structure is not even arguably chosen as an alternative to mortgage financing, but is simply an abuse of the lease

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[12] 46 C.F.R. §67.20(a)(2).

financing provision to avoid U.S. citizen ownership requirements. The Coast Guard has therefore appropriately proposed in this proceeding to prohibit such charter-back arrangements.

For its part, the Maritime Administration recognized that such chartering arrangements may transfer control over a coastwise qualified vessel to foreign interests, thus implicating MarAd's authority under Section 9 of the Shipping Act, 1916 ("Section 9").[13] To help assure a coordinated and consistent approach to these important chartering issues, the two agencies prudently issued the JNPR to which these comments are directed.

In its section of the JNPR, the Coast Guard further sought comments with respect to two additional concerns. The first relates to vessels that were issued a certificate of documentation with coastwise endorsement under the lease financing provision before the date of the JNPR, but which could not be so documented under the lease financing provision as implemented by the Final Rule (and as amended by the charter back regulations discussed above).[14] The second relates to the procedures and resources available to the Coast Guard to review complex and potentially controversial lease financing transactions.

By addressing all of these issues, the Coast Guard and MarAd stand to effectively finish the job they started when they undertook the effort more than three years ago to adopt regulations governing the implementation of the lease financing provision. MCTF greatly appreciates the progress made to date on this critically important issue, and takes this opportunity to address the important issues that remain. Our comments are divided into four

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[13] 46 App. U.S.C. §808(c).

[14] Such "Grandfather" rights would only apply if the original certificate of documentation were properly obtained, *i.e.*, if the application and supporting materials submitted to obtain the certificate were complete and proper. Of course, if an application for documentation included false or misleading information, the Coast Guard could revoke any such certificate at any time. Stated otherwise, a Grandfather provision would not immunize certificates of documentation from review and potential revocation where such certificates were improperly obtained using false or misleading statements.

parts. Immediately below is a summary of the Task Force's comments on the JNPR. Following the summary is a brief technical discussion of the Final Rule, and the progress such rule made in closing the lease financing loopholes to U.S. citizenship requirements. We then comment on, and analyze, the issues raised by the Coast Guard and MarAd in the JNPR. Finally, we propose a minor technical amendment to one definition used in the Final Rule, which the Task Force believes is necessary for the practical realization of the intent of the Final Rule.

II. SUMMARY OF MCTF COMMENTS TO THE JNPR

Charter-back arrangements. The fundamental assumption behind the Coast Guard and MarAd proposals concerning "charter-back"[15] arrangements is that, in the context of lease financing, such arrangements are incompatible with the fundamental purpose of the lease financing provision and place impermissible control over the vessel in the non-citizen owner.[16] The correctness of that assumption is self-evident and beyond question. Congress approved the lease financing provision in the context of a law that absolutely prohibits non-citizen control over vessels. It created an exception that permitted non-citizen ownership in a very narrow context – where the non-citizen owner's interest is purely financial, and where it gives complete control over the vessel to a Section 2 citizen. A charter-back arrangement contradicts those basic conditions to the use of the lease financing provision. It shows that the owner's

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[15] A charter-back arrangement involves two steps. In the first, the vessel owner charters a vessel to a presumably independent third party. In the second step, the third party sub-charters the vessel back to the owner or its affiliate so that that person can use the vessel to provide maritime services to itself or to third parties.

[16] "Because control of the vessel may be affected by a charter-back from the demise charterer to the owner, the owner's parent, or to a subsidiary or affiliate of the parent, we believe that the intent of Congress would be frustrated if charter-back arrangements were not prohibited or at least restricted." 69 Fed. Reg. 5405.

interest (which necessarily reflects the interests of the group to which the owner belongs) is not purely financial, but is contingent on the owner's group having control over the use of the vessel. Because the owner's group has control over the vessel's use, the Section 2 citizen does *not* have complete control over the vessel.

The question then is how best to prevent charter-back arrangements. Of the two options suggested by the Coast Guard, the Task Force strongly supports the "(a)(9) Option" as proposed.[17] That option is more definitive and would be more effective than the "(a)(6) Option"[18] in preventing abuse. Thus, the focus of the (a)(6) Option on vessel "operations", other ambiguities in the (a)(6) representation, and the suggestion in commentary that certain charter-back operations might be permitted, raise questions as to whether this provision would be fully effective in screening out impermissible transactions.

The Task Force does not object to the use of the lease financing provision in limited circumstances where the vessel owner charters the vessel back to its affiliate to carry proprietary cargoes in limited circumstances, as in the case of BP America's construction of new Jones Act tankers to carry its own cargo in domestic trades.[19] Such arrangements do not raise competitive concerns. The (a)(9) option recognizes this, while the (a)(6) option does not.

MarAd review. In the context of this proceeding, MarAd should review any chartering arrangements that are permitted under the regulations ultimately adopted by the Coast Guard. If the Coast Guard conditionally prohibits charter-back arrangements under the (a)(9) option such that proprietary cargo may be carried, the Task Force suggests that MarAd should review

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17 The (a)(9) option would amend 46 C.F.R. section 67.20(a)(9).

18 The (a)(6) Option would amend 46 C.F.R. section 67.20(a)(6).

19 The Task Force also does not object to the adoption of a reasonably flexible definition of what constitutes "proprietary cargo" consistent with current shipping practices.

the structure and use of chartering arrangements to assure that implementation of the proprietary cargo exception is properly administered.

Grandfather provision. The Task Force supports the approach proposed by the Coast Guard concerning the interests of those who currently hold certificates of documentation but cannot make the representations now required. Clearly, some time limit is necessary so that those persons are not permitted to operate outside the Coast Guard's regulations indefinitely. At the same time, while even a short grandfather period would not likely give rise to valid "takings" claims under the U.S. Constitution, a three-year time period is clearly sufficient to permit such owners to come into compliance with the new regulations.

Third Party audit. The Task Force appreciates the complexity of some of the transactions presented to the Coast Guard under the lease financing provision, and understands that the vessel documentation function does not normally trigger the kind of detailed investigation and review that such transactions require. There are several answers to that concern. First, the clear guidance provided in the Final Rule (and presumably following this proceeding) eliminates any doubt as to the Coast Guard's view of the lease financing provision, and will very likely deter most of the creative, complex and ultimately improper proposals that have required such in depth analysis. Secondly, to the extent the rules do not deter abuse, the Coast Guard will need to have the resources to investigate and make judgments about such transactions, as the ultimate decision whether to document a vessel or not is an inherently governmental function. Third, depending on the rules ultimately adopted, certain transactions may yet require additional scrutiny. Such scrutiny can come from a more public process, where interested parties are given notice of and details about the transaction and an opportunity to comment on it. Finally, if a transaction requires scrutiny and the Coast Guard believes it lacks the resources or expertise to do the job properly, it can consult a third party, who may investigate the facts and make recommendations. Such assistance may come

in the form of an administrative law judge, or the Maritime Administration given its expertise on these issues.

III. STATUTORY BACKGROUND

Congress has granted to the Coast Guard the authority and responsibility to enforce and administer our nation's vessel documentation laws. 46 U.S.C. §§ 12101 et. seq. With respect to vessels operating in the U.S. coastwise trade, such documentation laws have long reflected the citizenship requirements set forth in our cabotage laws, the foremost of which is the Jones Act, 46 U.S.C. app. 883 (the "Jones Act"). Under the Jones Act, "no merchandise . . . shall be transported by water . . . between points in the United States . . . in any vessel other than a vessel built in and documented under the laws of the United States and owned by citizens of the United States." (emphasis added). In this context, a "citizen of the United States" for the purpose of owning a vessel operating in the coastwise trade is governed by Section 2 ("Section 2") of the Shipping Act, 1916, as amended (the "1916 Act"), 46 U.S.C. app. § 802. Section 2 requires, among other things, that at least 75% of the interest in the vessel owning corporation, partnership or association be owned by citizens of the United States. In order to be assured that such a 75% ownership interest test cannot be evaded, Section 2 provides that non-citizens may not, "through any contract or understanding" or "by any means whatsoever" exercise or control more than 25% of any voting or other interest in the corporation or other owning entity. 46 U.S.C. app. § 802.

The restrictions of the Jones Act and Section 2 focus primarily upon the citizenship of the owner of the vessel. Consistent with the objective of assuring a strong, American-controlled maritime industry, Congress enacted Section 9 of the 1916 Act which provides that ". . .a person may not, without the approval of [MarAd], . . . sell, lease, charter, deliver, or in any manner transfer, or agree to sell, lease, charter, deliver or in any manner transfer, to a

person not a citizen of the United States, any interest in or control of a documented vessel . . .[20] 46 U.S.C. app § 808(c). Although MarAd has in 46 C.F.R. § 221 granted a blanket waiver for many transfers of a documented vessel to a non-citizen, it has not waived the prohibition with respect to bareboat charters of vessels operating in the coastwise trade. Moreover, as is more fully discussed below, MarAd now proposes to revoke the waiver with respect to transfers of the use of a vessel documented under Section 12106(e) back to the owner or a member of its group. Assuming that MarAd's proposed amendment to Section 221 is implemented, Section 9 can be used to ensure that non-citizens do not gain control of the leased vessel by virtue of the use of side agreements or agreements falling within 46 C.F.R. § 67.3's definition of "sub-charter."

The above-discussed statutes collectively form a comprehensive statutory scheme which creates a strong, long-established barrier to penetration of the coastwise trade by non-U.S. citizens.[21] Within this statutory framework, Congress passed Section 12106(e) "to promote lease financing for vessels engaged in the coastwise trade by eliminating citizenship requirements for leasing companies." House Conference Report No. 104-854, p. 129. Prior to its passage, non-citizen leasing companies, which by definition are the owners of vessels they lease, could not satisfy Section 2 requirements for coastwise vessels. Congress passed Section 12106(e) for the very limited purpose of making foreign leasing capital available to U.S. maritime interests.

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[20] The transfer of a U.S. flag vessel to an owner under Section 12106(e) is specifically exempt from the prohibitions of Section 9.

[21] Moreover, in making citizenship determinations, both the Coast Guard and MarAd must focus on the "substance rather than the form of the transaction." Meacham Corp. v. United States, 207 F.2d 535, 543 (4th Cir. 1953), *cert. dismissed*, 348 U.S. 801 (1954); *see* Ingram Barge Co. v. United States, 884 F.2d 1400 (D.C. Cir. 1989). Thus, both agencies have plenary power to review all the relevant facts to determine whether a non-citizen has obtained or will obtain undue control over a vessel with a certificate of documentation endorsed under Section 12106(e) or for which such endorsement is sought.

In the Final Rule, the Coast Guard summarized Congress's intent in passing the lease financing provision by quoting the Conference Report for Section 12106(e) as follows:

> Congress intended to broaden the sources of capital for owners of U.S. vessels engaged in the coastwise trade by creating new lease financing options. At the same time . . . Congress did not intend to undermine the basic principle of U.S. maritime law that vessels operated in the domestic trades must be built in shipyards in the United States and operated and controlled by U.S. citizens, which is vital to U.S. military and economic security.

Final Rule, p. 5391. This underlying tenet is echoed throughout the Final Rule and the JNPR and underscores the Coast Guard's and MarAd's view that the lease financing provision was intended to be a limited exception to the U.S. cabotage laws' U.S. citizen ownership requirements. As stated in the Final Rule, the lease financing provision was intended "to create a new vehicle for vessel financing, not a new means of vessel ownership." Final Rule, p. 5391. The Final Rule further states that Congress did not intend the provision to be "used as a loophole to avoid coastwise citizenship" through "the use of specially created 'leasing-company' subsidiaries that merely take title to existing vessels, with no financing involved, for the purpose of leasing them." Final Rule, pp. 5391-2. The Final Rule discussed at length the manner in which the lease financing provision fits into the Jones Act, referencing the legislative history not only of Section 12106(e), but also quoting statements made in 1918 in connection with the Jones Act itself.

The Task Force completely agrees with the Coast Guard's and MarAd's interpretation of the Congressional intent behind the lease financing provision and applauds these agencies for explicitly rejecting the argument that the plain language of the statute is clear and requires that improper lease financing arrangements be allowed. The evidence of Congressional intent, including the lease financing provision itself, the statutory scheme into which it was enacted, and all relevant legislative history, overwhelmingly shows that the lease financing provision was to be a very limited exception meant to help U.S. maritime interests by allowing them to

obtain capital at world-scale rates. The Coast Guard and MarAd must prevent misuse of the lease financing provision, which could have a devastating impact on the U.S. maritime industry.

IV. TECHNICAL SUMMARY OF THE FINAL RULE

The Final Rule makes great strides in narrowing, but not completely closing, the loopholes available to non-citizen maritime interests to evade U.S. citizenship requirements. The major changes designed to prevent misuse of the lease financing provision are briefly discussed below.

Under the Final Rule, 46 C.F.R. §67.20(a)(3) is clarified through the modification of the definition of "primarily engaged in leasing or other financing transactions" in 46 C.F.R. §67.3. The new definition of this phrase, and the distinctions the definition draws between mere leasing and lease financing, will make it more difficult to engineer transactions that arguably meet the Coast Guard's requirements while evading Congress's clear intent in enacting the lease financing provision. The new definition requires that the owner, its parent, or a subsidiary of the parent are specifically involved in lease financing activities, and earn at least 50% of its aggregate revenues from banking, investing, lease financing or similar transactions. The specific inclusion of "lease financing" in two places in the definition furthers Congress's intent that "banks, leasing companies, or other financial institutions qualify as owners" while prohibiting those special purpose companies that merely lease a vessel (without a financing component)[22] from qualifying under the Section 12106(e) exemption.

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[22] We believe that in order for the lease to have a financing component, the funds used by the owner to acquire the vessel must either be internally generated from prior transactions or from an unaffiliated third party. Stated differently, such funds cannot be generated by any other member of the owner's group. Likewise, a paper transaction between the owner and one or more members of its group who contribute the vessels to the owner will not qualify as a financing transaction.

A second improvement made in the Final Rule results from changes made to the parties subject to the aggregate revenues test. Revised subsection 46 C.F.R. 67.20(a)(7) properly applies the aggregate revenues test ("the majority of aggregate revenues of . . . is not derived from the operation or management of vessels") to include each of the vessel owner, the owner's parent and the owner's group. Applying the test in this fashion will clearly prevent many non-citizen maritime interests from entering U.S. domestic trades through the back door of lease financing. However, as indicated by the Coast Guard in the Final Rule:

> [t]his permits foreign banks, lease-financing companies, or other financial institutions to qualify as owners of U.S.-flag vessels under lease financing even if they have vessel owning and operating subsidiaries and affiliates, but prevents qualification of companies in which the primary business of the owner, the owner's parent, or the group of which an owner is a member, is vessel ownership or operation.

Final Rule, p. 5392. Large international conglomerates with substantial vessel operations may thus be able to continue to pass the aggregate revenues test because the aggregate revenue of the individual companies affected (*i.e.*, the owner and the parent) and of the group fails to reach a 50% threshold, <u>despite a substantial international maritime presence and income</u>. Being able to pass the aggregate revenues test would not provide a complete "safe harbor" for such a maritime affiliate if it can be shown that the non-citizen substantially controls the operation or use of the vessel in coastwise trade. As discussed below, the implementation of regulations that prohibit the chartering-back of a vessel to such an affiliated company should prevent such abuse.

Several other modifications to the definitions also help to restrict the ability of non-citizen maritime interests from utilizing the lease financing provision against the explicit intent of Congress. The changes make it more likely that an owner seeking to skirt U.S. citizenship requirements will directly or indirectly fail the aggregate revenues test, *i.e.*, it will derive more than 50% of its revenues from the operation or management of vessels. Four

definitional changes, including "affiliate"[23], "group", "operation or management of vessels", and "parent", clarify and expand the reach of this test.

The revised language of 46 C.F.R. § 67.20(a)(6) is also an improvement over earlier versions. New 46 C.F.R. § 67.20(a)(6) now prohibits an owner from "directly or indirectly" controlling the vessel's operations. The addition of this language would appear to prohibit charter-back arrangements. However, the absolute benefit of this provision is unclear because of confusion as to the meaning of the remainder of the provision. Again, arguably meeting this test does not provide a safe harbor if an affiliate of a foreign owner exercises an impermissible degree of control over the operation or use of a vessel in coastwise trade, and the Coast Guard's proposed rules regarding charter-backs provide much clearer guidance in this regard.

The owners of some vessels for which a coastwise endorsement has already been issued will not be able to renew those endorsements under the Final Rule. The Final Rule therefore grandfathers indefinitely any vessel which received a coastwise endorsement under Section 12106(e) before February 4, 2004, or any vessel that was built under a building contract that was entered into before that date in reliance on a letter ruling from the Coast Guard issued before that date. Grandfather privileges are forfeited if the vessel's document otherwise becomes subject to exchange, deletion or cancellation under applicable Coast Guard regulations. The JNPR's proposals to reduce the length of the grandfather period to 3 years are fairer to the hundreds of fully qualified American Jones Act operators whose vessels are forced to compete with such grandfathered vessels, and the Task Force supports this approach.

Finally, the application procedure set forth in 46 C.F.R. § 67.147 requires that a responsible officer, partner or member, as applicable, of the shipowner/applicant in a lease financing transaction submit an affidavit to the Coast Guard, and if requested, supporting

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[23] *See* Section VI for a suggested technical clarification to this definition.

documentation to the Coast Guard satisfying the requirements set forth in 46 C.F.R. § 67.20. Moreover, the demise charterer must submit, in addition to certifications relating to its U.S. citizenship, copies of any sub-charters or other agreements it has entered into with respect to the vessel. By defining "sub-charter" to include all types of charters or other contracts for the use of a vessel, the Coast Guard will be able to request any sub-demise, time, voyage, or space charters and contracts of affreightment relating to a leased vessel. We presume that side agreements outside the demise charter or other understandings relating to such vessel will also be included. Access to all such agreements is critically important in enabling the Coast Guard to fully understand the ownership and control structure of the vessel and determine whether the vessel is being controlled by a party other than the U.S. citizen demise charterer in violation of applicable maritime laws.

V. ANALYSIS OF THE PROPOSED RULE

A. CHARTER-BACK OPTIONS

Having clarified in the Final Rule the types of entities that are eligible to own vessels under the lease financing provision and the procedures they must follow, the most important issue remaining concerns how to address charter-back arrangements. These are arrangements by which the vessel is demise chartered to an ostensible Section 2 citizen and then sub-chartered back to the owner or a member of the owner's group. If such arrangements are permitted, a foreign entity that passes the aggregate revenue test and is otherwise deemed eligible to own a vessel under the Final Rule could both own a coastwise qualified vessel and use that vessel to compete in domestic trades – something Congress clearly did not intend to authorize by enacting the lease financing provision.

Both the Coast Guard and MarAd have recognized that charter-back arrangements must be addressed in this proceeding. As the Coast Guard put it:

> Because control of the vessel may be affected by a charter-back from the demise charterer to the owner . . . , we believe that the intent of Congress would be frustrated if charter-back arrangements were not prohibited or at least restricted.

69 Fed. Reg. at 5405. Similarly, MarAd recognized that its "general approval of time charters to non-citizens was predicated on the fact that a time charterer merely rents cargo space on a vessel", and that MarAd should review charter-back arrangements "in order to ensure that non-citizens are not able to exercise an excessive level of control" over coastwise vessels. 69 Fed. Reg. at 5404-5.

The Task Force fully supports the objective of the Coast Guard and MarAd to restrict or prohibit charter-back arrangements under the lease financing provision. As discussed below, that objective is well grounded in law, policy and common sense. Simply put, charter-back arrangements are not consistent with normal leasing practices, and prohibiting charter-back arrangements removes the incentive a foreign carrier might otherwise have to try and use the lease financing provision to penetrate domestic trades. That is not what Congress intended to do when it passed the lease financing provision.

Two questions in connection with the charter back issue merit particular attention. The first concerns the scope of the changes made by the lease financing provision to the U.S. citizen ownership requirement, and specifically whether the laws prohibit foreign control only over the vessel's "operations", or whether foreign control over the business and use of the vessel is prohibited. The second concerns whether charter-back arrangements involving proprietary cargo should be permitted. Each of these issues are addressed below.

Economic use of the vessel. A lease financing owner that sets up a charter-back arrangement betrays an interest in the vessel that is fundamentally at odds with lease financing, both as a general proposition and as Congress understood it when it enacted Section 12106(e). In general, one of the key characteristics that define leasing is that the lessor grants control to the lessee over the use of the property during the specified period in exchange for

rent.[24] Stated otherwise, the party to a leasing transaction that uses the asset is the lessee, not the lessor/owner of the asset. Indeed, in order to limit their potential liability, vessel lessors typically avoid any implication that they are involved in the use or operation of a vessel. Thus, lessors are, by definition, passive owners of the assets they lease to those who actively operate and use the assets.

Based on the language used in the lease financing provision, the statutory scheme into which it fits, and the policies at issue, Congress clearly understood when it approved the lease financing provision that it permitted only passive ownership of coastwise vessels by non-citizen financial institutions not actively involved in vessel operations or management, and that control over the operation and management (the use) of such vessels must remain with Section 2 citizens. As for the lease financing provision itself, Congress not only required that the owner lease the vessel to a Section 2 citizen, but it insisted that the lease (charter) agreement, first, be a legitimate "demise" charter of the vessel,[25] and second, that the lease meet certain additional tests clearly designed to assure that the owner's interest in the vessel is passive. These include requirements that the charter be long-term ("for a period of at least 3 years"),[26] and that if a demise charter is terminated due to a default by the charterer, the owner may, if the Secretary approves, hold onto the coastwise endorsement for a period not to exceed 6 months so that the owner can find another demise charterer.[27] These restrictions help assure

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24 *See, e.g.*, I. SHRANK & A. GAUGH, EQUIPMENT LEASING-LEVERAGED LEASING § 2.3 (4th Ed. 2004).

25 Several comments in Docket 8825 noted that where an agreement between a vessel owner and an operator requires the operator to charter the vessel back to the owner (or its affiliate), that agreement – no matter what title it is given – is not a true demise of the vessel. *See, e.g.*, Comments of Rep. James Oberstar at 3.

26 46 U.S.C. §12106(e)(1)(D). This requirement precludes a lease financing owner from offering the vessel in "for hire" service through voyage charters or other short term use agreements.

27 46 U.S.C. §12106(e)(3).

that, as the Coast Guard recognized, lease financing is a "vehicle for vessel financing, not a new means of vessel ownership." If Congress thought that a non-citizen could both own a coastwise vessel under this provision and control its use by chartering the vessel through a U.S. citizen conduit back to itself (or its affiliate), these requirements would not be needed.

The position of the lease financing provision against the broader backdrop of the Jones Act likewise compels the conclusion that charter-back arrangements must be restricted or prohibited. The Jones Act requirement of U.S. ownership and control is an impenetrable brick wall, among the most comprehensive restrictions on foreign ownership in the United States Code. As the Coast Guard noted in the Final Rule, Congress –

> sought to make the language so sweeping and comprehensive that no lawyer, however ingenious, would be able to work out any device under this section to keep the letter, while breaking the spirit of the law.

56 Cong. Rec. 8029 (June 19, 1918). The Coast Guard and MarAd have thus recognized that the lease financing exception to the U.S. ownership requirement must be restricted to assure that the exception does not swallow the rule. A realistic and common sense understanding of the lease financing provision in this context leads to the conclusion, again, that it permits only passive (or "portfolio")[28] ownership by non-citizens, and that any device or arrangement that is inconsistent with such limited ownership rights must be prohibited. Charter-back arrangements are just such devices.

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[28] International economics distinguishes active foreign investment (Foreign Direct Investment or FDI) from passive foreign investment (Foreign Portfolio Investment or FPI) based on the element of control over the management policies and decisions of the corporation, or over the use of the assets. *See* IMAD A. MOOSA, FOREIGN DIRECT INVESTMENT: THEORY, EVIDENCE AND PRACTICE 1 (PALGRAVE) (2002). *See also*, INTERNATIONAL MONETARY FUND, BALANCE OF PAYMENTS MANUAL, p.86 (1993), http://www.imf.org/external/np/sta/bop/BOPman.pdf; UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 1999: FOREIGN DIRECT INVESTMENT AND THE CHALLENGE OF DEVELOPMENT at 465, U.N. Sales No.E.99.II.D.3 (1999) http://www.unctad.org/en/docs//wir99_en.pdf. Foreign direct investment also raises concerns about "the causes and consequences of foreign ownership." Moosa, *supra*, at p. 3.

It may be suggested that as long as a vessel's "operations" are controlled by a Section 2 citizen, that no further restrictions on vessel ownership or control are appropriate.[29] There are several problems with this argument. First, what constitutes vessel operations is not defined. It is not the crewing requirement, as that is stated separately in the statutes. It may vaguely refer to the functions handled by the vessel's port captain, *i.e.*, selecting the crew, attending to bunkering, repairs, drydocking, etc. -- the activities directly related to maintaining and moving the vessel, without reference to the vessel's use. The theory sometimes offered is that U.S. control over such operations enhances readiness should U.S. flag vessels be needed in a military contingency. While this may be true, giving the U.S. ownership requirement such a limited scope makes no sense even in this limited context. The "operator" in such circumstances takes its directions from, and is subordinate to, the person having economic control over the vessel. In a serious military contingency where Jones Act vessels are needed, the U.S. military would unquestionably be better off with U.S. citizens having economic control over Jones Act vessels, rather than having foreign citizens with economic control over the vessels and only the vessels' "operators" being U.S. citizens.

Moreover, there is no legal basis for limiting the scope of the U.S. ownership requirement in this fashion. The term "operations" does not appear in the relevant statutes – not in the lease financing provision, the Jones Act, nor in Section 2 or Section 9 of the 1916 Act. To the contrary, the Jones Act's restrictions explicitly apply to the economic activity of

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[29] MarAd and the Coast Guard have not squarely confronted this distinction between control over vessel operations versus control over the use of the vessel. Most investigations into possible foreign control have focused on control over the physical operation of the vessel, on the theory that a layer of American control beyond the vessel's captain and crew is needed to assure that the U.S. flag vessel is made available in a military emergency for sealift purposes. While this is one of the rationales for having a U.S. citizen ownership requirement, it is not the only one. Concerns about unfair foreign competition, international relations (reciprocity), and an array of economic and homeland security concerns also support the U.S. citizenship requirement.

transporting merchandise, not to the operation of vessels. Further, Section 2 prohibits foreign control "by any other means whatsoever", while Section 9 requires government approval with respect to any manner of transfer of "any interest in or control of" a documented vessel. These provisions cannot be reconciled with a narrow construction of the scope of the U.S. ownership requirement limited solely to undefined vessel operations.

Economic control over the use of the vessel, rather than control solely over vessel operations, is also the key consideration from a variety of policy perspectives. Maintaining American citizen control over our domestic maritime industry (and not just the operation of vessels) surely advances our homeland security interests. It prevents foreign interests, who may be acting according to their home government's agenda rather than in pursuit of normal economic interests, from manipulating or withdrawing services or prices in U.S. domestic maritime trades in ways that harm American security or commercial interests.

This is also true from a competitive perspective. American carriers providing for hire services in domestic trades compete with each other on a level playing field, and are participating in this proceeding specifically to assure that foreign carriers that may have tax or other advantages may not use the lease financing provision as a mechanism to offer maritime services in U.S. domestic trades. Vessel operations (narrowly defined) are an essential component of any maritime service, and U.S. citizen control over operations is important. What is at stake here, however, is the overall maritime business generated by the vessels – the economic use and employment of the vessels. It is that business that generates the revenue that covers vessel operations and other operational costs, as well as sales, marketing, administration and related costs, and ultimately generates the payment stream that pays for the vessel's "financing". It is in that "for hire" business where unfair foreign competition will do the most harm.

Studies confirm that U.S. companies have been harmed when competing against U.S. operating subsidiaries of foreign parents.[30] These U.S. operating subsidiaries can indirectly benefit from tax incentives received by their parents or affiliates in tax-free jurisdictions. Fairly simple structures exist which permit foreign parents to strip income out of their U.S. operating subsidiaries. A common means of earnings-stripping is accomplished through the use of an intercompany debt payable to the foreign parent. The interest payments made by the subsidiary to the foreign parent may be deductible for U.S. income tax purposes, making the use of the lease financing transaction even more amenable to foreign non-maritime interests. Non-citizen maritime interests are not only utilizing an unintended loophole to compete in a protected market, they are also using creative means to strip income out of the country. The combination of income-stripping, incorporation of the parent of the vessel owner in a tax-free or favorable jurisdiction and other benefits that may be provided in a foreign jurisdiction greatly reduce the operating costs of the group, which in turn, can be passed down to the non-citizen maritime group member operating in the U.S. pursuant to the lease financing provision.

It should be emphasized that these rules should not impinge on the rights of a foreign shipper to time charter a vessel from an independent lease financing owner or a U.S. Section 2 citizen, be it an owner or a bareboat charter. The U.S. domestic fleet generates substantial income from the use of such time charters, which in and of themselves do not threaten U.S. policy interests or the viability of the domestic fleet.

However, when control over title to a vessel is combined with economic control of the vessel through a time charter that permits the time charterer to direct the vessel's sailing schedule, cargo, route and income (the very income that will pay for the financing of the

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30 U.S. Department of the Treasury - Office of Tax Policy, Corporate Inversion Transactions: Tax Policy Implications, pp.20-27 (May 2002).

vessel), a dangerous line has been crossed. As discussed immediately above, when one group or conglomerate of foreign interests has an economic interest in both the asset and its income stream, they are potentially able to operate at lower costs by reaping tax and other benefits of the laws that govern the conglomerate's operations. These benefits would allow the foreign maritime interests to compete unfairly in the U.S. market. Such unfair competition, if not prevented, will have a profound impact on American control over the nation's fleet

Proprietary Cargo. In general, the policy concerns just mentioned do not substantially apply to the carriage of proprietary cargo. Such operations, by definition, involve private transportation services that a shipper provides to itself. Shippers are the carriers' customers. Carriers do not compete with shippers. Allowing a non-citizen shipper to own a vessel that it needs to carry its own cargo simply does not raise competitive concerns in the same manner as where a non-citizen carrier would seek to own vessels and offer maritime services to unrelated third parties. Further, non-citizen domestic shippers generally do not raise the same security risks as do foreign carriers, particularly where they have substantial enough investments in U.S. domestic natural resource developments such that they require their own vessels to transport their cargo.

These policy considerations have long been recognized in the Bowaters provision[31], in which certain non-citizen shippers have been permitted to own the vessels they need to transport their cargo. Likewise, MarAd's blanket waiver for time charters essentially assumes that the time charterers are shippers. As stated by MarAd in the preamble to the JNPR,

> The general approval of time charters to non-citizens was predicated on the fact that a time charterer merely rents cargo space on a vessel and does not assume substantially

[31] 46 App. U.S.C. 883-1.

all of the benefits and risks incident to the ownership of the vessel or retain a property interest in the vessel.

69 Fed. Reg. 5404.

Accordingly, the Task Force recognizes that proprietary carriage does not generate the same concerns for hire service does, and that there is a long-standing recognition of this distinction in the laws administered by the Coast Guard and MarAd. The Task Force therefore supports recognizing a reasonable exception for proprietary cargo, as discussed further below.

Specific Charter-Back Proposals. The JNPR offers three different approaches to the issue: (1) by defining a demise charter so as not to include agreements in which the vessel is subject to a sub-charter back to a member of the owner's group, except when the vessel is used to carry proprietary cargo (the "(a)(9) Option");[32] (2) by completely prohibiting an owner from chartering the vessel's *operations* back to a member of the owner's group (the "(a)(6) Option");[33]and (3) by requiring MarAd approval of any transfer of a vessel by a demise charterer back to a member of the owner's group (the "MarAd approval" option).[34] Each of these approaches offers certain advantages and drawbacks, and is addressed separately below.

1. The (A)(9) Option.

MCTF fully supports the adoption of proposed 46 C.F.R. §67.20(a)(9) as drafted in the JNPR. The proposal in the JNPR, if adopted, would add the following language to the Final Rule:

> For purposes of this section, a demise charterer is not considered to be the owner *pro hac vice* when the vessel is subject to a subcharter to a member of the group

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32 *See* 46 C.F.R.. §67.20(a)(9)(as proposed).

33 The owner would have to certify that its ownership of the vessel "is primarily a financial investment without the ability and intent to directly or indirectly control the vessel's operations . . . by a member of the group of which the owner is a member." 46 C.F.R.. §67.20(a)(6) (as proposed). A key concern with this provision (discussed below) is that it restricts foreign control only over the vessel's operations, but not over its use.

34 *See* 46 C.F.R. §221.13(c)(as proposed).

> of which the vessel's owner is a member, except when the vessel is engaged in carrying cargo owned by the vessel's owner or a member of the group of which the vessel's owner is a member.

The (a)(9) Option provides broad protection because it prohibits *all* sub-charters of a lease financed vessel back to the vessel's owner or its group, and is not limited to agreements related to vessel operations. The Final Rule defines sub-charters to include "all types of charters or other contracts for the *use* of a vessel that are subordinate to a charter."[35] Hence, the (a)(9) Option appears effectively to protect against time charters or other agreements that would permit a foreign maritime entity to both own and control the use of coastwise vessels under the lease financing provision.

The primary question about the (a)(9) Option concerns the scope of the proprietary cargo exception.[36] As set forth in the JNPR, it is an extremely narrow exception, literally covering only cargo that is owned (presumably at the time the cargo is being transported) by the vessel owner or a member of its group. The Task Force would support a definition of "proprietary cargo" that, while prohibiting abuse, nevertheless affords reasonable flexibility to the use of lease financed vessels. For example, the definition might accommodate the practices of natural resource companies that may trade or sell their cargoes immediately before, during or immediately after the completion of the carriage. Moreover, industry practices involving vessel pools may be accommodated, as may emergency circumstances which may disrupt normal trading patterns. However, any such exemption would have to be carefully crafted to prevent abuse.

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35 46 C.F.R. §67.3 (emphasis added).

36 46 C.F.R. §67.20(a)(9) (" . . . except when the vessel is engaged in carrying cargo owned by the vessel's owner or by a member of the group of which the vessel's owner is a member.")

Although MTCF is not submitting a specific proposed definition, it believes that the Coast Guard has the authority to craft a reasonable and detailed proprietary cargo exception to the rules. Absent clear and unambiguous language from Congress, an agency is granted deference in its interpretation of the bounds of particular statutory language. *See Chevron U.S.A., Inc. v. Nat'l Resources Defense Council, Inc.*, 467 U.S. 837, 841-43 (1984); *see also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-92 (1988). If the statute is silent or ambiguous, the question is whether the agency regulation is a "permissible construction of the statute." *Id. at* 292. In determining the bounds of regulatory authority, an agency may look to both the legislative history of the statute and the underlying policies of the statutory grant of authority. *See U.S. v. Riverside Bayview Homes, Inc.*, 106 S.Ct. 455, 462 (1985).

Likewise, the Coast Guard can cite to ample evidence that the statutory purpose and legislative history of its enabling act provide a reasonable basis to exempt proprietary cargo from the JNPR. As the Coast Guard stated, the proposal in §67.20(a)(9) is similar in principle to the previously enacted Bowaters Amendment, a limited exception to the Jones Act. Incorporating Congressionally enacted exceptions in an agency's interpretation of its enabling statute support a permissive interpretation because, like the Corps' action in *Riverside Bayview*, they reasonably reflect Congressional intent in an ambiguous situation. The Coast Guard has considered the scope of its charge under the statute and the indications Congress has given as to when exceptions should apply and has developed a reasonable interpretation of its regulatory authority. The Coast Guard's interpretation is made more reasonable by evidence that Congress intended an exemption to apply to groups that carry cargo for related third-parties. *See* H.R. Conf. Rep. No. 104-854, at 128-29 (1996).

2. The (A)(6) Option.

For several reasons, the Task Force does not believe the proposal in 46 C.F.R. §67.20(a)(6), as drafted, adequately prevents foreign control over a lease financed vessel. While

the (a)(6) Option absolutely prohibits charter-back arrangements, it does so only insofar as they affect the "operations" of a vessel. As discussed above, because "vessel operations" are sometimes understood to cover only the activities directly related to the mechanical operation of the vessel and not its business or use, this provision will not prevent a lease finance owner from time chartering a vessel through a Section 2 citizen and back to itself. As long as the time charterer controls neither the relatively narrow band of functions that constitute vessel operations, nor any entity that controls those functions, the arrangement would not violate (a)(6) even though the time charterer and the owner may be affiliated. Stated otherwise, this provision arguably has the minimal benefit of restating the requirement that a non-citizen owner may not directly or indirectly control the Section 2 citizen demise charterer, nor may it control the key functions involved in vessel operations.

The uncertain scope of this provision is reinforced by the Coast Guard's statement in the JNPR that:

> a charter-back arrangement could be permissible under the statute if the charter-back arrangement is merely for the purpose of providing the legal framework under which the vessel will earn revenue for the demise charterer and if the demise charterer retains all aspects of control of the operation of the vessel, other than that which is directly involved in generating income.

This seems to suggest that charter-back arrangements are permissible as long as the demise charterer retains full control over the vessel's operations. In practice, this requirement will do little to deter improper use of the lease financing provision.

To address this concern, should the Coast Guard determine not to adopt the (a)(9) option, the Task Force proposes to delete the phrase "vessel's operations by a person not primarily engaged in the direct operation or management of vessels or" from 46 C.F.R. § 67(a)(6) of the Final Rule. We suggest replacing the deleted language with the phrase "operation or management of the vessel", so that the provision would incorporate the definition of "operation or management of vessels", found in 46 C.F.R. §67.3, which contains a reference

to controlling the use and employment of the vessel under a time charter or other use agreement. We also suggest striking the language "by a person not primarily engaged in the direct operation or management of vessels" as it is confusing and superfluous. The language "by a member of the group of which the owner is a member" is broad enough to cover the deleted language.

3. Marad Review Under Part 221.

In 1992, preceding the adoption of the lease financing provision, MarAd altered its regulations found in 46 C.F.R. §221 to grant blanket approval for the "sale, lease, charter, delivery, or any other manner of transfer" of a documented vessel to a non-citizen, with limited exceptions. Because a bareboat or other form of demise charter transfers physical control of the vessel to the charterer, the approval of bareboat or demise charters of vessels operating in the coastwise trade was specifically exempted from this blanket approval. However, time charters and similar arrangements that only transferred economic use of the vessel (the right to direct the loading of cargo and the vessel's routes) were automatically deemed approved by MarAd.

As MarAd correctly states, the regulation granting blanket approval was issued prior to the adoption of the lease financing provision, when it was impossible for a non-citizen to control both title to, and the chartering of, a coastwise vessel. The JNPR proposes to amend 46 C.F.R. §221.13(a) to require MarAd's review and approval of the charter arrangements involved in a Section 12106(e) application to the Coast Guard. MarAd points out that "[i]f a non-citizen is permitted to own a vessel and to time charter the vessel back to itself or a related entity, it can potentially exert much greater control over the operation of the vessel." MarAd, given its previous experience with reviewing charters and its general familiarity with commercial and cargo-related issues, is probably in a better position than the Coast Guard to examine the

contractual relationships between the foreign owner, the Section 2 U.S. citizen demise charterer and the foreign time charterer affiliated with the owner.[37]

The authorization behind 46 C.F.R. §221.13(a), Section 9 of the 1916 Act, gives MarAd great discretion to review charter-back arrangements. Under current law, and the regulations proposed in the Final Rule, the Coast Guard's analysis is centered around the owner of the vessel. MarAd's review of charter arrangements under its Section 9 authority shifts the focus of the review from the owner to the vessel. By analyzing the foreign interests in the vessel, MarAd authorization may provide it with additional ability to look into the economic use and management of the vessel. This ability makes it easier for MarAd to deny charter-back arrangements where both title to, and economic use and control of, the vessel rest with the non-citizen owner and an affiliate.

Depending on what charter-back option or options are adopted by the Coast Guard, the Task Force supports the involvement of MarAd in reviewing charter-back arrangements. If the Coast Guard elects the (a)(9) Option with a proprietary cargo exception, MarAd's should review the initial submission, as well as monitor continuing compliances with that exception. Alternatively, if the Coast Guard implements the (a)(6) Option including an economic use and management concept, MarAd's involvement in reviewing the arrangements would be invaluable.

B. GRANDFATHERING

Under the Final Rule, subject to certain conditions, the Coast Guard allows vessels with endorsements issued before February 4, 2004, as well as barges deemed eligible to operate in the coastwise trade under Section 12106(e) and 46 U.S.C. 12110(b), to continue to operate

[37] In addition to its general experience in reviewing chartering relationships, MarAd has developed extensive expertise and experience in reviewing ownership and control issues affecting the domestic fisheries under the American Fisheries Act. 46 U.S.C. § 12102(c).

indefinitely. As a general proposition, such indefinite authority is not acceptable in that it potentially permits tax-advantaged foreign maritime interests to compete for the useful life of the vessel against tax-paying U.S. companies. Such foreign companies may argue that they obtained this documentation in good faith. Others may argue that foreign maritime interests who obtained such documentation took a calculated risk, knowing that rules had not been adopted and that their eligibility to use the lease financing provision was at least suspect. In either case, a foreign maritime company that cannot meet current regulatory standards has absolutely no claim, legal or equitable, that it should be permanently exempt from such standards and able permanently to enjoy whatever advantages it has over tax-paying U.S. companies.

The proposed rule would amend 46 C.F.R. § 67.20(b) to limit the grandfather provision for such vessels and barges to 3 years. In addition, the Final Rule provides that a vessel or barge built under a construction contract dated before February 4, 2004 in reliance upon a Coast Guard letter ruling issued before February 4, 2004 is eligible when delivered for documentation indefinitely under 46 C.F.R. § 67.19 and Section 12106(e), presumably under the rules that existed prior to the Final Rule. The proposed rule would allow the vessel to operate for 3 years after the initial issuance of the endorsement. We agree that owners of vessels with existing endorsements issued under Section 12106(e) who have made investments in such vessels based upon the properly induced Coast Guard actions taken prior to the issuance of the Final Rule should be given a reasonable amount of time to restructure their investments. Under the circumstances, three years appears to be a reasonable proposal.

Some of the comments received by the Coast Guard have raised "takings"[38] arguments due to the possible loss of a coastwise endorsement on the certificates of documentation issued previously under Section 12106(e). We seriously doubt that a valid takings claim could be made in most cases.[39] Permitting a 3-year transition will allow a lease financing owner to come into compliance with the regulations without confronting a forced sale.

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[38] The Takings Clause of the Fifth Amendment states: "Nor shall private property be taken for public use, without just compensation." U.S. Constitution, amendment V.

[39] Although those shipowners who lose their coastwise endorsements may have a property interest in the vessel, *see* Maritrans Inc. v. U.S., 342 F.3d 1344, 1352-1353 (Fed. Cir. 2003), that may be adversely affected by such loss, we believe it is highly unlikely that a regulatory takings claim brought by such shipowners will be successful. Under the three part test first established by the Supreme Court in Penn-Central Trans. Co. v. New York City, 438 U.S. 104, 124 (1978), the courts look at the following factors in their analysis of regulatory takings: (i) the economic impact on the claimant, (ii) interference with the reasonable, investment-backed expectations of the claimant, and (iii) the character of the government action. Penn Central, 438 U.S. at 124.

In considering the first factor, economic impact of the claimant, the court will compare the value of the property at issue before and after the regulatory action. *See* Arctic King Fisheries, Inc. v. U.S., 59 Fed. Cl. 360, 369 (Fed. Cl. 2004). The Court of Federal Claims in Arctic King noted that in other decisions of that court it usually requires a diminution of the property's value in excess of 85% before finding a regulatory taking. Id. at 385. It further noted that none of the Supreme Court's, the Federal Circuit or the Court of Federal Claims decisions had ever held that a loss in value of less than 50% was sufficient to constitute a regulatory taking. Id. Since any owner who loses a coastwise endorsement would be able to use the vessel in the foreign trade, the vessel's diminution in value will clearly not exceed 50%. Thus, the potential claimant will likely fail to establish a sufficient economic impact to sustain a regulatory taking claim.

The second factor considered, reasonable investment-backed expectations is analyzed in light of (i) the reliance of the investor on the current regulatory scheme at the time of investment and (ii) the extent to which the regulation was foreseeable. *See* Arctic King, 59 Fed. Cl. 378, citing Ruckelhaus v. Monsanto, Co., 467 U.S. 987 (1984). As stated above in Section III, Section 12106(e) was enacted in 1996 as a specific, limited exception to the citizenship requirements of U.S. cabotage laws in order to provide passive leasing capital to U.S. operators. Moreover, Congress specifically required the Coast Guard to establish regulations implementing Section 12106(e). No non-citizen claimant, which has previously utilized the loophole in Section 12106(e) to gain control of a coastwise vessel, can now reasonably claim that the Final Rule or the JNPR were unforeseeable at the time of its investment. Thus, a court should find that no reasonable investment-backed expectations were sufficiently impaired to effect a taking.

Finally, the character of the government action does not effect a taking when its purpose and importance to the public interest are weighed against the burden on any private party. *See* Arctic King, 359 Fed. Cl. at 381. Factors indicative of a taking are extensive retroactive application of a regulation and the targeting of an individual. *See* Id. The public purpose of the Final Rule and the JNPR are clear and well established. Furthermore, no specific owner has been targeted; rather, a general limitation on

C. THIRD PARTY REVIEW

The final proposal raised in the JNPR would require, in addition to the certifications already required under 46 C.F.R. §§ 67.147 and 67.179, a certification from an independent auditor with expertise in the business of vessel finance and operations. The final rules adopted in this proceeding should clarify the standards sufficiently such that most, if not all transactions that would be controversial will simply not be proposed. It is nevertheless possible that the Coast Guard will, on rare occasions, need to investigate various aspects of an application under Section 12106(e). For example, any application from an owner that has an affiliation with a foreign maritime operator, or where there is arguably a charter-back arrangement, should require further investigation. Expert analysis may be required to evaluate Section 12106(e) proposals from an operational, financial, economic use, or management perspective. Corporate structures are becoming increasingly more complicated and a review of these arrangements, especially foreign conglomerates and affiliations, may require expert review.

Rather than resorting to an independent auditor, the Task Force believes that the most effective way to monitor the substance of 12106(e) is by involving the public through a Sunshine Act publication, and if necessary, by recourse to an administrative law judge if the responses to the publication warrant review by a trier of fact. No one is better suited to review and comment on the substance of a maritime structure than those persons that operate within

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foreign ownership is proposed. This has already been found to be within the proper sphere of regulation for takings purposes. *See* Id. at 382 (finding no taking in a regulatory regime that privileged domestic vessels over foreign-owned vessels). Because the proposed rule applies broadly to a class of owners and affects a traditional area of regulation, the character of the government action does not reflect a taking.

the bounds of the law and are familiar with vessel management, operations and use and the corporate structures related thereto. MarAd's expertise in evaluating complex citizenship affidavits and in reviewing cargo-related issues could provide additional analysis for the Coast Guard to take into consideration.

1. Sunshine Act

The Task Force recommends that the Coast Guard establish a policy under the Sunshine Act[40] whereby a notice is published in the Federal Register every time a Section 12106(e) application reflects that the applicant is affiliated with a non-citizen maritime owner or operator or that the vessel will be (or may be) subject to a charter-back arrangement.[41] Given the numbers presented in the JNPR (since 1996, 87 entities have applied for certificates of documentation under Section 12106(e), and of those, 30 have engaged in charter-back practices) providing for a public notice and comment period would not result in an undue burden to the Coast Guard. Additionally, MarAd could provide expertise on citizenship and cargo-related issues, with which MarAd has substantial expertise.

So as not to delay legitimate Section 12106(e) applications, the Coast Guard could provisionally issue certificates of documentation, subject to confirmation that no substantial issues were raised during the comment period (we suggest a 45 day comment period). If information was presented during the comment period that raised suspicions concerning the status of the Section 12106(e) application, the Coast Guard could revoke, or temporarily suspend the suspect certificate of documentation until a thorough review of the complaint and the application could be performed. By allowing interested parties to comment on these

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40 5 U.S.C. §552b (1999).

41 The application form should be revised to require the applicant to submit such information.

applications, the Coast Guard would be broadening the information and expertise available to it in making determinations under Section 12106(e) applications.

In the event that the information provided to the Coast Guard by the public and MarAd raised issues of fact, the Coast Guard should provide for an accelerated hearing before an Administrative Law Judge.

2. Independent Auditor Questions

As discussed above, the Task Force believes that MarAd, or an ALJ through a Sunshine Act Hearing, would have the expertise to review the form and substance of 12106(e) structures. However, the Coast Guard has requested comments regarding the need for an independent auditor to evaluate such applications. In the event that the Coast Guard determines that MarAd or an ALJ are unable to effectively review 12106(e) applications, the Task Force offers the following responses to the eight questions raised in the JNPR:

1. *Should an independent auditor be used?* The Coast Guard has alluded that it may lack the expertise to review certain issues related to Section 12106(e), notably involving complicated corporate structures and arrangements. Consequently, MCTF believes that the expertise of one or more outside consultants may be valuable to the Coast Guard in making a determination with respect to certain Section 12106(e) applications.
2. *What are the minimum qualifications of an auditor?* At this point in time, the Task Force is not able to assess the applicable qualifications of such an auditor. The minimum qualifications should be set by specialists within the Coast Guard who are familiar with consultant qualifications and have a familiarity with the corporate, economic and legal issues discussed herein.

3. *Who should select the auditor, the Coast Guard, another government agency or the applicant?* The Coast Guard should select the auditor from a list of pre-approved auditors who meet the qualifications determined in number 2 above. Specific conflict of interest rules should govern the auditor's involvement in a review, effectively barring the auditor from reviewing the application if the auditor or his or her firm has any business or personal relationship with the owner, its parent or group, or any of their legal representatives involved in the case.
4. *If the applicant selects the auditor, how should the Coast Guard ensure that the auditor is truly independent? Should the Coast Guard provide a list of approved auditors from which the applicant may choose?* The Coast Guard has the responsibility for assessing the application. The auditor chosen to assist the Coast Guard should be chosen by the Coast Guard. Thus, the applicant should not be allowed to select its auditor.
5. *What standards does the auditor apply in deciding whether to examine the details of the proposed transaction beyond the face of the documents submitted?* While the Coast Guard would be expected to review the application documents on their face, the auditor should be given a broad mandate to examine evidence outside of the documents presented in the application. Such additional information could include, but should not be limited to, a review of press reports and public statements as well as publicly available documents such as securities filings. The auditor should be able to seek any documents reflecting any arrangement affecting the vessel.

6. *Would the added benefit provided by the certification by the independent auditor justify the extra time and cost of obtaining such a certification?* A review of certain Section 12106(e) applications is necessary to protect the domestic maritime industry. Incursion by non-citizen maritime interests weakens the strength of the domestic industry by jeopardizing national security and the industry's continued viability, due to unfair competition concerns discussed herein. The minor additional costs and time delays resulting from an independent auditor's involvement pale in comparison to the stakes that are ultimately at risk.
7. *Would such an audit be an inherently governmental function that should not be entrusted to an independent auditor?* We believe that the investigation is inherently a governmental function that should be made by the Coast Guard, and certainly not by a private party hired by the applicant. We do not believe it likely that an auditor hired by the applicant could provide a meaningful certification in the context of these applications.
8. *Should we increase our investigation and examination of applications for vessel documentation?* The Coast Guard should only increase its investigation and examination of vessel documentation applications submitted under Section 12106(e) when the applicant is affiliated with a vessel owner or operator or when the vessel is or may be chartered back to a member of the owner's group. There is no need for the Coast Guard to change any other procedures. The Coast Guard, or the auditor selected by it, should undertake a thorough analysis of the corporate structure of the foreign owner, its subsidiaries, affiliates, parents and the

overall group of companies affiliated with the owner. Additionally, the Coast Guard should review all charter-back arrangements, including the bareboat charter to the Section 2 U.S. citizen, as well as any sub charters to foreign entities and any side agreements that may impact the contractual relationships described in such charters.

If the Coast Guard believes that MarAd or an ALJ are capable of making 12106(e) application determinations within a very brief time frame, it is evident that many of the concerns raised by the Coast Guard through these questions would become moot.

VI. TECHNICAL CORRECTIONS TO THE FINAL RULE:

One of the definitions used by the Coast Guard in the Final Rule needs to be clarified if it is to be effective. As presently drafted, "Affiliate means a person that is less than 50 percent owned or controlled by another person." Unfortunately, this definition would include as affiliates two "persons" (as defined in 46 C.F.R. §67.3) that are totally unrelated. Although we know that this definition was intended to be the mirror image of the definition of "subsidiary", it just does not work as drafted. Instead the Task Force suggests that the following definition be adopted:

> Affiliate means, with respect to any person, any other person that is directly or indirectly controlled by, under common control with or controlling such person. As used herein, the term "control" means possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities or partnership interests, by contract or otherwise.

VII. CONCLUSION

For the reasons stated, the Task Force, on behalf of itself and its coalition of more than 400 members with an interest in the cabotage laws of the United States, respectfully requests that its views be fully incorporated into the Coast Guard's and MarAd's final rules implementing the lease financing provision.

Respectfully submitted,

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May 4, 2004

Exhibit 1

MARITIME CABOTAGE

TASK FORCE

A. H. Powers, Inc
Advance Boiler and Tank Co.
Adventure Cruises, Inc.
AFL-CIO Maritime Committee
Afram Carriers, Inc.
AHL Shipping Co.
Ahrenkiel Ship Management U.S., Inc.
Air Line Pilots Association
Alaska Sightseeing Tours
Alaska Transportation Company
Alfa-Laval, Inc.
All States Drilling & Blasting
Allied Transportation Company
Allouez Marine Supply Co.
Amerada Hess Corporation
American Bureau of Shipping
American Commercial Line LLC
American Foreign Shipping Company, Incorporated
American Industrial Motor Services
American Inland Mariners Association
American Marine Constructors, Inc.
American Maritime Congress
American Maritime Officers
American Maritime Officers Service
American Navigation, Inc.
American Overseas Marine Corporation
American Pacific Transport
American Shipbuilding Association
American Steamship Company
American Trucking Associations
American Waterways Operators
American WorkBoats
Ameron Protective Coatings
Anixter Appleton
Apex Marine Corporation
Argo International Corporation
Arkansas Valley Dredging Company, Inc. Carter Construction
Arnold Transit Company
Assoc. of Professional Flight Attendants
Atlantic Marine/Alabama Shipyard
Avondale Industries, Inc.
B.B. Riverboats, Inc.
Bauer Interiors, Inc.
Bayfront Marine, Inc.
Bay-Houston Towing Company
Bay Shipbuilding Company
Bay Tankers, Inc.
Bean Dredging Corporation
Belle Carol Riverboat Co.
Belt Maintenance Company
Bender Shipbuilding & Repair Co., Inc.
Benson Electric Company
Bigane Vessel Fueling Company
Bird-Johnson Company
Blackstone Valley Tourism Council
Barker Blount Shipbuilding
Bludworth Marine LLC
Blue Water Excursions
Bollinger Shipyards, Inc.
Bossert Industrial Supply
Bourg Dry Dock & Service Company
Brady Marine Repair Company
Brent Transportation Corporation
Bridgeport/Port Jefferson Steamboat
Brotherhood of Locomotive Engineers
Brotherhood of Maintenance of Way Employees
Buchanan Enterprises, Inc.
C.G. Willis, Incorporated
C.J.C., Inc
California Marine Cleaning, Inc.
Canal Barge Company, Inc.
Cape Fear Towing Company, Incorporated
Capital Fleet, Inc.
Carotex, Inc.
Cascade General, Inc.
Caterpillar, Inc.
Cement Transit Company
Cenac Towing Company, Inc.
Central Gulf Lines, Inc.
Central Radio Telegraph Co.
Chamber of Shipping of America
Channel Shipyard Company, Inc
Chotin Carriers, Inc.
Christiana Marine Service Corporation
Cleveland Shiprepair Co.
Cleveland Tankers Ship Management Inc.
Clipper Cruise Line
Coalition for Peace Through Strength
Coastal Marine
Coastal Towing, Inc.
Colle Towing Company, Inc.
Colonna's Shipyard Co., Inc.
Coltec Industries, Inc.
Columbia Coastal Transport LLC
Compass Rose Yacht Charters
Connolly-Pacific Company
Conrad Industries
Cooper Bessemer
Coscol Marine Corporation
Corn Island Shipyard, Inc.
Cove Shipping, Incorporated
Crescent Towing Company, Inc.
Crowley Liner Services, Inc.
Crowley Marine Services, Inc.
Crowley Maritime Corporation
Cunningham & Walker Marine Consultants
Delta Western
Dereckter Gunnel Shipyard
Designers & Planners, Inc.
Detyens Shipyards, Inc.
Devall Towing & Boat Service, Inc.
Diversified Marine
Dixie Carriers, Inc.
Dixie Fuels Limited
Dixie Marine, Inc.
Dredging Contractors of America
Drew Chemical Corporation
Durocher Dock & Dredge, Inc.
Eastern Shipbuilding Co.
Edward E. Gillen Company
Elliott Bay Design Group, Ltd.
Elliott Turbine
Empress River Casino
Energy Transportation Corporation
Erie Sand Steamship Co.
Evansville Marine Service, Inc.
Express Marine, Incorporated
Exxon Seamen's Union
Fabco Equipment, Inc.
First Wave Marine
Fishing Vessel Owners Marine Ways
Florida West Coast Cruises, Inc.
Food and Allied Service Trades Department, AFL-CIO
Fort Sumter Tours, Inc.
Foss Maritime Company
Fraser Shipyards, Inc.
Freeport Shipbuilding
Friede Goldman Halter
G&H Towing
Gaelic Tugboat Company
Gage Corporation, Inc.
Gallagher Marine Construction Co., Inc.
Garner Environmental Services, Inc.
Gateway Riverboat Cruises
General Electric Marine Service
Gibson & Cushman Dredging Corporation
Gladding Hearn
Goldstein and Price
Goodtime Cruise Line, Inc.
Grand River Navigation
Gray Line Water Tours, Inc.
Great Lakes Associates, Inc.
Great Lakes Conveyor Belt
Great Lakes Dredge & Dock Company
Great Lakes Fleet, Inc.
Great Lakes Group
Great Rivers Marine Service
Gulfcoast Transit Company
Gulf Craft, Inc.
Gulf Caribe Maritime Inc.
Gulf County Shipbuilding
Gulf Marine Repair Corp.
Gunderson, Inc.

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http://www.mctf.com

Hallett Dock Co.
Halter Marine Group
Hannah Marine Corporation
Harbor Docking & Towing Company, Inc.
Harrison Bros. Dry Dock & Repair Yard
Harley Marine Services
Hatch & Kirk, Inc.
Hawaii Transportation Association
Hawaiian Tug & Barge
Hendry Corporation
Henry Marine Service
Higman Marine Services, Inc.
Hone Heke Corporation
dba:EXPEDITIONS
Hopeman Brothers, Inc.
Horizon Lines, LLC
Houston Marine Training Services
HT&T Company, Inc.
Hudson River Cruises, Inc.
Hughes Bros., Inc.
Hunter Marine Transport, Inc.
Husky Terminal & Stevedoring, Inc.
Hyde Products
In-Place Machining Co.
Ingram Barge Company
Inland Lakes Management, Inc.
Inlandboatmen's Union of the Pacific
Interior Design International
Interlake Steamship Co.
International Association of Machinists and Aerospace Workers
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
International Brotherhood of Electrical Workers
International Brotherhood of Teamsters
International Longshoremen's and Warehousemen's Union
International Longshoremen's Association, AFL-CIO
International Marine Carriers, Inc.
International Marketing & Business, Inc.
International Organization of Masters, Mates & Pilots
International Ship Masters' Association
International Ship Repair & Marine Services, Inc.
International Union of Operating Engineers
Interocean Ugland Management Corporation
Interstate Valweld
Intracoastal Towing & Transportation Corporation
Island Tug & Barge Company
Isles of Shoals Steamship Co.
J. Cortina, Inc.
J & D Services
Jamestown Metal Marine Sales, Inc.
Jeffboat, LLC
Jensen Maritime Consultants
John Bludworth Marine, Inc.
Jungle Queens, Inc.
Kadampanattu Corporation
Kahlenberg Brothers Company
Karl Senner, Inc.
KING Company, Inc.
Kirby Corporation
Kirby Tankships, Inc.
Kvaerner Philadelphia Shipyard
L & R Midland, Inc.
L & S Electric
Labor-Management Maritime Committee, Inc.
Laborers' International Union of North America
Lake Carriers' Association
Lake Mead Cruises
Lake Michigan Carferry Service, Inc.
Lake Michigan Contractors, Inc.
Laughlin River Tours, Inc.
Liberty Bell Cruises
Liberty Maritime Corporation
Loomis & Lapann, Inc.
Ludwig Crane Service, Inc.
Luedtke Engineering Company
Luhr Bros., Inc.
Lyon Shipyard, Inc.
M. Rosenblatt & Son, Inc.
Manson Construction and Engineering Company
MARCO Seattle Inc.
Marcol Dredging Company
Marine Contracting Corporation
Marine Firemen's Union
Marine Hospitality Corporation
Marine Inland Transportation Co.
Marine Resources Inc.
Marine Oil Service, Incorporated
Marine Systems, Inc.
Marine Transport Lines, Inc.
Marinette Marine Corporation
Maritime Institute for Research and Industrial Development
Maritime Overseas Corporation
Maritime Trades Department, AFL-CIO
Maritrans Operating Partners L.P.
Marmara, Inc.
Maryland Marine, Inc.
Matson Navigation Company, Inc.
McAllister Brothers, Incorporated
McAllister Towing & Transportation
McDermott, Inc.
McDonough Marine Service
McGinnis, Inc.
Memphis Queen Line, Inc.
Merchant Mariners Fairness Committee
Mercury Sightseeing Boats
Metal Trades Department, AFL-CIO
Metro Machine Corporation
Michigan Maritime Trades Port Council, AFL-CIO
Mid-South Dredging Company
Mid-South Towing
Midwest Energy Resources Company
Missouri Barge Line Company
Missouri Dry Dock & Repair Co.
Moran Towing Corporation
Mormac Marine Group, Inc.
Mt. Vernon Barge Service, Inc.
Mt. Vernon Fleeting Service, Inc.
Multicom
National Maintenance & Repair
National Marine Engineers' Beneficial Association
National Maritime Union
National Security Caucus Foundation
National Steel & Shipbuilding Co.
Navieras/NPR, Inc.
Neuman Boat Line, Inc.
Neuman Cruise & Ferry Line
New Orleans Steamboat Co.
Newport News Shipbuilding
Nicholas Bachko Company, Inc.
North Ferry Company
Nott Company
Oahu Express
Ocean Specialty Tankers Corp.
Offshore Marine Service Association
Offshore Marine Supply Company
Oglebay Norton Marine Services Company
Omega Products
OMR Transportation Co.
Orgulf Transport Company
PPR Inc.
Pacific Fishermen
Pacific-Gulf Marine, Inc.
Packer Marine, Inc.
Padelford Packet Boat Co.
Passenger Vessel Association
Penn Maritime, Inc.
Peterson Builders, Inc.
Petroleum Service Corporation
Phillips' Cruises & Tours
Pine Bluff Sand & Gravel Company
Piney Point Transportation
Pinnacle Marine Corporation
Project Acta
Propeller Club of the United States
Propulsion Controls Engineering
Puget Sound Freight Lines, Incorporated

R & J Transport
Rail Systems, Inc.
River City USA
Riverboat Tours, Inc.
Runyon Industries, Inc.
RV Charters, Inc.
Sabine Towing & Transportation Co., Inc.
Sabine Transportation Company
Sailors' Union of the Pacific
Saltchuk Resources, Inc.
Sause Bros. Ocean Towing Co., Inc.
Save Our Ships Campaign, Inc.
Sayville Ferry Service, Inc.
Sea Coast Towing, Inc.
Sea-Star Line, LLC.
Seabulk International
Seabulk Offshore, Ltd.
Seafarers International Union of North America
Sea Patriot
Seaworthy Systems, Inc.
Service Marine Industries, Inc.
Sheet Metal Workers International Association
Shipbuilders Council of America
Shoreline Contractors, Inc.
Southeast Shipyard Association
Southeastern New England Shipyard Company
Southern Dredging Company, Inc.
Southern Towing Company
Southwest Shipyard, Inc.
Spar Associates, Inc
Stan Stephens Charters
Stapp Towing Company, Inc.
Star Fleet
Star Line Mackinac Island Ferry
Stokes Towing Company, Inc.
Suderman & Young Towing Co., Inc.
Sun State Marine Services, Inc.
Superior Boat Works, Inc.
Swath Ocean Systems, Inc.
T. L. James & Company, Inc.
T.T. Barge Service, Inc.
Talen's Marine & Fuel, Inc.
Tampa Bay Shipbuilding & Repair
Tampa Town Ferry
Tennessee Valley Towing, Inc.
The Council of American Master Mariners
The Delta Queen Steamboat Company
The Dubuque Diamond Joe
The Glosten Associates, Inc.
The Ohio River Company
The Rosie Paddleboats, Inc.
The Vernon Group
The Waterways Journal, Inc.
Tidewater Barge Lines, Inc.
Timco Industries, Inc.
Timothy Graul Marine Design/TGMD, Inc.
Todd Pacific Shipyards, Inc.
Toledo Port Maritime Council
Toledo Ship Repair Company
Tom Naughton Associates
Totem Ocean Trailer Express
TPT Transportation Co.
Trailer Bridge Company Inc.
Transportation Institute
Transportation Trades Department, AFL-CIO
Transportation-Communications Union
Travel Systems, Ltd./M.S. Dixie II
Trinity Marine Group
Union Dry Dock & Repair
United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry of the United States & Canada
United Automobile, Aerospace & Agricultural Implement Workers of America (UAW)
United Brotherhood of Carpenters and Joiners of America
United States Maritime Coalition
United Steelworkers of America
United Steelworkers of America-Local 5000
United Transportation Union
Upper Lakes Towing
Van Enkevort Tug & Barge Inc.
Victor Fluid Power
Viking Boat Tours of Newport
Virgin Island Fast Ferries
Yankeetown Fleet
W. S. Patterson
Warrior & Gulf Navigation Company
Washington Island Ferry Line
Waterman Steamship Corporation
Water Taxi
Waterways Cruises, Inc.
Weeks Marine, Inc.
Wendella Sightseeing Boats
WESCO
Westar Marine Services
Westchester Marine Shipping
West Coast Shipping
Western Towing Company, Inc.
Westport Shipyard
Williams Steel
Williamsport Wire Rope Works, Inc.
Wisconsin Bearing
Women's Propeller Club of the United States
Women's Propeller Club of the United States, Port of San Diego
World Yacht Cruises
W & O Supply, Inc.
WP & RS Mars Co.
Wright Dredging Company
Young Brothers, Limited
Ziegler, Inc.

May 4, 2004