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# Title 46—Shipping

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# CHAPTER II—MARITIME ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

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# SUBCHAPTER A—POLICY, PRACTICE AND PROCEDURE

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AUTHORITY: 46 App. U.S.C. 1114(b); 49 CFR 1.66 and 1.69.

SOURCE: General Order 41, 3d Rev., 29 FR 14475, Oct. 22, 1964; 29 FR 15374, Nov. 17, 1964, unless otherwise noted.

## Subpart A—General Information (Rule 1)

### § 201.1 Scope of rules.

The regulations in this part govern practice and procedure before the Maritime Administration and Maritime Subsidy Board (as described in 49 CFR 1.66 and 1.67), hereinafter referred to collectively as the "Administration," under the Merchant Marine Act, 1920, as amended, Merchant Marine Act, 1936, as amended, Merchant Ship Sales Act, 1946, Administrative Procedure Act, and related Acts. In addition, certain proceedings under sections 605(c)

and 805(a) of the Merchant Marine Act, 1936, as amended, shall be conducted in accordance with part 203 of this chapter except as may be provided otherwise by the Administration.

[55 FR 12358, Apr. 3, 1990]

### § 201.2 Mailing address; hours.

Documents required to be filed in, and correspondence relating to, proceedings governed by the regulations in this part should be addressed to "Secretary, Maritime Administration, Department of Transportation, Washington, DC 20590." The Office of the Secretary, Maritime Administration, including the public document reading room, located in room 7210, 400 Seventh Street, SW., Washington, DC 20590, is open from 8:30 a.m. to 5:00 p.m.

[55 FR 12358, Apr. 3, 1990, as amended at 63 FR 9157, Feb. 24, 1998]

### § 201.3 Authentication of rules, orders, determinations and decisions of the Administration.

All rules, orders, determinations or decisions issued in any proceeding covered by the regulations in this part shall, unless otherwise specifically provided by the Administration, be signed and authenticated by seal by the Secretary of the Administration in the name of the Administration.

### §§ 201.4–201.5 [Reserved]

### § 201.6 Documents in foreign languages.

Every document, exhibit, or other paper written in a language other than English and filed with the Administration or offered in evidence in any proceeding before the Administration under the regulations in this part or in response to any rule or order of the Administration pursuant to the regulations in this part, shall be filed or offered in the language in which it is written and shall be accompanied by an English translation thereof duly subscribed.

### § 201.7 Information; special instructions.

Information as to procedure under the regulations in this part, and instructions supplementing the regulations in this part in special instances, will be furnished upon application to the Secretary of the Administration.

### § 201.8 Use of gender and number.

Words importing the singular number may extend and be applied to several persons or things; words importing the plural number may include the singular; and words importing the masculine gender may be applied to females.

### § 201.9 Suspension, amendment, etc., of rules.

The regulations in this part may, from time to time, be suspended, amended, or revoked, in whole or in part. Notice of any such action will be published in the FEDERAL REGISTER. Also, any regulation in this part may be waived by the Administration or the Presiding Officer to prevent undue hardship in any particular case.

## Subpart B—Appearance and Practice Before the Administration (Rule 2)

### § 201.15 Appearance in person or by representative.

A party may appear in person or by an officer, partner, or regular employee of the party, or by or with counsel or other duly qualified representative, in any proceeding under the regulations in this part. A party may offer testimony, produce and examine witnesses, and be heard upon brief and at oral argument if oral argument is granted. Any person compelled to appear in a proceeding pursuant to subpoena may be accompanied, represented, and advised by counsel and may purchase a transcript of his testimony.

### § 201.16 Authority for representation.

Any individual acting in a representative capacity in any proceeding before the Administration may be required by the Administration or the Presiding Officer to show his authority to act in such capacity.

### § 201.17 Written appearance.

Persons who appear at any hearing shall deliver a written notation of appearance to the reporter, stating for whom the appearance is made. The

written appearance shall be made a part of the record.

### § 201.18 Practice before the Administration defined.

Practice before the Administration shall be deemed to comprehend all matters connected with any presentation to the Administration or its staff.

### § 201.19 Presiding officers.

Hearings on any matter before the Administration will be held by a duly designated Member or Members thereof, or a Hearing Examiner qualified under section 11 of the Administrative Procedure Act, assigned by the Chief Hearing Examiner, who shall be designated as the Presiding Officers. Where appropriate the Administration may designate other members of the staff to serve as Presiding Officers in hearings not required by statute, as provided in § 201.86.

### § 201.20 Attorneys at law.

Attorneys at law who are admitted to practice before the Federal courts or before the courts of any State or territory of the United States may practice before the Administration. An attorney's own representation that he is such in good standing before any of the courts herein referred to will be sufficient proof thereof.

### § 201.21 [Reserved]

### § 201.22 Firms and corporations.

Except as regards law firms, practice before the Administration by firms or corporations on behalf of others shall not be permitted.

### § 201.23 [Reserved]

### § 201.24 Suspension or disbarment.

The Administration may, in its discretion, deny admission to, suspend, or disbar any person from practice before the Administration who it finds does not possess the requisite qualifications to represent others or is lacking in character, integrity, or to have engaged in unethical or improper professional conduct. Disrespectful, disorderly, or contumacious language or contemptuous conduct at any hearing before the Administration or a presiding officer shall constitute grounds for immediate exclusion from said hearing by the Presiding Officer. Any person who has been admitted to practice before the Administration may be disbarred from such practice only after he has been afforded an opportunity to be heard.

### § 201.25 Statement of interest.

The Administration, in its discretion, may call upon any practitioner for a full statement of the nature and extent of his interest in the subject matter presented by him before the Administration. Attorneys retained on a contingent fee basis shall file with the Administration a copy of the contract of employment.

[General Order 41, 3d Rev., 29 FR 14475, Oct. 22, 1964; 29 FR 15374, Nov. 17, 1964, as amended at 60 FR 38735, July 28, 1995]

### § 201.26 Former employees.

(a) No former officer or employee of the Administration, after his or her employment with the Administration has ceased, shall act as agent or attorney for anyone other than the United States in connection with any particular matter in which a specific party or parties are involved and in which the United States is a party or has a direct and substantial interest and in which the former officer or employee participated personally and substantially as an officer or employee of the Maritime Administration through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise while so employed by the Maritime Administration.

(b) No former officer or employee of the Administration shall practice, appear, or represent anyone, directly or indirectly, other than the United States, before the Administration in any matter for a period of 1 year subsequent to the termination of his or her employment with the Administration in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, or other particular matter involving a specific party or parties in which the United States is a party or directly and substantially interested

and which was under his or her official responsibility as an officer or employee of the Administration at any time during the last year of his or her service.

(c) Any person in doubt as to the applicability of paragraph (a) or (b) of this § 201.26 to a particular case or to the postemployment activities of a former officer or employee of the Administration may address an application to the Administration for the Administration's consent to appear, stating his former connection with the Administration or predecessor agency, identifying the matter in which he or she desires to appear and describe in detail his or her participation in or responsibility for the particular matter and the specific party or parties involved and the extent, if any, in which the former officer or employee had participated while employed by the Administration. The applicant shall be promptly advised as to his or her privilege to appear in the particular matter. Separate consents to appear must be obtained in each particular matter.

[G.O. 41, 3d Rev., Amdt. 3, 36 FR 4377, Mar. 5, 1971]

## Subpart C—Parties (Rule 3)

### § 201.30 Parties; how designated.

The term *party*, whenever used in these Rules, shall include any natural person, corporation, association, firm, partnership, trustee, receiver, agency, public or private organization, or governmental agency. A party requesting official action subject to these Rules shall be designated as *applicant*. A party whose petition for leave to intervene is granted pursuant to § 201.78 shall be designated as *intervenor*. Only a party as designated in this section may introduce evidence or examine witnesses at hearings.

### § 201.31 Public counsel.

The Assistant General Counsel, Chief, Division of Operating Subsidy Contracts, shall be a party to all proceedings involving operating-differential subsidy contracts. The Assistant General Counsel and his representatives shall be designated as Public Counsel and shall be served with copies of all papers, pleadings, and documents in such proceedings. In addition the General Counsel may designate any member of his staff to serve as Staff Counsel in contract appeal cases or any other proceeding governed by the regulations in this part. Public Counsel or Staff Counsel shall participate in any proceeding to which he is a party, to the extent he deems required in the public interest, subject to the separation of functions required by section 5(c) of the Administrative Procedure Act.

### § 201.32 Substitution of parties.

Upon petition and for good cause shown, the Administration may order a substitution of parties; except that in case of death of a party substitution may be ordered upon suggestion and without the filing of a petition.

## Subpart D—Form, Execution and Service of Documents (Rule 4)

### § 201.41 Form and appearance of documents filed with the Administration.

All papers to be filed under the regulations in this part may be reproduced by printing or by any other process, provided the copies are clear and legible; shall be dated, the original signed in ink, and shall show the docket description and title of the proceeding, and the title, if any, and address of the signatory. If typewritten, the impression shall be on only one side of the paper and shall be double spaced, except that quotations shall be single spaced and indented. Documents not printed, except correspondence and exhibits, should be on strong, durable paper and shall not be more than 8½ inches wide and 12 inches long, with a left margin 1½ inches wide. Printed documents shall be printed in clear type (never smaller than pica or 11-point type) adequately leaded, and the paper shall be opaque and unglazed. Briefs, if printed, shall be printed on paper not less than 6⅛ inches wide and 9¼ inches long, with inside margin not less than 1 inch wide. All briefs over 15 pages shall contain a subject index with page references and a list of authorities cited.

### § 201.42 Subscription, authentication of documents.

(a) Documents filed shall be subscribed: (1) By the person or persons filing same, (2) by an officer thereof if it be a corporation, (3) by an officer or employee if it be a government instrumentality, or (4) by an attorney or other person having authority with respect thereto.

(b) Documents submitted pursuant to stipulation of counsel where no sponsoring witness will be used must be verified.

### § 201.43 Service by parties.

All documents, when tendered for filing should show that service has been made upon all parties to the proceeding. Such service shall be made by delivering one copy to each party in person or by mailing by first-class mail properly addressed with postage prepaid. When a party has appeared by attorney or other representative, service upon such attorney or other representative will be deemed service upon the party. All documents served by mail preferably should be mailed in sufficient time to reach the parties on the date on which the original is due to be filed and should be air mailed if addressee is more than 300 miles distant.

### § 201.44 Date of service.

The date of service of documents shall be the day when the matter served is deposited in the United States mail, shown by the postmark thereon, or is delivered in person, as the case may be.

### § 201.45 Certificate of service.

The original of every document filed with the Administration and required to be served upon all parties to a proceeding shall be accompanied by a certificate of service signed by the party making service, stating that such service has been made upon each party to the proceeding. Certificates of service may be in substantially the following form:

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing, postage prepaid (or by delivering in person) a copy to each such party.

Dated at _____ this _____ day of _____, 19____

(Signature)_____

For_____

### § 201.46 Copies of documents for use of the Administration.

Except as otherwise provided in the regulations in this part, an original and fifteen copies of every document shall be filed for use of the Administration, except written testimony and exhibits to be made a part of a record, which shall be filed in triplicate unless otherwise directed.

## Subpart E—Time (Rule 5)

### § 201.51 Computation.

In computing any period of time under these Rules, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or national legal holiday. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, and holidays shall be excluded from the computation.

### § 201.52 Additional time after service by mail.

Whenever service of a document has been made by mail in accordance with § 201.43 three (3) days shall be added to the prescribed period for answer.

### § 201.53 Extension of time to file documents.

Applications for extension of time for the filing of any document shall set forth the reasons for the application and may be granted upon a showing of good cause on the part of applicant. Answers to such applications are permitted.

### § 201.54 Reduction of time to file documents.

Except as prohibited by law, for good cause the Administration, or the Presiding Officer with respect to matters pending before him, may reduce any time limit prescribed in the regulations in this part.

### § 201.55 Postponement of hearing.

Applications for postponement of any hearing date may be granted upon a showing of good cause on the part of the applicant. Answers to such applications are permitted.

## Subpart F—Rule Making (Rule 6)

### § 201.61 Petition for issuance, amendment, or repeal of rule or regulation.

Any interested person may file with the Administration a petition for the issuance, amendment, or repeal of a rule designed to implement, interpret, or prescribe law, policy, organization, procedure, or practice requirements of the Administration. The petition shall set forth the interest of petitioner and the nature of the relief desired, shall include any facts, views, arguments, and data deemed relevant by petitioner, and shall be subscribed to. If such petition is for the amendment or repeal of a rule, it shall be accompanied by proof of service on all persons, if any, specifically named in such rule, and shall conform in all other aspects to subpart D of this part. Answers to such petition shall conform to the requirements of subpart D of this part.

### § 201.62 Notice of proposed rule making.

After receipt of petitions and any answers thereto described in § 201.61, or upon its own initiative, the Administration may, in its discretion, direct that notice thereof be published in the FEDERAL REGISTER unless all persons subject thereto are named and either are personally served or otherwise have actual notice thereof in accordance with law. Except where publication of notice of proposed rule making and public hearing is required by statute, this section shall not apply to interpretative rules, general statements of policy, organization rules, rules of procedure, or practice of the Administration, or amendments thereto, or any situation in which the Administration for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

### § 201.63 Participation in rule making.

Interested persons will be afforded an opportunity to participate in rule making through submission of written data, views, or arguments, with or without opportunity to present the same orally in any manner: *Provided,* That where the proposed rules are such as are required by statute to be made on the record after opportunity for a hearing, or where a hearing is ordered by the Administration upon petition of any party or upon its own initiative, such hearing shall be conducted pursuant to sections 7 and 8 of the Administrative Procedure Act.

### § 201.64 Contents of rules.

The Administration will incorporate in any rule to be adopted a concise general statement of their basis and purpose.

### § 201.65 Effective date of rules.

The publication or service of any substantive rule shall be made not less than 30 days prior to its effective date except: (a) As otherwise provided by the Administration for good cause found and published in the FEDERAL REGISTER or (b) in the case of rules granting or recognizing exemption or relieving restriction, interpretative rules, and statements of policy.

## Subpart G—Formal Proceedings, Notice, Pleadings, Replies (Rule 7)

### § 201.71 Commencement of proceedings.

Formal proceedings may be commenced with respect to any phase of an application for Government aid or other relief, the processing of which by statute requires a public hearing. The Administration may, in its discretion, also direct the holding of a hearing not required by statute for any purpose authorized in the statutes it administers.

### § 201.72 Notice.

Notice of any matter which may result in or involves the institution of a formal proceeding will be given by publication in the FEDERAL REGISTER in sufficient detail and in sufficient time to apprise interested persons of the nature of the issues to be heard and to

allow for an opportunity to file petitions for leave to intervene.

### § 201.73 Joinder of proceedings.

(a) Two or more matters which have been set for hearing by the Administration, and which involve similar issues, may be consolidated for the purpose of hearing. Such consolidation may, at the discretion of the Administration, or Presiding Officer after hearing has been ordered, be ordered upon petition of any party to said hearing or upon the initiative of the Administration.

(b) A petition to consolidate shall be filed not later than the first prehearing conference in the proceeding with which consolidation is requested, and shall relate only to then pending applications. If made at such conference, the petition may be oral. A petition which is not timely filed shall be dismissed unless the petitioner shall clearly show good cause for the failure to file said petition on time. A petition which does not relate to an application pending at the time of or before a prehearing conference in a proceeding with which consolidation is requested, shall likewise be dismissed unless the petitioner shall clearly show good cause for a failure to file the application within the prescribed period.

### § 201.74 Declaratory orders.

The Administration may issue a declaratory order to terminate a proceeding or to remove uncertainty. Petitions for the issuance thereof shall state clearly and concisely the nature of the controversy or uncertainty, shall cite the statutory authority involved, shall include a complete statement of the facts and grounds supporting the petition, together with a full disclosure of petitioner's interest.

### § 201.75 Petitions—general.

All petitions shall be written and shall state the petitioner's grounds of interest in the subject matter, the facts relied upon, and the relief sought, and shall cite the authority upon which the petition rests. The petition shall be served upon all parties named therein or affected thereby. Answers to petitions may be filed.

### § 201.76 Applications for Government aid.

Applications for operating-differential subsidies, charter of Government-owned vessels, and other types of Government aid shall conform to the requirements set forth in the various general orders and other regulations of the Administration specifically provided therefor.

### § 201.77 Amendments or supplements to pleadings.

Amendments or supplements to any pleading will be allowed or refused in the discretion of the Administration if the case has not been assigned for hearing, otherwise in the discretion of the presiding officer designated to conduct the hearing; *Provided*, That after a prehearing conference has been held no amendment shall be allowed which would substantially broaden the issues, unless an opportunity is afforded all parties to answer such amended pleadings and to prepare for hearing upon the broadened issues. The presiding officer may direct a party to state its case more fully and in more detail by way of amendment. If a response to an amended pleading is necessary, it may be filed and served. Amendments or supplements allowed prior to hearing will be served in the same manner as the original pleading. Whenever by the regulations in this part a pleading is required to be subscribed, the amendment or supplement shall also be subscribed.

### § 201.78 Petition for leave to intervene.

A petition for leave to intervene may be filed in any proceeding before the Administration. The petition will be granted by the presiding officer if the proposed intervenor establishes that it has a substantial interest in the proceeding and will not unduly broaden the issues therein or unduly delay the proceeding. All such petitions shall be filed prior to the opening of the prehearing conference, or if none is held, before the commencement of hearing, unless petitioner shows good cause for allowing the petition at a later time. Intervention petitions shall be served in the same manner as other petitions, and shall be subject to answer. Intervention petitions will be granted where

necessary to protect substantial interests of the petitioner and where intervention will not materially broaden the issues. A person granted permission to intervene becomes a party to the proceeding.

### § 201.79 Motions.

All motions and requests for rulings shall state the relief sought, the authority relied upon, and the facts alleged. If made before or after the hearing, such motions shall be in writing. If made at the hearing, they may be stated orally: *Provided, however,* That the presiding officer may require that such motion be reduced to writing and filed and served in the same manner as a formal motion. Answers to formal motions shall comply with the requirements of § 201.80. Motions and answers thereto shall be addressed to the presiding officer if the case is pending before such officer. Oral argument upon a written motion in which an answer has been filed may be granted within the discretion of the Administration or the presiding officer, as the case may be. A repetitious motion will not be entertained.

### § 201.80 Answers to applications, petitions, or motions.

A pleading filed in response to an application, petition, or motion is called an answer. An answer may be filed to any application, petition, motion or pleading which is required to be served on the answering party or noticed in the FEDERAL REGISTER. An answer to a written application, petition, or motion shall be in writing and shall be filed within ten days after service of the pleading which it answers. Any new matter raised in an answer shall be deemed to be controverted. A response to an answer is called a reply. A short reply restricted to such new matters may be filed within five days of service of the answer.

## Subpart H—Responsibilities and Duties of Presiding Officer (Rule 8)

### § 201.85 Commencement of functions of Department of Transportation Office of Hearings.

In proceedings handled by the Department of Transportation Office of Hearings, its functions shall attach upon notice of the institution of a formal proceeding involving a prehearing conference and/or a hearing by the Administration.

[General Order 41, 3d Rev., 29 FR 14475, Oct. 22, 1964; 29 FR 15374, Nov. 17, 1964, as amended at 63 FR 9157, Feb. 24, 1998]

### § 201.86 Presiding officer.

An Administrative Law Judge in the Department of Transportation Office of Hearings will be designated by the Department's Chief Administrative Law Judge to preside at hearings required by statute, or directed to be held under the Administration's discretionary authority in hearings not required by statute, in rotation so far as practicable, unless the Administration shall designate one or more of its officials to serve as presiding officer(s) in hearings required by statute, or member(s) of the staff in proceedings not required by statute.

[63 FR 9157, Feb. 24, 1998]

### § 201.87 Authority of presiding officer.

The officer designated to hear a case shall have authority to arrange and issue notice of the date, time and place of hearings; under appropriate circumstances consolidate dockets for joint hearing; sign and issue subpoenas authorized by law; take or cause depositions to be taken; rule upon proposed amendments or supplements to pleadings; hold conferences for the settlement or simplification of matters embraced in the proceedings; regulate the course of the hearing; prescribe the order in which evidence shall be presented; dispose of procedural requests or similar matters; hear and initially rule upon all motions and petitions before him; administer oaths and affirmations; examine witnesses, direct witnesses to testify or produce available evidence and to submit reports, studies and analyses of data available to them which may be generally relevant and material to the determination of any questions of fact in issue; rule upon offers of proof and receive competent,

relevant, material, reliable, and probative evidence; exclude irrelevant, immaterial, unreliable, repetitious or cumulative evidence; exclude cross-examination which is primarily intended to elicit self-serving declarations in favor of the witness; and limit cross-examination of any questions of fact in issue; for a full and true disclosure of the facts in issue; act upon petitions to intervene; act upon submission of facts, or argument; initially consider offers of settlement or other proposals of adjustment upon which recommendations to the Administration may be made; hear oral argument at the close of testimony; fix the time for filing briefs, motions and other documents to be filed in connection with hearings and replies thereto; and issue the initial or recommended decisions and dispose of any other pertinent matter that normally and properly arises in the course of proceedings. When the presiding officer is unavailable for any reason, and the exercise of any of his powers and functions, as described herein, is due, timely, and necessary, the Chief Administrative Law Judge may exercise such powers and functions until the presiding officer becomes available or until his successor is designated.

[General Order 41, 3d Rev., 29 FR 14475, Oct. 22, 1964; 29 FR 15374, Nov. 17, 1964, as amended at 63 FR 9157, Feb. 24, 1998]

### § 201.88 Postponement or change of place by presiding officer.

If, in the judgment of the presiding officer, convenience or necessity so requires he may postpone the time or change the place of hearing.

### § 201.89 Disqualification of presiding officer.

Any presiding officer may at any time withdraw if he deems himself disqualified, in which case another presiding officer will be designated. If a party to a proceeding, or his representative, files in good faith a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the Administration will determine the matter as a part of the record and decision in the case.

## Subpart I—Summary Disposition (Rule 9)

### § 201.91 Filing of motions, answers.

Any party or (if a petition to intervene shall have been filed but not have been acted upon) any prospective party may at or before the first prehearing conference in any proceeding, or at such later time as might be allowed by the presiding officer, move with supporting affidavits for a summary disposition in his favor of all or any part of the proceeding. Any adverse party may within 20 days serve opposing affidavits or may countermove for summary disposition. Oral argument thereon may be granted in the discretion of the presiding officer.

### § 201.92 Ruling on motion.

The presiding officer may grant such motion if the application, motion, or other pleadings, affidavits or depositions, if any, and matters of official notice show that there is no genuine issue as to any material facts, that there is no necessity that further facts be developed in the record, and that such party is entitled to a decision as a matter of law.

### § 201.93 Review of ruling, appeal.

The order of the presiding officer denying a motion for summary disposition shall be subject to interlocutory appeal under the provisions of § 201.123. An order granting a motion for summary disposition is automatically reviewable by the Administration in accordance with the provisions of § 201.133 and shall not be final until acted upon by the Administration.

## Subpart J—Prehearing Conference; Settlements; Procedural Agreements (Rule 10)

### § 201.101 Prehearing conference.

Prior to any hearing a prehearing conference may be held before the presiding officer. Written notice of a prehearing conference shall be transmitted by the Secretary of the Administration or the Chief Hearing Examiner to all parties of record including persons whose petitions for leave to intervene in the proceeding have not

theretofore been granted, and where practicable, by general release to the public press.

(a) At the prehearing conference the following matters, among others, shall be considered: (1) Petitions for leave to intervene; (2) motions for consolidation or severance of dockets for joint or separate hearing to the extent that the Administration has not theretofore taken specific action; (3) simplification and delineation of the issues to be heard; (4) designation of matters in respect of which official notice may be taken; (5) requests for discovery and production of evidence considered to be generally relevant and material to the issues in the proceeding; (6) stipulations; (7) limitation of number of witnesses, particularly the avoidance of duplicate expert witnesses; (8) procedure applicable to the proceeding; (9) offers of settlement, as hereinafter to be more particularly discussed in § 201.103; and (10) scheduling of the dates for exchange of exhibits, written testimony both affirmative and rebuttal and establishing the date, time and place for hearing.

(b) If deemed necessary or appropriate, the presiding officer may also, on his own motion, or on motion of Public Counsel direct any party to a proceeding to prepare and submit exhibits setting forth studies, forecasts, or estimates on matters relevant and material to the issues in the proceeding to be sponsored by witnesses available for cross-examination thereon.

### § 201.102 Prehearing rulings.

The presiding officer will, where practicable, issue prehearing rulings, acting on petitions for leave to intervene, delineating the issues, summarizing the rulings made at the conference, specifying a schedule for the exchange of exhibits and written testimony, the date, time and place of hearing and specifying a time for the filing of exceptions to the rulings. The prehearing rulings shall be served upon all parties to the proceeding and any persons who participated in the conference. Exceptions to the prehearing rulings may be filed by any such party or person within the time specified therein. The presiding officer may serve amended rulings in the light of the exceptions presented. Such rulings and amendments, if any, shall constitute the official account of the conference and shall control the subsequent course of the proceeding, but they may be reconsidered and modified at any time to protect the public interest or to prevent injustice.

### § 201.103 Opportunity for agreement of parties and settlement of case.

Where time, the nature of the proceeding, and the public interest permit, all interested parties shall have the opportunity for submission to and consideration by the presiding officer of offers of settlement, or proposals of adjustment together with facts and/or arguments relevant to such offers or proposals without prejudice to the rights of the parties. The presiding officer need not be present at any negotiations of such nature. The presiding officer shall issue an initial or recommended decision thereon recommending approval or disapproval of such offer of settlement or proposal of adjustment to the Administration for final action thereon. No agreement, offer, or proposal shall be admissible in evidence over the objection of any party in any hearing on the matter. When any settlement does not dispose of the whole proceeding, the remaining issues shall be determined in accordance with sections 7 and 8 of the Administrative Procedure Act.

## Subpart K—Discovery and Depositions (Rule 11)

### § 201.109 Discovery and production of documents.

Upon request of any party showing good cause therefor, at the prehearing conference or otherwise upon notice to all other parties, the Administration or presiding officer may direct any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged which constitute or contain evidence relating to any matter, not privileged, which is relevant to the subject matter involved in the pending proceeding, and which

are in his possession, custody or control. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just. In lieu of such inspections the material may be produced in exhibit form and served upon all parties to a formal proceeding. Such exhibits may also, upon request of any party, be offered in evidence at a hearing.

### § 201.110 Depositions: request for orders to take; time of filing.

The Administration or presiding officer may, upon proper request of a party to a proceeding or under circumstances deemed proper, issue an order to take a deposition regarding any matter, not privileged, which is relevant to the subject matter involved in the proceedings. A motion to take a deposition shall be filed not less than fifteen (15) days before the proposed date for taking the deposition, unless a shorter period is fixed under § 201.54, and shall set forth the reason for the deposition, the place and time of taking, the officer before whom it is to be taken, the name and address of each witness to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and whether the deposition is to be based upon written interrogatories or upon oral examination. If the deposition is to be based upon oral examination, the motion shall contain a statement of the matters concerning which each witness will testify. If the deposition is to be based on written interrogatories, the motion shall be accompanied by the interrogatories to be propounded, serially numbered. Copies of all motions to take depositions, and accompanying interrogatories, if any, shall conform to the requirements of subpart D of this part. Objection to the taking of such depositions may be made in an answer to such motion. Without prejudice to objection, the answer may also state objection to any individual interrogatory, and if the deposition is permitted, the presiding officer will rule upon such objections to interrogatories. A party served with an order to take a deposition on written interrogatories shall have ten (10) days after date of service of such order unless a shorter period is fixed under § 201.54, within which to file and serve written cross interrogatories, which shall be served pursuant to subpart D of this part. Answers to applications for cross interrogatories may be filed in accordance with § 201.80. Upon the issuance of an order by the Administration or the presiding officer for the taking of a deposition, the Docket Clerk shall mail a copy thereof to all parties, including the party who requested the deposition. An application to take a deposition in a foreign country will be entertained when necessary or convenient, and authority to take such deposition will be granted upon such notice and other terms and directions as are lawful and appropriate.

### § 201.111 Contents of order.

The order issued authorizing the taking of a deposition will state the name and address of each witness or a general description sufficient to identify him or the particular class or group to which he belongs, the matters concerning which the witness may be questioned, the place where, the time when, and the officer before whom the deposition is to be taken, any or all of which may or may not be the same as set forth in the motion filed. If the deposition is to be taken upon written interrogatories, a list of the interrogatories will accompany the order.

### § 201.112 Record of examination; oath; objections.

The officer before whom the deposition is to be taken shall put the witness under oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically, shall be translated to English, if necessary, and shall be transcribed unless the parties agree otherwise. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objections to the proceedings, shall be noted by the officer upon the

deposition. Any party served with a notice to take an oral deposition may cross-examine a witness whose testimony is taken under such deposition. In lieu of cross-examination, parties served with notice of taking a deposition may transmit written interrogatories or cross-interrogatories to the officer taking the deposition, who shall propound them to the witness and record the answers verbatim together with any objections interposed thereto by adverse parties.

### § 201.113 Submission to witness, changes, signing.

When the testimony is fully transcribed the deposition of each witness shall be submitted to him for examination and shall be read to or by him. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign, together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless upon objection the presiding officer holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

### § 201.114 Certification and filing by officer; copies.

The officer taking the deposition shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness, and that said officer is not of counsel or attorney to either of the parties and is not directly or indirectly interested in the outcome of the proceeding or investigation. He shall then securely seal the deposition in an envelope endorsed with the title of the proceeding and marked "Deposition of (here insert name of witness)", and shall promptly send the original and two copies thereof, together with the original and two copies of all exhibits, by registered mail to the Administration. Parties shall make their own arrangements with the officer taking the deposition for copies of the testimony and exhibits.

### § 201.115 Waiver of objections and admissibility.

Objections to the form of question and answer shall be made before the officer taking the deposition by parties or representatives present, and if not so made, shall be deemed waived. Depositions shall, when offered at the hearing, be subject to proper legal objections.

### § 201.116 Time of filing.

Any depositions to be offered in evidence shall be filed with the presiding officer not later than the close of the offering party's presentation.

### § 201.117 Inclusion in record.

No deposition or part thereof shall constitute a part of the record in any proceeding until received in evidence.

### § 201.118 Witness fees; expenses of taking depositions.

Witnesses whose depositions are taken pursuant to the regulations in this part, and the officer taking such deposition, shall severally be entitled to the same fees and mileage as are paid in the courts of the United States. All expenses of taking such depositions shall be paid by the party at whose instance the deposition is taken.

## Subpart L—Subpoenas (Rule 12)

### § 201.121 Application for subpoena ad testificandum.

An application for a subpoena requiring attendance of a witness at a hearing may be made without notice by any party to the presiding officer, or, in the event that a presiding officer has not been assigned to a proceeding or the presiding officer is not available, to the Chief Hearing Examiner, for action by him or by a member of the Administration. A subpoena for the attendance of a witness shall be issued on oral application at any time and shall be issued

upon request of any interested party upon tender of an original and two copies of such subpoena. A record of the issuance of such a subpoena shall be entered in the docket.

### § 201.122 Application for subpoena duces tecum.

An application for a subpoena duces tecum for documentary or tangible evidence shall be in duplicate except that for good cause shown it may be made during the course of a hearing on the record to the presiding officer. Such application need not be served upon all parties. All such applications, whether written or oral, shall contain a statement or showing of general relevance and reasonable scope of the evidence sought and shall be accompanied by an original and two copies of the subpoena sought which shall describe the documentary or tangible evidence to be subpoenaed with as much particularity as is feasible.

### § 201.123 Standards for issuance of subpoena duces tecum.

The officer considering any application for a subpoena duces tecum shall issue the subpoena requested if he is satisfied the application complies with this section and the request is not unreasonable, oppressive, excessive in scope or unduly burdensome. No attempt shall be made to determine the admissibility of evidence in passing upon an application for a subpoena duces tecum and no detailed or burdensome showing shall be required as a condition to the issuance of any subpoena.

### § 201.124 Service and quashing of subpoenas.

Subpoenas issued under this section may be served upon the person to whom directed in accordance with subpart D of this part. Any person upon whom a subpoena is served may within seven (7) days after service or at any time prior to the return date thereof, whichever is earlier, file a motion to quash or modify the subpoena with the officer who issued the subpoena for action by him, and serve a copy of such motion to quash upon the party requesting the subpoena. If the person to whom the motion to modify or quash the subpoena has been addressed or directed has not acted upon such a motion by the return date, such date shall be stayed pending his final action thereon. The Administration may at any time review, upon its own initiative, the ruling of the officer denying a motion to quash a subpoena. In such cases, the Administration may at any time order that the return date of a subpoena which it has elected to review be stayed pending Administration action thereon.

### § 201.125 Attendance and mileage fees.

Persons attending hearings under requirement of subpoenas are entitled to the same fees and mileage as in the courts of the United States, to be paid by the party at whose instance the persons are called.

### § 201.126 Service of subpoenas.

If service of subpoena is made by a United States marshal or his deputy, such service shall be evidenced by his return thereon. If made by any other person, such person shall make affidavit thereto, describing the manner in which service is made, and return such affidavit on or with the original subpoena. In case of failure to make service, the reasons for the failure shall be stated on the original subpoena. In making service the original subpoena shall be exhibited to the person served, shall be read to him if he is unable to read, and a copy thereof shall be left with him. The original subpoena, bearing or accompanied by required return, affidavit, or statement, shall be returned without delay to the Administration, or if so directed on the subpoena, to the presiding officer before whom the person named in the subpoena is required to appear.

### § 201.127 Subpoena of Administration employees, documents, or things.

No subpoena for the attendance of an Administration officer or employee, or for the production of Administration documents or things shall be complied with except upon written authorization of the General Counsel upon written application by the party requesting the subpoena.

## Subpart M—Hearing Procedures (Rule 13)

### § 201.131 Presentation of evidence.

(a) *Testimony.* Where appropriate, the Presiding officer may direct that the testimony of witnesses be prepared in written exhibit form and shall be served at designated dates in advance of the hearing. Evidence as to events occurring after the exhibit-exchange dates shall be presented by a revision of exhibits. Witnesses sponsoring exhibits shall be made available for cross-examination. However, unless authorized by the presiding officer, witnesses will not be permitted to read prepared testimony into the record. The evidentiary record shall be limited to factual and expert opinion testimony. Argument will not be received in evidence but rather should be presented in opening and/or closing statements of counsel and in briefs to the presiding officer subsequently filed.

(b) *Exhibits.* All exhibits and responses to requests for evidence shall be numbered consecutively by the party submitting same and appropriately indexed as to number and title and shall be exchanged on dates prior to the hearing prescribed in the prehearing rulings. Written testimony should be identified alphabetically. Two copies shall be sent to each party and two to the presiding officer. No response to a request for evidence will be received into the record unless offered and received as an exhibit at the hearing. The exhibits, other than the written testimony, shall include appropriate footnotes or narrative material explaining the source of the information used and the methods employed in statistical compilations and estimates and shall contain a short commentary explaining the conclusions which the offeror draws from the data. Rebuttal exhibits should refer specifically to the exhibits being rebutted. Where one part of a multipage exhibit is based upon another part, appropriate cross-reference should be made. The principal title of each exhibit should state precisely what it contains and may also contain a statement of the purpose for which the exhibit is offered. However, such explanatory statement, if phrased in an argumentative fashion, will not be considered as a part of the evidentiary record. Additional exhibits pertinent to the issues may be submitted in a proceeding with the approval of the presiding officer.

(c) *Cooperation on basic data.* Parties having like interests are specifically encouraged to cooperate with each other in joint presentations particularly in such items as basic passenger, cargo, and scheduling data compiled from official or semiofficial sources, and any other evidence susceptible to joint presentation. Duplicate presentation of the same evidence should be avoided wherever possible.

(d) *Authenticity.* The authenticity of all documents submitted as proposed exhibits in advance of the hearing shall be deemed admitted unless written objection thereto is filed prior to the hearing, except that a party will be permitted to challenge such authenticity at a later time upon a clear showing of good cause for failure to have filed such written objection.

(e) *Statement of position and trial briefs.* A written statement of position should be exchanged by all counsel with copies to all other parties prior to the beginning of the hearing: *Provided, however,* That Public Counsel or counsel for a public body which has intervened as its interests may appear, may offer his statement of position at the conclusion of the evidentiary hearing, unless such is impracticable. This statement should include a showing of the theory of the case of the party submitting the statement and will not be subject to cross-examination. Trial briefs are acceptable but will not be required.

### § 201.132 Conduct of the hearing.

(a) *Order of presentation.* Normally the order of presentation at the hearing will be alphabetical in each of the following categories:

(1) MarAd statistical material.

(2) Shipper interests, United States and foreign government departments.

(3) Applicants.

(4) Intervenors.

(5) Public counsel.

Normally, rebuttal should be presented without any adjournment in the proceedings.

(b) *Burden of proof.* The burden of proof shall be (1) upon an applicant for any form of government aid or grant; and (2) upon a proponent for the issuance of any rule or order within the jurisdiction of the Administration. The burden of going forward with rebuttal evidence in proceedings involving matters under paragraphs (b) (1) and (2) of this section shall fall upon opposing intervenors. Whenever an intervenor is permitted by the presiding officer to raise or advance a new issue in the proceeding, the burden of proof as to such issue shall fall upon such intervenor. If the burden of proof is met as to such new issue, the other parties shall have the burden of going forward with rebuttal evidence in such regard.

(c) *Requirement for submission of corrected copies of exhibits.* Each party shall present three fully corrected copies of its exhibits to be offered in evidence, one for the docket and two for the presiding officer.

(d) *Offer of exhibits in evidence.* The exhibits and written testimony sponsored by each witness shall be offered in evidence at the close of his direct examination to the extent practicable. After ruling upon motions to strike they shall be received in evidence subject to cross-examination. The presiding officer, in his discretion, may defer such ruling until after completion of cross-examination.

(e)(1) *Cross-examination.* Cross-examination shall be limited to the scope of the direct examination and, except for Public Counsel and counsel for public bodies which have intervened as their interests may appear, to witnesses whose testimony is adverse to the party desiring to cross-examine—this being intended specifically to prohibit so-called "friendly cross-examination". Cross-examination, which is not necessary to test the truth and completeness of the direct testimony and exhibits, will not be permitted.

(2) *Re-cross-examination.* Second rounds of cross-examination normally will not be permitted unless it is necessary to cover new matters raised by a subsequent examination. Cross-examination of any particular witness shall be limited to one attorney for each party and shall not include subjects which are not germane to the interest represented by the cross-examiner.

(f) *Oral motions.* Oral presentation on any motion or objection shall be limited to the party or parties making the motion or objection and the party or parties against which the motion or objection is directed and Public Counsel. Such presentation shall also be limited to one attorney for each party.

(g) *Official notice; public document items.* Whenever there is offered (in whole or in part) a public document, such as an official report, decision, opinion, or published scientific or economic statistical data issued by any of the executive departments (or their subdivisions), legislative agencies or committees, or administrative agencies of the Federal Government (including Government-owned corporations), or a similar document issued by a State or its agencies, and such document (or part thereof) has been shown by the offerer to be reasonably available to the public, such document need not be produced or marked for identification, but may be offered for official notice as a public document item by specifying the document or relevant part thereof.

(h) *Oral argument at hearings.* A request for oral argument at the close of testimony will be granted or denied by the presiding officer in his discretion.

### § 201.133 Appeal from ruling of presiding officer.

Rulings of presiding officers may not be appealed prior to, or during the course of, the hearing except where the presiding officer has granted a Motion for Summary Disposition under subpart I of this part, or in extraordinary circumstances where prompt decision by the Administration is necessary to prevent unusual delay, expense, or detriment to the public interest, in which instances the matter shall be referred forthwith by the presiding officer to the Administration. Any such appeal shall be filed within fifteen (15) days from the date of the ruling by the presiding officer.

### § 201.134 Separation of functions.

The separation of functions as required by section 5(c) of the Administrative Procedure Act shall be observed

in adversary proceedings involving controverted factual issues arising under the regulations in this part.

## Subpart N—Evidence (Rule 14)

### §201.136 Evidence admissible.

In any proceeding under the regulations in this part all evidence which is relevant, material, reliable and probative, and not unduly repetitious or cumulative shall be admissible. Irrelevant and immaterial or unduly repetitious or cumulative evidence shall be excluded.

### §201.137 Rights of parties as to presentation of evidence.

Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

### §201.138 Unsponsored written material.

(a) *Material that may be deemed evidence.* Where a formal hearing is held, a party shall be afforded an opportunity to participate through submission of relevant, material, reliable and probative written evidence including official notice matters covered in §201.132(g): *Provided,* That such evidence submitted by persons not present at the hearing will not be made a part of the record if opposed to by any party for good cause shown.

(b) *Material that may not be deemed evidence.* Letters expressing views or urging action and other unsponsored written material in respect of matters embraced in, or related to, a formal hearing will be placed in the correspondence section of the docket of the proceeding. These data are not to be deemed part of the evidence or part of the record in the material unless sponsored at the public hearing by an authenticating and supporting witness.

### §201.139 Documents containing matter both material and not material.

Where written matter offered in evidence is embraced in a document containing other matter which is not intended to be offered in evidence, the party offering shall present the original document to all parties at the hearing for their inspection, and shall offer a true copy of the matter which is to be introduced unless the presiding officer determines that the matter is short enough to be read into the record. Opposing parties shall be afforded an opportunity to introduce in evidence, or by stipulations other portions of the original document which are material and relevant.

### §201.140 Records in other proceedings.

When any portion of the record before the Administration in any proceeding other than the one being heard is offered in evidence, a true copy of such portion shall be presented for the record in the form of an exhibit unless the parties represented at the hearing stipulate upon the record that such portion may be incorporated by reference.

### §201.141 Stipulations.

The parties may, by stipulation in writing filed at the prehearing conference, or by written or oral stipulation presented at the hearing or by written stipulation subsequent to the hearing, agree upon any facts involved in the proceeding and include them in the record with the consent of the presiding officer. Proposed written stipulations shall be subscribed by the sponsors and served upon all parties of record. Only upon acceptance by all parties to the proceeding may a stipulation be noted for the record or received as evidence.

### §201.142 Further evidence required by presiding officer during hearing.

At any time during the hearing the presiding officer may call for the production of further relevant and material evidence, reports, studies, and analyses upon any issue, and require such evidence, where available, to be presented by the party or parties concerned, either at the hearing or adjournment thereof in accordance with §201.132(b). Such material shall be received subject to appropriate motions, cross-examination and/or rebuttal. If a witness refuses to testify or produce

the evidence as requested, the presiding officer shall report such refusal to the Administration forthwith.

### § 201.143 Exceptions to rulings of presiding officer unnecessary.

Formal exceptions to rulings of the presiding officer are unnecessary. It is sufficient that a party, at the time the ruling of the presiding officer is made or sought, makes known the action which he desires the presiding officer to take or his objection to an action taken, and his grounds therefor.

### § 201.144 Offer of proof.

An offer of proof made in connection with an objection taken to any ruling of the presiding officer rejecting or excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony; and, if the excluded evidence consists of evidence in documentary or written form or of reference to documents or records, a copy of such evidence shall be marked for identification and shall accompany the record as the offer of proof.

## Subpart O—The Record: Contents; Development; Perfection; Confidential Treatment (Rule 15)

### § 201.146 Receipt of documents after hearing.

Documents to be submitted for the record after the close of the hearing will not be received in evidence except upon ruling of the presiding officer. Such documents when submitted shall be accompanied by proof that copies have been served upon all parties, who shall have an opportunity to comment thereon; and shall be received not later than ten (10) days after the close of the hearing except for good cause shown, and not less than ten (10) days prior to the date set for filing briefs. Exhibit numbers should be assigned by counsel or the party. In computing the time within which to file such documents or other writings the five (5) additional days provided in § 201.54 shall not apply. Documents which are submitted but do not comply with the provisions of this rule will be filed in the correspondence section of the docket.

### § 201.147 Official transcript.

The Administration will designate the official reporter for all hearings. The official transcript of testimony taken, together with any exhibits and any briefs or memoranda of law filed therewith shall be filed with the Administration. Transcripts of testimony will be available in any proceeding under the regulations in this section, and will be supplied by the official reporter to the parties and to the public except when required for good cause to be held confidential, at rates not to exceed the maximum rates fixed by the contract between the Administration and the reporter.

### § 201.148 Corrections of transcript.

Motions made at the hearing to correct the record will be acted upon by the presiding officer. Motions made after the hearing to correct the record as to matters of substance rather than form, shall be filed with the presiding officer within ten (10) days after receipt of the transcript, unless otherwise directed by the presiding officer, and shall be served on all parties. Such motions may be in the form of a letter and shall certify the date when the transcript was received. If no objections are received within ten (10) days after date of service, the transcript will, upon approval of the presiding officer, be changed to reflect such corrections. If objections are received, the motion will be acted upon with due consideration of the stenographic record of the hearing.

### § 201.149 Copies of data or evidence.

Every person compelled to submit data or evidence shall be entitled to retain or procure a copy of transcript thereof on payment of proper costs.

### § 201.150 Record for decision.

The transcript of testimony and exhibits, together with all papers and requests (except the correspondence section of the docket), including rulings and any recommended or initial decisions filed in the proceeding shall constitute the exclusive record for decision. Final decisions will be predicated

on the same record, including the initial decision of the presiding officer.

### §201.151 Objections to public disclosure of information.

Upon objection to public disclosure of any information sought to be elicited during a hearing, and a showing of cause satisfactory to the presiding officer, the witness shall disclose such information only in the presence of the presiding officer, official reporter and such attorneys or representatives of each party with demonstrated interests, as the presiding officer shall determine and after all present have been sworn to secrecy. The transcript of testimony shall be held confidential. Within five (5) days after such testimony is given, or document received, the objecting party shall file with the presiding officer a verified written motion to withhold such information from public disclosure, setting forth sufficient identification of same and the basis upon which public disclosure should not be made. Copies of said transcript and motion need not be served upon any other parties than those sworn to secrecy unless so ordered by the presiding officer.

## Subpart P—Briefs, Requests for Findings, Decisions, Exceptions (Rule 16)

### §201.155 Briefs; request for findings.

The time for filing briefs to the presiding officer, and extensions thereof, shall be fixed by him. The period of time allowed shall be the same for all parties unless the presiding officer, for good cause shown, directs otherwise. Normally there shall be an opening brief by the moving parties, an answering brief by the proponents of a contrary conclusion and a short reply by the moving parties. Briefs and statements of position as authorized, shall be served upon all parties pursuant to subpart D of this part. Briefs shall include a summary of evidence, together with references to exhibit numbers and pages of the transcript, and memoranda of law with appropriate citations of the authorities relied upon. They shall contain proposed findings of fact and conclusions in serially numbered paragraphs.

### §201.156 Requests for extension of time for filing briefs.

Requests for extension of time within which to file briefs shall conform to the requirements of §201.53. Except for good cause shown, such requests shall be filed and served not later than five (5) days before the expiration of the time fixed for the filing of briefs.

### §201.157 Reopening of a case by presiding officer prior to decision.

At any time prior to the filing of his initial or recommended decision, the presiding officer, either upon petition or upon his own initiative may, for good cause shown and upon reasonable notice, reopen the case for the receipt of further evidence.

### §201.158 Decisions, authority to make and kinds.

To the presiding officer is delegated the authority to render initial or recommended decisions in all proceedings before him, including motions, petitions and other pleadings. Tentative or final decisions will be rendered by the Administration. The same officers who preside at the reception of evidence pursuant to section 7 of the Administrative Procedure Act shall render the initial or recommended decisions except where such officers become unavailable to the Administration, in which case another Presiding Officer will be designated to make such decision or certify the record to the Administration. Where the Administration requires the entire record in the case to be certified to it for initial decision, the Presiding Officer shall first recommend a decision, except that in rule making:

(a) In lieu thereof the Administration may issue a tentative decision or any of its responsible officers may recommend a decision or (b) any such procedure may be omitted in any case in which the Administration finds upon the record that due and timely execution of its functions in the public interest imperatively and unavoidably so requires.

### §201.159 Decisions; contents and service.

All initial, recommended, tentative, and final decisions, whether rendered

orally or in writing shall include a statement of findings and conclusions, as well as the reasons or bases therefor, upon the material issues presented, as well as a statement of the appropriate rule, order, sanction, relief to be imposed, or the denial thereof. A copy of each decision when issued or when transcribed if orally rendered (and all orally presented decisions shall be stenographically recorded) shall be served on the parties to the proceeding, and furnished to interested persons upon request.

### § 201.160 Decision based on official notice.

Official notice may be taken of such matters as might be judicially noticed by the courts, or of technical or scientific facts within the general or specialized knowledge of the Administration as an expert body or of a document required to be filed with or published by a duly constituted governmental body: *Provided,* That where a decision or part thereof rests on the official notice of a material fact not appearing in the evidence of the record, the fact of official notice shall be so stated in the decision, and any party, on timely request, shall be afforded an opportunity to show the contrary.

### § 201.161 Exceptions to, and review by the Administration of initial or recommended decisions.

Within twenty (20) days after the service date of the initial or recommended decision, whether oral or in writing, unless a shorter period is fixed under § 201.54, any party may file exceptions to any conclusions, findings, or statements contained in such decision, and a brief in support of such exceptions. Such exceptions and brief shall constitute one document, shall indicate with particularity alleged errors, shall indicate pages of transcript and exhibit numbers when referring to the record, and shall be served on all parties pursuant to subpart D of this part. Whenever the presiding officer renders an initial decision, in the absence of the filing of exceptions thereto, or notice of review thereof by the Administration, such decision, shall upon the issuance of an appropriate order by the Administration, become the decision of the Administration. Upon the filing of exceptions to, or notice of review of, an initial or recommended decision, such decision shall become inoperative until the Administration determines the matter. Where exceptions are filed to, or the Administration reviews, an initial or recommended decision, the Administration, except as it may limit the issues upon notice or by rule, will have all the powers which it would have in making the initial decision. Whenever the Administration shall determine to review an initial or recommended decision on its own initiative, notice of such intention shall be served upon the parties within thirty (30) days after the date when the initial or recommended decision is orally rendered and, if in writing, served.

### § 201.162 Replies to exceptions.

Any party may file and serve a reply to exceptions within twenty (20) days after date of service thereof, unless a shorter period is fixed pursuant to § 201.54. Such reply shall indicate pages of the transcript and exhibit numbers when referring to the record.

### § 201.163 Request for extension of time for filing exceptions and replies thereto.

Requests for extension of time within which to file exceptions, and briefs in support thereof, or replies to exceptions shall conform to the applicable provisions of subpart E of this part. Except for good cause shown, such requests shall be filed and served not later than five (5) days before the expiration of the time fixed for the filing of such documents.

### § 201.164 Certification of record by presiding officer.

The presiding officer shall certify and transmit the entire record to the Administration when: (a) Exceptions are filed or the time therefor has expired, (b) notice is given by the Administration that the initial or recommended decision will be reviewed on its own initiative, or (c) the Administration requires the case to be certified to it for initial decision.

## Subpart Q—Oral Argument; Submittal for Final Decision (Rule 17)

### §201.166 Oral argument.

If oral argument before the Administration is desired on exceptions or replies to exceptions to an initial, recommended, or tentative decision, or on a motion, petition, or application, a request therefor shall be made in writing properly addressed to the Administration. Any party may make such request irrespective of his filing exceptions or replies. If a brief on exceptions or replies thereto are filed, the request for oral argument shall be incorporated therein. Requests for oral argument on any motion, petition, or application shall be made in the motion, petition, or application or in the reply thereto. Requests for oral argument will be granted or denied in the discretion of the Administration, and, if granted, the notice of oral argument will set forth the order of presentation and the amount of time to be allotted. Those who appear before the Administration for oral argument should confine their argument to points of controlling importance and shall limit their argument to points upon which exceptions have been filed. Where the facts of a case are adequately and accurately dealt with in the initial, recommended, or tentative decision, parties should, as far as possible, address themselves in argument to the conclusions. Effort should be made by parties taking the same position to agree in advance of the argument upon those who are to present their side of the case. The names of persons who will argue and the amount of time requested by each should be received by the Administration not later than ten (10) days before the date set for the argument. Ordinarily, consolidation of appearances at oral argument will permit the parties' interests to be presented more effectively in the time allotted.

### §201.167 Submission to Administration for final decision.

A proceeding will be deemed submitted to the Administration for its determination as follows: (a) If oral argument is had, on the date of completion thereof, or if memoranda on points of law are permitted to be filed after argument, the last date of such filing; (b) if oral argument is not had, the last date when exceptions or replies thereto are filed, or if exceptions are not filed, the expiration date for such exceptions or the date when all parties have stated that no exceptions will be filed; (c) in the case of an initial decision, the date of notice of the Administration to review the decision, if such notice is given.

## Subpart R—Stay of Administration's Decision, Reopening of Proceedings (Rule 18)

### §201.171 Stay of Administration's decision.

The Administration's decision or order shall be stayed pending resolution by the Administration of a petition for reopening, duly filed, and for so long as such Administration's action has not been finally disposed of in accordance with the provisions of section 7 of Department of Commerce Order 117 (Revised).

### §201.172 Time for filing petition to reopen.

Except for good cause shown, and upon leave granted, petition to reopen under §201.174, shall be filed with the Administration within twenty (20) days after the date of service of the Administration's decision or order in the proceeding, unless a different period is fixed under §201.54.

### §201.173 Reopening by Administration and modification or setting aside of decision.

Upon petition and a showing of compelling cause, filed in accordance with §201.174, or on its own motion, the Administration may at any time reopen any proceeding under the regulation in this part for rehearing, reargument, or reconsideration in whole or in part. After reasonable notice and opportunity for hearing or such other procedure as the Administration may direct, the Administration may alter, modify or set aside in whole or in part its decision therein if it finds such action is required by changed conditions in fact or law or by the public interest.

### § 201.174 Petition for reopening.

A petition for reopening for the purpose of rehearing, reargument, or reconsideration, shall be made in writing, shall state the grounds relied upon, and conform to the requirements of subpart D of this part. If the petition is for the purpose of rehearing, said petition shall state the nature and purpose of the new evidence to be adduced and that such evidence was not available at the time of the prior hearing. If the petition be for reargument or reconsideration, the matter claimed to have been erroneously decided shall be specified and the alleged errors briefly stated. In case of exceptional circumstances, satisfactorily shown by the petitioner, a request for modification of rules or orders may be made by telegram or otherwise, upon notice to all parties or attorneys of record, but such request shall be followed by a petition filed and served in accordance with subpart D of this part.

### § 201.175 Answers to petition to reopen.

Answers to petitions to reopen shall conform to the requirements of subpart D of this part.

## Subpart S—Judicial Standards of Practice (Rule 19)

### § 201.181 General matters.

(a) In general, the functions of the Administration involve hearing procedures comparable to those of a court and accordingly parties to proceedings before the Administration and persons representing these parties are expected to conduct themselves with honor and dignity. For the same reasons, the members of the Administration and those of its employees who participate with the Administration in the determination of formal proceedings are expected to conduct themselves with the same fidelity to standards of propriety that characterizes a court and its staff. The standing and the effectiveness of the Administration are in direct relation to the observance by it, its staff and the parties and attorneys appearing before it of the highest of judicial and professional ethics.

(b) It is essential in cases to be determined after notice and hearing and upon a record, or in any other cases which the Administration by order may designate, that the judicial character of the Administration be recognized and protected. As a consequence, from the time of the filing of an application or a petition which can be granted by the Administration only after notice and opportunity for hearing, or in the case of other matters from the time of notice by the Administration that such matters shall be determined after notice and opportunity for hearing, no ex parte communications, as hereinafter defined, are to constitute or be considered part of the record on which the final decision is to be predicated.

### § 201.182 Improper pressures.

It is determined to be improper that there be any effort by any person interested in a case before the Administration to attempt to sway the judgment of the Administration by undertaking to bring pressure or influence to bear upon the Administration, its staff, or the presiding officer assigned to the proceeding. It is further determined to be improper that such interested persons or any member of the Administration's staff or the presiding officer directly or indirectly give statements to the press or radio, by paid advertisements or otherwise, designed to influence the Administration's judgment in the matter. In addition, it is further determined to be improper that any person solicit communications to the Administration or any of its members, its staff or the presiding officer in the case other than by counsel of record who shall serve copies thereof on all other parties to the proceeding.

### § 201.183 Ex parte communications.

(a) Requests for expeditious treatment of matters pending with the Administration are deemed communications on the merits and as such are improper except when forwarded from parties to a proceeding and served upon all other parties thereto. Such communications from parties to a proceeding should be in the form of a motion and are to be dealt with as such by the Administration, the presiding officer, and

the parties to the proceeding. Any such request which is not made as a motion shall be placed in the public correspondence file and will not be considered by the Administration or any of its staff members or the presiding officer in connection with the disposition of the case.

(b) Written or oral communications involving any substantive or procedural issue in a matter subject to public hearing directed to a Member of the Administration, its staff, or the presiding officer in the case, from any individual in private or public life shall be deemed a private communication in respect of the merits of the case. These communications, unless otherwise provided for by law or a published rule of the Administration are deemed ex parte communications and are not to be considered part of any record or the basis for any official action by the Administration, members of its staff or the presiding officer: *Provided, however,* That this prohibition shall not be determined to apply to informal petitions or applications filed with the Administration; the usual informal communications between counsel including discussions directed toward the development of a stipulation or settlement between parties; communications of a nature deemed proper in proceedings in U.S. Federal courts; and communications which merely inquire as to the status of a proceeding without discussing issues or expressing points of view. Any prohibited communications in writing received by a Member of the Administration, its staff or the presiding officer shall be made public by placing it in the correspondence file of the docket which is available for public inspection and will not be considered by the Administration or the presiding officer as part of the record for decision. If the ex parte communication is received orally, a memorandum setting forth the substance of the conversation shall be made and filed in the correspondence section of the appropriate public docket.

## Subpart T—Effective Date (Rule 20)

### § 201.185 Effective date and applicability of rules.

The regulations in this part shall become effective October 23, 1964, and shall apply only to cases which are designated for hearing on or after October 23, 1964: *Provided, however,* That the regulations in this part shall be applicable to cases designated for hearing prior to October 23, 1964, if consolidated with a case designated for hearing on or after that date. All other cases designated for hearing prior to October 23, 1964, shall be governed by the rules in effect immediately prior to such date.

# PART 202—PROCEDURES RELATING TO REVIEW BY SECRETARY OF TRANSPORTATION OF ACTIONS BY MARITIME SUBSIDY BOARD

Sec.

202.1 Purpose.
202.2 Time and place for filings.
202.3 Form of petitions, requests and replies.
202.4 Petitions and requests for review—content.
202.5 Replies and requests that review not be exercised—content.
202.6 Grant or denial of review.
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202.8 Oral argument.
202.9 Decisions by the Secretary of Transportation.
202.10 Petitions for reconsideration.
202.11 Ex parte communications.

AUTHORITY: Sec. 204, 49 Stat. 1987, as amended; sec. 204(b), as amended, 46 U.S.C. 1114(b); Reorganization Plan No. 7 of 1961 (26 FR 7315).

SOURCE: 32 FR 2705, Feb. 9, 1967, unless otherwise noted.

### § 202.1 Purpose.

The rules of this part prescribe procedures relating to Secretarial review of any decision, report, order or action of the Maritime Subsidy Board (Board) pursuant to Department Order 117–A (31 FR 8087, 15331). Section 6 of Department Order 117–A is reprinted here for the convenience of the public.

SEC. 6. *Review and finality of actions by Maritime Subsidy Board.* .01 The Secretary of Transportation (hereinafter referred to as "Secretary") may, on his own motion or on the basis of a petition filed as hereinafter

provided, review any decision, report and/or order of the Maritime Subsidy Board based on a hearing held pursuant to (a) statutory requirements or (b) Board order, by entering a written order stating that he elects to review the action of the Board. Copies of all orders for review shall be served on all parties of record (which phrase includes the Board). Petitions for review under this paragraph may be filed by parties of record, shall be in writing, and shall state the grounds upon which petitioner relies. Ten (10) copies of such petitions for review, together with proof of service thereof on all parties of record, shall be filed with the Secretary within fifteen (15) days after the date of the service of the Board's decision, report or order. Parties of record may file replies in writing thereto. Ten (10) copies of such replies, together with proof of service thereof on the petitioner and all other parties of record, shall be filed with the Secretary within ten (10) days after the date the petition for review is timely filed. Petitions for review and replies thereto shall be limited to the record before the Board. If a petition for review is filed within the time prescribed, a decision, report or order of the Board shall be final fifteen (15) days after expiration of the time prescribed for filing a reply thereto unless the Secretary, prior to expiration of the fifteen (15) days, enters a written order granting the petition for review. If no petition for review is filed within the time prescribed, a decision, report or order of the Board shall be final twenty (20) days after the date of service of the decision unless the Secretary, prior to expiration of the twenty (20) days, enters a written order stating that he elects to review the action of the Board. If upon any review the decision of the Secretary rests on official notice of a material fact not appearing in the evidence in the record, any party of record shall, if request is made within ten (10) days after the date of service of the Secretary's decision on said party, be afforded an opportunity to show the contrary. The said ten (10) days shall constitute the period for a "timely request" within the meaning of section 7(d) of the Administrative Procedure Act.

.02 The Secretary may on his own motion review all actions of the Maritime Subsidy Board other than those referred to in paragraph .01 of this section by entering a written order stating that he elects to review the action of the Board. Any person having an interest in any action of the Board under this paragraph shall have the privilege of submitting to the Secretary within ten (10) days after the date of such Board action, a request that the Secretary undertake such review. Such request shall be in writing and shall state the grounds upon which the person submitting the same relies and his interest in the action for which review is requested. Ten (10) copies of such requests shall be submitted to the Secretary. Any other person having an interest in such matter shall have the privilege of submitting within fifteen (15) days after the date of the Board's action, a written request that the Secretary not exercise such review. Copies of request that the Secretary undertake or not exercise review will be open for public inspection at the office of the Secretary of the Board. If either a request that the Secretary undertake review or a request that he not exercise review is submitted within the time prescribed, an action of the Board shall be final in ten (10) days after expiration of the time prescribed for submission of a request that review not be exercised unless the Secretary, prior to the expiration of the ten (10) days, enters a written order stating that he elects to review the action of the Board. If neither a request that the Secretary undertake review nor a request that he not exercise review is submitted within the time prescribed, an action of the Board shall be final in twenty (20) days after the date of such action unless the Secretary, prior to expiration of the twenty (20) days, enters a written order stating that he elects to review the action of the Board. Copies of all orders for review shall be served upon the Board, and upon all persons filing requests as herein described.

.03 If a timely petition for reconsideration is filed under the rules prescribed by the Board, the time for filing a petition or request for review by the Secretary under paragraph .01 or .02 of this section, respectively, or the entry of an order by the Secretary on his own motion electing to review an action of the Board under paragraph .01 or .02 of this section, shall, in the case of actions under paragraph .01 of this section run from the date of service of the Board's action and, in the case of actions under paragraph .02 of this section, run from the date of the Board's action, finally disposing of the issues presented by the petition for reconsideration.

.04 In computing any period of time under this section, the time begins with the day following the act, event, or default, and includes the last day of the period unless it is Saturday, Sunday, or national legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or such holiday. The prescribed time for action by the Secretary in a proceeding in which additional days have been added pursuant to the provisions of this paragraph shall be extended by the total of such additional days.

.05 Petitions and requests for review by the Secretary shall not be filed:

a. Unless the petitioner shall have first exhausted his administrative remedies (other than a petition for reconsideration) before the Maritime Subsidy Board; nor

b. With respect to interlocutory decisions of the Maritime Subsidy Board in actions or proceedings referred to in paragraphs .01 and .02 of this section.

.06 The Secretary may, for good cause and/or in order to prevent undue hardship in any particular case, waive or modify any procedural provision of this section by written order.

### § 202.2 Time and place for filings.

All petitions, requests and replies relating to Secretarial review of Maritime Subsidy Board actions shall be filed with the Office of the Secretary of Transportation, Department of Transportation. Such papers shall be filed in accordance with the provisions of and within the time periods prescribed by Department Order 117–A.

### § 202.3 Form of petitions, requests and replies.

(a) All papers presented to the Secretary, other than records, shall bear on the cover the name and post office address of the party, and the name and address of the principal attorney or authorized representative (if any) for the party concerned. Certification shall be made that service of the paper has been made upon all parties of record (if any) and upon the Secretary of the Maritime Subsidy Board. One copy of every paper filed with the Secretary must in addition bear at its close the hand written signature of the party or attorney.

(b) All papers presented to the Secretary, other than records, shall, unless they are fewer than 10 pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of the cases (alphabetically arranged), textbooks, statutes and other material cited, with references to the pages where they are cited.

(c) Whenever a reference is made to a transcript, exhibit or other part of the record, such reference must be accompanied by a specific citation identifying the document and indicating the relevant page number of the document concerned.

(d) Papers filed with the Secretary should be logically arranged, with proper headings, concise, and free from irrelevant and unduly repetitious matter.

(e) It will not be necessary to reproduce the opinion of the Board.

### § 202.4 Petitions and requests for review—content.

Petitions and requests for review shall contain in the order here indicated—

(a) A reference to the decision, report, order or action of the Board;

(b) A concise statement of the interest of the party submitting the paper;

(c) A concise summary statement of the case containing that which is material to the consideration of the questions presented;

(d) A listing of each of the grounds upon which the party seeking review relies, expressed in the terms and circumstances of the case, each ground set forth in a separate, numbered paragraph;

(e) The argument, generally amplifying the material in paragraph (d) of this section and exhibiting clearly the points of law, policy and fact being presented, citing the authorities, statutes and other material relied upon. The argument should separately identify and treat each of the grounds upon which review is sought. In cases where reversible legal error is contended, a full legal argument on the points concerned should be presented. In cases where policy error is contended, it should be pointed out what policy of the Board is alleged to be wrong, what is wrong with it and what policy the submitting party advocates as the correct one. In cases where reversible factual error is contended, the findings of fact alleged to be erroneous should be pointed out along with citations to the record where appropriate. The party should further indicate precisely what it contends to be the correct findings of fact, with supporting references;

(f) A conclusion, specifying with particularity the action which the submitting party believes the Secretary should take.

### § 202.5 Replies and requests that review not be exercised—content.

Replies and requests that review not be exercised shall contain in the order here indicated—

(a) A reference to the decision, report, order, or action of the Board;

(b) A concise statement of the interests of the party submitting the paper;

(c) Where deemed necessary by the submitting party, a concise summary statement of the case explicitly pointing out any inaccuracy or omission in the statement of the other side, with references to the record where appropriate;

(d) A listing of the reasons why review should not be exercised, each reason set forth in a separate, numbered paragraph;

(e) The argument generally amplifying the material in paragraph (d) of this section and, in addition, specifically replying to the points of law, policy and fact presented by the other side (each stated separately) citing the authorities, statutes, and other material relied upon by the submitting party;

(f) A conclusion, specifying with particularity the action which the submitting party believes the Secretary should take.

### § 202.6 Grant or denial of review.

(a) A petition or request for review by the Secretary of any decision, report, order or action of the Board will not be granted unless significant and important questions of over-all policy requiring the Secretary's attention are involved or there appears to be significant legal, policy, or factual error in the Board's action.

(b) The parties and the Secretary of the Board will be notified, by Order, of the Secretary's decision to review a case on his own motion, and of his decision to review or to deny review of a case where a petition or request concerning review has been filed.

(c) Promptly upon notice of a decision by the Secretary to review a case subject to review under section 6.01 of Department Order 117–A, the Secretary of the Board shall certify to the Secretary the complete record of the proceeding before the Board and shall serve upon all parties a copy of such certification which shall adequately identify the matter so certified. The Secretary of the Board shall further serve upon all parties a copy of any further communication from the Board or Maritime Administration on such a case.

### § 202.7 Supplemental briefs.

If an order taking review is entered by the Secretary, further briefs supplementing the arguments set forth in the petitions and replies may be requested in cases where the Secretary deems such to be appropriate and desirable.

### § 202.8 Oral argument.

Generally, oral argument will not be necessary. However, the Secretary reserves the right to schedule such when he deems it desirable.

### § 202.9 Decisions by the Secretary of Transportation.

Decisions of the Secretary will be reached in accordance with applicable law and the evidence. Upon the determination of a case taken under review by the Secretary, a written decision and opinion which states the Secretary's conclusions and an explanation thereof will be issued.

### § 202.10 Petitions for reconsideration.

Petitions for reconsideration of decisions by the Secretary in any case taken under review will be considered, upon a showing of good cause, if filed within ten (10) days of service of the Secretary's decision.

### § 202.11 Ex parte communications.

Oral or written communications with the Department concerning a matter subject to Secretarial review under section 6.01 of Department Order 117–A, unless otherwise provided by law or by order, rule, or regulation of the Department, shall be deemed ex parte communications and shall not be part of the record and shall not be considered in making any recommendation, decision or action; *Provided, however,* That this rule shall not apply to customary informal communications with Department counsel, including discussions directed toward the development of a stipulation or settlement between parties; communications of a nature deemed proper in proceedings in U.S. Federal courts; and communications with Department counsel which merely inquire as to procedures or the status of a proceeding without discussing issues or expressing points of view. Any

written communication subject to the above stated rule received by the Department shall be placed in the correspondence file of the case, which is available for public inspection. If an oral communication subject to the above stated rule is received, a memorandum setting for the substance of the conversation shall be made and placed in the correspondence file.

# PART 203—PROCEDURES RELATING TO CONDUCT OF CERTAIN HEARINGS UNDER THE MERCHANT MARINE ACT, 1936, AS AMENDED

Sec.
203.1 Scope of rules.
203.2 Applications.
203.3 Opposition to applications.
203.4 Replies.
203.5 Types of hearings.
203.6 Oral evidentiary hearing before one or more members.

AUTHORITY: Secs. 204(b), 605(c) and 805(a), Merchant Marine Act, 1936, as amended (46 U.S.C. app. 1114(b), 1175(c) and 1223(a)).

SOURCE: 55 FR 12358, Apr. 3, 1990, unless otherwise noted.

## § 203.1 Scope of rules.

(a) The provisions of this part apply to applications which involve statutorily mandated hearings under sections 605(c) and 805(a) of the Merchant Marine Act, 1936, as amended (46 U.S.C. app. 1175(c), 1223(a)), hereinafter referred to as the "Act", conducted by the Maritime Administrator or Maritime Subsidy Board of the Maritime Administration, hereinafter referred to collectively as the "Administration".

(b) The provisions of this part are to be construed consistently with the Administration Rules of Practice and Procedure in 46 CFR part 201. If this part and 46 CFR part 201 conflict, this part shall govern.

## § 203.2 Applications.

(a) Notice of all applications subject to this part shall be published in the FEDERAL REGISTER, in accordance with the provisions of 46 CFR 201.72.

(b) All applications under section 605(c) of the Act shall specify, at a minimum, full details of the existing or proposed new or amended service, to include itineraries and the number and type of vessels currently operated in the trade or trade route, the number and type of vessels proposed to be operated in the trade or trade route, the frequency of sailings and port calls and the nature and extent of U.S.-flag and any foreign-flag competition. As a matter of discretion, the Administration may request additional information, which may be protected by a confidentiality ruling, if justified. If the application is one for additional service on a route in which the applicant has an established service, or for an existing service, then the applicant must include information on its previous three years of operation. Applicants for permission under section 805(a) of the Act must describe clearly the scope of permission sought, including details of proposed domestic service and existing or proposed foreign service, as well as the applicant's operating structure.

(c) Applications under section 605(c) of the Act shall be filed on Form MA–964, in accordance with the instructions annexed thereto. Copies of Form MA–964 may be obtained on request from the Secretary of the Administration.

(d) Applications for permission under section 805(a) of the Act shall be submitted in accordance with the procedures set forth in 46 CFR part 380, and shall comply with all of the requirements of that part.

## § 203.3 Opposition to applications.

(a) *Required documents.* A person seeking to oppose an application shall file with the Secretary of the Administration, and concurrently serve upon the applicant, a petition for leave to intervene, together with an answer, within the time period specified in the FEDERAL REGISTER notice of the application. Normally, twenty days will be provided.

(b) *Petition for leave to intervene.* The petition for leave to intervene shall specify the basis upon which such person asserts a right to intervene and shall set forth with particularity:

(1) The number and type of U.S.-flag vessels currently operated by the person seeking intervention in the trade or trade route to which the application pertains.

(2) The frequency of sailings of vessels operated by such person in the trade or trade route to which the application pertains in the 36 calendar months immediately preceding the date of the application.

(3) The specific ports of call conducted by such person in the trade or trade route to which the application pertains in the 36 calendar months immediately preceding the date of the application.

(4) The average annual carriage by such person for the past 36 months on the trade route to which the application pertains.

(5) If applicable, specific information detailing firm and definite plans for the inauguration of a new service, including, as appropriate, but not limited to, approval by the board of directors or general partners, membership in applicable conference agreements, office openings or the retention of agents in the proposed service area, acquisition of vessels and related equipment, subsidy applications, applications for any needed Government approvals or advertisement for the proposed service.

(6) Such other information as the person believes should be considered in a determination of such person's right to intervene.

(c) *Answer.* (1) The answer shall be simultaneously filed with the petition for leave to intervene and shall specify the basis upon which such person asserts the application should be denied or granted subject to modifications.

(2) The answer shall set forth with particularity:

(i) The ground upon which opposition is based;

(ii) The factual matters which such person believes must be determined by the Administration;

(iii) The legal matters which such person believes must be determined by the Administration;

(iv) For each factual and legal matter raised such person's position and basis therefor; and

(v) The precise nexus between each factual and legal matter raised and the decision of the Administration.

(d) *Right to intervene in Opposition to applications.* (1) Leave to intervene in opposition to applications under section 605(c) of the Act will only be granted to operators of U.S.-flag vessels, and only to the extent, as demonstrated by the petition for leave to intervene, that such person provides an existing service, or that such person has firm and definite plans to provide a service, by a showing that its vessels operate in the same trade or on the same trade route as that proposed by the applicant and so operate in a manner competitive with the specific service proposed by the applicant. Although persons seeking intervention need not call at the same specific ports proposed by the applicant by direct vessel calls, any filing based on intermodal service in opposition to an application shall demonstrate that such person regularly competes by intermodal service for cargo moving to or from ports in the service proposed by the applicant. The burden of demonstrating competition between the vessels of the person seeking intervention and those of the applicant will be with the person seeking such intervention. Leave to intervene will not be granted to those conducting a competing service on an intermittent or *de minimis* basis.

(2) Leave to intervene in opposition to applications under section 805(a) of the Act will be granted, as provided in the statute, to every person, firm, or corporation "having any interest" in such application.

### § 203.4 Replies.

Within ten (10) days after the date for filing answers, the applicant may file a reply specifically addressed to the issues raised in the answers and to oppose the grant to any petitioner of leave to intervene.

### § 203.5 Types of hearings.

(a) *Oral Evidentiary Hearing:* If, upon review of the application, answers, petitions to intervene and replies, the Administration determines that the proceeding involves a disputed issue of material fact which cannot be resolved on the basis of available information of record, and that the case is anticipated to involve the submission of extensive evidence, or the Administration determines that it is otherwise appropriate, the Administration may issue an order referring the case to an Administrative

Law Judge for oral evidentiary hearing. Such hearing shall be conducted in accordance with the procedures set out in 46 CFR part 201. The Administration may resolve issues of intervention in such order or refer such issues to the Administrative Law Judge. The burden of establishing that there is a disputed issue of material fact is upon the party seeking the oral evidentiary hearing.

(b) *Hearing on Submission of Written Evidence and Argument:* If, upon review of the application, answers, petitions to intervene and replies, the Administration determines that the proceeding involves a disputed issue of material fact which cannot be resolved on the basis of available information of record, but which is not anticipated to involve the submission of extensive evidence, the Administration may fulfill the hearing requirement in sections 605(c) and 805(a) of the Act by rendering a decision solely on the merits of papers submitted, provided that a full and true disclosure of the facts is made and such procedure is fair to all parties. The Administration may, in its discretion, direct the submission of briefs on legal issues together with evidence in written form, and/or the holding of oral argument before the Administration prior to issuing its final decision on the proceeding.

(c) *Show Cause Proceeding:* If, upon review of the application, answers, petitions to intervene and replies, the Administration determines that the proceeding does not or is not likely to involve a disputed issue of material fact or that if such facts exist they can be resolved on the basis of available information subject to official notice, and if the case is not anticipated to involve the submission of extensive evidence, the Administration may determine to handle the matter by show-cause proceeding. In that event, it will issue a decision setting out its tentative conclusions on all of the matters of fact and law at issue in the proceeding. A Notice summarizing such decision shall be published in the FEDERAL REGISTER in accordance with 46 CFR 201.72. Interested persons may file comments, including support or rebuttal for any matter officially noticed, within 30 days of the date of service of the tentative decision and responses to such comments shall be filed within ten days thereafter unless a shorter or longer period is provided by the Administration for such comments and answers.

### § 203.6 Oral evidentiary hearing before one or more members.

If an oral evidentiary hearing is to be conducted, the Maritime Administration, or the Maritime Subsidy Board or one or more of its members, may conduct such hearing. A member who is not present at the hearing may participate in the consideration and the decision of the case where the oral evidentiary hearing, if held, has been stenographically recorded in full and transcribed for the member's review.

## PART 204—CLAIMS AGAINST THE MARITIME ADMINISTRATION UNDER THE FEDERAL TORT CLAIMS ACT

Sec.
204.1 Scope and procedure for filing claims.
204.2 Claims payable.
204.3 Claims not payable.
204.4 Time limitations on claims.
204.5 Notification to claimant of action on claim.
204.6 Payment of claims.
204.7 Delegation of authority.
204.8 Where to file claims.
204.9 Indemnity or contribution.
204.10 Attorney's fees.

AUTHORITY: 28 U.S.C. 2672; 28 CFR 14.11; 49 CFR 1.45(a)(2), (3), and (16).

SOURCE: 50 FR 25711, June 21, 1985, unless otherwise noted.

### § 204.1 Scope and procedure for filing claims.

This part prescribes the requirements and procedure for administrative settlement of claims against the United States, involving the Maritime Administration, under the Federal Tort Claims Act, based on death, personal injury, or damage to or loss of property. The controlling regulations are promulgated by the Department of Justice at 28 CFR Part 14—Administrative Claims Under Federal Tort Claims Act. These regulations supplement those of the Department of Justice and provide specific guidance regarding claims processing in the Maritime Administration.

### § 204.2 Claims payable.

Claims for death, personal injury, or damage to or loss of real or personal property are payable when the death, injury or damage is caused by a negligent or wrongful act or omission of an employee of the Maritime Administration, while acting within the scope of employment and under circumstances in which the United States, if a private person, would be liable to the claimant under the law of the place where the act or omission occurred.

### § 204.3 Claims not payable.

A claim is not payable under the regulations in this part 204, if such tort claim is excluded from the scope of the Federal Tort Claims Act, as amended, pursuant to 28 U.S.C. 2680.

### § 204.4 Time limitations on claims.

(a) A claim can be settled only if presented in writing within two years after it accrues.

(b) The two year statute of limitations is not tolled until the Office of the Chief Counsel of the Maritime Administration receives from a claimant, or the claimant's duly authorized agent or legal representative, an executed Standard Form 95, "Claims for Damage, Injury, or Death," or written notification of an incident, together with a claim for money damages in a sum certain, for death, personal injury, or damage to or loss of real or personal property. When a claim is received in any office, mail unit, or other Maritime Administration activity other than the Office of the Chief Counsel, such office, unit or activity shall transmit it to the Office of the Chief Counsel without delay.

[50 FR 25711, June 21, 1985, as amended by 64 FR 54782, Oct. 8, 1999]

### § 204.5 Notification to claimant of action on claim.

(a) If a claim is approved (either for the amount claimed or less than such full amount), the claimant, prior to the disbursement of an award, shall sign a document releasing the United States, its agents and employees from all further claims relating to the incident giving rise to the approved claim.

(b) If the claim is finally denied, the official vested with such authority shall inform the claimant by certified or registered mail of the final denial of the claim. Notification of final denial shall include a statement that a claimant who does not accept or is dissatisfied with the action may institute suit against the United States not later than six months after the date of mailing of the notice of final denial.

(c) A claimant may regard the failure of the Maritime Administration to make a final disposition of a claim within six months after the date of receipt of the claim by the Maritime Administration as a final denial for the purpose of filing suit.

### § 204.6 Payment of claims.

(a) Once the amount to be paid has been agreed upon, the agency shall attempt to forward a check for such amount to the claimant within thirty days.

(b) If a claimant is represented by an attorney, both the claimant and the claimant's attorney shall be designated as payees on any check delivered to the claimant's attorney.

### § 204.7 Delegation of authority.

(a) Subject to written approval of the Attorney General of the United States of any payment in excess of $100,000, the Chief Counsel of the Maritime Administration is authorized to approve the award, compromise, or settlement of any tort claim and to authorize payment of the claim.

(b) The Chief Counsel is authorized to deny any claim and to settle and authorize payment of any tort claim involving the Maritime Administration in an amount not exceeding $100,000.

[64 FR 54783, Oct. 8, 1999]

### § 204.8 Where to file claims.

Claimants must file claims with the Chief Counsel (MAR–220), Maritime Administration, Department of Transportation, Room 7232, SW, Washington, DC 20590 at the Nassif Building, 7th and D Streets.

[64 FR 54783, Oct. 8, 1999]

### § 204.9 Indemnity or contribution.

(a) *Sought by the United States.* If a claim arises under circumstances in which the United States is entitled to indemnity or contribution under a contract or the applicable law governing joint tort-feasors, the Chief Counsel of the Maritime Administration shall notify the third party of the claim and request the third party to honor its obligation to the United States or to accept its share of joint liability. If the issue of third party indemnity or contribution is not satisfactorily adjusted, the underlying claim shall be settled only after consultation with the Department of Justice as provided in 28 CFR 14.7

(b) *Sought from the United States.* Claims for indemnity or contribution from the United States shall be settled under this part only if the incident giving rise to liability and the claim is otherwise cognizable under this part.

### § 204.10 Attorney's fees.

Attorney's fees for any claim settled under this part are limited to not more than twenty percent of the amount paid in settlement.

## PART 205—AUDIT APPEALS; POLICY AND PROCEDURE

Sec.
205.1 Purpose.
205.2 Policy.
205.3 Procedure.
205.4 Finality of decisions.
205.5 Contracts containing disputes article.

AUTHORITY: Sec. 204, 49 Stat. 1987, 1998, 2004, 2011; 46 U.S.C. 1114, 1155, 1176, 1212.

SOURCE: 66 FR 23861, May 10, 2001, unless otherwise noted.

### § 205.1 Purpose.

This part establishes the policy and procedure for parties to use when seeking redress and appeals of audit decisions involving contracts with the Maritime Subsidy Board or the Maritime Administration (MARAD, we, our, or us). A party to a contract (you or your) may appeal MARAD's findings, interpretations, or decisions of annual or special audits.

### § 205.2 Policy.

If you disagree with audit findings and fail to settle any differences with the appropriate Office Director, you may ask the appropriate office Associate Administrator to review the audit findings. If you disagree with the Associate Administrator, you may appeal to the Maritime Administrator (Administrator).

### § 205.3 Procedure.

(a) You have 90 days from the date you receive the initial audit findings to file a written request for review of the audit findings with the appropriate Associate Administrator. Your written request must state the legal or factual bases for your disagreement. The appropriate Associate Administrator will issue a written determination.

(b) You have 30 days following the Associate Administrator's final audit determination to submit your appeal in writing to the Administrator. Your written appeal must set forth the legal and factual bases for your appeal. The Administrator may, at his or her discretion, extend the time limitation in the case of extenuating circumstances.

(c) We will notify you, in writing, if you must submit additional facts for our consideration of the appeal. We will notify you, in writing, once the Administrator has made a decision regarding your appeal.

### § 205.4 Finality of decisions.

The Administrator's decision will be the final administrative action on all audit appeals.

### § 205.5 Contracts containing disputes article.

When a contract contains a disputes article, the disputes article will govern the bases for negotiating disputes regarding audit findings, interpretations, or decisions made by MARAD and any appeals.

# SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

## PART 221—REGULATED TRANSACTIONS INVOLVING DOCUMENTED VESSELS AND OTHER MARITIME INTERESTS

### Subpart A—Introduction


Sec.
221.1 Purpose.
221.3 Definitions.
221.5 Citizenship declarations.
221.7 Applications and fees.


### Subpart B—Transfers to Noncitizens or to Registry or Operation Under Authority of a Foreign Country


221.11 Required approvals.
221.13 General approval.
221.15 Approval for transfer of registry or operation under authority of a foreign country or for scrapping in a foreign country.
221.17 Sale of a documented vessel by order of a district court.
221.19 Possession or sale of vessels by mortgagees or trustees other than pursuant to court order.


### Subpart C [Reserved]

### Subpart D—Transactions Involving Maritime Interests in Time of War or National Emergency Under 46 App. U.S.C. 835 [Reserved]

### Subpart E—Civil Penalties


221.61 Purpose.
221.63 Investigation.
221.65 Criteria for determining penalty.
221.67 Stipulation procedure.
221.69 Hearing Officer.
221.71 Hearing Officer referral.
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221.75 Response by party.
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221.79 Request for confidential treatment.
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221.85 Hearing procedures.
221.87 Records.
221.89 Hearing Officer's decision.
221.91 Appeals.
221.93 Collection of civil penalties.


### Subpart F—Other Transfers Involving Documented Vessels [Reserved]

### Subpart G—Savings Provisions


221.111 Status of prior transactions—controlling dates.


AUTHORITY: 46 App. U.S.C. 802, 803, 808, 835, 839, 841a, 1114(b), 1195; 46 U.S.C. chs. 301 and 313; 49 U.S.C. 336; 49 CFR 1.66.

SOURCE: 57 FR 23478, June 3, 1992, unless otherwise noted.

## Subpart A—Introduction

### § 221.1 Purpose.

(a) This part implements statutory responsibilities of the Secretary of Transportation (the Secretary) with respect to:

(1) The regulation pursuant to 46 App. U.S.C. 808 of transactions involving transfers of:

(i) An interest in or control of Documented Vessels owned by Citizens of the United States (including the Transfer of a Controlling Interest in such owners) to Noncitizens or;

(ii) A Documented Vessel to registry or Operation under Authority of a Foreign Country or for scrapping in a foreign country; and

(2) Transactions involving maritime interests in time of war or national emergency under 46 App. U.S.C. 835.

(b) The responsibilities in paragraph (a) (1) and (2) of this section have been delegated by the Secretary to the Maritime Administrator.

[57 FR 23478, June 3, 1992, as amended at 63 FR 6880, Feb. 11, 1998]

### § 221.3 Definitions.

For the purpose of this part, when used in capitalized form:

(a) *Bowaters Corporation* means a Noncitizen corporation organized under the laws of the United States or of a State that has satisfied the requirements of 46 App. U.S.C. 883–1(a)–(e) and holds a valid Certificate of Compliance issued by the Coast Guard.

(b) *Charter* means any agreement or commitment by which the possession or services of a vessel are secured for a

period of time, or for one or more voyages, whether or not a demise of the vessel.

(c) *Citizen of the United States* means a Person (including receivers, trustees and successors or assignees of such Persons as provided in 46 App. U.S.C. 803), including any Person (stockholder, partner or other entity) who has a Controlling Interest in such Person, any Person whose stock or equity is being relied upon to establish the requisite U.S. citizen ownership, and any parent corporation, partnership or other entity of such Person at all tiers of ownership, who, in both form and substance at each tier of ownership, satisfies the following requirements—

(1) An individual who is a Citizen of the United States, by birth, naturalization or as otherwise authorized by law;

(2) A corporation organized under the laws of the United States or of a State, the Controlling Interest of which is owned by and vested in Citizens of the United States and whose chief executive officer, by whatever title, chairman of the board of directors and all officers authorized to act in the absence or disability of such persons are Citizens of the United States, and no more of its directors than a minority of the number necessary to constitute a quorum are Noncitizens;

(3) A partnership organized under the laws of the United States or of a State, if all general partners are Citizens of the United States and a Controlling Interest in the partnership is owned by Citizens of the United States;

(4) An association organized under the laws of the United States or of a State, whose chief executive officer, by whatever title, chairman of the board of directors (or equivalent committee or body) and all officers authorized to act in their absence or disability are Citizens of the United States, no more than a minority of the number of its directors, or equivalent, necessary to constitute a quorum are Noncitizens, and a Controlling Interest in which is vested in Citizens of the United States;

(5) A joint venture, if it is not determined by the Maritime Administrator to be in effect an association or a partnership, which is organized under the laws of the United States or of a State, if each coventurer is a Citizen of the United States. If a joint venture is in effect an association, it will be treated as is an association under paragraph (c)(4) of this section, or, if it is in effect a partnership, will be treated as is a partnership under paragraph (c)(3) of this section; or

(6) A Trust described in paragraph (t)(1) of this section.

(d) *Controlling interest* owned by and vested in Citizens of the United States means that—

(1) In the case of a corporation:

(i) Title to a majority of the stock thereof is owned by and vested in Citizens of the United States, free from any trust or fiduciary obligation in favor of any Noncitizen;

(ii) The majority of the voting power in such corporation is vested in Citizens of the United States;

(iii) Through no contract or understanding is it so arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any Noncitizen; and

(iv) By no other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any Noncitizen;

(2) In the case of a partnership, all general partners are Citizens of the United States and ownership and control of a majority of the partnership interest, free and clear of any trust or fiduciary obligation in favor of any Noncitizen, is vested in a partner or partners each of whom is a Citizen of the United States;

(3) In the case of an association, a majority of the voting power is vested in Citizens of the United States, free and clear of any trust or fiduciary obligation in favor of any Noncitizen; and

(4) In the case of a joint venture, a majority of the equity is owned by and vested in Citizens of the United States free and clear of any trust or fiduciary obligation in favor of any Noncitizen; but

(5) In the case of a corporation, partnership, association or joint venture owning a vessel which is operated in the coastwise trade, the amount of interest and voting power required to be owned by and vested in Citizens of the United States shall be not less than 75 percent as required by 46 App. U.S.C. 802.

(e) *Documented vessel* means a vessel documented under chapter 121, title 46, United States Code or a vessel for which an application for such documentation is pending.

(f) *Fishing vessel* means a vessel that commercially engages in the planting, cultivating, catching, taking, or harvesting of fish, shellfish, marine animals, pearls, shells, or marine vegetation or an activity that can reasonably be expected to result in the planting, cultivating, catching, taking, or harvesting of fish, shellfish, marine animals, pearls, shells, or marine vegetation.

(g) *Fish processing vessel* means a vessel that commercially prepares fish or fish products other than by gutting, decapitating, gilling, skinning, shucking, icing, freezing, or brine chilling.

(h) *Fish tender vessel* means a vessel that commercially supplies, stores, refrigerates, or transports (except in foreign commerce) fish, fish products, or materials directly related to fishing or the preparation of fish to or from a Fishing Vessel, Fish Processing Vessel, or another Fish Tender Vessel or a fish processing facility.

(i) *Hearing Officer* means an individual designated by the Maritime Administrator to conduct hearings under Subpart E of this part and assess civil penalties.

(j) *Noncitizen* means a Person who is not a Citizen of the United States.

(k) *Operation under the authority of a foreign country* means any agreement, undertaking or device by which a Documented Vessel is voluntarily subjected to any restriction or requirement, actual or contingent, under the laws or regulations of a foreign country or instrumentality thereof concerning use or operation of the vessel that is or may be in derogation of the rights and obligations of the owner, operator or master of the vessel under the laws of the United States, unless such restriction or requirement is of general applicability and uniformly imposed by such country or instrumentality in exercise of its sovereign prerogatives with respect to public health, safety or welfare, or in implementation of accepted principles of international law regarding cabotage or safety of navigation.

(l) *Party* means the Person alleged to have violated the statute or regulations for which a civil penalty may be assessed.

(m) *Person* includes individuals and corporations, partnerships, joint ventures, associations and Trusts existing under or authorized by the laws of the United States or of a State or, unless the context indicates otherwise, or any foreign country.

(n) *Pleasure vessel* means a vessel that has been issued a Certificate of Documentation with a recreational endorsement and is operated only for pleasure pursuant to 46 U.S.C. 12109.

(o) *Settlement* means the process whereby a civil penalty or other disposition of the alleged violation is agreed to by the Hearing Officer and the Party in accordance with § 221.73 of this part.

(p) *State* means a State of the United States, Guam, Puerto Rico, the Virgin Islands, American Samoa, the District of Columbia, the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States.

(q) *Transfer* means the passing of control of or an interest in a Documented Vessel and includes the involuntary conveyance by a foreign judicial or administrative tribunal of any interest in or control of a Documented Vessel owned by a Citizen of the United States to a Noncitizen that is not eligible to own a Documented Vessel.

(r) *Trust* means:

(1) In the case of ownership of a Documented Vessel, a Trust that is domiciled in and existing under the laws of the United States, or of a State, of which the trustee is a Citizen of the United States and a Controlling Interest in the Trust is held for the benefit of Citizens of the United States; or

(s) *United States,* when used in the geographic sense, means the States of the United States, Guam, Puerto Rico, the Virgin Islands, American Samoa, the District of Columbia, the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States; when used in other than the geographic sense, it means the United States Government.

(t) *United States Government* means the Federal Government acting by or

through any of its departments or agencies.

(u) *Vessel Transfer Officer* means the Maritime Administration's Vessel Transfer and Disposal Officer, whose address is MAR–745.1, Maritime Administration, United States Department of Transportation, Washington, DC 20590, or that person's delegate.

[57 FR 23478, June 3, 1992, as amended at 63 FR 6880, Feb. 11, 1998; 69 FR 34310, June 21, 2004]

### § 221.5 Citizenship declarations.

(a) Pursuant to 46 U.S.C. 31306(a), when an instrument transferring an interest in a Documented Vessel owned by a Citizen of the United States is presented to the United States Government for filing or recording, the Person filing shall submit therewith Maritime Administration Form No. MA–899 so it may be determined if sections 9 or 37 of the Shipping Act of 1916 (46 App. U.S.C. 808 and 837) apply to the transaction. Form No. MA–899 is available from the Coast Guard Documentation Office at the port of record of the vessel or from the Vessel Transfer Officer.

(b) The filing required by paragraph (a) of this section is not required for transactions involving vessel types described in § 221.11(b)(1)(i) through (iv) of this part.

(c) The filing required by paragraph (a) of this section is waived for transactions which are given general approval in this part.

(d) If the transfer of interest is one which requires written approval of the Maritime Administrator, the Person filing shall submit therewith evidence of that approval.

(e) A declaration filed by any Person other than an individual shall be signed by an official authorized by that Person to execute the declaration.

### § 221.7 Applications and fees.

(a) *Applications.* Whenever written approval of the Maritime Administrator is required for transfers to Noncitizens or to foreign registry or Operation Under Authority of a Foreign Country, or pursuant to a Maritime Administration contract or Order, an application on Maritime Administration Form MA–29 or MA–29B giving full particulars of the proposed transaction shall be filed with the Vessel Transfer Officer.

(b) *Fees.* Applications for written approval of any of the following transactions shall be accompanied by the specified fee:

(1) Transactions requiring approval for:

| | |
|---|---|
| (i) Sale and delivery by a Citizen of the United States to a Noncitizen, or Transfer to foreign registry or Operation Under Authority of a Foreign Country, of a Documented Vessel, per vessel— | |
| (A) Of 1,000 gross tons and over | $325 |
| (B) Of less than 1,000 gross tons | 170 |
| (ii) Transfer of any interest in, or control of, a Documented Vessel owned by a Citizen of the United States to a Noncitizen, per vessel | 250 |
| (iii) Charter of a Documented Vessel owned by a Citizen of the United States to a Noncitizen, per vessel | 250 |
| (iv) Sale or Transfer of an interest in or the control of an interest in an entity that is a Citizen of the United States and owns, or is the direct or indirect parent of an entity that owns, any Documented Vessel, if by such sale or Transfer the Controlling Interest in such entity is vested in, or held for the benefit of, any Noncitizen | 325 |

(2) Transactions requiring written approval pursuant to a Maritime Administration contract or Order:

| | |
|---|---|
| (i) Transfer of ownership or registry, or, both, of the vessel, per vessel | $260 |
| (ii) Sale or Transfer of any interest in the owner of the vessel, if by such sale or Transfer the Controlling Interest in the owner is vested in, or held for the benefit of, a Noncitizen, per vessel | 235 |
| (iii) Charter of the vessel to a Noncitizen, per vessel | 240 |

(c) *Modification of applications or approvals.* An application for modification of any pending application or prior approval, or of an outstanding Maritime Administration contract or Order, shall be accompanied by the fee established for the original application.

(d) *Reduction or waiver of fees.* The Maritime Administrator, in appropriate circumstances, and upon a written finding, may reduce any fee imposed by paragraph (b) or (c) of this section, or may waive the fee entirely in extenuating circumstances where the interest of the United States Government would be served.

[57 FR 23478, June 3, 1992, as amended at 63 FR 6880, Feb. 11, 1998]

## Subpart B—Transfers to Noncitizens or to Registry or Operation Under Authority of a Foreign Country

### § 221.11 Required approvals.

(a) Except as provided in section 12106(e) of title 46, United States Code, a Person may not, without the approval of the Maritime Administrator:

(1) Sell, lease, charter, deliver, or in any manner Transfer to a Noncitizen, or agree (unless such agreement by its terms requires approval of the Maritime Administrator in order to effect such transfer), to sell, lease, charter, deliver, or in any manner Transfer to a Noncitizen, any interest in or control of a Documented Vessel owned by a Citizen of the United States or a vessel the last documentation of which was under the laws of the United States except as provided in this part; or

(2) Place any Documented Vessel, or any vessel the last documentation of which was under the laws of the United States, under foreign registry or operate that vessel under the authority of a foreign country, except as provided in this part.

(b)(1) The approvals required by paragraph (a)(1) of this section are not required for the following Documented Vessel types if the vessel has been operated exclusively and with *bona fides* for one or more of the following uses, under a Certificate of Documentation with an appropriate endorsement and no other, since initial documentation or renewal of its documentation following construction, conversion, or transfer from foreign registry, or, if it has not yet so operated, if the vessel has been designed and built and will be operated for one or more of the following uses:

(i) A Fishing vessel;

(ii) A Fish processing vessel;

(iii) A Fish tender vessel; and

(iv) A Pleasure vessel.

(2) A vessel of a type specified in paragraphs (b)(1)(i) through (iii) of this section will not be ineligible for the approval granted by this paragraph by reason of also holding or having held a Certificate of Documentation with a coastwise or registry endorsement, so long as any trading under that authority has been only incidental to the vessel's principal employment in the fisheries and directly related thereto.

[57 FR 23478, June 3, 1992, as amended at 63 FR 6880, Feb. 11, 1998]

### § 221.13 General approval.

(a) *Transactions other than transfer of registry or operation under authority of a foreign country.* (1) The Maritime Administrator hereby grants the approval required by 46 App. U.S.C. 808(c)(1) for the sale, lease, Charter, delivery, or any other manner of Transfer to a Noncitizen of an interest in or control of a Documented Vessel owned by a Citizen of the United States or a vessel the last documentation of which was under the laws of the United States except:

(i) As limited by paragraph (b) of this section for transfers to Bowaters Corporations;

(ii) As limited by § 221.15(d) of this part for sales for scrapping;

(iii) Bareboat or demise Charters of vessels operating in the coastwise trade.

A Documented Vessel shall remain documented following any transaction approved by this paragraph (a)(1). Other approvals may be required by statutes other than 46 App. U.S.C. 808(c)(1) and/or by contract for certain vessels.

(2) The approvals granted by paragraph (a)(1) of this section shall not apply to any such Transfer proposed to be made during any period when the United States is at war or during any national emergency, the existence of which has invoked the provisions of section 37 of the Shipping Act, 1916, as amended (46 App. U.S.C. 835), or to any such Transfer proposed to be made to a citizen of any country when such transfer would be contrary to the foreign policy of the United States as declared by an executive department of the United States.

(3) An information copy of any sales agreement, bareboat or demise Charter entered into pursuant to this approval shall be submitted to the Vessel Transfer Officer not later than thirty days following a request by that official.

(4) Except for Charters to Noncitizens of documented bulk cargo vessels engaged in carrying bulk raw and processed agricultural commodities from the United States to ports in the geographic area formerly known as the

Union of Soviet Socialist Republics, or to other permissible ports of discharge for transshipment to the geographic area formerly known as the Union of Soviet Socialist Republics, pursuant to an operating- differential subsidy agreement that is consistent with the requirements of 46 CFR parts 252 and 294, this approval excludes and does not apply to Transfers to a Person who is subject, directly or indirectly, to control of an entity within any country listed by the Department of Commerce in 15 CFR part 740, Supplement 1, Country Group E, unless such transferee is an individual who has been lawfully admitted into, and resides in, the United States, or to Charters for the carriage of cargoes of any kind to or from, or for commercial operation while within the waters of (as distinct from passage through), any of these countries. This list of countries is subject to change from time to time. Information concerning current restrictions may be obtained from the Vessel Transfer Officer.

(b) *Bowaters corporations.* (1) For documented Vessels other than those operating in the coastwise trade, the approvals granted in paragraph (a) of this section shall apply to Bowaters Corporations.

(2) The Maritime Administrator hereby grants approval for the time charter of a Documented Vessel of any tonnage by a Citizen of the United States to a Bowaters Corporation for operation in the coastwise trade, subject to the following conditions:

(i) If non-self-propelled or, if self-propelled and less than 500 gross tons, no such vessel shall engage in the fisheries or in the transportation of merchandise or passengers for hire between points in the United States embraced within the coastwise laws except as a service for a parent or subsidiary corporation; and

(ii) If non-self-propelled or, if self-propelled and less than 500 gross tons, no such vessel may be subchartered or subleased from any such Bowaters Corporation except:

(A) At prevailing rates;

(B) For use otherwise than in the domestic noncontiguous trades;

(C) To a common or contract carrier subject to part 3 of the Interstate Commerce Act, as amended, which otherwise qualifies as a Citizen of the United States and which is not connected, directly or indirectly, by way of ownership or control with such corporation.

[57 FR 23478, June 3, 1992, as amended at 63 FR 6880, Feb. 11, 1998; 69 FR 54248, Sept. 8, 2004]

### § 221.15 Approval for transfer of registry or operation under authority of a foreign country or for scrapping in a foreign country.

In no case will approval be granted to place under foreign registry or to operate under the authority of a foreign country a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel that has had its fishery endorsement revoked pursuant to Appendix D of Public Law 106–554, 114 Stat 2763. Subject to this exclusion, approval requests will be considered as set forth in this section.

(a) *Vessels of under 1,000 gross tons.* (1) The Maritime Administrator hereby grants approval for the Transfer to foreign registry and flag or Operation Under the Authority of a Foreign Country or for scrapping in a foreign country of Documented Vessels or vessels the last documentation of which was under the laws of the United States and which are of under 1,000 gross tons if at the time of such Transfer there are no liens or encumbrances recorded against the vessel in the U.S. Coast Guard Documentation Office at its last U.S. port of record.

(2) This approval shall not apply if the vessel is to be placed under the registry, or operated under the authority of, or scrapped in any country listed in § 221.13(a)(4) of this part.

(3) This approval shall not apply to any such Transfer proposed to be made during any period when the United States is at war or during any national emergency, the existence of which has invoked the provisions of section 37 of the Shipping Act, 1916, as amended (46 App. U.S.C. 835), or to any such Transfer proposed to be made to a citizen of any country when such transfer would be contrary to the foreign policy of the United States as declared by an executive department of the United States.

(b) *Vessels of 1,000 gross tons or more.* (1) Applications for approval of Transfer to foreign registry and flag or Operation Under the Authority of a Foreign Country or for scrapping in a foreign country of Documented Vessels or vessels the last documentation of which was under the laws of the United States and which are of 1,000 gross tons or more will be evaluated in light of—

(i) The type, size speed, general condition, and age of the vessel;

(ii) The acceptability of the owner, proposed transferee and the country of registry or the country under the authority of which the vessel is to be operated; and

(iii) The need to retain the vessel under U.S. documentation, ownership or control for purposes of national defense, maintenance of an adequate merchant marine, foreign policy considerations or the national interest.

(2) If the application is found to be acceptable under the criteria of this paragraph, approval will be granted. For vessels of under 3,000 gross tons, in the absence of unusual circumstances, no conditions will be imposed on the transfer. For vessels of 3,000 gross tons and above, approval will be granted upon acceptance by the owner of the terms and conditions referred to in paragraph (c) or (d) of this section, as applicable. Additional terms deemed appropriate by the Maritime Administrator may be imposed. The terms and conditions shall be contained in an Approval Notice and Agreement ("Contract") executed prior to issuance of the Transfer Order. Unless otherwise specified, the terms and conditions shall remain in effect for the period of the remaining economic life of the vessel or for the duration of a national emergency proclaimed by the President prior or subsequent to such Transfer, whichever period is longer. The economic life of a vessel for purposes of this regulation is deemed to be twenty (20) years for tankers and other liquid bulk carriers and twenty-five (25) years for other vessel types. This period is to be calculated from the date the vessel was originally accepted for delivery from the shipbuilder, but may be extended for such additional period of time as may be determined by the Maritime Administrator if the vessel has been substantially rebuilt or modified in a manner that warrants such extension.

(c) *Foreign transfer other than for scrapping.* If the foreign Transfer of a vessel referred to in paragraph (b) of this section is other than for the purpose of scrapping the vessel and other than a Transfer to the government of an acceptable foreign country, and in the absence of unusual circumstances as determined by the Maritime Administrator (for example a Transfer to an entity controlled by the government of an acceptable foreign country), the following conditions will be imposed on the transferee:

(1) *Ownership.* (i) Without the prior written approval of the Maritime Administrator, there shall be no further Transfer of ownership, change in the registry or Operation of such vessel Under the Authority of a Foreign Country; provided, however, that, if the Transfer of ownership is to a Citizen of the United States or other entity qualified under 46 U.S.C. 12102(a) to document a vessel and the vessel is thereafter documented under U.S. law, no prior written approval shall be required but the transferee shall notify the Vessel Transfer Officer in writing of such change in the ownership and the U.S. documentation within thirty (30) days after such change in ownership and documentation.

(ii) The restrictions contained in paragraph (c)(1)(i) of this section shall not be applicable to a change in ownership resulting from the death of the vessel owner, so long as notification of any such Transfer of ownership occurring by reason of death shall be filed with the Vessel Transfer Officer within 60 days from the date of such Transfer identifying with particularity the name, legal capacity, citizenship, current domicile or address of, or other method of direct communication with, the transferee(s).

(2) *Requisition.* The vessel shall, if requested by the United States, be sold or Chartered to the United States on the same terms and conditions upon which a vessel owned by a Citizen of the United States or documented under U.S. law could be requisitioned for purchase or Charter pursuant to section 902 of the Merchant Marine Act, 1936,

as amended (46 App. U.S.C. 1242). If the vessel is under the flag of a country that is a member of the North Atlantic Treaty Organization (NATO), the Maritime Administrator will consider this condition satisfied if the owner furnishes satisfactory evidence that the vessel is already in noncommercial service under the direction of the government of a NATO country.

(3) *Trade.* Without the prior written approval of the Maritime Administrator, the vessel shall not carry cargoes of any kind to or from, or be operated commercially while within the waters of (as distinct from passage through), a country referred to in § 221.13(a)(4) of this part, nor shall there be any Charter or other Transfer of an interest in the vessel, other than to a Citizen of the United States, for carriage of cargoes of any kind to or from, or for commercial operation while within the waters of (as distinct from passage through), any such country.

(4) *Default.* In the event of default under any or all of the conditions set forth in paragraphs (c) (1), (2) or (3) of this section, the owner shall pay to the Maritime Administration, without prejudice to any other rights that the United States may have, as liquidated damages and not as a penalty, the sum of not less than $25,000 or more than $1,000,000, as specified in the contract, and the vessel shall be subject to the penalties imposed by 46 App. U.S.C. 808 and 839. Pursuant to 46 App. U.S.C. 836, the Maritime Administrator may remit forfeiture of the vessel upon such conditions as may be required under the circumstances of the particular case, including the payment of a sum in lieu of forfeiture, and execution of a new agreement containing substantially the same conditions set forth above and such others as the Maritime Administrator may deem appropriate and which will be applicable to the vessel for the remaining period of the original agreement. In order to secure the payment of any such sums of money as may be required as a result of default, the transferee shall contractually agree, in form and substance approved by the Chief Counsel of the Maritime Administration, to comply with the above conditions and to provide a United States commercial surety bond or other surety acceptable to the Maritime Administrator for an amount not less than $25,000 and not more than $1,000,000, depending upon the type, size and condition of the vessel. "Other surety" may be any one of the following:

(i) An irrevocable letter of credit, which is acceptable to the Maritime Administrator, issued or guaranteed by a Citizen of the United States or by a federally insured depository institution;

(ii) A pledge of United States Government securities;

(iii) The written guarantee of a friendly government of which the transferee is a national;

(iv) A written guarantee or bond by a United States corporation found by the Maritime Administrator to be financially qualified to service the undertaking to pay the stipulated amount;

(v) If the transferee is controlled in any manner by one or more Citizens of the United States, a contractual agreement in form and substance acceptable to the Chief Counsel of the Maritime Administration by the transferee and the Citizens of the United States with authority to exercise such control, if found by the Maritime Administrator to be financially qualified, jointly and severally to pay the stipulated amount, such agreement to be secured by the written guarantee of the transferee and each of the Citizens of the United States or other form of guarantee as may be required by the Maritime Administrator; or

(vi) Any other surety acceptable to the Maritime Administrator and approved as to form and substance by the Chief Counsel of the Maritime Administration.

(d) *Foreign transfer for scrapping.* If the transfer of control, whether or not there is a transfer of registry, of a vessel referred to in paragraph (b) of this section is for the purpose of scrapping the vessel abroad, the following conditions will be imposed on the transferee:

(1) The vessel or any interest therein shall not be subsequently sold to any Person without the prior written approval of the Maritime Administrator, nor shall it be used for the carriage of cargo or passengers of any kind whatsoever.

(2) Within a period of 18 months from the date of approval of the sale, the hull of the vessel shall be completely scrapped, dismantled, dismembered, or destroyed in such manner and to such extent as to prevent the further use thereof, or any part thereof, as a ship, barge, or any other means of transportation.

(3) The scrap resulting from the demolition of the hull of the vessel, the engines, machinery, and major items of equipment shall not be sold to, or utilized by, any citizen or instrumentality of a country referred to in § 221.13(a)(4) of the part, nor may such scrap be exported to these countries. The engines, machinery and major items of equipment shall not be exported to destinations within the United States.

(4) In the event of default under any or all of the conditions set forth in paragraphs (d) (1), (2) or (3) of this section, the transferee shall pay to the Maritime Administration, without prejudice to any other rights that the United States may have, as liquidated damages and not as a penalty, the sum of not less than $25,000 or more than $1,000,000, as specified in the contract, depending upon the size, type and condition of the vessel. This payment shall be secured by a surety company bond or other surety satisfactory to the Maritime Administrator. "Other surety" may be one of those set out in paragraph (c)(4) (i) through (vi) of this section.

(5) There shall be filed with the Vessel Transfer Officer a certificate or other evidence satisfactory to the Chief Counsel of the Maritime Administration, duly attested and authenticated by a United States Consul, that the scrapping of the vessel (hull only) and disposal or utilization of the resultant scrap and the engines, machinery and major items of equipment have been accomplished in accord with paragraphs (d) (2) and (3) of this section.

(e) *Resident agent for service.* (1) Any proposed foreign transferee shall, prior to the issuance and delivery of the Transfer Order covering the vessel or vessels to be transferred, designate and appoint a resident agent in the United States to receive and accept service of process or other notice in any action or proceeding instituted by the United States relating to any claim arising out of the approved transaction.

(2) The resident agent designated and appointed by the foreign transferee shall be subject to approval by the Maritime Administrator. To be acceptable, the resident agent must maintain a permanent place of business in the United States and shall be a banking or lending institution, a ship-owner or ship-operating corporation or other business entity that is satisfactory to the Maritime Administrator.

(3) Appointment and designation of the resident agent shall not be terminated, revoked, amended or altered without the prior written approval of the Maritime Administrator.

(4) The foreign transferee shall file with the Vessel Transfer Officer a written copy of the appointment of the resident agent, which copy shall be fully endorsed by the resident agent stating that it accepts the appointment, that it will act thereunder and that it will notify the Vessel Transfer Officer in writing in the event it becomes disqualified from so acting by reason of any legal restrictions. Service of process or notice upon any officer, agent or employee of the resident agent at its permanent place of business shall constitute effective service on, or notice to, the foreign transferee.

(f) *Administrative provisions.* (1) The subsequent Transfer of ownership or registry of vessels that have been Transferred to foreign ownership or registry or both, or to Operation Under the Authority of a Foreign Country, that remain subject to Maritime Administration contractual control as set forth above, will be subject to substantially the same Maritime Administration policy considerations that governed the original Transfer, including such changes or modifications that have subsequently been made and continued in effect. Approval of these subsequent Transfers will be subject to the same terms and conditions governing the foreign Transfer at the time of the previous Transfer, as modified (if applicable).

(2) The authorization for all approved transactions, either by virtue of 46 App. U.S.C. 808, 835 and 839 or the Maritime Administration's Contract with

the vessel owner, will be by notification in the form of a Transfer Order upon receipt of the executed Contract, the required bond or other surety, and other supporting documentation required by the Contract.

(3) In order that the Maritime Administration's records may be maintained on a current basis, the transferor and transferee of the vessel are required to notify the Vessel Transfer Officer of the date and place where the approved transaction was completed, and the name of the vessel, if changed. This information relating to the completion of the transaction and any change in name shall be furnished as soon as possible, but not later than 10 days after the same has occurred.

[57 FR 23478, June 3, 1992, as amended at 63 FR 6881, Feb. 11, 1998; 66 FR 55596, Nov. 2, 2001]

### § 221.17 Sale of a documented vessel by order of a district court.

(a) A Documented Vessel may be sold by order of a district court only to a Person eligible to own a Documented Vessel or to a mortgagee of the vessel. Unless waived by the Maritime Administrator, a Person purchasing the vessel pursuant to court order or from a mortgagee not eligible to document a vessel who purchased the vessel pursuant to a court order must document the vessel under chapter 121 of title 46, United States Code.

(b) A Person purchasing the vessel, pursuant to court order or from a mortgagee not eligible to document a vessel who purchased the vessel pursuant to a court order, and wishing to obtain waiver of the documentation requirement must submit a request including the reason therefor to the Vessel Transfer Officer.

(c)(1) A mortgagee not eligible to own a Documented Vessel shall not operate, or cause operation of, the vessel in commerce. Except as provided in paragraph (c)(2) of this section, the vessel may not be operated for any purpose without the prior written approval of the Maritime Administrator.

(2) The Maritime Administrator hereby grants approval for a mortgagee not eligible to own a Documented Vessel to operate the vessel to the extent necessary for the immediate safety of the vessel or for repairs, drydocking or berthing changes, but only under the command of a Citizen of the United States.

[57 FR 23478, June 3, 1992, as amended at 63 FR 6881, Feb. 11, 1998]

### § 221.19 Possession or sale of vessels by mortgagees or trustees other than pursuant to court order.

(a) A mortgagee or a trustee of a preferred mortgage on a Documented Vessel that is not eligible to own a Documented Vessel does not require the express approval of the Maritime Administrator to take possession of the vessel in the event of default by the mortgagor other than by foreclosure pursuant to 46 U.S.C. 31329, if provided for in the mortgage or a related financing document, but in such event the vessel may not be operated, or caused to be operated, in commerce. The vessel may not, except as provided in paragraph (b) of this section, be operated for any other purpose unless approved in writing by the Maritime Administrator, nor may the vessel be sold to a Noncitizen without the approval of the Maritime Administrator.

(b) The Maritime Administrator hereby grants approval for such mortgagee or trustee to operate the vessel to the extent necessary for the immediate safety of the vessel, for its direct return to the United States or for its movement within the United States, or for repairs, drydocking or berthing changes, but only under the command of a Citizen of the United States.

(c) A Noncitizen mortgagee that has brought a civil action *in rem* for enforcement of a preferred mortgage lien on a citizen-owned Documented Vessel pursuant to 46 U.S.C. 31325(b)(1) may petition the court pursuant to 46 U.S.C. 31325(e)(1) for appointment of a receiver and, if the receiver is Person eligible to own a Documented Vessel, to authorize the receiver to operate the mortgaged vessel on such terms and conditions as the court deems appropriate. If the receiver is not a Citizen of the United States, the vessel may not be operated in coastwise trade without prior written approval of the Maritime Administrator.

[57 FR 23478, June 3, 1992, as amended at 63 FR 6881, Feb. 11, 1998]

## Subpart C [Reserved]

## Subpart D—Transactions Involving Maritime Interests in Time of War or National Emergency Under 46 App. U.S.C. 835 [Reserved]

## Subpart E—Civil Penalties

### § 221.61 Purpose.

This subpart describes procedures for the administration of civil penalties that the Maritime Administration may assess under 46 U.S.C. 31309 and 31330, and section 9(d) of the Shipping Act, 1916, as amended (46 App. U.S.C. 808(d)), pursuant to 49 U.S.C. 336.

NOTE: Pursuant to 46 U.S.C. 31309, a general penalty of not more than $12,000 may be assessed for each violation of chapter 313 or 46 U.S.C. subtitle III administered by the Maritime Administration, and the regulations in this part that are promulgated thereunder, except that a person violating 46 U.S.C. 31328 or 31329 and the regulations promulgated thereunder is liable for a civil penalty of not more than $30,000 for each violation. A person that charters, sells, transfers or mortgages a vessel, or an interest therein, in violation of 46 App. U.S.C. 808 is liable for a civil penalty of not more than $12,000 for each violation. These penalty amounts are in accordance with Pub. L. 101–410, amended by Pub. L. 104–134. Criminal penalties may also apply to violations of these statutes.

[68 FR 33406, June 4, 2003]

### § 221.63 Investigation.

(a) When the Vessel Transfer Office obtains information that a Person may have violated a statute or regulation for which a civil penalty may be assessed under this subpart, that Officer may investigate the matter and decide whether there is sufficient evidence to establish a *prima facie* case that a violation occurred.

(b) If that Officer decides there is a *prima facie* case, then that Officer may enter into a stipulation with the Party in accordance with § 221.67 of this subpart, or may refer the matter directly to a Hearing Officer for procedures in accordance with § 221.73 to 221.89 of this subpart.

### § 221.65 Criteria for determining penalty.

In determining any penalties assessed, the Vessel Transfer Officer under § 221.67 and the Hearing Officer under §§ 221.73 to 221.89 of this part shall take into account the nature, circumstances, extent and gravity of the violation committed and, with respect to the Party, the degree of culpability, any history of prior offenses, ability to pay and other matters that justice requires.

### § 221.67 Stipulation procedure.

(a) When the Vessel Transfer Office decides to proceed under this section, that Office shall notify the Party in writing by registered or certified mail—

(1) Of the alleged violation and the applicable statute and regulations;

(2) Of the maximum penalty that may be assessed for each violation;

(3) Of a summary of the evidence supporting the violation;

(4) Of the penalty that the Vessel Transfer Officer will accept in settlement of the violation;

(5) Of the right to examine all the material in the case file and have a copy of all written documents provided upon request;

(6) That by accepting the penalty, the Party waives the right to have the matter considered by a Hearing Officer in accordance with §§ 221.73 to 221.89 of this subpart, and that if the Party elects to have the matter considered by a Hearing Officer, the Hearing Officer may assess a penalty less than, equal to, or greater than that stipulated in settlement if the Hearing Officer finds that a violation occurred; and

(7) That a violation will be kept on record and may be used by the Maritime Administration in aggravation of an assessment of a penalty for a subsequent violation by that Party.

(b) Upon receipt of the notification specified in paragraph (a) of this section, a Party may within 30 days—

(1) Agree to the stipulated penalty in the manner specified in the notification; or

(2) Notify in writing the Vessel Transfer Officer that the Party elects to have the matter considered by a Hearing Officer in accordance with the

procedure specified in §§ 221.73 through 221.89 of this subpart.

(c) If, within 30 days of receipt of the notification specified in paragraph (a) of this section, the Party neither agrees to the penalty nor elects the informal hearing procedure, the Party will be deemed to have waived its right to the informal hearing procedure and the penalty will be considered accepted. If a monetary penalty is assessed, it is due and payable to the United States, and the Maritime Administration may initiate appropriate action to collect the penalty.

### § 221.69 Hearing Officer.

(a) The Hearing Officer shall have no responsibility, direct or supervisory, for the investigation of cases referred for the assessment of civil penalties.

(b) The Hearing Officer shall decide each case on the basis of the evidence before him or her, and must have no prior connection with the case. The Hearing Officer is solely responsible for the decision in each case referred to him or her.

(c) The Hearing Officer is authorized to administer oaths and issue subpoenas necessary to the conduct of a hearing, to the extent provided by law.

### § 221.71 Hearing Officer referral.

If, pursuant to § 221.67(b)(2) of this subpart, a Party elects to have the matter referred to a Hearing Officer, the Vessel Transfer Officer may—

(a) Decide not to proceed with penalty action, close the case, and notify the Party in writing that the case has been closed; or

(b) Refer the matter to a Hearing Officer with the case file and a record of any prior violations by the Party.

### § 221.73 Initial Hearing Officer consideration.

(a) When a case is received for action, the Hearing Officer shall examine the material submitted. If the Hearing Officer determines that there is insufficient evidence to proceed, or that there is any other reason which would make penalty action inappropriate, the Hearing Officer shall return the case to the Vessel Transfer Officer with a written statement of the reason. The Vessel Transfer Officer may close the case or investigate the matter further. If additional evidence supporting a violation is discovered, the Vessel Transfer Officer may resubmit the matter to the Hearing Officer.

(b) If the Hearing Officer determines that there is reason to believe that a violation has been committed, the Hearing Officer notifies the Party in writing by registered or certified mail of—

(1) The alleged violation and the applicable statute and regulations;

(2) The maximum penalty that may be assessed for each violation;

(3) The general nature of the procedure for assessing and collecting the penalty;

(4) The amount of the penalty that appears to be appropriate, based on the material then available to the Hearing Officer;

(5) The right to examine all the material in the case file and have a copy of all written documents provided upon requests; and

(6) The right to request a hearing.

(c) If at any time it appears that the addition of another Party to the proceedings is necessary or desirable, the Hearing Officer will provide the additional Party and the Party alleged to be in violation with notice as described above.

(d) At any time during a proceeding, before the Hearing Officer issues a decision under § 221.89, the Hearing Officer and the Party may agree to a Settlement of the case.

### § 221.75 Response by party.

(a) Within 30 days after receipt of notice from the Hearing Officer, the Party, or counsel for the Party, may—

(1) Pay the amount specified in the notice as being appropriate;

(2) In writing request a hearing, specifying the issues in dispute; or

(3) Submit written evidence or arguments in lieu of a hearing.

(b) The right to a hearing is waived if the Party does not submit a request to the Hearing Officer within 30 days after receipt of notice from the Hearing Officer, unless additional time has been granted by the Hearing Officer.

(c) The Hearing Officer has discretion as to the venue and scheduling of a hearing. The hearing will normally be

held at the office of the Hearing Officer. A request for a change of location of a hearing or transfer to another Hearing Officer must be in writing and state the reasons why the requested action is necessary or desirable. Action on the request is at the discretion of the Hearing Officer.

(d) A Party who has requested a hearing may amend the specification of the issues in dispute at any time up to 10 days before the scheduled date of the hearing. Issues raised later than 10 days before the schedule hearing may be presented only at the discretion of the Hearing Officer.

### § 221.77 Disclosure of evidence.

The Party shall, upon request, be provided a free copy of all the evidence in the case file, except material that would disclose or lead to the disclosure of the identity of a confidential informant and any other information properly exempt from disclosure.

### § 221.79 Request for confidential treatment.

(a) In addition to information treated as confidential under § 221.77 of this subpart, a request for confidential treatment of a document or portion thereof may be made by the Person supplying the information on the basis that the information is—

(1) Confidential financial information, trade secrets, or other material exempt from disclosure by the Freedom of Information Act (5 U.S.C. 552);

(2) Required to be held in confidence by 18 U.S.C. 1905; or

(3) Otherwise exempt by law from disclosure.

(b) The Person desiring confidential treatment must submit the request to the Hearing Officer in writing and the reasons justifying nondisclosure. The Hearing Officer shall forward any request for confidential treatment to the appropriate official of the Maritime Administration for a determination hereon. Failure to make a timely request may result in a document being considered as nonconfidential and subject to release.

(c) Confidential material shall not be considered by the Hearing Officer in reaching a decision unless—

(1) It has been furnished by a Party; or

(2) It has been furnished pursuant to a subpoena.

### § 221.81 Counsel.

A Party has the right to be represented at all stages of the proceeding by counsel. After receiving notification that a Party is represented by counsel, the Hearing Officer will direct all further communications to that counsel.

### § 221.83 Witnesses.

A Party may present the testimony of any witness either through a personal appearance or through a written statement. The Party may request the assistance of the Hearing Officer in obtaining the personal appearance of a witness. The request must be in writing and state the reasons why a written statement would be inadequate, the issue or issues to which the testimony would be relevant, and the substance of the expected testimony. If the Hearing Officer determines that the personal appearance of the witness may materially aid in the decision on the case, the Hearing Officer will seek to obtain the witness' appearance. The Hearing Officer may move the hearing to the witness' location, accept a written statement, or accept a stipulation in lieu of testimony.

### § 221.85 Hearing procedures.

(a) The Hearing Officer shall conduct a fair and impartial proceeding in which the Party is given a full opportunity to be heard. At the opening of a hearing, the Hearing Officer shall advise the Party of the nature of the proceedings and of the alleged violation.

(b) The material in the case file pertinent to the issues to be determined by the Hearing Officer shall first be presented. The Party may examine, respond to and rebut this material. The Party may offer any facts, statements, explanations, documents, sworn or unsworn testimony, or other exculpatory items that bear on the issues, or which may be relevant to the size of an appropriate penalty. The Hearing Officer may require the authentication of any written exhibit or statement.

(c) At the close of the Party's presentation of evidence, the Hearing Officer

may allow the introduction of rebuttal evidence. The Hearing Officer may allow the Party to respond to rebuttal evidence submitted.

(d) In receiving evidence, the Hearing Officer shall not be bound by the strict rules of evidence. In evaluating the evidence presented, the Hearing Officer shall give due consideration to the reliability and relevance of each item of evidence.

(e) After the evidence in the case has been presented, the Party may present argument on the issues in the case. The party may also request an opportunity to submit a written statement for consideration by the Hearing Officer. The Hearing Officer shall allow a reasonable time for submission of the statement and shall specify the date by which it must be received. If the statement is not received within the specified time, the Hearing Officer may render a decision in the case without consideration of the statement.

### § 221.87 Records.

(a) A verbatim transcript of a hearing will not normally be prepared. The Hearing Officer will prepare notes on material and points raised by the Party in sufficient detail to permit a full and fair review of the case.

(b) A Party may, at its own expense, cause a verbatim transcript to be made, in which event the Party shall submit, without charge, two copies to the Hearing Officer within 30 days of the close of the hearing.

### § 221.89 Hearing Officer's decision.

(a) The Hearing Officer shall issue a written decision. Any decision to assess a penalty shall be based on substantial evidence in the record, and shall state the basis for the decision.

(b) If the Hearing Officer finds that there is not substantial evidence in the record establishing the alleged violation, the Hearing Officer shall dismiss the case. A dismissal is without prejudice to the Vessel Transfer Officer's right to refile the case if additional evidence is obtained. A dismissal following a rehearing is final and with prejudice.

(c) The Hearing Officer shall notify the Party in writing, by certified or registered mail, of the decision and, if adverse, shall advise the Party of the right to an administrative appeal to the Maritime Administrator or an individual designated by the Administrator from that decision.

(d) If an appeal is not filed within the prescribed time, the decision of the Hearing Officer constitutes final agency action in the case.

### § 221.91 Appeals.

(a) Any appeal from the decision of the Hearing Officer must be submitted in writing by the Party to the Hearing Officer within 30 days from the date of receipt of the Hearing Officer's decision.

(b) The only issues that will be considered on appeal are those issues specified in the appeal which were raised before the Hearing Officer and jurisdictional questions.

(c) There is no right to oral argument on an appeal.

(d) The Maritime Administrator or an individual designated by the Administrator will issue a written decision on the appeal, and may affirm, reverse, or modify the decision, or remand the case for new or additional proceedings. In the absence of a remand, the decision on appeal is final agency action.

(e) The Maritime Administrator or an individual designated by the Administrator shall notify the Party in writing, by certified or registered mail, of the decision on appeal and, if adverse, shall advise the Party of the right of appeal to the courts.

### § 221.93 Collection of civil penalties.

Within 30 days after receipt of the Hearing Officer's decision, or a decision on appeal, the Party must submit payment of any assessed penalty in the manner specified in the decision letter. Failure to make timely payment will result in the institution of appropriate action to collect the penalty.

## Subpart F—Other Transfers Involving Documented Vessels [Reserved]

## Subpart G—Savings Provisions

### § 221.111 Status of prior transactions—controlling dates.

(a) The Maritime Administrator hereby grants approval for any transaction occurring on or after January 1, 1989 and prior to July 3, 1991 that was lawful under 46 CFR part 221, revised as of October 1, 1989.

(b) The Maritime Administrator hereby grants approval for any transaction occurring on or after July 3, 1991 and prior to June 3, 1992 that was lawful under 46 CFR part 221, revised as of October 1, 1991.

(c) Any transaction approved by the Maritime Administrator prior to January 1, 1989, or any transaction that did not require such approval prior to that date, shall continue to be lawful.

# PART 232—UNIFORM FINANCIAL REPORTING REQUIREMENTS

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232.5 Income statement accounts.
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AUTHORITY: Section 204(b), Merchant Marine Act, 1936, as amended (46 App. U.S.C. 1114(b)); 49 CFR 1.66.

SOURCE: 48 FR 30122, June 30, 1983, unless otherwise noted.

### § 232.1 Purpose and applicability.

(a) *Purpose.* The purpose of this regulation is to establish uniform reporting requirements for the preparation of financial reports and submissions of information to the Maritime Administration. The Maritime Administration will, as necessary, issue clarifying instructions to those subject to these reporting requirements to assist in their interpretation and application. The uniform reporting requirements consist of:

(1) A chart of accounts defined in this regulation.

(2) Standard financial report formats, set forth in Form MA–172 (Revised).

(b) *Applicability.* This regulation is application to all participants in financial assistant programs administered by the Maritime Administration, U.S. Department of Transportation, that are required to file periodic financial reports with that agency.

[48 FR 30122, June 30, 1983, as amended at 58 FR 62043, Nov. 24, 1993]

### § 232.2 General instructions.

(a) *Use of generally accepted accounting principles.* All contractors shall conform their accounting policies to generally accepted accounting principles (promulgated by the Financial Accounting Standards Board of the American Institute of Certified Public Accountants).

(b) *Need to conform accounting information.* All contractors may continue to use their current accounting system, if the system provides a basis for the preparation of reports in the prescribed formats and is consistent with generally accepted accounting principles.

(c) *Reconciliation of financial reports.* When a program participant issues certified financial statements following accounting policies different from those followed for the financial statement filed with the Maritime Administration (such as reports filed with the Securities and Exchange Commission, public service commissions or other regulatory agencies, or reports using other acceptable accounting methods differing from methods used for this regulation's purposes), the program participant shall clearly set forth the nature and amount of each adjustment necessary to reconcile the published statements with those filed with the Maritime Administration.

(d) *Submission of questions.* (1) A contractor may submit in writing, or by electronic options (such as facsimile and Internet), if practicable, any question involving the interpretation of any provision of this part for consideration and decision to the Director, Office of Financial and Rate Approvals, for the Maritime Security Program, or Director, Office of Ship Financing, for the Maritime Loan Guarantee Program (Title XI), Maritime Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC

20590. Appeals from such interpretation will be in accordance with the interpretation letter.

(2) A contractor who has a question of financial accounting or reporting procedure pending before the Maritime Administration at the time a financial report is due shall file the report in accordance with established scheduled dates. The contractor shall include in the report a footnote disclosure that adequately describes the question pending, the manner of presentation in the report, and the relative impact on the balance sheet and income statement, respectively.

(e) *Effective Date.* This regulation is effective as of December 27, 1993 and its requirements are mandatory for financial reports for accounting periods ending on or after December 31, 1993.

[48 FR 30122, June 30, 1983, as amended at 58 FR 62043, Nov. 24, 1993; 68 FR 62537, Nov. 5, 2003; 69 FR 61449, Oct. 19, 2004]

### § 232.3 Chart of accounts.

(a) *Purpose of accounts.* A contractor shall use this chart of accounts as a guide for preparing the financial statements and for other required financial reports required to be submitted to the Maritime Administration. However, whenever there is a conflict between the meaning of any term used in the Chart of Accounts in this part 232 and that stated in any revision to generally accepted accounting principles, the meaning of the latter shall control and shall be followed.

(b) *Account numbers.* Contractors are not required to use these account numbers or titles for their internal accounting.

(Approved by the Office of Management and Budget under control number 2133–0005)

[48 FR 30122, June 30, 1983, as amended at 58 FR 62044, Nov. 24, 1993]

BALANCE SHEET

### § 232.4 Balance sheet accounts.

(a) *Accounts defined.* Each account is identified by an account number and an account title, followed by a text describing the accounting information to be included in that account. Where considered necessary, accounting procedures are also included to explain how the contractor shall disclose information for reporting purposes.

(b) *Purpose of balance sheet accounts.* The balance sheet accounts are intended to disclose the financial condition of the contractor as of a given date.

(*A*) *Asset Accounts.*

(*1*) *100 Cash.*

(i) This account shall include the amount of current funds available on demand in the hands of financial officers or deposited in banks or trust companies, including cash in transit for which agents or others have received credit. Cash appropriated or otherwise restricted for any purpose shall be included in Account 300, "Restricted Funds."

(ii) Compensating balances included in this account shall be disclosed by appropriate footnote.

(*2*) *120 Marketable Securities.*

(i) This account shall include securities and other temporary investments which are available for general purposes of the business. In no case shall securities of the reporting contractor or of a related party be included in this account. Separate subaccounts may be used to account for discounts and premiums on marketable securities.

(ii) For financial reporting, the lower of aggregate cost or market value at the balance sheet date shall be used to value securities included in this account.

(*3*) *140 Notes Receivable.*

(i) This account shall include the amount of all obligations in the form of short-term notes receivable or other evidences (except interest coupons) of money receivable and due on demand or within one year from date of issue.

(ii) Separate subaccounts shall be used to segregate notes receivable from related parties.

(*4*) *150 Accounts Receivable.*

(i) This account shall include trade or traffic receivables and claims receivable from insurance underwriters and other miscellaneous receivables not otherwise provided for in other accounts. Accrued accounts receivable for interest, dividends, rents, royalties,

charters and other unmatured receivables of a current nature shall be reported in this account, except those accrued amounts which are required to be deposited to a restricted fund.

(ii) Separate subaccounts shall be used to segregate trade or traffic receivables, claims receivables and miscellaneous receivables. Receivables arising from transactions with related parties shall also be segregated.

(iii) This account shall also be used to report construction-differential subsidy (CDS) and operating-differential subsidy (ODS) estimated to have accrued to the contractor and which remain unpaid as of the balance sheet date.

(iv) Separate subaccounts shall be maintained by contract number and, under each contract, identified by year of termination and by category of subsidy as applicable, e.g., for CDS categories may include design and inspection costs; and for ODS categories may include wages, maintenance and repair, and any other category for which the contractor receives an operating subsidy.

(*5*) *160 Allowance for Bad Debts.*

This account shall be credited at the close of each accounting period for estimated uncollectable notes and accounts.

(*6*) *170 Other Current Assets.*

(i) Inventories, prepaid expenses and other items that are expected to be used or consumed within 12 months of purchase or acquisition shall be reported in this account.

(ii) Acquisition of similar items that will not be used or consumed within one year should be reported as part of account 360, Other Assets.

(iii) For Financial Report purposes, this account shall be used to record the contra entries of accrued deposits in account 300 Restricted Funds.

(*7*) *300 Restricted Funds.*

(i) This account shall include the amount of cash and securities (at cost) deposited to any restricted fund, including but not limited to Title XI Reserve or Restricted Fund, Capital Construction Fund, Construction Reserve Fund, Title XI Escrow Fund, Title XI Construction Fund, Drilling Rig Reserve Fund, Insurance Fund, Debt Retirement Fund, special and guarantee deposits.

(ii) For each fund established, subsidiary accounts shall be used to separately account for cash or securities deposited to the fund. At the close of each accounting period accrual entries shall be made to account for earned but undeposited investment income.

(iii) Compensating balances under an agreement which legally restricts the use of such funds and constitutes support for borrowing arrangements shall be included in this account.

(iv) Deposits required to be made into any Restricted Fund are to be included in the column "Accrued for Deposit"—appearing in Schedule 211. The contra entry for the accrual shall be credited to account 170 Other Current Assets.

(*8*) *310 Investments.*

(i) This account shall include amounts of investment instruments intended to be held more than one year and includes securities of related parties, noncurrent notes receivable and noncurrent accounts receivable, both from related parties and others, cash value of life insurance policies and other investments. Noncurrent marketable securities shall be carried at the lower of aggregate cost or market value at the balance sheet date.

(ii) Separate subaccounts shall be maintained for the various investments, including those resulting from related party transactions.

(iii) For financial reporting purposes, the lower of cost or market value at the close of business on the balance sheet date will be used to value the securities included in the account except as noted below.

(iv) Investments in related parties must be reported using the equity or consolidated basis of accounting as adopted by the Financial Accounting Standards Board.

(*9*) *330 Property and Equipment.*

(i) This account shall include the cost of acquisition or construction and related capitalizable cost, including additions and betterments and all other associated cost necessary to place the respective property and equipment in acceptable condition for its intended use. This account shall also include the capitalized amount of financing leases, computed in accordance with generally

accepted accounting principles, as prescribed by the Securities and Exchange Commission and the Financial Accounting Standard Board.

(ii) Subaccounts shall be maintained by type and category of property and equipment such as, but not limited to, the following: (A) Floating equipment, including self-propelled vessels for transporting cargo or passengers in U.S. foreign or worldwide foreign commerce, tugs and barges, drilling platforms used in offshore operations, fishing and associated service vessels, service vessels used in conjunction with off-shore drilling platforms and deep-water mining operations, lighters primarily used to transport cargo within port areas and river systems or carried aboard mother vessels—i.e., LASH and SEABEE lighters and barges, other floating equipment ancillary to the operator's primary vessel operations; (B) containers and flat racks; (C) chassis and trailer equipment; (D) terminal property and cargo handling equipment; (E) other property and equipment; (F) leaseholds, leasehold improvements and Capital Leases; and (G) construction work-in-progress (to provide information by project or by type of capitalized asset cost category). For each asset account within account 330 a separate depreciation or amortization accumulation account must be established except for work-in-progress accounts.

(*10*) *360 Deferred Charges.*

(i) This account shall be used to report expenses, the payment for which the contractor has become liable currently, but which will not be charged to income within one year of the balance sheet date.

(ii) Separate subaccounts shall be maintained to identify the different categories of expense included in this account. These subaccounts may include such items as prepaid insurance; the expense of issuing long-term debt and for absorption of discounts on the stated value of the debt instruments; organization expenses; deferred prepayments and other deferred charges.

(iii) Separate subaccounts shall be maintained for amortization of the various deferred charges included in this account.

(*11*) *380 Other Assets.*

All assets, not otherwise provided for above, shall be reported in this account. Separate subaccounts shall be maintained for the various types of assets, including notes and accounts receivable which are not due in the normal course of business within one year of the balance sheet date. Each type of asset shall be further segregated to disclose amounts due from officers and employees of the reporting contractor or operator, officers and employees of related parties, related parties themselves, allowance for the trade in of vessels to the Maritime Administration (where the allowance is to be applied by the agency on behalf of the contractor toward progress payments on new construction) and other assets not otherwise accounted for as miscellaneous assets.

(*12*) *390 Intangible Assets.*

(i) This account shall be used to report the amount of goodwill attributed to the cost of acquiring a business or segment of a business from an unrelated party, as well as the cost of acquiring by purchase, development or other means such intangible assets as patents, copyrights, trade names, operating rights, and similar assets.

(ii) The contractor shall maintain separate subaccounts for the identified intangible assets, including subaccounts to identify their respective amortization.

(*B*) *Liability Accounts.*

(*1*) *400 Notes Payable and Current Portion of Long-Term Debt.*

(i) The amount reported for this account shall include the face value of notes, drafts and other evidences of indebtedness issued by the contractor which are payable on demand or within one year of the balance sheet date.

(ii) Separate subaccounts shall be used to identify different groups of creditors, e.g., banks, insurance companies, officers and employees, related parties and all other creditors.

(iii) The amount of capitalized lease liability maturing during the twelve months following the balance sheet date shall also be reported in this account. A record shall be maintained for each lease agreement, with a description of the type of equipment under lease.

(iv) This account shall not include obligations due within one year which the contractor intends to refinance on a long-term basis or which are payable from restricted funds. Long-term refinancing of short-term obligations means replacement with long-term obligations or equity securities or renewal, extension, or replacement with short-term obligations for an uninterrupted period extending beyond one year from the balance sheet date. Such short-term obligations are to be recorded in account 510, Long-term Debt.

(*2*) *420 Accounts Payable.*

(i) The amount reported for this account shall include accounts payable—trade; accounts payable—traffic; pension and welfare funds; accounts payable—Maritime Administration; and other accounts payable.

(ii) Sufficient information shall be maintained to identify individual creditors and the general categories or classification of the liabilities.

(iii) Debts of individual creditors not incurred in the normal course of business shall be identified by group, e.g., officers and employees, affiliated companies, officers and employees of an affiliated company, and other appropriate groupings of creditors not otherwise affiliated in any way with the contractor.

(*3*) *440 Accrued Liabilities.*

(i) This account shall be used to report the amount of accrued taxes, accrued operating expenses and other accrued liabilities arising in the regular course of business.

(ii) Subaccounts shall be maintained for each category of liability.

(*4*) *450 Other Current Liabilities.*

(i) This account shall include all current liabilities for which no other account has been provided.

(ii) Subaccounts shall be maintained to account separately for each class of current liabilities that arise from transactions with officers or employees, affiliated companies and officers or employees of affiliated companies, and must be readily identifiable to facilitate financial reporting requirements.

(*5*) *470 Advance Payments and Deposits.*

(i) This account shall be used to report the balance of collections from customers for services not yet provided by the contractor.

(ii) Sufficient accounting information shall be maintained to readily disclose collections from related parties.

(*6*) *510 Long-Term Debt.*

(i) This account shall be used to report the noncurrent portion of long-term debt, including mortgage notes payable to the Maritime Administration, U.S. Government insured or guaranteed debt obligations issued under Title XI of the Act, and the face amount of bonds, debentures and other long-term debt not provided for in other accounts.

(ii) Subaccounts shall be maintained to disclose unsecured and secured debt by creditor and by secured asset.

(iii) This account shall also include the balance of the long-term portion of capitalized lease liabilities. Reporting shall be by lease agreement and type of asset leased.

(iv) This account shall also include obligations due within one year which are expected to be refinanced on a long-term basis in accordance with the discussion of Account 400.

(v) Separate subaccounts shall be maintained to record the premiums for each class of funded debt (which shall be amortized over the respective lives of the securities by credit to Account 670, Other Revenue).

(*7*) *530 Other Liabilities.*

(i) This account shall be used to report the balance of all other liabilities maturing after one year from the balance sheet date and for which no other account has been specifically provided.

(ii) Subsidiary accounts shall be maintained for each category or type of liability and accounted for by debtor.

(iii) Reporting of balances outstanding shall show separately amounts due to officers and employees, affiliated companies and officers and employees of affiliated companies.

(*8*) *560 Deferred Credits.*

This account shall be used to report the amount of accumulated deferred income taxes, income or credits for which no other account is specifically provided.

(*C*) *Equity Accounts.*

(*1*) *570 Invested Capital.*

This account shall be used to report the amount of capital contribution by an individual in a proprietary company, by partners of a partnership, and by stockholders of a corporation for the par or stated value of the capital stock outstanding and additional paid-in capital.

(*2*) *580 Treasury Stock.*

This account shall be used to report the cost to the contractor of its stock that has been reacquired.

(*3*) *590 Retained Earnings.*

(i) This account shall be used to report the balance of restricted and unrestricted retained earnings for an incorporated business entity. Subsidiary accounts shall be used for each class of restricted earnings.

(ii) Partnerships should make appropriate changes of titles to account for partners accounts.

(iii) For purposes of meeting the Maritime Administration's Dividend Policy for Operators Receiving ODS (46 CFR part 283), accounting information for unrestricted retained earnings shall be made available to show the income or loss taken into retained earnings, dividends and other distributions paid, and the current balance of unrestricted retained earnings available for distribution.

[48 FR 30122, June 30, 1983, as amended at 58 FR 62044, Nov. 24, 1993; 58 FR 64798, Dec. 9, 1993]

INCOME STATEMENT

## § 232.5 Income Statement Accounts.

(a) *Accounts Defined.* Each account shall be identified by an account number and an account title followed by a text describing the accounting information to be included in that account.

(b) *Purpose of Income and Expense Accounts.* The income and expense accounts shall show for each reporting period the amount of money the contractor is entitled to receive for services rendered; the income accrued from investments in securities and property; accrued expenses; and income and expense attributable to extraordinary items.

(*D*) *Revenue Accounts.*

(*1*) *600 Vessel Revenue.*

(i) This account shall be used to report revenue (including surcharges) from operations. As used here, vessel refers to any asset that qualifies for obligation guarantees pursuant to regulations issued under Title XI of the Act (46 CFR part 298).

(ii) For contractors who operate vessels in the U.S. foreign commerce with a construction or operating-differential subsidy agreement (CDSA or ODSA), operating revenue attributed to such vessels shall be separately accounted for to report the following: Freight-foreign, freight-coastwise and intercoastal; passenger-foreign, passenger-coastwide and intercoastal; charter revenue; and other voyage revenue. Contractors with an ODSA shall further describe freight and passenger revenue—foreign (including surcharges), U.S. foreign commerce revenue outbound and foreign commerce revenue (transportation between foreign ports). Revenue shall be accounted for to facilitate reporting the source of revenue by trade route or service area.

(iii) All other contractors shall report vessel revenue by category or class, or by operating segment or division if different business segments or operating divisions produce vessel revenue.

(iv) Except as otherwise provided in paragraph (*D*)(*1*)(i) of this section, vessel revenue shall be accounted for following generally accepted accounting principles for the segment of the maritime industry of which the contractor is a part and shall be applied consistently between reporting periods.

(*2*) *640 Operating-Differential Subsidy.*

(i) This account shall be used to report the revenue accrued under provisions of the ODSA.

(ii) Subsidiary accounts shall be used to account for the amount of subsidy accrued by expense classifications to include: Wages of officers and crew; subsistence of officers and crew; maintenance, repairs and upkeep not compensated by insurance; hull and machinery insurance premiums; protection and indemnity insurance premiums; protection and indemnity insurance; deductible expense attributed to illness or injury of crew members; and other expense categories as may be specified in the ODSA.

(iii) Records shall be maintained by vessel for each trade route or service

area in which a vessel subject to an ODSA operates.

(iv) If ODS is accrued at substantially different rates developed by the contractor applicable to any year in which final rates have not been agreed to, the difference between the ODS accruals based on billing rates established by MARAD and the ODS accruals based on the contractor's rates shall be disclosed in appropriate footnotes to the balance sheet and to the income statement.

(*3*) *650 Other Shipping Operations Revenue.*

This account shall be used to report revenue earned from shipping activities other than vessel operations. Examples are revenue from pooling agreements, terminal services provided to others, and cargo handling services performed for others; cargo equipment rentals, and repairs to cargo equipment belonging to others; agency fees, commissions and brokerage fees earned.

(*4*) *670 Other Revenue.*

This account shall be used to report revenue from the following sources: Interest bearing securities, dividends from capital stock, gains from the sale of assets not accounted for under the provisions prescribed for account 995, amortization of premium on funded debt, income or loss from subsidiaries, and other revenue not otherwise provided for, including nonshipping operations revenue.

(*E*) *Expense Accounts.*

(*1*) *700 Vessel Operating Expense.*

(i) This account shall be used to report expenses of vessel operations of any kind. As used here, vessel has the same meaning as in paragraph (D)(1)(i) of this section.

(ii) For contractors with an ODSA who operate vessels subject to such an agreement in the U.S.-foreign commerce or worldwide foreign commerce, vessel expense shall be recorded by category as follows: Salaries and wages of officers and unlicensed crew, including relief crews and others regularly employed aboard the vessel; fringe benefits, such as pension and welfare, vacation payments to unions on behalf of the officers, crew and others, accrued payroll taxes; consumable stores, supplies and equipment, sales taxes, delivery and inspection charges; vessel maintenance and repair expense, including laundry service, inspection services, cost of maintaining expendable equipment and other costs not recoverable from insurance which are integral parts of vessels (including the purchase of permanent equipment and spares required by the classification societies in the United States and its territories and possessions); hull and machinery insurance costs, including premium expense, deductibles which have been incurred or paid, protection and indemnity insurance, including premium expense, personal injury and illness deductibles which have been incurred or paid, and second seaman's insurance premiums; premiums for other marine risk insurance involving the vessel and not properly chargeable to hull and machinery insurance or to protection and indemnity insurance accounts; vessel fuel and incidental costs; charter hire expenses, including time, trip, short-term and long-term bareboat charter hire; and other vessel expenses not properly chargeable to other accounts described herein which are incidental to the operation of vessels.

(iii) For contractors who own or operate vessels not subject to an ODSA, vessel expense shall include all expenses directly attributable to the operation of vessels. Such expense shall include such expense classifications as generally in use by the segment of the industry with which the contractor is identified. To the extent applicable, the expense classifications mentioned in the preceding paragraph (ii) shall be used.

(iv) Contractors operating vessels to transport cargo or passengers shall maintain appropriate vessel expense records for the purpose of filing vessel operating reports with the Maritime Administration.

(*2*) *750 Vessel Port Call Expense.*

(i) This account shall be used to report the expenses of a vessel at each port of call. Port call expenses may include: Charges for wharfage and dockage of the vessel, pilotage, entry dues and fees, port dues and taxes; anchor dues; canal tolls; launch hire, and tug hire; dispatch and husbanding fees of agents; and other port and terminal expenses.

(ii) Port charges attributable to the vessel's cargo or passengers are not to be reported in this account. Such expenses shall be reported in Account 760, Cargo Handling Expense.

(*3*) *760 Cargo Handling Expense.*

This account shall be used to report all expenses directly attributable to the handling of cargo or passengers for a fee. This account shall include: Cost of preparing a vessel to receive cargo; cost of loading and discharging of the vessel's cargo, including stevedoring and equipment and service charges of stevedoring contractors; cost of transporting cargo from the point of delivery into the possession of the contractor to the loading port and from the discharge port to the point of delivery stipulated by the freight agreement if different from the port of discharge; brokerage expense, including commissions paid brokers' agencies for the procurement of passengers or freight; cargo loading plans, demurrage, costs incidental to receiving, delivering and warehousing at freight station facilities; and other charges for cargo services performed by others.

(*4*) *800 Inactive Vessel Expense.*

(i) This account shall be used to report all expenses incurred during and directly incident to inactive periods of vessels.

(ii) Expenses in this account include: Wages of officers and crew; contributions to crew fringe benefit plans; accrued payroll taxes; subsistence cost of personnel assigned to inactive vessels; consumables other than subsistence items; vessel maintenance expense; vessel repairs; insurance expense; charter hire cost; wharfage and dockage; port expense; and miscellaneous expenses.

(*5*) *860 Other Shipping Operations Expense.*

This account shall be used to report cost of container leasing, maintenance and repair cost and costs of shipping related activities in which the contractor engages to support vessels, such as terminal operations, cargo equipment, fleet operations, cargo pooling agreements, container loading and other activities that are not accounted for elsewhere and that are ancillary to the contractor's vessel operations.

(*6*) *900 General and Administrative Expenses.*

(i) This account shall be used to report the administrative and general expenses incurred in the operation of the business.

(ii) This account shall include: Compensation of corporate officers, directors, administrative and service employees; fringe benefits of general and administrative personnel; legal fees; accounting and auditing fees; other professional fees; office and storage expense; utilities; communications expense; data processing expense; dues; subscriptions; entertainment; travel expense; insurance expense; maintenance and repair expense for office facilities; fixtures and equipment; fees and commissions paid to managing agents; advertising expense; foreign currency conversion; and other expenses to enhance the operation of the business.

(*7*) *940 Depreciation and Amortization Expense.*

(i) This account shall be maintained by class of assets as accounted for in the property and equipment accounts.

(ii) Subaccounts shall be grouped by classifications such as: Vessels; terminals; cargo equipment; office furniture and fixtures; and nonshipping assets.

(*8*) *950 Other Expense.*

This account is to be used to report expenses not chargeable to any other expense account. Such charges may include: Amortization of deferred charges; taxes other than income; debt discount and expense; nonshipping operations expense; organization and preoperating expense and other miscellaneous deferred charges; as well as doubtful notes and accounts receivable.

(*9*) *960 Interest Expense.*

(i) This account shall be used to report all interest expense accrued and charged to income during the period.

(ii) Subaccounts shall be maintained by debt source/contract to provide information needed to fulfill reporting disclosure requirements.

(*10*) *970 Income Taxes.*

(i) This account shall be used to report accrued income tax liability for the current year's operation exclusive of extraordinary items, discontinued operations and the cumulative effect of a change in accounting policy.

(ii) Sufficient accounting records shall be maintained to meet income and expense allocation requirements that may exist as a result of a Capital Construction Fund Agreement entered into under 46 CFR parts 390 and 391, pursuant to provisions of Title VI of the Act.

(*11*) *990 Cumulative Effect of Change in Accounting Policy*.

(i) This account shall be used to report the cumulative effect of a change in accounting policy or a change required under generally accepted accounting principles.

(ii) A footnote shall be added to the income statement explaining the substance of the old and new accounting methods and the reason supporting the change in accounting policy.

(iii) The amount reported in this account shall be net of all taxes.

(*12*) *995 Income or Loss from Extraordinary Items Net of Taxes*.

(i) Amounts representing gain or loss from extraordinary items, as defined by generally accepted accounting principles customarily applied in the industry of which the contractor is a part, shall be reported in this account. Generally, these transactions would be attributed to insurance proceeds from the total loss of a vessel or catastrophic losses to shore-based facilities, as well as from sales of damaged assets scrapped because of a natural catastrophe, and disposal of assets used primarily in a business segment which is being discontinued.

(ii) Sufficient records shall be maintained to fully describe and account for all aspects of each item reported in this account, and when a firm commitment is made to dispose of an operating business segment, a provision for anticipated gain or loss to be realized in the subsequent period from disposal of assets and winding down of operations of the discontinued segment shall be taken into income in the year the contractor makes the decision.

(iii) Amounts in this account must be net of all taxes including Federal income taxes.

[48 FR 30122, June 30, 1983, as amended at 58 FR 62044, Nov. 24, 1993]

## § 232.6 Financial report filing requirement.

(a) *Reporting Frequency and Due Dates*. The contractor shall file a semiannual financial report and an annual financial report, in the format referred to in § 232.1(a)(2), which MARAD shall make available to the contractor. This Form MA–172 (Revised) shall be prepared in accordance with generally accepted accounting principles and modified to the extent necessary to comply with this regulation. The annual financial report shall be reconciled to the financial statements audited by independent certified public accountants (CPAs) licensed to practice by a state or other political subdivision of the United States, or licensed public accountants licensed to practice by regulatory authority or other political subdivision of the United States on or before December 31, 1970. Both the annual and semiannual financial reports shall be due within 120 days after the close of the contractor's annual or semiannual accounting period. If certified (CPA) statements are not available when required, company certified statements are to be submitted within the due dates, and the CPA statements shall be submitted as soon as available. The respondent may, in place of any Schedule(s) contained in the Form MA–172, submit a schedule or schedules from its audited financial statements, or a computer print-out or schedule, consistent with the instructions provided in the MARAD formats. MARAD will accept electronic options (such as facsimile and Internet) for transmission of required information to MARAD, if practicable.

(b) *Certification*. Annual and semiannual reports shall be approved by the Respondent and Official of Respondent whom MARAD may contact regarding the report in the reporting formats prescribed as the MA–172 submission.

(c) *Presumption of confidentiality*. MARAD will initially presume that each part of the financial reports or data submitted as prescribed by this Regulation, other than Schedule 101—Identity of Respondent and Schedules 102 and 103, only with respect to the

names and titles of directors and principal officers and employees, is privileged or confidential within the meaning of 5 U.S.C. 552(b)(4). In the event of a subsequent request for any portion of the reports or data under 5 U.S.C. 552, the submitter will be notified of such request and given the opportunity to comment. The contractor shall claim confidentiality at that time by memorandum or letter stating the basis, in detail, for such assertion of exemption, including but not limited to statutory and decisional authorities. Those parts not so claimed by the submitter to be confidential will be disclosed, and those parts so claimed will be subject to initial determination by the Freedom of Information Act Officer.

(Approved by the Office of Management and Budget under control number 2133–0005)

[48 FR 30122, June 30, 1983, as amended at 68 FR 62537, Nov. 5, 2003; 69 FR 61449, Oct. 19, 2004]

# SUBCHAPTER C—REGULATIONS AFFECTING SUBSIDIZED VESSELS AND OPERATORS

## PART 249—APPROVAL OF UNDERWRITERS FOR MARINE HULL INSURANCE


Sec.
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249.9 American market participation.
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AUTHORITY: Sec. 204(b), 1109, Merchant Marine Act, 1936, as amended (46 App. U.S.C. 1114(b), 1279b); 49 CFR 1.66.

SOURCE: 53 FR 23119, June 20, 1988, unless otherwise noted.

### § 249.1 Purpose.

This part prescribes certain regulations governing the placement of marine hull insurance on vessels built or operated with subsidy or covered by vessel obligation guarantees issued pursuant to Title XI of the Merchant Marine Act, 1936, as amended (Act). (46 U.S.C. 1271–1279)

### § 249.2 Policy.

(a) It is the policy of the Maritime Administration (MARAD) that companies subject to requirements for the placement of marine hull insurance shall be afforded the widest possible opportunity to obtain the necessary coverage, with minimal regulatory constraints, with financially sound underwriters, and that such placement should not create any unnecessary impediments to competitive maritime operations.

(b) It is also the policy of MARAD to require owners of vessels with ODS or Title XI obligation guarantees to allow the American marine insurance market the opportunity to compete for the marine hull insurance on their vessels before such insurance is placed. Consistent with sound business judgment, owners will be expected to place their insurance with the American market to the maximum extent possible when the rates, terms and conditions offered by American underwriters are competitive with those offered by foreign underwriters.

### § 249.3 Amounts of insurance.

MARAD will inform the owner of each vessel that is subsidized or covered by vessel obligation guarantees, prior to initial placement and at least annually thereafter, of the minimum amount of insurance required to be placed on the vessel.

### § 249.4 Eligibility.

*In General.* All required marine hull insurance must be placed with:

(a) Underwriters licensed to do business in one or more of the United States;

(b) Underwriters at Lloyds;

(c) Member companies of the Institute of London Underwriters; or

(d) Other underwriters specifically approved in advance by the Maritime Administration.

### § 249.5 Eligibility criteria.

(a) *U.S. Underwriters.* Underwriters licensed to do business in a state are eligible to participate without further consideration, provided they have at least a B security rating, as published in the latest edition of A.M. Best's Insurance Reports, and the amount of insurance does not exceed the limitation on risk prescribed in § 249.8.

(b) *Foreign Underwriters.* (1) Underwriters at Lloyds are eligible to participate without further consideration.

(2) Underwriters which are members of the Institute of London Underwriters (ILU) (i.e., *member* companies, not parents or affiliates of the member companies) are eligible to participate without further consideration, provided that the ILU member company actually underwriting the risk maintains a trust fund in the United States for the benefit of its U.S. policyholders in an amount at least equal to the minimum provided in § 249.7(d), and the

amount insured does not exceed the limitation on risk prescribed in §249.8. Parent companies or affiliates of the ILU member companies are treated as other foreign underwriters under subsection (c) of this section.

MARAD reserves the right to review this eligibility at any time.

(c) *Other Foreign Underwriters.* Foreign underwriters, other than those specified in paragraphs (b) (1) and (2) of this section, may also be eligible to participate in the writing of marine hull insurance on MARAD program vessels, if approved to do so in accordance with the procedures contained in §§249.6 and 249.7.

(d) *Documentation of eligibility.* It shall be the responsibility of the vessel owner and its broker to ensure that the requirements of this section are met, and they should be able to provide MARAD, upon request, with documentation to that effect.

**§249.6 Application procedures.**

(a) MARAD may grant specific approval for underwriters described in §249.5(c) to participate in the writing of marine hull insurance on MARAD program vessels, only in advance of any actual placement.

(b) Only those foreign underwriters who have obtained a high rating (A or comparable) from an accepted international rating service may apply, and if approved, such approval will be contingent upon continued maintenance of such rating. MARAD will make available to interested parties the names of any accepted international rating service.

(c) To seek approval, an applicant shall submit to MARAD:

(1) Certified financial data for the five previous years in sufficient detail to enable MARAD to assess the financial strength and solvency of the applicant. Normally, this would be the same data which the underwriter must submit to the regulatory agency in its country of domicile. However, MARAD may request additional data if the applicant's submissions are considered inadequate;

(2) A comprehensive description and English language version of the insurance regulatory regime that is in place in the insurer's country of domicile. (After review, MARAD may contact the foreign national regulatory authorities, as appropriate);

(3) An affidavit in writing, executed by an agent of the applicant who is a domiciliary of the United States, and supported by appropriate documentation, to demonstrate that there is nothing in either law or practice to preclude a U.S. insurer from obtaining the same access to the applicant's home market as the applicant is seeking to the U.S. market, and

(4) The details of its reinsurance program, if it wishes to write any risks in excess of five percent of its policyholders' surplus. These details shall be accompanied by a statement that clearly demonstrates the special circumstances and good cause by which MARAD should be persuaded to modify its general policy on limitation of risk described in §249.8.

**§249.7 Approval.**

(a) Approval of the applicant will be based upon an assessment of the applicant's financial condition and solvency, its rating by an accepted international rating service, suitability of the regulatory regime under which the applicant must operate in its home country, and on the principle of reciprocal non-discrimination. MARAD will not approve access to the U.S. hull insurance market, if U.S. insurers are denied similar access to the hull insurance market in the applicant's home country.

(b) MARAD will publish in the FEDERAL REGISTER each Notice of Application received from foreign underwriters described in §249.5(c), affording interested persons an opportunity to bring to MARAD's attention any discriminatory laws or practices relating to the placement of marine hull insurance which might exist in the applicant's country of domicile.

(c) In granting approval, MARAD will consider all materials available to it, and may impose reasonable terms and conditions upon any such approvals granted.

(d) Upon approval, applicant will be required to establish and maintain for the benefit of its U.S. policyholders a U.S. trust fund in the amount of at least $1.5 million, such amount to be

reviewed periodically (but not more frequently than annually), and adjusted as appropriate. This requirement may be satisfied by means of an appropriate irrevocable letter of credit.

(e) All policies, at the time of issuance, shall contain the latest American Institute of Marine Underwriters' forms, or equivalent, as approved by MARAD.

(f) All policies issued by foreign underwriters shall include New York Suable Clause or Service of Suit (USA) Clause.

(g)(1) To maintain approval, foreign underwriters, other than those specified in § 249.5(b), shall, in addition to retaining the high rating from an accepted international rating service, file annual financial statements in the same level of detail as required for original approval. Such statements shall be due within 120 days after the close of the underwriter's annual accounting period.

(2) In addition, a new affidavit concerning the lack of discriminatory laws or practices related to hull insurance in the underwriter's home market, as described in § 249.6(c)(3), shall be filed annually at the same time as the financial statements.

(h) Since there is no annual reapproval required, foreign underwriters which are approved shall agree to submit additional information, as requested by MARAD, if it has reason to believe there has been a change in the underwriter's financial status or business practices which could affect the quality of its security. Failure to provide such information on a timely basis could result in immediate withdrawal of the authorization to write hull insurance on MARAD program vessels.

### § 249.8 Limitation on risk.

(a) Underwriters may take a line on any single risk in excess of five percent of its Policyholders' Surplus only with the prior approval of MARAD. MARAD will grant such approval to certain underwriters only in special circumstances, and for good cause shown. The standard to be applied in such cases shall be that the underwriter's *net* retention on any single risk may not exceed five percent of its Policyholders' Surplus, the gross amount of the risk may not exceed its surplus, and the reinsurers must have a high (A or comparable) rating from an accepted international rating service.

(b) The vessel owner shall also provide MARAD with a mortgagee's interest policy in an amount equal to the difference between the net retention and the amount of the line taken by such underwriter.

### § 249.9 American market participation.

(a) Owners of vessels receiving ODS or Title XI vessel obligation guarantees, or their brokers, shall offer to the American marine insurance market the opportunity to compete for the placement of marine hull insurance on each vessel. Consistent with sound business judgment, owners will be expected to place their insurance with the American market to the maximum extent possible when the rates, terms and conditions offered by American underwriters are competitive with those offered by foreign underwriters. MARAD will make available a list of approved American underwriters and their capacities.

(b) In the event that less than 50 percent of the placement is made with the American marine insurance market, the owners, or their brokers, shall file an affidavit confirming that the risk has been offered to a substantial portion of the American market. The affidavit shall list the American underwriters to which the risk was offered, and such underwriters shall account for at least 50 percent of the approved American market capacity, or 75 percent in the event that more than 75 percent of the risk was placed in foreign markets.

(c) Failure to comply with (a) or (b), above, may result in MARAD requiring that the risk be reoffered and that the existing placement be modified, as deemed appropriate.

### § 249.10 Non-discrimination policy.

To administer effectively the policy regarding non-discrimination against U.S. insurers in other countries, as described in §§ 249.6(b)(3) and 249.7(a), MARAD seeks the assistance of the American marine insurance industry to

provide information at the time of publication of Notice of Application described in §249.7(b) concerning the existence of any discriminatory laws or practices in the marine hull insurance market abroad. Upon receipt of such information, MARAD will take whatever action it deems appropriate.

### §249.11 Confidentiality.

(a) If the data submitted under this rule contain information that the submitter considers to be commercial or financial information and privileged or confidential, or otherwise exempt from disclosure under the Freedom of Information Act (FOIA) (5 U.S.C. 552), the submitter shall assert a claim of exemption at the time the data are submitted. The claim shall be made in a letter contained in a sealed enveloped marked "Confidential Information," addressed to the Secretary, Maritime Administration. The submitter shall stamp or mark "confidential" on the top of each page containing information claimed to be confidential.

(b) In claiming an exemption under FOIA, the submitter must state the basis for such action, including supporting information showing: (1) That the information claimed to be confidential is a trade secret or commercial or financial information in accordance with statutory and decisional authority; and (2) that measures have been taken by the submitter of the information to ensure that the information has not been disclosed or otherwise made available to the public, or, if the information has been disclosed or otherwise becomes available to the public, why such disclosure or availability does not compromise the confidential nature of the information.

(c) In the event of a subsequent request for any portion of the data under the FOIA, those submissions not so claimed by the submitter will be disclosed, and those so claimed will be subject to the initial determination by the Secretary, Maritime Administration.

(d) If the Secretary makes a determination unfavorable to the submitter, the submitter will be advised that MARAD will not honor the request for confidentiality at the time of any request for production of information under the FOIA by third parties.

### §249.12 Waivers.

The provision of this part may be waived in writing, for special circumstances and good cause shown, provided the procedures adopted are consistent with the Act and with the intent of these regulations.

## PART 251—APPLICATION FOR SUBSIDIES AND OTHER DIRECT FINANCIAL AID

Sec.

251.1 Applications for construction-differential subsidy under Title V, Merchant Marine Act, 1936, as amended.
251.11 Applications under Title VI, Merchant Marine Act, 1936, as amended.
251.21 Applications under sections 803, 804, 805 (a) and (d), and 605(b), Merchant Marine Act, 1936.
251.31 Charges for processing applications for authorization to transfer ownership of ships built with construction-differential subsidy.

AUTHORITY: Sec. 204, 49 Stat. 1987, as amended; 46 U.S.C. 1114.

### §251.1 Applications for construction-differential subsidy under Title V, Merchant Marine Act, 1936, as amended.

(a) Applications under section 501 of the Act for subsidy to aid in the construction of new vessels or the reconstruction of existing vessels, to be operated in the foreign commerce of the United States, shall be filed on form FMB–8 in accordance with the instructions annexed thereto.[1]

(b) Applications for aid in the construction of new vessels to be operated in domestic trade shall be filed on Form VA–9 in accordance with the instructions annexed thereto.[1]

APPENDIX NO. 1—POLICY

1. *To the maximum practical extent as determined by the Maritime Subsidy Board* applicants for construction-differential subsidy (CDS) under Title V of the Merchant Marine Act of 1936, as amended, shall duplicate designs of ships previously approved by the Board for Subsidized Ship Construction.

[1] Copies of forms referred to may be obtained on request from the Secretary, Maritime Subsidy Board, Washington, D.C.

Such duplication contemplates retention of: Hull form; major structure, i.e., shell, transverse bulkheads, decks, girder systems; etc.; machinery horsepower and arrangement; and arrangement of deck house. However the Board will permit modifications such as changes to reefer cargo capacity, deep tankage, and cargo gear in a manner so as not to disrupt the basic configuration of the ship and without sacrificing gains that can be made from group production. New ship designs will be considered from any operator who has already constructed sufficient ships of a given design to have optimized the economy of standardized ship construction, when the applicant feels that a new design is necessary in exceptional cases and justifies this need to the Board. Where the Board concludes contrary to an applicant that a previously developed design can be satisfactorily adapted to requirements of the intended service at a substantial saving compared with building to a new design, invitations to bid shall be issued for both the standard design and the custom design of the owner's preference. Construction-differential subsidy will be based on whichever design requires the least subsidy.

2. The Board may require such variations from designs of ships previously approved as are necessary to optimize the economic utilization of mechanization and labor saving equipment with the potential of reducing operating-differential subsidy (ODS). Other nonstandard equipment or shipbuilding components shall be eligible for CDS, only if (a) their effect is to decrease the total sum of such CDS and ODS projected over the life of a ship, or (b) when it can be demonstrated with reasonable certainty that the added investment will produce a return to the owner of at least 10 percent per annum after taxes over the life of the investment.

3. Value engineering provisions will be included in all construction-differential subsidy contracts and construction contracts. Value engineering items considered mandatory by the Board prior to or during the development of the bidding plans and specifications and during the actual ship construction period shall be incorporated in the plans and specifications or incorporated in the ship. If the mandatory items are not acceptable to the owner the difference in cost, as determined by the Board, between the value engineered and the installed item will be borne by the owner. This paragraph shall not be construed (a) as revising the present appeal rights of the shipowner, or (b) as imposing upon the shipbuilding contractor any requirement for employment of a specific number of value engineering personnel.

4. Subsidy for changes under the construction contract will be allowed only when the net effect of the change will with reasonable certainty (a) comply with the standard in 2 (a) or (b) above, (b) correct a deficiency in design which is clearly essential, or (c) comply with a change in the requirement of a regulatory body which becomes effective after 30 days preceding bid opening. Any changes desired by the owner which do not adversely affect the safe, efficient or economical operation of the ship will be permitted, but without the benefit of subsidy. Subsidy for changes under category 2(b) shall be based on an estimate as to what the work would have cost if it had been included in the bidding specifications.

5. Post-contract engineering costs incurred by the owner for engineering review and plan approval will be subsidized within a ceiling. The owner's expenses for such engineering and plan approval shall be limited for subsidy purposes to a maximum of 2 percent of the low bid for each of one ship in each contract. This limitation shall apply to liner cargo vessels of the break bulk type with no more than twelve passengers, but including special features such as mechanization, container carrying devices, special cargo handling equipment, refrigeration spaces and special deep tanks, etc. This upper limit shall be adjusted downward to take into account features including, but not limited to, standardized design, successive flights of ships in the same yard, or successive flights of ships in different yards.

6. Construction-differential subsidy on owner's engineering expenses for inspection when only one ship is being built shall be limited to an amount equal to 1.3 percent of the bid price. For multiple ship construction the amount subsidizable will be 1.3 percent of the contract price per ship plus an additional increment of 0.36 percent for each vessel beyond the first. For example, the subsidizable amount for inspection on a four ship contract would be 1.3 percent plus 1.08 percent (0.36×3) or 2.38 percent times the cost of the each of four ship bid price.

This limitation shall apply to liner type cargo vessels of the break bulk type with no more than 12 passengers but including special features such as mechanization, container carrying devices, special cargo handling equipment, refrigeration spaces and special deep tanks, etc. This upper limitation shall be adjusted downward to take into account features including, but not limited to, standardized design, or other vessels for the same owner and in the same shipyard.

7. Interior decorators' fees will be limited to a maximum of $10,000 per contract.

8. Construction-differential subsidy will not apply to owner furnished equipment. All material or equipment to which construction-differential subsidy shall apply must be included in the plans and specifications upon which the competitive ship construction bids are based or included in authorized changes under contract.

9. Notwithstanding any of the foregoing limitations on subsidy the Board will in exceptional cases authorize subsidy or research and development grants for new ship concepts or individual ship features whose economic justification lie in the possibility of future major advances in ship construction or operation and which in the Board's judgment may lead to greater efficiency and economy.

APPENDIX NO. 2—STATEMENT OF GENERAL POLICY

1. The appropriations available for the payment of construction-differential subsidy by the Maritime Subsidy Board necessarily are limited. Present replacement program schedules for individual operators repeatedly have been revised and extended in recent years in accordance with the operating-differential subsidy contracts. It is possible that further delay will occur in the replacement of some of the vessels required to be replaced pursuant to the existing contractual obligations of those operators under operating-differential subsidy contracts with the Government. These standards are designed to provide better guidance for the operators and the Government in making the judgments necessary in selecting from among competing applications for limited funds. This policy will apply to requests for and allocations of appropriations for fiscal year 1967 and thereafter. It furthermore applies only to awards of financial assistance in the construction of vessels for liner service.

2. (a) To provide for the optimum development of the American Merchant Marine in number of vessels and in shipping capability, the Board will allocate federal financial assistance for construction or reconstruction of vessels so as to give priority to those proposals which, having met all requirements of Title V, Merchant Marine Act, 1936, will in the Board's opinion utilize such assistance to obtain the greatest shipping capability and productivity possible. In making its determinations under this policy, the Maritime Subsidy Board will take into consideration the following factors:

(1) Number of vessels proposed for construction by the applicant.

(2) Cubic and deadweight capacities and speed of the proposed vessels.

(3) Proposed cargo handling equipment and techniques for transfer of cargo in and out of vessels and to and from inland points. In this connection, the applicant will be required to set forth the estimated rate of loading and of discharge of cargo, as well as the adaptability of the proposed vessel to integrated systems of transportation embracing both ocean and overland transportation.

(4) Estimated domestic cost of construction.

(5) Estimated revenues and cost of operation; and with respect to wage cost, the proposed manning schedule on the proposed vessels.

(6) The applicant's intention to seek operating subsidy and if so, the duration and amount of such subsidy payments.

The Board will weigh the above factors in such a fashion as will measure the productivity of the vessel (i.e., its carrying capacity, speed, and rate of cargo handling) against the Government's cost of construction and operating aid. The Board will award aid (so far as funds are available) for the construction of those vessels otherwise eligible, as will give the greatest productivity for each dollar of Government aid.

(b) The Board reserves for determination at a later time standards to be applied in the allocation of federal financial assistance for the construction of vessels to be used in nonliner operations.

APPENDIX NO. 3—CONSTRUCTION-DIFFERENTIAL SUBSIDY FOR MACHINERY AND ELECTRIC PLANT SPARE PARTS

1. The total cost of machinery and electric plant spare parts (whether shore-based or carried aboard ship), which are in addition to those spare parts required by all cognizant regulatory bodies (including ABS, Coast Guard and the FCC), which shall be eligible for CDS, shall not exceed the amount determined by application of the percentages shown in the Table below:

2. TABLE 2—COST OF ADDITIONAL SPARE PARTS ELIGIBLE FOR CDS

[Footnotes at end of table]

| Cost class | Type of equipment covered [2] | Cost of spare parts [1] |
|---|---|---|
| 12 ... | Gallley, pantry, and utility space equipment ... | 1.0 |
| 15 ... | Ventilation and heating ... | 2.0 |
| 17 ... | Air-conditioning machinery ... | 3.0 |
| 18 ... | Hull piping (engineering) ... | 2.0 |
| 19 ... | Cargo oil system ... | 2.0 |
| 20 ... | Hull piping (domestic) ... | 2.0 |
| 21 ... | Deck machinery ... | 8.0 |
| 22 ... | Electric generation and distribution ... | 5.0 |
| 23 ... | Electronics ... | 5.0 |
| 25 ... | Main engine ... | 3.0 |
| 26 ... | Shafting and propellers ... | 6.0 |
| 27 ... | Condensers ... | 1.0 |
| 28 ... | Boilers ... | 1.0 |
| 29 ... | Fuel oil service piping ... | 4.0 |
| 30 ... | Steam piping ... | 4.0 |
| 31 ... | Feed, condensate, circulating, and drain piping. | 4.0 |
| 32 ... | Lube oil piping ... | 4.0 |
| 33 ... | Salt water evaporator system ... | 7.0 |
| 34 ... | Feed heaters and other heat exchangers ... | 3.0 |
| 35 ... | Pumps ... | 13.0 |
| 36 ... | Miscellaneous auxiliaries ... | 7.0 |
| 39 ... | Instruments and gauges ... | 15.0 |
| 40 ... | Engineers workshop ... | 1.0 |

[1] Expressed as percentage of base cost of the equipment in each cost class.

[2] Cost of spare anchor, propeller, or tailshaft is not included in this allowance and is handled as a separate Maritime Subsidy Board action.

3. This regulation shall be implemented in accordance with the following procedures and guidelines:

(a) The allowance is to be calculated by the Maritime Administration and will be included in the contract price for all new contracts for which CDS is awarded after this regulation becomes effective. For ships under contract on the effective date of this regulation, the regulation shall form the basis for permitting a change under contract for additional spare parts to be subsidized, provided that a request for CDS participation is submitted to the Maritime Administration prior to delivery of the applicable ship.

(b) The allowance is to be fixed and will not be escalated under the escalation provisions (if any), of the contract. For changes to existing contracts, the allowance will be computed based on the original contract price.

(c) An audit, as deemed appropriate by the Maritime Administration, will be made at the end of the contract to determine total spare parts expenditures and a change under contract will be issued if actual expenditures are less than the allowance. The audit will be based on Maritime Administration review of a priced list, by shipyard purchase orders, of spare parts furnished pursuant to this § 251.1.

(d) Shipping and shipyard handling costs are to be included in the allowance.

(e) If the cost of material in a cost class is increased or decreased by reason of a change under contract, the total spare parts allowance will not be increased or decreased unless included as part of the change under contract.

(f) The actual expenditure of funds for spare parts by the Owner need not correspond to the percentages shown in the table which are used to determine the total amount eligible for CDS.

(g) An owner may exceed the limit set by this regulation, provided such excess is for his sole account.

(Approved by the Office of Management and Budget under control number 2133–0020)

(Reorganization Plans No. 21 of 1950 (64 Stat. 1273) and No. 7 of 1961 (75 Stat. 840), as amended by Pub. L. 91–469 (84 Stat. 1036); and Department of Commerce Organization Order 10–8 (38 FR 19707, July 23, 1973))

[G.O. 11, 2 FR 2205, Sept. 22, 1937, as amended by Amdt. 1, 24 FR 7832, Sept. 29, 1959; 30 FR 11756, Sept. 15, 1965; 30 FR 14598, Nov. 24, 1965; 43 FR 1622, Jan. 11, 1978; 47 FR 25530, June 14, 1982]

## § 251.11 Applications under Title VI, Merchant Marine Act, 1936, as amended.

(a) Applications under title VI of the Act for subsidy to aid in the operation of vessels in the foreign commerce of the United States shall be filed on Form MA–632 in accordance with the instructions annexed thereto.

(b) Copies of Form MA–632 may be obtained on request from the Secretary, Maritime Subsidy Board, Washington, D.C., 20590.

(Approved by the Office of Management and Budget under control number 2133–0017)

[G.O. 13, Rev., 36 FR 11033, June 8, 1971, as amended at 47 FR 25530, June 14, 1982]

## § 251.21 Applications under sections 803, 804, 805 (a) and (d), and 605 (b), Merchant Marine Act, 1936.

Form VI-B of instructions is the required form for the preparation of applications under sections 803, 804, 805(a) (see procedure for 805(a) applications covered in part 380 of this chapter (General Order 86)) and (d), and 605(b), Merchant Marine Act, 1936 (49 Stat. 2012, 2013, 2003; 46 U.S.C. Sup., 1221–1223 (a), (d), 1175(b)).[1] All applicants for operating differential subsidies who file such applications are required to comply therewith.

[G.O. 14, 2 FR 2295, Sept. 28, 1937, as amended at 23 FR 7538, Sept. 27, 1958]

## § 251.31 Charges for processing applications for authorization to transfer ownership of ships built with construction-differential subsidy.

(a) Applications for an amendment or addendum to construction-differential subsidy contracts to provide for the sale of a vessel built under Title V, Merchant Marine Act, 1936, as amended, to a buyer who assumes the obligations under said contracts, shall be filed with the Secretary, Maritime Subsidy Board, Washington, DC 20590.

(b) *Fee.* Each such application shall be accompanied by the sum of $200,

[1] Copies of form referred to may be obtained from the Secretary, Maritime Subsidy Board, Washington, D.C.

which sum will be retained to recover the cost of processing the application.

(Sec. 4; 5 U.S.C. 553)

[G.O. 106, 31 FR 3397, Mar. 4, 1966]

# PART 252—OPERATING-DIFFERENTIAL SUBSIDY FOR BULK CARGO VESSELS ENGAGED IN WORLD-WIDE SERVICES

## Subpart A—Introduction

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252.2 Policy.
252.3 Definitions.
252.4 Waivers.

## Subpart B—Eligibility and Agreement

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252.12 Approval.
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## Subpart E—Subsidy Payment and Billing Procedures

252.40 Payment of subsidy.
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252.42 Appeals procedures.

AUTHORITY: 46 app. U.S.C. 1114(b), 1117, 1121, 1171, 1172, 1173, and 1175; 49 CFR 1.66.

SOURCE: 40 FR 43490, Sept. 22, 1975, unless otherwise noted.

## Subpart A—Introduction

### § 252.1 Purpose.

This part prescribes regulations implementing provisions in Title VI of the Merchant Marine Act, 1936, as amended (46 App. U.S.C. 1171–1176 and 1178–1181) governing operating-differential subsidy for bulk cargo vessels engaged in carrying bulk cargo in essential services in the foreign commerce of the United States.

[51 FR 40425, Nov. 7, 1986, as amended at 61 FR 32706, June 25, 1996]

### § 252.2 Policy.

The policy of the Merchant Marine Act, 1936, as amended, is set forth in section 101 thereof, as follows:

It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for shipbuilding and ship repair. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

### § 252.3 Definitions.

When used in this part:

(a) *Act* means the Merchant Marine Act, 1936, as amended (46 U.S.C. 1101–1294).

(b) *Maritime Administrator* means the Maritime Administrator, Department of Transportation of the Department of Transportation.

(c) *Board* means the Maritime Subsidy Board of the Maritime Administration.

(d) *Bulk cargo vessel* means a vessel built to carry solid, liquid or gaseous commodities that in normal shipment are contained only by the vessel's structure.

(e) *Citizen of the United States* includes a corporation, if all directors of the corporation are citizens of the United States, partnership or association but only if it is deemed a citizen of the United States under section 2 of the Shipping Act, 1916, as amended (46 U.S.C. 802).

(f) *Contracting Officer* means the Associate Administrator for Maritime Aids.

(g) *Fiscal year* means any annual period beginning on July 1 and ending on June 30.

(h) *Foreign-flag competition* means those foreign-flag vessels deemed by the Board to be competitive with the subsidized vessel.

(i) *Gross revenue* means the operator's total gross receipts from cargoes or fixtures of a vessel or both.

(j) *Operating-differential subsidy agreement* (*ODSA*) means the agreement entered into by the operator and the United States government for the payment of operating-differential subsidy.

(k) *Operating-differential subsidy* (*ODS*) means, except as the operator and the United States government should agree upon a lesser amount, the excess of the cost of subsidizable items of expense incurred in the operation under United States registry of a vessel over the estimated fair and reasonable cost of the same items of expense (excluding any increase in the cost of such items necessitated by features incorporated for national defense), if such vessel were operated under the registry of a foreign country whose vessels are substantial competitors of the vessel, or such sums as the Board may determine to be necessary to make the cost of operating such vessel competitive with the cost of operating similar vessels under the registry of a foreign country.

(l) *Operator* means any individual, partnership, corporation or association that contracts with the United States government under Title VI of the Act to receive ODS.

(m) *Reduced crew period* means any period in port beginning on the day that a vessel's normal crew complement is reduced by 4 or more men and division of wages is not paid for the missing men and ending on the day prior to the day that the vessel's crew complement is restored to not more than 3 men less than the normal crew complement, or division of wages is paid for the missing men, or the vessel is temporarily or permanently withdrawn from subsidized service, whichever occurs first.

(n) *Region Director* means the Region Director of the Maritime Administration within whose region the principal office of the operator is located.

(o) *Subsidized service* means the operation of a vessel other than in the coastal or intercoastal trade in accordance with the terms and conditions of the ODSA.

(p) *Subsidy rate* means the method adopted by the Board for determining the amount of ODS that is to be paid for an item of subsidizable expense.

(q) *Subsidized vessel* means a vessel covered by an ODSA.

(r) *U.S. foreign commerce* means the commerce or trade between the United States, its territories or possessions, or the District of Columbia and a foreign country.

(s) *Vessel* means subsidized vessel unless otherwise specified.

(t) *Voyage day* means any day or part of a day during which a subsidized vessel is operated in accordance with the terms and conditions of the ODSA.

[40 FR 43490, Sept. 22, 1975, as amended at 45 FR 30442, May 8, 1980; 51 FR 40425, Nov. 7, 1986]

### § 252.4 Waivers.

In special circumstances and for good cause shown, the procedures prescribed in this part may be waived, in writing, by mutual agreement of the parties, in keeping with the circumstances then present, provided that the procedures adopted are consistent with the Act and with the intent of these regulations.

[51 FR 40425, Nov. 7, 1986]

## Subpart B—Eligibility and Agreement

### § 252.10 Eligibility.

Any citizen of the United States may apply to the Board for the payment of ODS for the operation of a bulk cargo vessel in an essential service in the U.S. foreign commerce.

### § 252.11 Application forms.

Application forms may be obtained from the Secretary, Maritime Administration, Department of Transportation, Washington, DC 20590.

### § 252.12 Approval.

The Board may not approve an application for the payment of ODS until the Board has determined, in addition to other statutorily required determinations, that:

(a) The operation of the vessel in an essential service is required to meet foreign-flag competition and to promote U.S. foreign commerce;

(b) The vessel was built in the United States, or built foreign and determined to be eligible for ODS pursuant to the applicable law at the time it was built or acquired, and the vessel is documented under the laws of the United States.

(c) The applicant owns or leases, or can and will build or purchase or lease, a vessel or vessels of the size, type, speed and number, and with the proper equipment required to enable him to operate in an essential service in such manner as may be necessary to meet competitive conditions and to promote U.S. foreign commerce;

(d) The applicant possesses the ability, experience, financial resources and other qualifications necessary to enable him to conduct the proposed operation of the vessel to meet competitive conditions and promote U.S. foreign commerce;

(e) The granting of the aid applied for is necessary to place the proposed operations of the vessel on a parity with the vessels of foreign competitors, and is reasonably calculated to carry out effectively the purposes and policy of the Act;

(f) The vessel is of steel or other acceptable metal, is propelled by steam or motor, and is as nearly fireproof as practicable; and

(g) The vessel is constructed in accordance with plans and specifications approved by the Board and Secretary of the Navy, with particular reference to economical conversion into an auxiliary naval vessel, or approved by the Board and Navy Department as otherwise useful to the United States in time of national emergency.

[40 FR 43490, Sept. 22, 1975, as amended at 51 FR 40425, Nov. 7, 1986]

### § 252.13 Contract.

Upon approval by the Board of an application for ODS, the applicant and the United States may enter into an ODSA.

## Subpart C—Operation

### § 252.20 Subsidized and nonsubsidized voyages.

(a) *Subsidized voyages*—(1) *Minimum operation.* The operator shall operate each subsidized vessel for a minimum of 335 days each year in the worldwide carriage of bulk cargo in the U.S. foreign commerce and in the carriage of such cargo between foreign ports.

(2) *Commencement.* The first voyage shall commence at the time provided in the ODSA. All subsequent voyages shall commence at 0001 hours local time of the day following the day of termination of the previous voyage or, in the event that a reduced crew period follows such termination, at 0001 hours local time of the day following the day on which such reduced crew period terminates.

(3) *Termination.* A voyage shall terminate at 2400 hours local time:

(i) In a U.S. port, on the day of completion of (*a*) paying off the crew from foreign articles, (*b*) discharge of cargo at the last U.S. port of discharge, or (*c*) voyage repairs, whichever event occurs last;

(ii) In a foreign port, on the day (*a*) of completion of the discharge of cargo if the vessel loads cargo in such port of discharge, (*b*) prior to the day of commencement of loading cargo if the vessel departed its last port of cargo discharge in ballast;

(iii) In the case of special circumstances such as strike or lack of cargo activity, on the day approved by the Region Director upon request for a variance by the operator; or

(iv) On the final voyage, on the day provided in the ODSA for termination of the final voyage.

(4) *Periods of reduced crew, idleness, delay or lay-up*—(i) *Report by operator.* The operator shall report promptly to the Region Director any reduced crew period and any period of idleness, lay-

up or delay occurring during or between voyages and the facts and circumstances relating to any such period.

(ii) *Region Director's finding.* The Region Director shall make a finding as to whether the period reported by the operator could have been avoided through the efficient and economical operation of the vessel and whether operating costs were reduced to a minimum in accordance with sound commercial practice. The Region Director shall, by means of a written report, promptly advise the operator and Contracting Officer of his finding.

(iii) *Contracting Officer's determination.* The Contracting Officer shall consider the Region Director's finding and shall determine what costs, if any, shall be subsidized during the period reported by the operator. The Contracting Officer shall promptly advise the operator of his determination in writing.

(b) *Nonsubsidized voyages in the U.S. foreign commerce.* (1) For any period of nonsubsidized service in the U.S. foreign commerce with respect to which the Board has granted prior authorization, a vessel shall go off subsidy after 2400 hours local time of the day of final discharge of cargo on the last subsidized voyage, or in the event the nonsubsidized voyage follows a subsidized period of reduced crew, idleness or layup, the vessel shall be deemed to be off subsidy at 0001 hours local time of the day following the day on which such period of reduced crew, idleness or layup terminates. The vessel shall continue in this nonsubsidized service until 2400 hours local time of the day of final discharge of the nonsubsidized cargo after which time the vessel will resume subsidized status. In the event the vessel makes consecutive nonsubsidized voyages during any such period of nonsubsidized service, it will remain in nonsubsidized status until completion of the final nonsubsidized voyage.

(2) For the purposes of meeting the requirements set forth in §§ 252.20(a) and 252.21, any such nonsubsidized voyage will be considered in the same manner as a subsidized voyage.

(3) Voyage reports shall be submitted upon the completion of each nonsubsidized voyage in the same manner as specified in § 252.23(a) and shall clearly indicate that the voyage is nonsubsidized.

[40 FR 43490, Sept. 22, 1975, as amended at 43 FR 4858, Feb. 6, 1978; 51 FR 40426, Nov. 7, 1986]

### § 252.21 Essential service requirement.

(a) *Essential service.* A vessel which is not subject to a charter, or a vessel subject to a charter which does not exceed 5 years duration and which may not be extended beyond 5 years duration by exercise of an option either within the charter or contained in a separate agreement, shall be deemed to be in an essential service, within the meaning of section 211(b) of the Act. The operator shall be entitled to the full amount of ODS payable under the operator's ODSA (less any reduction with respect to the carriage of cargo in the coastwise or intercoastal trades, as described in section 605(a) of the Act). A vessel subject to a charter which exceeds 5 years duration, or which may be extended beyond 5 years duration by exercise of an option (pursuant to provision of the charter or any separate agreement), shall not be deemed to be in an essential service unless such charter has been approved by the Maritime Administrator pursuant to paragraph (b) of this section.

(b) *Approval of charters.* Charters of vessels that exceed 5 years duration or that may be extended beyond 5 years duration by exercise of an option (pursuant to provision of the charter or any separate agreement) shall be submitted to the Maritime Administrator for review and approval at least 30 days prior to execution of such charter. Charters exceeding 5 years shall be approved if the Maritime Administrator finds that the vessel will probably be employed during a substantial portion of its economic life in carrying a significant volume of cargo in the U.S. foreign commerce. The Maritime Administrator shall base this finding on all relevant considerations, including but not limited to, the terms of the charter, the business of the charterer and the normal tendency for bulk operators to participate substantially in U.S. foreign commerce. When the Maritime Administrator has made this finding with respect to a vessel, its operations during

any period of subsidized service while subject to that charter shall be deemed to be operation in an essential service. The payment of ODS for such period shall not be reduced because of any amendment to this section or any other provision in this part 252 made prior to expiration of the charter. ODSA default provisions shall be applicable to noncompliance with this requirement. Charters that do not exceed 5 years and do not provide for extension beyond 5 years do not have to be submitted for approval by the Maritime Administrator, unless otherwise required by the ODSA. Charters previously approved by the Maritime Administration under existing procedures are deemed approved for purposes of this section.

(c) *Modification of requirement.* The Board shall have the authority to modify prospectively the provisions of this section as future circumstances may dictate. However, any such modification made by the Board shall apply only to charters that are executed on or after the date of the Board action, and the Board shall have discretion in determining whether such modification shall have general or limited applicability.

(d) *Applicability.* This is a general requirement applicable to the payment of ODS to operators of all types of bulk cargo vessels. The provisions of any ODS regulations pertaining specifically to dry bulk cargo vessels as may be finally adopted by the Maritime Administration and set forth in title 46, Code of Federal Regulations, shall govern as to dry bulk cargo vessels where such provisions are inconsistent with those contained in this section.

[45 FR 30442, May 8, 1980]

### § 252.22 Substantiality and extent of foreign-flag competition.

(a) *Type and tonnage groupings.* Foreign-flag competition shall be determined, as of January 1 of the year preceding January 1 of the subsidized year, by surveying a data file known as "Merchant Fleets of the World" that is maintained by MARAD. All foreign-flag bulk cargo vessels included in this data file are divided by type and category, and further subdivided by class. Classes include, but are not limited to general tanker, chemical tanker, OBO, general dry bulk carrier and wood chip carrier. Each vessel class is further divided into deadweight tonnage ranges as follows:

(1) Range A-vessels of less than 25,000 DWT;

(2) Range B-vessels of 25,000 but less than 50,000 DWT;

(3) Range C-vessels of 50,000 but less than 100,000 DWT; and

(4) Range D-vessels of 100,000 or more DWT.

(b) *Competitive classes and range.* The following classes of foreign-flag vessels in the same tonnage range as the subsidized vessel shall be deemed to be competitive with the subsidized vessel:

*Subsidized Vessels and Foreign-flag Class*

(1) General tanker—general tanker

(2) Chemical tanker—general and chemical tankers

(3) OBO—general dry bulk carriers and tankers, OBO, bulk/oil, ore/oil and ore carriers

(4) General dry bulk carrier—general dry bulk carriers

(c) *Grouping and ranking competitive foreign-flags.* The foreign-flag vessels deemed to be competitive with the subsidized vessel shall be grouped by nationality and ranked according to the total deadweight tonnage under each foreign-flag.

(d) *Competitive foreign flag.* The competitive foreign flag shall be the flag with the greatest total tonnage in the range.

(e) *Largest foreign flag not competitor.* In the event that the Board believes that the competitive foreign-flag so determined pursuant to this § 252.22 is not a substantial competitor of any particular operator, the Board may determine the foreign-flag competition in a manner that more accurately reflects the true competition of the particular operator. In making this determination, the Board shall consider the written views of the operator and any other interested parties.

[40 FR 43490, Sept. 22, 1975, as amended at 45 FR 8024, Feb. 6, 1980; 51 FR 40426, Nov. 7, 1986]

### § 252.23 Financial and other reporting requirements.

(a) *Voyage report.* The operator shall submit a voyage report to the Director,

Office of Subsidy Administration, Maritime Administration, Washington, DC 20590, upon the completion of each subsidized voyage. Each voyage report shall include the following:

(1) Name of vessel and voyage number.

(2) Subsidy contract number.

(3) Vessel activity, including the following:

(i) Ports of voyage commencement and termination, including dates and times.

(ii) Loading ports, including dates of arrival and departure and long tons of cargo loaded (specify commodity).

(iii) Discharge ports, including dates of arrival and departure and long tons of cargo discharged.

(iv) Other ports, ports of bunkering, emergency calls, etc., including dates of arrival and departure (specify reason for call).

(4) All reduced crew periods, all periods of idleness, lay-up and delay, and all related correspondence with the Region Director.

(b) *Condition of vessels, inspection and repairs.* In order that the Maritime Administration may participate in the inspection of vessels, in compliance with part 272 of this subchapter, the operator shall give at least 24 hours notice to the Region Director as to the time and place of vessel inspections.

(c) *Vessel insurance*—(1) *Policies.* Upon the binding of any insurance policy with respect to a subsidized vessel, the operator shall submit promptly to the Director, Office of Marine Insurance, Maritime Administration, Washington, DC 20590, for approval of the Maritime Administration, a signed copy of each cover note issued by the operator's brokers, which, to the extent applicable, shall set forth as to such vessel the amounts covered by hull, increased value and other forms of total loss protection, as well as protection and indemnity insurance. Such cover notes shall include the rates, the amounts placed in the different markets, the participating underwriters, the amount underwritten by each underwriter, and the amounts of the deductibles. Upon request, copies of the policy shall be submitted to the Maritime Administration for examination.

(2) *Cancellation and policy changes.* The operator shall advise the Maritime Administration promptly of the cancellation of any policy of insurance, any changes in the terms or underwriters of any policy of insurance, any period of lay-up that permits the collection of return premiums, and the occurrence of any major casualty or total loss covered by a policy of insurance.

(d) *Financial statements.* The operator shall submit, in triplicate, to the Director, Office of Financial Approvals, Maritime Administration, Washington, DC 20590, the following reports, including management footnotes where necessary to make a fair financial presentation:

(1) Not later than 120 days after the close of the operator's semiannual accounting period, a Form MA–172 on a semiannual basis, in accordance with 46 CFR 232.6.

(2) Not later than 120 days after the close of the operator's annual accounting period an audited annual financial statement, in accordance with 46 CFR 232.6.

(Reporting requirements for paragraph (a) were approved by the Office of Management and Budget under control number 2133–0024 and reporting requirements for paragraph (d) were approved by the Office of Management and Budget under control number 2133–005)

[40 FR 43490, Sept. 22, 1975, as amended at 45 FR 30443, May 8, 1980; 47 FR 25530, June 14, 1982. Redesignated and amended at 51 FR 40426, Nov. 7, 1986]

### § 252.24 Continued eligibility for subsidy.

Operators shall remain eligible for ODS so long as they are engaged in service which would, under this part and sections 601(a), 602, and 605(c) of the Act, qualify for approval of an ODSA. The payment of ODS will be made only for carriage of commercial cargoes for which U.S.-flag vessels are in direct competition with foreign-flag vessels. An example of cargo that is excluded is bulk cargo reported by a shipper as the U.S.-flag share of cargoes subject to an agreement (including a unilateral commitment by a foreign government which has the effect of reserving cargoes for U.S.-flag vessels), between the United States and a foreign government in connection with

any U.S. cash transfer foreign assistance program. In such a circumstance, there is no foreign-flag competitions for such cargoes.

[54 FR 39182, Sept. 25, 1989]

## Subpart D—Calculation of Subsidy Rates

SOURCE: 51 FR 40426, Nov. 7, 1986, unless otherwise noted.

### § 252.30 Amount of subsidy payable.

(a) *Daily rates.* Daily ODS rates shall be used to quantify the amount of ODS payable except for the ODS rates applicable to maintenance and repair expenses, as described separately in § 252.32. The daily ODS rate represents the cost differential between the subsidized vessel and its foreign-flag competition. A daily rate shall be calculated for each subsidized item of expense identified in the ODSA (with the exception of ODS rates applicable to maintenance and repair expenses), and the total of all items is the daily amount of ODS payable for approved vessel operating days, excluding reduced crew periods.

(b) *Reduced crew periods.* For reduced crew periods, as defined in § 252.3 of this part, a man-day reduction amount, calculated separately for officers and unlicensed crew members, shall be used to reduce the daily wage ODS rate to conform to the complement remaining on the vessel. The man-day reduction amounts shall be determined by dividing the daily wage ODS for officers and unlicensed crew members by the number of subsidizable crew members in each category. For each day of a reduced crew period, the man-day amount shall be multiplied by the number of crew members missing for that day, and the resulting product shall be deducted from the daily ODS rate. The difference shall be the ODS payable for such day. (See illustration in Schedule C at § 252.41 of this part.)

(c) *Review of rates.* Daily subsidy rates shall be reviewed every six months. For the item, "wages of officers and crews," the daily rate shall be calculated for fiscal periods July 1 through June 30, in accordance with provisions of the Act. During the period January through June, adjustments—paid as a lump sum or as a daily amount—shall be made to wage ODS so that the correct amount of ODS for the full fiscal period is received by the operator. For other subsidizable items of expense, the daily rate shall be calculated for calendar years.

(d) *Negative rates.* When an ODS rate in any category is less than zero, indicating that the subsidized operator is at an advantage rather than a disadvantage in such category, the negative rate shall be deducted from positive rates in determining the daily ODS amount payable.

(e) *Operator Comments.* The operator shall have the opportunity to comment on each subsidy rate as calculated by MARAD. The operator and contracting officer shall make every effort to resolve disagreements that arise. In the event of a disagreement that cannot be resolved, comments received from the operator and the contracting officer's recommendation shall be presented to the Board for its consideration in determining subsidy rates.

[51 FR 40426, Nov. 7, 1986, as amended at 58 FR 17349, Apr. 2, 1993]

### § 252.31 Wages of officers and crews.

(a) *Definitions.* When used in this part:

(1) *Base period.* The first base period under the wage index systems, as provided in section 603 of the Act, is the period beginning July 1, 1970 and ending June 30, 1971. Thereafter, base period means any annual period beginning July 1 and ending June 30, with respect to which the Board establishes a base period cost. At intervals of not less than two years, nor more than four years, the Maritime Subsidy Board shall establish a new base period. Base periods shall be announced by the Board prior to the December 31 date that would be included in the new base period.

(2) *Base period cost*—(i) *Initial base period.* For the initial base period of subsidized service, the term *base period cost* means the collective bargaining cost as of January 1 of that base period.

(ii) *Subsequent base periods.* For base periods subsequent to the initial base

period, the term *base period cost* means the average of the collective bargaining cost as of January 1 of such fiscal year, and the base period cost of the previous base period, indexed to January 1 of the new base period by an index compiled by the Bureau of Labor Statistics. This index shall consist of the average annual change in wages and benefits placed into effect for employees covered by collective bargaining agreements, with equal weight to be given to changes affecting employees in the transportation industry (excluding the off-shore maritime industry) and to changes affecting employees in private non-agricultural industries other than transportation. However, such base period cost shall not be less than a minimum, nor more than a maximum amount, determined as a percentage of the collective bargaining cost computed for January 1 of such base period in accordance with the following schedule:

| | Minimum (pct) | Maximum (pct) |
|---|---|---|
| Base period following a: | | |
| 2 year cycle | 97½ | 102½ |
| 3 year cycle | 96¼ | 103¾ |
| 4 year cycle | 95 | 105 |

(3) *Collective bargaining cost (CBC)* means the annual cost, calculated on the basis of the per diem rate of expense, as of January 1 of the annual fiscal periods July 1 through June 30, of all items of expense required by the operator through a collective bargaining or other agreement, covering the employment of the approved manning complement of the subsidized vessel, including payments required by law to assure old-age pensions, unemployment benefits or similar benefits, and taxes or other governmental assessments on crew payrolls.

(4) *Approved manning complement* means the complement approved by the Board for subsidy.

(5) *U.S. wage cost (WC)* means the annual cost, calculated on the basis of the per diem rate of expense as of January 1 of the annual fiscal periods July 1 through June 30, of all items of expense required of the operator through a collective bargaining or other agreement, covering the employment of the normal manning complement of the subsidized vessel, including payments required by law to assure old-age pensions, unemployment benefits or similar benefits, and taxes or other governmental assessments on crew payrolls.

(6) *Normal manning complement* means the crew complement established by a collective bargaining or other agreement with the officers and unlicensed crew of the vessel. When ratings of different salaries are in the same job during the year, the base wages of the rating carried most of the time shall be used.

(7) *Subsidizable wage cost* means, (i) with respect to a base period, the base period cost, and (ii) in any fiscal period other than a base period, the most recent base period cost, increased or decreased by the change from January 1 of the base period to January 1 of the non-base period. The subsidizable wage cost shall not be less than 90 percent nor greater than 110 percent of the collective bargaining cost as of January 1 of such period.

(8) *Unpredictably timed costs* are collective bargaining costs that are not regularly incurred. Examples of unpredictably timed costs are such costs as severance pay, shortfalls, special assessments, and war zone bonuses.

(b) *Method of calculating collective bargaining cost (CBC).* CBC shall be determined by pricing out, for the approved crew complement, the per diem total of fixed costs specified in the collective bargaining agreement and adding a per diem total of variable costs obtained from the cost experience of the subsidized vessel during the first nine months of the preceding calendar year.

(1) *Fixed Costs.* The per diem total of fixed costs shall include all costs that are stated in specific or determinable amounts per time period and, based on operating experience, do not vary. In cases where a monthly amount is specified in the agreement, the per diem amount shall be determined by dividing the monthly amount by 30. When a daily amount is specified it shall be used. Examples of fixed costs are:

(i) Base wages:

(ii) Non-watch pay;

(iii) Vacation pay (including contributions to vacation funds);

(iv) Tool allowance;

(v) Clothing and uniform allowances; and

(vi) Per diem contributions for pension, training, welfare, unemployment, including unallocated contributions placed in escrow.

(2) *Variable costs.* Variable costs are regularly incurred employment costs which vary with ship operating experience. The per diem aggregate of variable costs as of January 1 shall be determined by applying a ratio to the per diem aggregate of base wage costs as of January 1, the numerator of which shall be the total of variable costs for the first nine months of the preceding calendar year and the denominator of which shall be the total of base wage costs for the first nine months of the preceding calendar year. Variable costs include but are not limited to:

(i) Payroll taxes (including social security taxes);

(ii) Overtime and penalty pay;

(iii) Variable pension, training, welfare, unemployment, and vacation costs;

(iv) Pay in lieu of time off;

(v) Transportation and travel allowances;

(vi) Payments to relief officers and crews;

(vii) Wages and other expenses of USMMA cadets and extra messmen;

(viii) Board and lodging allowances;

(ix) Overlap in wages (a maximum of three days for officers and two days for unlicensed crew); and

(x) Penalty cargo bonuses.

(c) *Method of calculating U.S. wage cost (WC).* Two different calculations of WC are necessary—a per diem amount for every ship type on the service and a per month amount for the predominant ship type (most voyages) on the service. The purpose of the per month calculation is to make a comparison with the monthly foreign wage costs. The relationship of WC to foreign costs for the predominant ship is applied to the per diem WC for other ship types in the service to estimate comparable foreign costs for them.

(1) *Calculation of per diem WC.* The per diem WC shall be calculated by the same method that applies to CBC, except that the normal manning complement shall be used.

(2) *Calculation of per month WC.* The costs and manning level used in this calculation shall be the same as those used for the per diem WC.

(d) *Data submission requirements.* For purposes of calculating CBC and WC the operator shall each year submit Form MA-790 and, as appropriate, current copies of all collective bargaining or other agreements, memoranda of understanding, and arbitration awards, which specify the fixed costs as of January 1. Schedule A of Form MA–790, which covers wage costs on voyages terminated during the first nine months of the previous calendar year, shall be submitted by December 31. Schedule B of Form MA–790—normal manning complement, rates of pay, and contributions in effect on January 1 of the current year—shall be submitted by January 31. Form MA–790, Schedules A and B, shall be submitted to the Director, Office of Ship Operating Costs, Maritime Administration, 400 Seventh Street, SW., Washington, DC 20590.

(e) *Example Calculation.* The following is a sample calculation of CBC and WC:

ABC BULK CO.

Jan. 1, 1985, Collective Bargaining Costs (CBC) and U.S. Wage Cost (WC)

| | Per diem | |
|---|---|---|
| | WC | CBC |
| Crew Complement | [1] 35 | [2] 31 |
| Fixed Costs as of January 1, 1985: | | |
| Base Wages and non-watch pay | $1,789.79 | $1,571.60 |
| Allowances (radio, telephone, clothing, etc.) | $5.75 | $5.75 |
| Vacation Pay | $1,189.60 | $1,109.65 |
| Pension, Welfare, Training, Unemployment Fund Contributions | $,280.80 | $1,171.75 |
| Total Fixed | $4,265.94 | $3,858.75 |
| Variable Costs as of January 1, 1985: | | |
| Variable Cost Factor (based on 1984 cost experience) (pct) | 104.69 | 104.69 |
| Total Variable Costs (January 1, 1985 base wages × variable cost factor) | $1,873.73 | $1,645.31 |
| Total wage costs as of January 1, 1985 | $6,139.67 | $5,504.06 |

[1] Normal manning complement.
[2] Approved manning complement.

(f) *Method of calculating foreign wage costs.* The foreign wage cost (FC) of the

principal foreign-flag competitor and the comparable WC of the subsidized vessel are matched as of January 1 of the last fiscal year preceding the subsidized fiscal year for purposes of determining the wage cost of the principal foreign flags. The following procedures are used:

(1) *Manning.* The foreign manning complement in number and nationality for the principal foreign-flag competitor shall be constructed for the subsidized vessel type using the manning scales and practice of the competitor as developed through an examination of alien crew manifests, payrolls, and other reliable information. The commonly used crew complement of the competitor shall be adjusted to fit the predominant vessel type, in recognition of differences in physical characteristics that would affect manning scales. Where the manning complement cannot be estimated with reasonable substantiation, it will be deemed to be identical with that of the subsidized vessel.

(2) *Method.* The method of calculating FC shall be the same as that used for WC, provided that it is possible to obtain foreign cost data on the same basis as wage cost data. Preference shall be given to pricing out for fixed costs and to cost experience for variable costs. Where applicable, foreign currencies shall be converted into U.S. currency equivalents by using the average of end-month exchange rates for the period July through June that includes the January 1 for which FC is calculated. The exchange rates shall be obtained from the publication, "International Financial Statistics", published monthly by the International Monetary Fund. If exchange rates for particular foreign currencies are not available in this publication, they shall be obtained from the United States Department of the Treasury.

(3) *Foreign wage costs.* The per diem composite foreign wage cost is determined by multiplying the per diem WC for the U.S. ship type, calculated as of January 1 of the subsidized fiscal year, by the ratio of FC to WC, calculated as of January 1 of the last fiscal year preceding the subsidized fiscal year. The following is a sample calculation of the foreign percentage.

ABC BULK COMPANY, INC.

[Jan. 1, 1985—Foreign Wage Cost (FC)]

| | United States | Liberia |
|---|---|---|
| Crew Complement | 26 | 26 |
| Base Wages | [1] $53,687 | [1] $24,779 |
| Allowances | $1,074 | $4,584 |
| Vacation Pay (leave) | [1] $35,681 | [1] $13,009 |
| Pension and Welfare | [3] $38,407 | [1] $2,065 |
| Social Security | [2] $6,608 | [2] $7,227 |
| Overtime and other variable costs (not elsewhere included) | [2] $48,732 | [2] $10,944 |
| Repatriation. | | |
| Total wage costs | $184,189 | $62,608 |
| Percentage FC to WC | | 33.99 |

[1] Based on Jan. 1 priced out cost.
[2] Based on cost experience.
[3] Excludes training costs—foreign data not available.

(g) *Determination of daily wage rate.* The foreign wage cost is deducted from subsidizable wage costs to determine the daily wage subsidy rate. Table 1 is an example calculation of a daily wage subsidy rate using the procedures described in this section.

(h) *Unpredictably timed costs (UTC)* are subsidized by calculating costs incurred during the previous six months and converting them into a daily rate. A lump sum amount would be paid for special lump sum assessments or for per man-day increases to benefits plans which become effective during the six months following the establishment of the daily rate. In either case, the percentage subsidy rate—which is the differential percentage between the subsidizable wage cost and the foreign wage cost—is used to establish the amount of subsidy payable for UTC incurred.

(1) UTC expenses such as severance pay and area bonuses shall be eligible for subsidy payment without obtaining prior approval and subsidy shall be paid as a lump sum amount.

(2) Expenses such as shortfalls in benefit fund contributions, special assessments for benefits funds, and retroactive wage increases may be treated as UTC if the cost increase was not negotiated. Such costs must be approved as UTC by the Director, Office of Ship Operating Costs. To the extent such expenses qualify for UTC, the Director shall determine the appropriate method of paying subsidy—added to the per diem wage subsidy rate and/or as a lump sum amount treated separately.

TABLE 1—ABC BULK COMPANY, INC.

[Calculation of Wage Subsidy Rates [1]]

| Base period (1) | Interim period (2) | U.S. wage cost (3) | Collective bargaining cost (4) | Application of BLS index to base period cost (5) | Averaging in base periods (4)+(5) / 2 (6) | Appropriate limits (7) |
|---|---|---|---|---|---|---|
| 1981 | | $4,162.60 | $3,850.29 | | | |
| | 1982 | $4,578.24 | $4,230.15 | $3,850.29 × 1.0845 = $4,175.64 | | .9 × (4) = $3,807.14 |
| | | | | | | 1.1 × (4) = $4,653.17 |
| | 1983 | $4,578.24 | $4,230.15 | $3,850.29 × 1.1816 = $4,549.50 | | .9 × (4) = $4,104.34 |
| | | | | | | 1.1 × (4) = $5,016.42 |
| | 1984 | $5,539.40 | $4,966.90 | $3,850.29 × 1.2992 = $5,002.30 | | .9 × (4) = $4,470.21 |
| | | | | | | 1.1 × (4) = $5,463.59 |
| 1985 | | $6,139.57 | $5,504.06 | $3,850.29 × 1.4044 = $5,407.35 | | .95 × (4) = $5,228.86 |
| | | | | | | 1.05 × (4) = $5,779.26 |

[1] This computation is based on a new vessel entering subsidized service in May 1981.

| Base period cost | Subsidizable wage cost | Foreign cost percentage | Foreign wage cost | Wage subsidy daily rate | Wage subsidy percentage rate (12)+(9) |
|---|---|---|---|---|---|
| $3,850.9 | $3,850.29 | 32.99 | $1,373.24 | $2,477.05 | 64.33 |
| | $4,175.64 | 32.98 | $1,509.90 | $2,665.74 | 63.84 |
| | $4,549.50 | 32.15 | $1,812.49 | $2,737.01 | 60.16 |
| | $5,002.30 | 34.77 | $1,926.05 | $3,076.25 | 61.50 |
| $5,455.71 | $5,455.71 | 33.99 | $2,086.84 | $3,368.87 | 61.75 |

[51 FR 40426, Nov. 7, 1986, as amended at 54 FR 5086, Feb. 1, 1989]

## § 252.32 Maintenance (upkeep) and repairs.

(a) *Subsidy items.* The fair and reasonable maintenance and repair costs not compensated by insurance, if eligible for subsidy under the ODSA and the regulations in 46 CFR part 272, incurred by the operator during the calendar year.

(b) *Subsidy rate.* The subsidy rate for maintenance and repair shall be the U.S.-foreign cost differential determined from price estimates of representative items of maintenance and repair work and by using the repair practices of the foreign-flag competition. See paragraph (b)(4) of this section for an example calculation.

(1) *Cost survey.* MARAD shall select a sample of jobs which are representative of the various types of maintenance and repair work—drydocking and underwater repairs, machinery repairs, hull and deck repairs, electrical repairs, exterior painting and interior painting, etc. The jobs shall be described fully and combined into a standard set of specifications based on a particular type of vessel. The same specifications shall be used for obtaining all price estimates. MARAD shall request reliable and mutually acceptable ship repair cost experts to ascertain the U.S. and foreign M&R prices. MARAD shall survey foreign countries during a three-year cycle. The survey year prices shall be adjusted in the years between surveys by price adjustments estimated by the ship repair cost experts.

(2) *Country cost differential.* A country cost differential shall be determined for each country where work was performed on the competitive vessels. The country cost differential shall be 100 percent minus the ratio of the estimated foreign price to the U.S. price estimate. The U.S. price estimate shall be representative of the coastal area included in the subsidized service (for example East Coast) or, if more than one coast is served, the coast where the company is home based. For example:

DETERMINATION OF COUNTRY COST DIFFERENTIAL

[Year—1985; U.S. Atlantic—Gulf Coast; Foreign Country—Singapore]

| Repair category | Foreign price | U.S. price |
|---|---|---|
| Drydocking and Underwater Repairs | $89,840 | $300,245 |
| Tank Cleaning and Coating | 70,160 | 77,080 |
| Boiler Repairs | 10,545 | 47,550 |
| Machinery Repairs | 22,505 | 108,165 |
| Hull and Deck Repairs | 33,500 | 99,370 |
| Piping System | 71,905 | 215,830 |
| Electrical Repairs | 12,340 | 36,660 |
| Exterior Painting | 5,035 | 30,640 |
| Interior Painting | 390 | 1,470 |
| Estimate Totals | 316,220 | 917,010 |

Foreign/U.S. Price Ratio—34%.
Country Cost Differential (100–34)—66%.

(3) *Distribution of repairs.* The distribution of repairs refers to the countries where M&R work was performed on the vessels of the foreign-flag competitor. When data on the repairing practices are obtained directly from the foreign competitor, they shall be used. If information about such practices is unavailable—or only partially available—data, published by the classification societies and Lloyd's Voyage Record, reporting the dates and localities of drydocking and completion of the various types of vessel surveys, shall be used for determining the geographical distribution of the unknown repairing practices. If such information is unavailable, repairing practices shall be determined on the basis of the industry as a whole.

(4) *M&R subsidy rate.* The U.S.-foreign cost differential for the foreign-flag competitor shall be determined by multiplying the percentage distribution of repairs for each country where repair work was performed by the country cost differential for that country, and by adding the resulting weighted cost differential for all countries. For example:

ABC BULK COMPANY, INC., MAINTENANCE AND REPAIR SUBSIDY RATE

| Principal competitor | Distribution of repairs | | Country cost differential percent (2) | Weighted cost differentials _____ (1) × (2) (percent) (3) |
|---|---|---|---|---|
| | Country (1) | Percent | | |
| Liberia | U.K. | 15 | 19 | 2.9 |
| | Japan | 20 | 36 | 7.2 |
| | Singapore | 65 | 57 | 37.1 |
| Subsidy rate | | | | 47 |

(c) *Data submission requirement.* The operator is required to submit a Subsidy Repair Summary (Form MA–140) quarterly, in accordance with 46 CFR part 272.

[51 FR 40426, Nov. 7, 1986, as amended at 54 FR 5086, Feb. 1, 1989; 58 FR 17349, Apr. 2, 1993; 61 FR 32706, June 25, 1996]

## § 252.33 Hull and machinery insurance.

(a) *Subsidy items.* The fair and reasonable net premium costs (including stamp taxes) of hull and machinery, increased value, excess general average, salvage, and collision liability insurance against risks and liabilities covered under the terms and conditions of policies approved as to form and coverage by MARAD, less lay-up returns, shall be eligible for subsidy and used for determining the U.S.-foreign cost differential. Port risk premiums are eligible for subsidy but not for determining the U.S.-foreign cost differential.

(b) *U.S.-foreign cost differential.* A U.S.-foreign cost differential shall be calculated for the service. Due to the difficulty of comparing forms and costs of hull and machinery insurance coverages, the following assumptions shall be used for estimating the composite premium cost of the foreign-flag competitor.

(1) *Coverage.* The foreign competitive vessels have the same types and amounts of insurance coverages and deductible averages as the subsidized vessels.

(2) *Premium rate.* The foreign competitive vessels are insured in the British market and the rate for such vessels is the same as the British market rate for

the subsidized vessels. If the operator carries all of its insurance in the American market, the American market rate shall be assumed to be the same as the British market rate.

(3) *Repairs.* Insurable repairs of the foreign competitive vessels are performed in the same countries and in the same distribution as non-insurable repairs, and the cost differential for such repairs shall be the same as the maintenance and repair percentage differential.

(4) *Particular average.* The percentage of particular average repair claims for the foreign competitive vessels is the same as the percentage of particular average repair claims for the subsidized vessels. The particular average portion of the premium cost for the subsidized vessels shall be determined as follows:

(i) *Percentage.* The particular average portion of the premium cost shall be determined by applying a percentage to the hull and machinery premium cost after deducting the estimated total loss premium. The percentage is based on insured claims experience. The percentage shall be determined by dividing the total of underwriter's absorptions for particular average domestic repair claims paid and estimated by the total of underwriter's absorptions for all claims paid and estimated (excluding total loss and constructive total loss claims) under the hull and machinery portion of the insurance coverage, except that such percentage shall not exceed eighty-five (85) percent. The percentage is based on the claims experience of the subsidized vessels for the five (5) calendar year period preceding the subsidized year. For subsidized operators that do not have five years of claims experience, the average percentage of particular average domestic repair claims for all similar subsidized vessels shall be used unless the operator can submit data to substantiate its own claims cost experience on similar vessels.

(ii) *Data submission requirement.* The operator shall submit the five year claims experience, invoices showing net premium costs and coverages for the subsidized year, and lay-up returns for the previous year to the Director, Office of Ship Operating Costs, not later than sixty (60) days after the close of each calendar year.

(c) *Calculation.* In calculating the subsidized premium cost, the following steps shall be taken:

(1) The particular average portion of the premium cost shall be adjusted in order to give effect to the repair cost differential for the foreign competitive vessels by applying the complement of the maintenance and repairs percentage cost differential (100 percent minus the differential) to the particular average portion of the premium cost. The adjusted particular average foreign premium cost shall be added to the net premium cost excluding the particular average portion to determine the composite foreign premium cost.

(2) The foreign premium cost shall be subtracted from the operator's total premium cost to determine the difference in dollars. The percentage differential is determined by dividing the dollar difference by the operator's total premium cost. An example calculation is included in Table 2.

(3) The net premium cost of the subsidized vessels shall be divided by the number of days in the calendar year and the resultant daily insurance cost shall be multiplied by the U.S.-foreign cost differential percentage applicable to the most recent year to determine the daily amount of subsidy for hull and machinery insurance.

TABLE 2—ABC BULK COMPANY, INC., U.S./FOREIGN COST DIFFERENTIAL FOR HULL AND MACHINERY INSURANCE—1985

| | | |
|---|---|---|
| 1. Foreign Premium Cost: | | |
| A. Hull and Machinery, Total coverage | $92,741,996 | |
| Average Premium Rate in British Market | 1.00966% | |
| Premium Cost in British Market | | $936,379 |
| (Estimated Total Loss Premium $92,741,966@ .46500% [1] | 431,250) | |
| B. *Increased Value,* Total Coverage | 1,083,325 | |
| Average Premium Rate in British Market | .32550% | |
| Premium Cost in British Market | | 3,526 |
| C. *Excess Liability,* Total Coverage | | None |
| D. Total Premium Cost if Insured 100% in British Market | | 939,905 |

TABLE 2—ABC BULK COMPANY, INC., U.S./FOREIGN COST DIFFERENTIAL FOR HULL AND MACHINERY INSURANCE—1985—Continued

| | | |
|---|---|---|
| E. *Deduct Particular Average Portion:* $936,379 Less $431,250= $505,129 × 62%[2] | ..... | 313,180 |
| F. Net Premium Cost Exclusive of Particular Average | ..... | 626,725 |
| G. *Particular Average Adjustment.* | Worldwide service | |
| P/A Portion of Premium Cost | $313,180 | |
| M&R Subsidy Rate Complement[3] | 84.48% | |
| Adjusted P/A Foreign Premium Cost | 264,574 | |
| Add: Net Premium Cost (Excluding P/A) | 626,725 | |
| 2. *Foreign Premium Cost* | 891,299 | |
| 3. *Total Premium Cost to Subsidized Operators* | 1,068,998 | |
| 4. *Differential in Dollars*[4] | 177,699 | |
| 5. *U.S.–Foreign Cost Differential*[5] | 16.62% | |

[1] Estimated gross total loss rate adjusted for broker's discounts, policy tax and other costs, as necessary.
[2] Percentage of particular average.
[3] 100% minus M&R subsidy rate of the same calendar year.
[4] Line 3 less line 2.
[5] Line 4 divided by line 3.

## § 252.34 Protection and indemnity insurance.

(a) *Subsidy items.* Items eligible for determination of subsidizable costs and the U.S.-foreign cost differential are:

(1) *Premiums.* The fair and reasonable net premium costs (including stamp taxes) of protection and indemnity, excess insurance, second seamen's insurance, "tovalop" or other forms of pollution insurance, bumbershoot (only that portion identified as applicable to P&I insurance), cargo liability if excluded from the primary policy, supplemental calls against liabilities covered under the terms and conditions of policies approved as to form and coverage by MARAD, less lay-up return premiums, shall be eligible for subsidy and used for determining the U.S.-foreign cost differential.

(2) *Deductibles.* The fair and reasonable cost of crew claims paid by and pending with the operator under the deductible provision of the protection and indemnity insurance policy approved as to form and coverage by MARAD, to the extent that such cost would have been paid by the insurance underwriter under the terms of the policy, except for the fact that it did not exceed the deductible provision of the policy, shall be eligible for subsidy. For subsidy purposes, the deductible absorption shall not exceed $50,000 for each accident or occurrence, provided however, that benefits paid on unearned wages, if excluded from coverage under the protection and indemnity insurance policy, shall be eligible, notwithstanding that the deductible provisions of the policy may be exceeded.

(b) *Assumptions made in calculation.* For purposes of determining subsidy for protection and indemnity insurance, it shall be assumed that the cost differential between the subsidized vessels and the foreign competitive vessels is limited to those portions of premium costs and deductible absorptions which are related to crew liability and that the cost of all other liabilities is the same for both the subsidized vessels and the foreign competitive vessels.

(c) *Calculation.* The following is the method of calculating the U.S.-foreign cost differential for premiums:

(1) *General.* A differential shall be calculated for the service of the vessels. Since the premium cost for all other liabilities is assumed to be the same for both the U.S. and foreign competitive vessels, the calculation of the differential for protection and indemnity insurance premiums is in effect based on the difference between U.S. and foreign premium costs for crew liabilities. Premium costs are determined in costs per gross registered ton (GRT).

(2) *Reporting requirement.* The operator shall submit the total premium cost for the subsidized year, plus any supplemental calls and lay-up return premiums not previously reported, to the Director, Office of Ship Operating Costs, not later than 60 days after the beginning of such year. The data shall be supported by invoices from the insurance underwriter.

(3) *U.S. crew liability cost.* the crew liability portion of the total premium cost shall be determined by applying a percentage to the total premium cost based on five (5) years of claims experience for the five years commencing six

years prior to January 1 of the subsidized year. The percentage shall be determined by dividing the total of underwriter's absorptions for crew claims, paid and estimated, by the total of underwriter's absorptions for all claims, paid and estimated. The crew claims portion shall be limited to eighty-five (85) percent unless the operator can substantiate a higher percentage as a result of having crew liability and all other liabilities insured with different underwriters. The operator shall submit the five-year claims experience not later than 60 days following the close of each calendar year.

(4) *All other liabilities cost—U.S. and foreign.* The all other liabilities portion of the U.S. premium cost shall be determined by subtracting the crew liability portion from the total premium cost. The same cost shall be used for the all other liabilities portion of the foreign-flag competitor's premium cost.

(5) *Foreign crew liability cost.* The crew liability cost of each principal foreign-flag competitor shall be used, if reliable cost data can be obtained. If such data cannot be obtained for a principal competitor, and it is determined that such competitor has a non-national crew, the crew liability cost for similar vessels registered under the flag of the crew's nationality may be used, at the Board's discretion, provided reliable cost data are obtained. If no reliable cost data are obtained for a competitor, the crew liability cost for that competitor shall be estimated by multiplying the subsidized operator's crew liability portion of the total premium cost by the ratio of that competitor's wage costs (FC) to the subsidized operator's wage costs (WC), as determined in the calculation of the wage differential.

(6) *U.S.-Foreign cost differential.* The U.S.-foreign cost differential shall be the excess of the operator's total premium cost over the principal foreign-flag competitor's estimated total premium cost, expressed as a percentage, calculated in the following manner.

ABC BULK COMPANY, INC., PROTECTION AND INDEMNITY INSURANCE PREMIUMS, 1985

| Premium cost (per GRT) | United States | Liberia |
|---|---|---|
| Crew liability | [1] $3.98 | [2] $1.27 |
| All other liability | $1.06 | $1.06 |
| Total cost | $5.04 | $2.33 |
| Differential—Excess of U.S. cost over foreign cost | ..... | $2.71 |
| U.S.-foreign cost differential (pct) | ..... | 53.77 |

[1] Determined by applying 79.03% (based on 5-year claims experience) to total GRT premium rate of $5.04.
[2] Crew Liability data obtained by Maritime Administration.
NOTE: The unweighted percentage of foreign to U.S. wage costs would be used to estimate the foreign cost if the foreign crew liability data were not available.

(d) *Daily subsidy rate.* The daily subsidy rate shall be calculated in the following manner:

(1) *Premiums.* The net premium costs per calendar day for the subsidized year shall be multiplied by the U.S.-foreign cost differential percentage determined for the most recent year. The product shall be the daily amount of subsidy for P&I premiums.

(2) *Deductibles.* (i) The eligible illness and injury crew claims paid and pending for each calendar year of a three-year period commencing six years prior to January 1 of the subsidized year, shall be recalculated, if necessary, to reflect the operator's current deductible levels. These expenses, after audit, shall be multiplied by the percentage wage differential, and determined in the calculation of wage subsidy for the appropriate fiscal period. The resulting calendar period P&I deductible subsidy for the three-year period shall be divided by the voyage days for the period to arrive at an aggregate daily P&I deductible subsidy. The aggregate fiscal period wage subsidy accrued for the three-year period shall be divided by the voyage days for the period to arrive at an aggregate daily wage subsidy amount. The aggregate daily P&I deductible subsidy for the three-year calendar period shall be divided by the aggregate daily wage subsidy for the three-year period. The P&I deductible differential shall be divided by the fiscal period wage differential in the service for the three-year period, and the resulting percentage shall be applied to the wage per diem calculated for each ship type in the service to derive the daily amount of subsidy for P&I

deductibles. As to pending claims previously recognized in the historical period, only the amount of changes in cost with respect to such claims shall be subsequently recognized. The following methodology shall determine subsidy for P&I deductibles.

DETERMINATION OF DAILY AMOUNT OF SUBSIDY FOR P&I DEDUCTIBLES

| Item | Calendar year 1979 | Calendar year 1980 | Calendar year 1981 | Total |
|---|---|---|---|---|
| P&I deductible C.Y. expenses | $1,680,000 | $1,220,000 | $1,400,000 | |
| Diff. foreign/U.S. wage cost (pct) | 26.00 | 23.00 | 20.00 | |
| Subsidy | $436,800 | $280,600 | $280,000 | $997,400 |
| Voyage days | 1,140 | 1,100 | 1,225 | 3,465 |

Average subsidy per voyage day ($997,400÷3,465 days)=$287.85.

| | Fiscal year 1979 | Fiscal year 1980 | Fiscal year 1981 | Total |
|---|---|---|---|---|
| Wages fiscal year per diem rate | $7,660 | $7,700 | $8,050 | |
| Voyage days | 1,090 | 1,180 | 1,230 | 3,500 |
| Subsidy | $8,349,400 | $9,086,000 | $9,901,500 | $27,336,900 |

Average subsidy per voyage day ($27,336,900÷3,500 days)=$7,810.54.
Ratio P&I deductible ODS to wage ODS $287.85÷$7,810.54=3.69%.

| T.R. 98 ship type | Daily wage ODS 1/1/85 | Ratio P&I ded. to wage ODS (pct) | Daily P&I ded. ODS 1/1/85 |
|---|---|---|---|
| C4–A | $9,000 | ×3.69 | $332.10 |
| C5–B | 9,300 | ×3.69 | 343.17 |
| C6–C | 9,600 | ×3.69 | 354.34 |

(ii) In cases where national insurance schemes cover crew claims costs in their entirety, resulting in no cost to the foreign competitor for deductible absorptions, the composite percentage differential for wages shall be adjusted by substituting a zero cost for such foreign competitor in the calculation of the differential. The adjustment of the wage percentage differential shall not be used for Japan, where operators incur minimal costs for deductible absorptions, rather than no costs. For Japan, the insurance related costs which are normally included in the calculation of Japanese wage costs shall be excluded in adjusting the wage percentage differential for this purpose.

(3) *Data submission requirement.* The operator is required to submit annually a certified statement of eligible and audited crew claims as identified in paragraph (d)(2) of this section for the historical period identified therein. The report shall be submitted to the Director, Office of Ship Operating Costs, no later than January 1 of the subsidized year.

## Subpart E—Subsidy Payment and Billing Procedures

SOURCE: 51 FR 40432, Nov. 7, 1986, unless otherwise noted.

### § 252.40 Payment of subsidy.

(a) *Submission of voucher.* At the close of each calendar month, the subsidized operator may submit a voucher, and include for payment in such voucher the amount of ODS accrued for the voyages terminated during the period.

(b) *Maintenance and repair subsidy.* In the case of payments for maintenance and repair subsidy only, the subsidized operator shall submit an initial voucher and include for payment in such voucher a percentage of the ODS payable for the period covered by the voucher, which percentage shall be negotiated between MARAD and the subsidized operator, but in no instance shall exceed 90 percent. Upon the completion of MARAD's determinations that the expenses are fair and reasonable, MARAD's computation of the ratio of subsidized vs. nonsubsidized days during the calendar year in which the last voyage terminated, and the Office of the Inspector General's audit of subsidizable expenses, the subsidized operator shall submit a final voucher for an adjustment of the amount of subsidy paid.

[51 FR 40432, Nov. 7, 1986, as amended at 58 FR 17349, Apr. 2, 1993]

## § 252.41 Subsidy billing procedures.

(a) *Subsidy voucher*—(1) *Form.* Requests for payment of ODS shall be submitted on a public voucher, Standard Forms 1034 and 1034A, which can be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC. 20402.

(2) *Copies.* The operator shall submit the original and 3 copies of the voucher to the MARAD Region Director for payment. The original and 2 copies must be supported by schedules and an affidavit. The third copy is the payee's copy and need not be supported.

(b) *Schedules and affidavit.* (1) The following schedules shall be used for calculating the amount of ODS payable:

SCHEDULE A

(Company) _____
ODSA No. _____
ODS Accrued During Fiscal Year 19____
ODS Payable for the Month of _____

| | Current voucher | Previous voucher | Total |
|---|---|---|---|
| Total accrued ODS (sched. B) ..... | $_____ | | |
| Les ODS reductions: reduced crew (sched. C) | _____ | | |
| Net ODS accrued ..... | _____ | $_____ | $_____ |
| Less previous payments | ..... | ..... | _____ |
| ODS payable ..... | ..... | ..... | _____ |

SCHEDULE B

(Company) _____
ODS Accrued for the Month of _____

| Vessel name | Voy. No. | Voyage dates | | Voy. days | Per diem rates | Accrued subsidy |
|---|---|---|---|---|---|---|
| | | From | To | | | |
| ..... | ..... | ..... | ..... | ..... | $_____ | $_____ |
| ODS payable for unpredictably timed expenses not included in daily amount (attach supporting supporting information) ..... | ..... | ..... | ..... | ..... | ..... | $_____ |
| Total accured subsidy (enter on Schedule A) ..... | ..... | ..... | ..... | ..... | ..... | $_____ |

SCHEDULE C

(Company) _____

REDUCED CREW PERIODS

| Vessel | Reduced crew dates | | No. of reduced crew days (a) | | No. of crew reduced | | Man-days | | Man-day amount | | Reduced crew reduction |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | From | To | | | | | | | | | |
| ..... | ..... | ..... | ..... | × | ..... | = | ..... | × | $_____ | = | $_____ |
| ..... | ..... | ..... | ..... | × | ..... | = | ..... | × | _____ | = | _____ |
| ..... | ..... | ..... | ..... | × | ..... | = | ..... | × | _____ | = | _____ |
| ..... | ..... | ..... | ..... | × | ..... | = | ..... | × | _____ | = | _____ |
| Total reduced crew reduction (enter on Schedule A) ..... | ..... | ..... | ..... | .... | ..... | .... | ..... | .... | _____ | | |

(a) If licensed crew, indicate (a).
(b) If unlicensed crew, indicate (b).

(2) A notarized affidavit as shown below shall be signed by an official of the subsidized operator who is familiar with the ODSA, these regulations, the operation of the subsidized vessel, and the accounts, books, records, and disbursements of the subsidized operator relating to such operation:

AFFIDAVIT

State of _____
City of _____
County/Parish of _____

I, _____, being duly sworn, depose and say that I am _____ (title) of the _____ (herein referred to as the "Operator"), and as such am familiar with (a) provisions of the Operating-Differential Subsidy Agreement, Contract No. _____, dated as of _____, as amended, to which the Operator is a party; and (b) the regulations governing the payment of operating-differential subsidy for bulk cargo vessels, PART 252, Title 46, CFR: and (c) the operation of the vessels covered by said Agreement and regulations; and (d) the accounts, books, records, and disbursements of the Operator relating to such operation.

Referring to the public voucher dated _____, covering voyage days allowed for subsidy during the periods commencing _____, and ending _____, and attached, submitted by said Operator concurrent herewith for a payment on account in the sum of _____, under said Agreement, I further depose and say that, to the best of my knowledge and belief, the Operator has fully complied with the terms and conditions of said Agreement and regulations, applicable orders, rulings and provisions of the Merchant Marine Act, 1936, as amended, and is entitled, under the provisions of said Agreement and regulations, orders and rulings applicable thereto, to the amount of the payment on account requested; and further depose and say that the vessels named in the attached schedules were in authorized service for the vessel operating days on which the payment is requested and has not included in the calculation of the amount of subsidy claimed in the attached voucher any costs of a character that the Maritime Administration, or Secretary of Transportation acting by and through the Maritime Subsidy Board or any predecessor or successor, had advised the Operator to be ineligible to be so included, or any costs collectible from insurance, or from any other source.

Payment by the Maritime Administration of all or part of the amount claimed herein shall not be construed as approval of the correctness of the amount stated to have been due, nor a waiver of any right of remedy the Maritime Administration, or Secretary of Transportation, acting by and through the Maritime Subsidy Board, or any predecessor or successor, may have under the terms of said Agreement, or otherwise.

I further depose and say that this affidavit is made for and on behalf and at the direction of the Operator for the purpose of inducing the Maritime Administration to make a payment pursuant to the provisions of the aforesaid Operating-Differential Subsidy Agreement, as amended.

_____

Subscribed and sworn to before me, a Notary Public, in and for the aforesaid County and State, this _____ day of _____,

My commission expires _____
Notary Public _____

(3) The subsidized operator shall furnish its own supply of supporting schedules and affidavit.

### § 252.42 Appeals procedures.

(a) *Appeals of annual or special audits.* An operator who disagrees with the findings, interpretations or decisions in connection with audit reports of the Office of the Inspector General and who cannot settle said differences by negotiation with the Contracting Officer may submit an appeal to the Maritime Administrator from such findings, interpretations or decisions in accordance with Part 205 of this chapter.

(b) *Appeals of administrative determinations*—(1) *Policy.* An operator who disagrees with the findings, interpretations or decisions of the Contracting Officer with respect to the administration of this part may submit an appeal from such findings, interpretations or decisions as follows:

(i) Appeals shall be made in writing to the Secretary, Maritime Subsidy Board, Maritime Administration, within 60 days following the date of the document notifying the operator of the administration determination of the Contracting Officer. In his appeal to the Secretary the operator shall indicate whether or not he desires a hearing.

(ii) The appellant will be notified in writing if a hearing is to be held and whether he is required to submit additional facts for consideration in connection with the appeal.

(iii) When a decision has been rendered by the Board, the appellant will be notified in writing.

(2) *Appeal to the Secretary of Transportation.* An operator who disagrees with the Board may appeal such findings and determinations by filing a written petition for review of the Board's action with the Secretary of Transportation. The petition shall be filed in accordance with provisions of the Department of Transportation pertaining to Secretarial review.

(3) *Hearings,* The Rules of Practice and Procedures, 46 CFR part 201, subpart M, shall be followed for all hearings granted under 46 U.S.C. 1176 and 46 CFR 252.42.

## PART 272—REQUIREMENTS AND PROCEDURES FOR CONDUCTING CONDITION SURVEYS AND ADMINISTERING MAINTENANCE AND REPAIR SUBSIDY

### Subpart A—General

Sec.
272.1 Purpose.
272.2 Scope.
272.3 Definitions.
272.4 Effective date.

272.5 Prior instructions superseded.

Subpart B—Requirements and Procedures for Determining the Condition of Eligible Vessels.

272.11 Scope.
272.12 Determining the condition of eligible vessels.
272.13 Operator's responsibilities.
272.14 Survey procedures.
272.15 Execution of condition survey reports.
272.16 Non-compliance with survey requirements.

Subpart C—Eligibility Criteria for M&R Subsidy; Substantiation of M&R Expenses

272.21 General eligibility criteria.
272.22 Improvements and other similar work.
272.23 Examples of ineligible expenses.
272.24 Subsidy repair summaries.
272.25 Requirements for subsidy repayment.

Subpart D—Penalties

272.31 Determination of penalty.
272.32 Mitigation of penalty.
272.33 Appeals.

Subpart E—Examination, Audit, Review and Appeal Procedures

272.41 Requirements for examination and allocation of M&R expenses.
272.42 Audit requirements and procedures.
272.43 Review and appeal procedures.
272.44 Dates.

AUTHORITY: 46 App. U.S.C. 1114(b), 1173, 1176; 49 CFR 1.66.

SOURCE: 55 FR 34919, Aug. 27, 1990, unless otherwise noted.

## Subpart A—General

### § 272.1 Purpose.

The purpose of this part is to prescribe the requirements and procedures for determining the condition of vessels receiving operating-differential subsidy, to prescribe the requirements for reporting and substantiating maintenance and repair (M&R) expenses, and to establish the criteria and procedures for determining whether a M&R expense is subsidizable.

### § 272.2 Scope.

Except as otherwise provided in subpart B, the provisions of this part apply only to vessels operating under an operating-differential subsidy agreement which provides for the payment of M&R subsidy, except that this part does not apply to any vessel operating under an operating-differential subsidy agreement for the carriage of bulk raw and processed agricultural commodities from the United States to the Union of Soviet Socialist Republics, pursuant to part 294 of this chapter.

### § 272.3 Definitions.

For the purposes of this part:

(a) *Act* means the Merchant Marine Act, 1936, as amended, 46 App. U.S.C. 1101 *et seq.*

(b) *MARAD* means the Maritime Administration, a unit of the United States Department of Transportation, as distinguished from the Board (which is a unit of MARAD).

(c) *Board* means the Maritime Subsidy Board of the Maritime Administration.

(d) *Domestic Origin:*

(1) *Labor.* With respect to labor, Domestic Origin means that the work shall be performed by a U.S. ship repair facility, a U.S. independent contractor, or by the Operator's own shore gang.

(2) *Materials.* With respect to materials, Domestic Origin means that all articles, materials, and supplies shall be of the growth, production or manufacture of the United States.

(e) *Eligible Vessel* means a vessel operated under an ODSA, other than an ODSA subject to part 294 of this chapter, which provides for the payment of M&R subsidy with respect to the operation of that vessel.

(f) *Equipment* means that part of an Eligible Vessel that is not part of the vessel's hull or machinery.

(g) *Expendable equipment* means those articles, outfittings and furnishings that are portable, semi-portable or detachable, that are used in equipping a ship for service and in its normal day-to-day maintenance and operation, and that are subject to casual or gradual deterioration and replacement. It does not include items classified as stores and supplies or Spare Parts.

(h) *Improvement* means work to be performed on an Eligible Vessel which is a modification, alteration, addition or betterment, which may be accomplished separately from M&R, but may

be eligible for M&R subsidy pursuant to § 272.22 of this part.

(i) *M&R* and *M&R Subsidy* mean, respectively, maintenance and repairs and maintenance and repair subsidy payable pursuant to section 603 of the Act.

(j) *ODS* and *ODSA* refer, respectively, to operating-differential subsidy provided under an operating-differential subsidy agreement entered into pursuant to title VI of the Act.

(k) *Operator* means any individual, partnership, corporation, or association that enters into an ODSA with the Board pursuant to title VI of the Act.

(l) *Permanent equipment* means Equipment that is, or is intended to become when installed, an integral, permanent, built-in part of the vessel.

(m) *Region Office* means any one of the four Maritime Administration Region Offices in New York, NY; New Orleans, LA; San Francisco, CA; and Chicago, IL; established pursuant to section 809 of the Act.

(n) *Spare parts* means such items as spare propellers and tailshafts and self-contained operable units of machinery or equipment, as well as those items generally recognized within the maritime industry as Spare Parts.

(o) *United States* means the states of the United States, the District of Columbia and Puerto Rico.

### § 272.4 Effective date.

The provisions of this part apply to voyages of every Eligible Vessel which terminate on or after September 26, 1990.

### § 272.5 Prior instructions superseded.

The provisions of this part supersede any provisions of MARAD Circular Letters and Accounting Instructions applicable to M&R and dated prior to the effective date of these regulations to the extent that the provisions of this part may be inconsistent with the provisions of such prior instructions.

## Subpart B—Requirements and Procedures for Determining the Condition of Eligible Vessels

### § 272.11 Scope.

This subpart applies to any Eligible Vessel, other than one operating under an ODSA subject to part 294 of this chapter.

### § 272.12 Determining the condition of eligible vessels.

The Operator of an Eligible Vessel shall make the vessel available whenever MARAD may require, in any of the following instances:

(a) At the commencement of the first subsidized voyage, except for a newly constructed vessel which enters subsidized service immediately upon delivery by the shipyard, and for which there is a prior condition survey report. If that subsidized service commences outside the continental limits of the United States, the vessel may be surveyed at the first United States port of call;

(b) At the commencement of the first voyage following the effective date for M&R subsidy established by MARAD, if such M&R rate was not established at the commencement of the vessel's first voyage;

(c) Upon the discontinuance of a M&R subsidy rate;

(d) Upon resumption of subsidized voyages after temporary withdrawal from subsidized operation. The vessel shall not be considered as having been temporarily withdrawn from subsidized service if it performed unsubsidized voyages in a subsidized service of the Operator;

(e) Upon withdrawal from subsidized service, either temporarily (subject to the provisions of paragraph (d) of § 272.14), or permanently;

(f) During the dry docking period incident to the vessel's American Bureau of Shipping Special Surveys;

(g) Upon termination of the last voyage under the ODSA, or at the end of the contract period, with respect to subsidized vessels in idle status at that time; or

(h) At any other time that MARAD considers to be appropriate.

### § 272.13 Operator's responsibilities.

Whenever MARAD notifies an Operator that a survey of an Eligible Vessel is required under this section, the Operator shall:

(a) Make the vessel immediately available for survey if the vessel is in a port of the United States at the time of notification, or make the vessel available for survey immediately upon arrival at the first port of call in the United States if the vessel is not in a port of the United States at the time of notification; and

(b) Furnish to the Secretary of the Board the following:

(1) A copy of each American Bureau of Shipping report and every other salvage association or damage survey report; and

(2) Copies of certificates or other evidence of compliance with applicable laws, rules, and regulations as to vessel condition and operation, including, but not limited to, those administered by the United States Coast Guard, Environmental Protection Agency, Federal Communications Commission, Public Health Service, or their respective successors, and compliance with all applicable treaties and conventions to which the United States is a signatory.

(Approved by the Office of Management and Budget under control number 2133–0007)

### § 272.14 Survey procedures.

(a) *Prior to survey*. Unless otherwise directed by MARAD, the Operator of a vessel which is required to be surveyed under this subpart shall contact the ship operations unit of the Region Office in which the survey is to be conducted.

(b) *Operator's assistance to surveyor*. The Operator shall assist the marine surveyor performing the survey for MARAD and shall permit access by that surveyor to all parts of the vessel, its log books, and other official records. The Operator may designate a representative to accompany the marine surveyor during the survey, but no Operator's representative is required to be present during the survey.

(c) *On-subsidy surveys*. An on-subsidy survey consists of the following:

(1) *Vessel survey*. This includes an inspection and the completion of reports by the surveyor, in sufficient detail to reveal a comprehensive picture of the conditions noted.

(2) *On-subsidy survey report*. The on-subsidy survey report consists of:

(i) Ship Survey Report, Form MA–58; and

(ii) As appropriate for the circumstances of the survey and the respective vessel, Forms MA–55 (Turbines and Gears Report); MA–56 (Tooth Contact Report); MA–57 (Drydock Report); and MA–59 (Measurements of Piston Rings and Grooves).

(d) *Off-subsidy surveys*. An off-subsidy survey consists of the following:

(1) *Repair specifications*. The Operator shall prepare and furnish to the appropriate Region Office detailed repair specifications covering all repair work attributable to completed subsidized service.

(2) *Off-subsidy survey report*. The survey report for an off-subsidy survey consists of the repair specifications required by paragraph (c)(1) of this section, and the findings of the Region Office on these specifications after the survey required by paragraph (c)(2) of this section.

### § 272.15 Execution of condition survey reports.

Every survey report shall be signed by:

(a) The Operator's representative, when designated pursuant to § 272.13(a), but only if that representative was in attendance during the survey;

(b) The Operator's superintendent engineer or equivalent;

(c) The marine surveyor who conducted the survey; and

(d) The appropriate representative of the Region Office for the Region in which the survey was conducted.

### § 272.16 Non-compliance with survey requirements.

MARAD may disallow any one or more M&R claims otherwise eligible for subsidy if an Operator fails to:

(a) Contact the appropriate Region Office as required by § 272.14(a);

(b) Comply with provisions of § 272.14(c)(1) with respect to repair specifications, or to make the vessel reasonably available for inspection before its next sailing; or

(c) Comply with any other requirement specified in this subpart B.

## Subpart C—Eligibility Criteria for M&R Subsidy; Substantiation of M&R Expenses

### § 272.21 General eligibility criteria.

(a) *Eligible maintenance and repairs.* Costs of maintenance and repair are eligible for M&R subsidy participation if they are:

(1) Performed on an Eligible Vessel;

(2) Necessary, because of subsidized operation, for the M&R or replacement of damaged or worn parts of the vessel's hull, machinery, or Permanent Equipment;

(3) Uncompensated by insurance;

(4) Considered fair and reasonable by the Board;

(5) Of Domestic Origin; and

(6) Otherwise eligible in accordance with provisions of this part.

(b) *Off-subsidy survey items.* Any M&R contained in an executed off-subsidy survey report is eligible maintenance and repair if:

(1) Paragraphs (a) (1) through (6) of this section are met;

(2) The work is accomplished by the Operator before or during the next drydocking period (periodic or otherwise); and

(3) The vessel is either owned by the same Operator who owned it at the time of the off-subsidy survey, or ownership was transferred to the Federal Government pursuant to section 510 of the Act (46 App. U.S.C. 1160).

(c) *Operator furnished items.* In addition to the general requirements of paragraph (a) of this section, the cost of the Operator's materials, supplies, or both, furnished by the Operator which are necessary to the performance of eligible M&R, is eligible for M&R subsidy if:

(1) The items for which the cost was incurred are issued by the Operator from ship's inventory or the Operator's shoreside inventory, or are issued by direct purchase to the ship repair yard, other independent contractor, or shore gang labor; and

(2) No subsidy, whether M&R or otherwise, has previously been paid for such material, supplies, or both; and

(3) The items are of Domestic Origin.

(d) *Costs associated with shore gang labor.* In addition to the general requirements of paragraph (a) of this section, the costs incurred with respect to the Operator's employment of U.S. shore gang labor necessary for the performance of eligible M&R are eligible for M&R subsidy participation only if such costs are:

(1) For direct labor charges;

(2) For eligible Spare Parts, as described in paragraph (e) of this section; or

(3) Incidental to the payment of wages for the direct labor, to the extent that such costs are required by State or Federal law or by collective bargaining agreements.

(e) *Spare parts.* Spare parts are eligible for M&R subsidy if they are:

(1) Necessary for eligible M&R;

(2) Issued by the Operator from the Operator's shoreside inventory or issued by direct purchase to a U.S. ship repair yard, U.S. independent contractor, or U.S. shore gang labor; and

(3) Placed aboard an Eligible Vessel, and

(4) Of Domestic Origin.

### § 272.22 Improvements and other similar work.

(a) *Eligible expenditures.* Any expenditure not in excess of $200,000 for work effected during any one or a series of repair periods, which the Operator and MARAD consider to be an Improvement, is eligible for M&R subsidy if otherwise eligible for such subsidy pursuant to provisions of this Part.

(b) *Capital expenditures.* An expenditure in excess of $200,000 for work effected during any one or a series of repair periods, which is not necessary for maintenance or repair shall be considered to be a capital expenditure, ineligible for M&R subsidy, except that work on an Eligible Vessel which the operator considers to be an Improvement is eligible for M&R subsidy if, before awarding this work:

(1) The Operator submits a written request to the Director, Office of Ship Operations, for consideration of the expenditures;

(2) The Director determines that the work is an Improvement and is technically acceptable; and

(3) The Associate Administrator for Maritime Aids approves M&R subsidy for the work, as appropriate, pursuant to the provisions of title VI of the Act.

(c) *Improvements performed in more than one repair period.* Whenever an Operator desires to spread the work incident to any Improvement over more than one repair period, the operator shall give written notice to the Director, Office of Ship Operations, prior to commencement of the work, as to the scope of work involved, expected benefits, the number of voyages over which the work will be spread and the estimated total cost. The operator shall report in the Subsidy Repair Summary (Form MA–140) the actual total cost of such work, covering the repair period in which it is finally completed, and shall attach a copy of the acknowledgement of such notification to the Form MA–140.

**§ 272.23 Examples of ineligible expenses.**

Expenses ineligible for M&R subsidy participation include, but are not limited to, the following examples:

(a) *Specialized improvements.* Any expenditure or Improvement required to alter, outfit or otherwise equip a vessel for its intended subsidized service which MARAD determines should have been performed before the initial entry of the vessel into subsidized service;

(b) *Convenience items.* Any expenditure for items that the Region Director determines to be aboard a ship only for the convenience of the Operator or crew members, and which are not considered integral parts of the vessel and are not required for seaworthiness, navigation or the health or well-being of the crew or passengers.

(c) *Unsupported expenses.* Any expense item which the Operator fails to substantiate adequately with documentation, as required by § 272.24.

(d) *Untimely requests for review.* Any disallowed expense item for which the Operator fails to make a timely request for review, as required by § 272.43.

(e) *Untimely appeals.* Any expense item disallowed in the final determination by the Director, Office of Ship Operations, for which the Operator fails to make a timely appeal to the Board, pursuant to § 272.43.

(f) *Absence of notice of multi-repair period Improvements.* Any expenses for an Improvement extending over more than one repair period in which the Operator did not notify the Director, Office of Ship Operations, as required by § 272.22(c).

(g) *Cargo expenses.* Any expense of special cargo fittings of a temporary nature, dunnage, ceiling, battens, the cleaning of cargo holds and tanks for cargo, the reading and certification of temperatures for refrigerated cargoes, and similar expenses.

(h) *Stevedore damage.* Any expense or any damage to the vessels or cargo gear directly attributable to a stevedore.

(i) *Rented equipment.* Any expense for the rental of Permanent or Expendable Equipment, such as compressors, paint floats, and other similar items for use by shore gangs or ship's crew on repair or other work, radar, radio telephones, and other similar items for use by ship's crew in ship operations.

(j) *Special requirements for trade routes.* Any expense for the initial installation of equipment necessary for the vessel's particular trade route, such as Suez Canal davits, which should have been installed before the entry of the vessel into the particular subsidized service.

(k) *General operating expenses.* Any expense for the loading of stores, the landing and sorting of laundry, pilot service, tug charges, removing surplus equipment to warehouses, and other similar expenses which do not involve actual maintenance and repair.

(l) *Items attributable to unsubsidized operations.* Any item of maintenance or repair that is clearly attributable to unsubsidized operation, including expenses noted in on-subsidy surveys for repairs which clearly should have been made before departure from the last United States port on the first voyage:

(1) In subsidized service, or

(2) Upon resumption of subsidized operation following temporary withdrawal.

(m) *Overdue classification and inspection requirements.* Any expenses for work required by a classification society or an agency of the Federal Government, which was due (irrespective of any grace period granted) and not completed before the first voyage:

(1) In subsidized service, or

(2) Upon resumption of subsidized operation following temporary withdrawal, except when such work is attributable to prior subsidized service.

(n) *Foreign maintenance and repairs.* Any expense for any item of M&R, including insurance repairs, that is not of Domestic Origin.

(o) *Marine or other loss.* Any part of an expense or a repair which is recovered or recoverable from an insurer or another party.

(p) *Consumables, expendables.* Any procurement expense for consumables, expendables, and Expendable Equipment, when used or installed by ship's crew or furnished for inclusion in ship's inventory, and any expense for maintenance, repair, or replacement of Expendable Equipment.

(q) *Excessive costs.* Costs for M&R which MARAD considers excessive, after allowing the Operator an opportunity to present all relevant facts pertinent to such costs.

(r) *Overhead costs.* Any expense included in shore gang labor charges which is an overhead item, as prescribed by 46 CFR part 232—Uniform Financial Reporting Requirements.

(s) *Guarantee items.* Any expense for an item adjudged or noted as being a guarantee item of a construction or repair contractor.

[55 FR 34919, Aug. 27, 1990, as amended at 57 FR 34690, Aug. 6, 1992]

### § 272.24 Subsidy repair summaries.

(a) *Filing requirements.* The Operator of an Eligible Vessel shall submit to the appropriate MARAD regional Ship Operations Office a Subsidy Repair Summary (Form MA–140) for each quarter of a calendar year in which one or more of the Operator's Eligible Vessels (including any vessel which has been temporarily withdrawn from subsidized service) terminates a voyage. This quarterly report shall include supporting documents and information, as described in paragraph (c) of this section. This summary may be for either a single voyage or multiple voyages, and shall be filed not later than 120 days after:

(1) The close of the calendar quarter in which a voyage is terminated, or

(2) The date the reported vessel is temporarily or permanently withdrawn from subsidized service.

(b) *Form requirements.* MARAD will make available one copy of Form MA–140 upon request. Each Operator shall furnish its own supply of the form and prepare each form for submission. Information on any Form MA–140 shall pertain to only one vessel. The Operator's superintendent engineer or other responsible official shall certify every summary submitted by an Operator in the following manner:

This is to certify that, to the best of my knowledge and belief, and based on recorded entries through (*Date*), this is a true and correct statement of repair and maintenance expenditures for the period stated, and that the repair and maintenance items indicated as eligible for subsidy participation are reasonably attributable to service subsequent to commencement of the first voyage under the Operating-Differential Subsidy Agreement and were necessary, satisfactorily completed, and the price is fair and reasonable (exceptions are listed on separate page).

(c) *Categorization.* The Operator shall exercise due diligence in identifying each item in the Form MA–140 within the following three separate categories:

(1) *Claimed for subsidy.* This includes the following:

(i) M&R

(ii) Spare Parts

(iii) Improvements

(2) *Marine loss.* If any M&R expense is incurred because of marine loss, the Operator shall list such an M&R expense under this separate category, and shall exclude such expense from the totals for the "Claimed for Subsidy" and "Non-Subsidized Items" categories provided for in this section.

(3) *Non-subsidized items.* This category shall include builders' guarantee items, foreign repairs, and other items of M&R expense not claimed for subsidy.

(d) *Required supporting documents and information*—(1) *General.* The Operator shall support every item in the Form MA–140 with documents or other information, in sufficient detail to permit MARAD to determine the fairness and reasonableness of the prices for the submitted work. With respect to any claims for M&R performed outside the United States, the Operator shall submit with the claim a certificate, signed

either by the Operator (if it uses its own shore gang labor or materials from its own inventory) or by an official of the ship repair yard or the independent contractor performing the work, stating that the M&R were performed with materials, labor, or both, of Domestic Origin.

(2) *U.S. Independent contractors.* If a U.S. independent contractor performed M&R work, the Operator shall support each such expense with one copy of the contractor's invoices covering the work performed. If an invoice is not itemized and fully descriptive of the work performed with item prices then the Operator shall attach to the contractor's invoice other supporting documentation, such as specifications, prepared in sufficient detail to permit a determination of the fairness and reasonableness of the prices for each segment of the work performed.

(3) *Operator's shore gang.* If an Operator's own U.S. shore gang has performed any M&R work, the Operator shall submit with the Form MA–140 specifications covering that work, prepared in sufficient detail (including the material and labor cost of each item) to permit a determination of the specific cost of each segment of work performed.

(4) *Operator furnished material.* Whenever an Operator furnishes to a contractor material obtained either from the Operator's own ship stores or shoreside inventory, or by direct purchase for a specific job, the Operator shall include on the invoice, requisition form or other form of transfer memorandum the item number for which the material was used and the contract number covering the work performed.

(5) *Spare parts.* The Operator shall ensure that the invoice covering any Spare Part for an Eligible Vessel which is to be used or installed as an integral, permanent part of the vessel, indicates the specific piece or part of the vessel's hull, machinery, or Equipment for which the Spare Part was obtained.

(6) *Foreign repairs.* Operators receiving M&R subsidy shall submit copies of all U.S. Customs entry forms detailing foreign expenditures on behalf of Eligible Vessels. The copies shall include all expenditures made during the quarter.

(Approved by the Office of Management and Budget under control number 2133–0007)

### § 272.25 Requirements for subsidy repayment.

(a) *Repayment of M&R subsidy for compensated marine or other loss.* If an Operator eventually receives compensation from an insurer or any other person for a marine loss or any other loss for which M&R subsidy has been paid, the Operator shall repay to MARAD an amount equal to the amount of subsidy paid with respect to that loss.

(b) *Repayment of M&R subsidy for Improvements—three year service requirement.* If, within three years after the completion of an Improvement for which M&R subsidy was paid, the Operator permanently withdraws the Eligible Vessel from the ODSA, the Operator shall repay to MARAD an amount equal to the amount of M&R subsidy paid with respect to that Improvement unless MARAD shall have determined that such action was beyond the control of the Operator.

(c) *Repayment of M&R subsidy due to allocation of costs.* If the allocation of total M&R costs required by § 272.41(e) of this part results in the allocation of a lesser amount of subsidizable M&R costs than were actually paid for during the calendar year, the Operator shall repay to MARAD the amount of ODS which was paid in excess of the allocated subsidizable costs.

(d) *Administrative action.* If an Operator fails to repay an M&R subsidy required to be repaid by this section, MARAD may either reduce any ODS payable by the amount of M&R subsidy required to be repaid by this section, or take any other action necessary to secure repayment.

## Subpart D—Penalties

### § 272.31 Determination of penalty.

Operators whose Eligible Vessels have undergone foreign repairs, which MARAD determines are non-emergency in nature, may be subject to a penalty in an amount equal to the total cost (exclusive of applicable U.S. Customs duties) of such foreign repairs and purchases, such penalty to be effected by a

deduction from the Operator's total ODS otherwise accrued. The Director, Office of Ship Operating Assistance, shall notify the Operator by letter with respect to:

(a) MARAD's determination of a penalty and the reasons therefore; and

(b) Whether the determination is final or subject to the submission of additional information.

### § 272.32 Mitigation of penalty.

The Director, Office of Ship Operating Assistance, may decide, after a non-emergency foreign repair occurs, to mitigate the penalty. Any mitigation of penalty shall be based on a determination that special circumstances existed at the time of repair. The Director shall not consider the difference in the price of foreign and domestic repair work in making this determination, and shall not grant prior approval of foreign repairs. In determining whether special circumstances existed, the Director shall consider, among others, the following factors:

(a) The trading area of the vessel both before and after the repair was performed;

(b) Loss of revenue and effect on vessel utilization if the vessel had returned to the United States for repairs;

(c) The additional operating expense which would have resulted from a return to the United States to repair the vessel; and

(d) Whether the repairs could have been deferred until return to the United States, taking into consideration the Coast Guard requirements for dry docking and special surveys.

### § 272.33 Appeals.

The Operator may appeal final penalty determinations of the Director, Office of Ship Operating Assistance, to the Board, as provided in § 272.43(c) of this part.

## Subpart E—Examination, Audit, Review and Appeal Procedures

### § 272.41 Requirements for examination and allocation of M&R expenses.

(a) *Examination requirement.* Pursuant to the specific limitations on M&R subsidy in section 603 of the Act, the Region Office shall examine the expenses submitted by an operator on Form MA–140 in order to determine eligibility to receive M&R subsidy and the reasonableness of such expenses.

(b) *Operator's responsibility.* During the examination, the operator shall provide, at the request of the Director or other official of the Region Office, any further documentation or information necessary to support an M&R expense. If such documentation or information, including information required under paragraph (e) of this section, is not received at the Region Office on a timely basis, the Director or other official of the Region Office may disallow the M&R expense.

(c) *Notification of examination results.* At the completion of the examination the Director or other appropriate official of the applicable Region Office shall notify the Operator by letter of the results of the examination, and shall state the reason for each disallowance of an item claimed for subsidy and/or each nonapproval of a marine loss item.

(d) *Record retention requirements.* To facilitate an audit examination of M&R made pursuant to § 272.42 of this part, the Operator shall maintain files arranged by vessel and voyage, which shall include, at a minimum, a copy of the Region Office notice letter, a copy of the Form MA–140 with all supporting documents submitted therewith, and the condition survey report. The Operator shall retain all the required materials in files for not less than 3 years after completion of the audit.

(1) *Limitation on approval.* Any approval for payment of M&R subsidy for a marine loss item shall be subject to rescission or modification if the Operator subsequently receives insurance or other compensation for the item. The Region Finance Officer may at any time request verification that the Operator has not received such compensation.

(2) *Status report on approved marine loss items.* The Operator shall advise the Region Finance Office by letter as to whether insurance or other compensation will be recovered for the marine loss item. The Operator is responsible for ensuring that the letter reaches the applicable Region Office within 120 days after:

(i) The date on which all repairs for damage attributed to the "Policy Voyage" (as defined in the Operator's insurance policy) are completed, when the amount for such repairs does not exceed the franchise or deductible of the policy, or

(ii) The date of the underwriter's rejection of the Operator's marine loss insurance claim or claims.

(Reporting and recordkeeping requirements contained in paragraph (d) introductory text were approved by the Office of Management and Budget under control number 2133–0007)

[55 FR 34919, Aug. 27, 1990, as amended at 61 FR 32706, June 25, 1996]

### § 272.42 Audit requirements and procedures.

(a) *Required audit.* In connection with the audit of the Operator's subsidizable expenses, the Office of the Inspector General, Department of Transportation, shall audit for MARAD the Operator's M&R costs, as necessary, for the determination of final subsidy rates. The Operator shall substantiate those costs recorded on the books of account which have been approved by the Administration.

(b) *Notification of audit results.* Upon completion of the audit by the Office of Inspector General, the MARAD Office of Financial Approvals shall notify the Operator of the audit results, including any items disallowed and the reasons for such disallowance.

[57 FR 34690, Aug. 6, 1992]

### § 272.43 Review and appeal procedures.

(a) *Exclusive procedures.* Notwithstanding the audit appeal procedures of part 205 of this chapter, the provisions of this section shall be the exclusive remedy available to an Operator for the review and appeal of any disallowance of subsidy for a M&R expense claimed or any penalty assessed pursuant to § 272.31.

(b) *Request for review.* An Operator may request review by:

(1) The Director, Office of Ship Operations, with respect to any disallowance by the Region office of a claimed M&R expense, after receiving the notification required by § 272.41(c); or

(2) The Director, Office of Financial Approvals, with respect to any disallowance of a claimed M&R expense, after receiving the notification required by § 272.42(b).

(c) *Timeliness of request.* The Operator shall file all requests for review pursuant to paragraph (b) of this section within 60 days after the date of the audit notification. Any disallowance with respect to which the Operator fails to file a timely request for review shall be final and shall not be subject to appeal to the Board pursuant to paragraph (e) of this section.

(d) *Notification of review determination.* The appropriate MARAD Office Director shall notify the Operator by letter, with respect to each timely filed review request, of the Director's determination and the reasons for each disallowance and whether the determination is final or subject to the submission of additional information.

(e) *Appeal to the Maritime Subsidy Board*—(1) *Right to appeal.* An Operator may appeal a MARAD Office Director's final determination issued pursuant to § 272.32 (penalties) or § 272.43 (review of claims disallowance or of audit results) of this section to the Board in writing.

(2) *Contents and timeliness.* The Operator shall set forth in any appeal the reasons for the Operator's objection to a penalty or disallowance of M&R subsidy and shall file such appeal with the Secretary of the Board within 60 days after the date of the notification sent to the operator by the appropriate Director pursuant to paragraph (d) of this section or § 272.33.

### § 272.44 Dates.

The dates noted on the letters or notifications sent to the Operator by officials of the Region Office, any Director or any other official or MARAD, pursuant to the provisions of this part, shall be conclusive for the purposes of determining the timeliness of any requests for review made under the provisions of this part.

## PART 276—CONSTRUCTION-DIFFERENTIAL SUBSIDY REPAYMENT

Sec.

276.1 Partial repayment—incidental domestic trading.

276.2 Reporting requirement—partial repayment.

AUTHORITY: 46 App. U.S.C. 1114(b), 1117, 1156, and 1204; 49 CFR 1.66.

### § 276.1 Partial repayment—incidental domestic trading.

In every instance where a vessel, with respect to which a construction-differential subsidy has been paid or allowance therefor has been made in calculating the basic charter hire under section 714 of the Merchant Marine Act, 1936, as amended (49 Stat. 1995, 52 Stat. 995; 46 U.S.C. 1151) is operated in other than exclusively foreign trade, the owner or charterer thereof shall pay to the Maritime Administration, not later than March 31 of the calendar year succeeding such operation, the proportion of the difference between the domestic and foreign cost of such vessel that is required to be paid to the Maritime Administration in such act, and particularly sections 506 and 714 thereof.

(Sec. 204, 49 Stat. 1987, as amended; 46 U.S.C. 1114)

[G.O. 50, 7 FR 588, Jan. 29, 1942, as amended at 45 FR 68394, Oct. 15, 1980]

### § 276.2 Reporting requirement—partial repayment.

Every owner of a vessel for which a construction-differential subsidy has been paid and every charterer of a vessel constructed under the provisions of the Merchant Marine Act, 1936, shall file with the Maritime Administration a General Financial Statement in the form and at the times prescribed by the Maritime Administration but not less frequently than annually; the amount of the payment due the Maritime Administration on account of the operation of such vessel in other than exclusively foreign trade must be shown in Balance Sheet Account No. 430; and a schedule reflecting the details of the manner in which the amount of such payment was determined must be made a corporate part of the General Financial Statement.

(Sec. 204, 49 Stat. 1987, as amended; 46 U.S.C. 1114)

[G.O. 50, 7 FR 588, Jan. 29, 1942, as amended at 45 FR 68394, Oct. 15, 1980]

## PART 277—DOMESTIC AND FOREIGN TRADE; INTERPRETATIONS

### § 277.1 Guam, Midway and Wake.

Steamship service between ports of the United States mainland and ports in the islands of Guam, Midway and Wake is not "domestic intercoastal or coastwise service" within the meaning of section 805(a) of the Merchant Marine Act, 1936. This interpretation is limited to Guam, Midway and Wake and does not signify that a similar interpretation is or would be applicable to Hawaii, Puerto Rico or Alaska.

(Sec. 204, 49 Stat. 1987, as amended; 46 U.S.C. 1114. Interprets or applies sec. 805, 49 Stat. 2012, as amended; 46 U.S.C. 1223)

[G.O. 73, 15 FR 9065, Dec. 19, 1950]

## PART 280—LIMITATIONS ON THE AWARD AND PAYMENT OF OPERATING-DIFFERENTIAL SUBSIDY FOR LINER OPERATORS

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AUTHORITY: Sec. 204(b), Merchant Marine Act, 1936, as amended (46 U.S.C. 1114) Reorganization Plans No. 21 of 1950 (64 Stat. 1273) and No. 7 of 1961 (75 Stat. 840) as amended by Pub. L. 91–469 (84 Stat. 1036), Department of Commerce Organization Order 10–8 (38 FR 19707, July 23, 1973).

SOURCE: 42 FR 61460, Dec. 5, 1977, unless otherwise noted.

### § 280.1 Purpose.

The purpose of this part is to prescribe regulations governing the award of operating-differential subsidy agreements and payment of operating-differential subsidy to liner operators

under Title VI of the Merchant Marine Act, 1936, as amended, as interpreted by the Maritime Subsidy Board in Docket No. S–244.

**§ 280.2 Definitions.**

For purposes of this part only:

(a) *Commercial cargo* means cargo other than military cargo and civilian preference cargo.

(b) *Military cargo* means that cargo required to be carried on a U.S.-flag vessel by 10 U.S.C. 2631.

(c) *Civilian preference cargo* means any cargo other than military cargo required by law to be carried on a U.S.-flag vessel, including, but not limited to, cargo required to be carried on a U.S.-flag vessel by 15 U.S.C. 616a and 46 U.S.C. 1241(b).

(d) *Conference-rated civilian preference cargo* means any civilian preference cargo moving at rates set by an international rate conference.

(e) *International rate conference* means any formal organization of competing carriers established for the purpose of setting shipping rates.

(f) *Open-rated civilian preference cargo* means any civilian preference cargo moving at a rate other than a set rate established by an international rate conference.

(g) *Open-rated civilian preference cargo carried at the world rate* means any open-rated civilian preference cargo that is considered pursuant to § 280.5 not to be carried at a premium rate.

(h) *Competitive cargo* means commercial cargo, conference-rated civilian preference cargo, and open-rated civilian preference cargo carried at the world rate.

(i) *Secretary* means the Secretary of the Maritime Administration, Department of Transportation.

(j) *Region Director* means the Region Director of the Maritime Administration within whose region the principal office of the operator is located.

(k) *Operator* means any individual, partnership, corporation or association that contracts with the United States Government under Title VI of the Act to receive ODS.

(l) *Board* means the Maritime Subsidy Board of the Maritime Administration, Department of Transportation.

(m) *Act* means the Merchant Marine Act, 1936, as amended.

(n) *Operating-differential subsidy (ODS)* means, except as the operator and the United States Government shall agree upon a lesser amount, the excess of the cost of subsidizable items of expense incurred in the operation under United States registry of a vessel over the estimated fair and reasonable cost of the same items of expense (excluding any increase in the cost of such items necessitated by features incorporated for national defense), if such vessel were operated under the registry of a foreign country whose vessels are substantial competitors of the vessel.

(o) *Gross freight revenue* means total gross receipts earned from the carriage of cargo (other than mail) in the U.S. foreign commerce.

(p) *Miscellaneous gross revenue* means total gross receipts earned in the U.S. foreign commerce from the carriage of passengers and mail plus miscellaneous voyage revenues.

(q) *Inbound gross freight revenue* means gross freight revenue earned from the carriage of cargo in foreign commerce inbound to the United States.

(r) *Outbound gross freight revenue* means gross freight revenue earned from the carriage of cargo in foreign commerce outbound from the United States.

(s) *Wayport gross freight revenue* means gross freight revenue earned from the carriage of cargo between foreign ports.

(t) *Total gross revenue* means the sum of inbound gross freight revenue, outbound gross freight revenue, wayport gross freight revenue and miscellaneous gross revenue.

(u) *Service* means any essential service in the foreign commerce of the United States under section 211(a) of the Act for which an ODS agreement has been entered into by the operator and the United States.

(v) *ODS payable on the inbound leg of a service* means the inbound gross freight revenue of the service divided by the total gross revenue of the service times the ODS payable for the service.

(w) *ODS payable on the outbound leg of a service* means the outbound gross

freight revenue of the service divided by the total gross revenue of the service times the ODS payable for the service.

(x) *U.S. foreign commerce* means the commerce or trade between the United States, its territories or possessions, or the District of Columbia and a foreign country.

### § 280.3 Standards governing award of an ODS agreement.

No ODS agreement, including any amendments thereto concerning additional services or revised service area, shall be made under Title VI of the Act, unless the applicant establishes in its application to the satisfaction of the Board, that the vessel operations proposed to be subsidized will be conducted in a manner which will not preclude the applicant from earning at least 50 percent of its inbound gross freight revenue and at least 50 percent of its outbound gross freight revenue for each service covered by the application from the carriage of competitive cargo.

### § 280.4 Standards governing payment of ODS.

(a) *Full payment.* Except to the extent otherwise provided in § 280.8, ODS shall be paid in full to the operator for vessel operations on the inbound and outbound legs of each service if, during the calendar year, at least 50 percent of the inbound and 50 percent of the outbound gross freight revenues earned on voyages terminated during the calendar year, for each service, are earned from the carriage of competitive cargo.

(b) *Reduction in payment*—(1) *Inbound leg of service.* The amount of ODS payable for the inbound leg of a service for the calendar year shall be reduced as provided in paragraph (b)(3) of this section if, during the calendar year, less than 50 percent of the inbound gross freight revenue earned in such service, on voyages terminated during the calendar year, is earned from the carriage of competitive cargo.

(2) Outbound leg of service. The amount of ODS payable for the outbound leg of a service for the calendar year shall be reduced as provided in paragraph (b)(3) of this section if, during the calendar year, less than 50 percent of the outbound gross freight revenue earned in such service, on voyages terminated during the calendar year, is earned from the carriage of competitive cargo.

(3) *ODS reduction formula.* The reduction in ODS payable required by paragraphs (b) (1) and (2) of this section for any calendar year shall be made by reducing the amount payable on one or more ODS vouchers for the subsequent calendar year by a cumulative amount equal to an amount determined in accordance with the following table:

| Percent of inbound or outbound gross freight revenue from carriage of competitive cargo | ODS reduction [1] |
|---|---|
| 40 to 49.9 | 20 |
| 30 to 39.9 | 40 |
| 20 to 29.9 | 60 |
| 10 to 19.9 | 80 |
| 0 to 9.9 | 100 |

[1] Expressed in percent of total ODS payable for cargo carriage on the inbound or outbound leg of the service.

(4) *Last calendar year exception.* The provisions of this paragraph do not apply to the last calendar year of an ODS agreement except to the extent that any reduction in ODS payable required by this section for the calendar year immediately preceding the last calendar year is to be made, pursuant to paragraph (b)(3) of this section, on ODS vouchers submitted in the last calendar year.

### § 280.5 Criteria for determining whether or not civilian preference cargo is carried at a premium rate.

Civilian preference cargo shall be considered to be carried at a premium rate unless carried:

(a) At the tariff commodity rate published in a conference tariff or at the stated minimum level or floor rate for an open-rated commodity published in a conference tariff, *Provided,* That the international rate conference issuing such tariff commodity rate, stated minimum level, or floor rate has at least one foreign-flag carrier as a voting member, or

(b) At a rate or tariff agreement rate, or at the stated minimum level or floor rate for an open-rated commodity, established by a rate making group other than an international rate conference, *Provided,* That such rate making group has at least one foreign-flag carrier as a voting member, or

(c) At a rate approximately the same as or less, or at a rate that the subsidized operator by use of indices or other mechanism can demonstrate is reasonably equated to or less, than a rate quoted or actually charged by a foreign-flag carrier for the same commodity with the same or a competitive origin and destination and within a reasonably similar time period. This paragraph is applicable to, but is not limited to, rates:

(1) Established by a conference or other rate making group that has only U.S. flag carriers as voting members;

(2) Quoted by an individual member of an international rate conference or other rate making group with permits an individual member to negotiate or otherwise establish its own rate; or

(3) Quoted by a carrier and not published in any conference tariff.

### §280.6 Calendar year accounting.

Except as provided in §280.9 (relating to the final year of an ODS agreement), the calculations required under this part for years after 1973 shall be on the basis of voyages terminated during the calendar year. Calculations for the calendar year 1973 shall be made on the basis of voyages commenced and terminated in 1973.

### §280.7 Reporting and recordkeeping requirements.

(a) *Reporting requirement.* Except as provided in §280.9 of this part (relating to the final year of an ODS agreement), each operator shall submit to the Secretary (two copies) and to the Region Director (one copy), by March 31 of the succeeding year, a report for each calendar year setting forth for each service; the total gross revenue, the miscellaneous gross revenue, the inbound and outbound gross freight revenues, the wayport gross freight revenue, and the outbound and inbound gross freight revenues earned from the carriage of military cargo and from the carriage of civilian preference cargo carried at premium rates as determined pursuant to §280.5. See §280.10(b) for the form of the report required to be submitted by this paragraph.

(b) *Recordkeeping requirement.* In support of each report submitted pursuant to this section or §280.9, each operator shall:

(1) Maintain and make available for audit upon request, records for each service, outbound and inbound, which show for each item of civilian preference cargo carried during the calendar year, the name of the commodity carried according to the tariff description, the rate at which it was carried, the world rate for the commodity for the same or a competitive origin and destination and within a reasonably similar time period, and whether or not the item was considered to have been carried at a premium rate, or

(2) Establish upon request to the satisfaction of the Region Director, by demonstration of its accounting system or by other reasonable means, that the report filed under paragraph (a) of this section is substantially correct.

(c) *Certification of report.* Each report submitted pursuant to this section or §280.9 must be accompanied by a certification by a responsible official of the operator in the following form:

> I hereby certify to the best of my knowledge and belief that this report is complete and accurate and conforms to the requirements of 46 CFR part 280.

(d) *Requirements for requesting confidentiality.* (1) Except as otherwise provided in this paragraph, the information contained in any report submitted pursuant to this section or §280.9 is not entitled to be considered confidential for purposes of the Freedom of Information Act (5 U.S.C. 552).

(2) If an operator desires confidential treatment of any information contained in such a submitted report, the operator is required to file concurrently with each such report a written request for a determination of confidentiality.

(3) The operator shall include in any confidentiality request filed under this paragraph:

(i) A precise, item-by-item specification of the information in the report that the operator asserts is within one of the exemptions from disclosure in 5 U.S.C. 552(b);

(ii) A statement as to whether each identified item is treated as confidential by the operator and the steps taken by the operator to ensure that confidentiality; and

(iii) An explanation of how release of each identified item would cause substantial competitive injury to the operator, and the exact nature of that injury.

(4) An operator's general, unexplained assertions of exemption under section 552(b) are insufficient and the item or items concerned will not be considered for confidential treatment.

(e) *Determination.* (1) If it is determined that an exemption is applicable to an item or items of information which have been properly specified and supported in a confidentiality request under paragraph (d) of this section, the operator will be so notified in writing.

(2) If it is determined that no exemption is applicable to or that none will be asserted for an item of information included in a confidentiality request, the operator will be given a written statement of and reasons for that determination.

### § 280.8 Certain ODS agreement provisions not affected.

The provisions of this part are not intended to supersede contractual or other requirements dealing with sailings, and the carriage of full loads of military or bulk cargoes.

### § 280.9 Special rules for last year of ODS agreement.

(a) *Reduction in payment of ODS.* ODS payable during the last year of any ODS agreement shall be reduced, as provided in paragraph (b) of this section, if on a cumulative basis for each quarter of the calendar year:

(1) Less than 50 percent of the inbound gross freight revenue earned on the inbound leg of a service, or

(2) Less than 50 percent of the outbound gross freight revenue earned on the outbound leg of a service, is earned from the carriage of competitive cargo. Any reduction required by this paragraph is in addition to any reduction in ODS payable for the preceding calendar year as required by paragraph (b) (3) of § 280.4.

(b) *Amount and method of required reduction*—(1) *Quarterly voucher.* As required by paragraph (a) of this section, the amount payable on the ODS voucher for the last month of any quarter of the last calendar year is to be reduced by an amount determined by applying the table in paragraph (b)(3) of § 280.4 to the cumulative ODS payable.

(2) *Insufficient ODS payable*—(i) *Vouchers for subsequent months.* If the total amount of reduction required to be made pursuant to (b)(3) of § 280.4 or paragraph (b)(1) of this section or both, is greater than the amount of ODS payable on the ODS vouchers for the last month of the 1st, 2nd, or 3rd quarter of the last calendar year, the operator shall carry an amount equal to this excess forward to one or more of the months subsequent to such quarter of the last calendar year as a reduction in the ODS payable on the ODS voucher for any such subsequent months.

(ii) *Voucher in the final quarter.* If the amount of reduction required by paragraph (b)(1) of this section is greater than the amount of ODS payable on the ODS voucher for the last month of the final quarter of the last calendar year, the Maritime Administrator may apply an amount equal to this excess as a reduction of any outstanding ODS payable to the operator for the last calendar year or any preceding years.

(c) *Reporting requirements.* During the last year of the ODS agreement, the operator shall submit a report to the Secretary (two copies) and to the Region Director (one copy) for each quarter of the calendar year, providing for each such quarter on a cumulative basis for the calendar year, the information required by paragraph (a) of § 280.7. The reports required by this paragraph shall be submitted concurrently with the operator's vouchers for the 3rd, 6th, 9th and 12th months of the calendar year. Each report submitted pursuant to this paragraph is also subject to the other applicable requirements of § 280.7.

(d) *Cumulative quarterly accounting.* The calculations required under this section shall be made on the basis of the cumulative voyages terminated from the beginning of the calendar year through the reported quarterly period.

(e) *Special procedures.* Whenever the Maritime Administrator, Department of Transportation determines that the provisions of this section may fail at any time to protect the interests of the

Maritime Administration, the Maritime Administrator may take any measures necessary to ensure against an overpayment of ODS or to ensure the prompt repayment of any such overpayment.

### § 280.10 Waiver.

The Board has the power to waive the requirements of any provision of this part for a specific period of time under special circumstances and for good cause shown.

### § 280.11 Example of calculation and sample report.

(a) *Example of calculation.* The provisions of this part may be illustrated by the following example:

Company A operates several vessels engaged in carrying cargo, passengers and mail from the west coast of the United States outbound to foreign ports in the Far East, cargo between the foreign ports in the Far East, and cargo from foreign ports in the Far East inbound to the west coast of the United States. Company A's operation on this service is subsidized under an ODS agreement made in accordance with § 280.3. Total annual subsidy payable for Company A's service is $1 million. In 1976 Company A's total gross revenue was $10 million, computed as follows:

| | |
|---|---|
| Outbound gross freight revenue | $4,000,000 |
| Inbound gross freight revenue | 4,000,000 |
| Wayport gross freight revenue | 1,000,000 |
| Miscellaneous gross revenue | 1,000,000 |
| Total gross revenue | 10,000,000 |

Of the $4 million outbound gross freight revenue $1,600,000, or 40 percent, was earned from carriage of competitive cargo. Of the $4 million inbound gross freight revenue $1,200,000, or 30 percent, was earned from carriage of competitive cargo. Accordingly, total ODS payable to Company A for voyages terminated during the calendar year 1976 is reduced by $240,000, from $1 million to $760,000, as follows:

| OUTBOUND LEG OF SERVICE | |
|---|---|
| ODS payable (Outbound freight revenue, $4 million, divided by total gross revenue, $10 million, times total ODS payable for service, $1 million.) | $400,000 |
| Percent reduction of ODS payable (40% carriage of competitive cargo requires 20% reduction in ODS payable.) | 20% |
| Amount of reduction in ODS payable (20% of $400,000.) | $80,000 |
| **INBOUND LEG OF SERVICE** | |
| ODS payable (Inbound freight revenue, $4 million, divided by total gross revenue, $10 million, times total ODS payable for service, $1 million.) | $400,000 |
| Percent reduction of ODS payable (30% carriage of competitive cargo requires 40% reduction in ODS payable.) | 40% |
| Amount of reduction in ODS payable | $160,000 |
| Total amount of reduction in ODS payable ($80,000 plus $160,000.) | $240,000 |
| Total ODS payable for service in 1976 (after reduction) ($1 million minus $240,000.) | $760,000 |

(b) *Sample report.* Reports providing the information required by §§ 280.7 and 280.9 shall be made in the following form:

MA—819 (COMPANY)

Report of Revenues Earned for _____ [1] Pursuant to 46 CFR Part 280

Form Approval—OMB No. 41.R2954–15

| | Trade Route No. | | Trade Route No. | | Trade Route No. | |
|---|---|---|---|---|---|---|
| | Dollars | Percent | Dollars | Percent | Dollars | Percent |
| Outbound freight revenue: Military and Premium Rated Civilian. Competitive. | | | | | | |
| Total Outbound Freight Revenue | ..... | 100 | ..... | 100 | ..... | 100 |
| Inbound freight revenue: Military and premium rated civilian. Competitive. | | | | | | |
| Total inbound freight revenue | ..... | 100 | ..... | 100 | ..... | 100 |
| Wayport freight revenue. Miscellaneous revenue. | | | | | | |

MA—819 (COMPANY)—Continued

Report of Revenues Earned for _____ [1] Pursuant to 46 CFR Part 280

Form Approval—OMB No. 41.R2954–15

| | Trade Route No. | | Trade Route No. | | Trade Route No. | |
|---|---|---|---|---|---|---|
| | Dollars | Percent | Dollars | Percent | Dollars | Percent |
| Total gross revenue. | | | | | | |

[1] Enter Calendar Year __ or Cumulative Quarterly Period Ending ____ as applicable for the report being filed.

# PART 281—INFORMATION AND PROCEDURE REQUIRED UNDER LINER OPERATING-DIFFERENTIAL SUBSIDY AGREEMENTS

Sec.
281.1 Information and procedure required under liner operating-differential subsidy agreements.
281.2 Definitions.
281.3 Method of commencing and terminating voyages and of determining idle status.
281.4 Treatment of subsidy during idle status and off-hire period.
281.5 Right of Maritime Administrator to recover subsidy for any period of idleness.
281.6 Interpretation.

AUTHORITY: Sec. 204, 49 Stat. 1987, as amended; 46 U.S.C. 1114. Interpret or apply sec. 606, 49 Stat. 2004, as amended; 46 U.S.C. 1176.

## § 281.1 Information and procedure required under liner operating-differential subsidy agreements.

In compliance with the terms of the operating-differential subsidy agreement, the following information shall be submitted to the Maritime Administration by each operator who is a party to any such agreement and operates liner type vessels pursuant to such agreement.

(a) *Sailing schedules, routes, etc.* (1) One copy of a list of sailings is required to be submitted not later than the 5th day of each month, listing each outbound sailing during the preceding month. Such list shall show for each such sailing: (i) Vessel name; (ii) voyage number; (iii) last continental U.S. port; (iv) sailing date; and (v) the service on which the sailing took place.

(2) A "Final Report" in five copies shall be submitted not later than 15 days after the end of the month in which the voyage is terminated and shall show: (i) The time and ports at which the voyage commenced and terminated; (ii) the arrival and sailing dates of the vessel at and from each United States and foreign port, including ports of call for bunkering and/or mail only; (iii) explanation of any delay in excess of 2 days at a United States or foreign port; (iv) appropriate notation of official authorization for any deviations from the service described in the applicable contract.

(3) The procedures outlined in paragraphs (a) (1) and (2) of this section shall be effective on the first of the month following publication in the FEDERAL REGISTER.

(4) The sailing schedules and lists of sailings specified in this paragraph shall be sent to the Division of Trade Studies, Office of Subsidy Administration, Maritime Administration, Washington, DC 20590.

(b) *Condition of vessels, inspection and repairs.* (1) In order that the Maritime Administration may have an opportunity to participate in the inspection of the vessels, the operator is required to give at least twenty-four hours' notice to the Maritime Administration as to the time and place of making inspections. In the event the Maritime Administration's representative is not available, the operator shall employ an independent surveyor, who shall be satisfactory to the Maritime Administration, and proceed with inspection, and a report thereof shall be made to the Maritime Administration on forms MA–55, MA–56, MA–57, and MA–58, sworn to by persons making the inspection.

(2) The operator shall give due notice to the local office of the Division of Maintenance and Repair, at the port at which the vessel is to be available, of the port, date and time for the making of repairs or replacements in the United States.

(3) In connection with further requirements, reference is made to General Order 20 (Part 271 of this chapter) and supplements thereto for more detailed instruction.

(4) Vessel repairs are to be performed within the continental limits of the United States, except in emergency cases the necessity for which the operator should be prepared to justify upon audit.

(c) *Insurance.* (1) Immediately upon the binding of any insurance with respect to any vessel covered by the operator's subsidy agreement, there shall be submitted to the Division of Insurance Office of the Comptroller, Maritime Administration, Washington, DC 20590, for the Maritime Administration's approval, a signed copy of each cover note issued by the operator's brokers, which, to the extent applicable, shall set forth as to such vessel the amounts covered by hull, disbursements and other forms of total loss protection, as well as P and I insurance. Such cover notes shall include the rates, the amounts placed in the different markets, the companies interested, the policy numbers and the amount underwritten by each policy; also, there shall be shown the amount of the deductible average, if any. Upon request, policies shall be submitted to the Maritime Administration for examination and return.

(2) The Maritime Administration shall be advised promptly of any cancellation, changes in terms, or companies interested, and of any lay-up periods which will permit of the collection of return premiums, and of any major casualty or total loss which may occur.

(3) Insurance arranged in conformity with the requirements of applicable mortgages held by the United States will be deemed sufficient to comply with the requirements of the operator's operating-differential subsidy agreement.

(4) The Maritime Administration furthermore, wishes to emphasize its desire that as much of the American Merchant Marine insurance coverage as is practicable be placed in the American insurance market. Therefore, when a renewal of policies or new insurance is under negotiation by an operator subject to the provisions of this order, it is urgently requested that particular attention be given to the Maritime Administration's desire as herein expressed with regard to markets in which such insurance may be placed, and that the Maritime Administration be notified in ample time to give consideration to the pertinent facts and circumstances of each case, so that prior to the attachment of such insurance, approval thereof or suggested changes may be indicated.

(d) *Inventories.* Twenty-four hours' notice shall be given to the Maritime Administration as to the time and place of inventorying classification-required spare parts, ship's spare equipment, fuel and stores as are customarily inventoried and the cost of which is charged to the voyage accounts. If, upon giving the above-required notice, the Maritime Administration's representatives are not present, the operator is to proceed with his inventory in the normal way. The operator may use his own inventory forms, one copy of which shall be sworn to by the persons taking the inventory and included in the voyage accounting.

(e) *Partial payments on account.* When partial payments are desired on account of operating-differential subsidy accruals, the operator should communicate with the Comptroller, Maritime Administration, Washington, DC 20590, who shall forward necessary instructions and forms to be used.

(f) *Current financial reports.* Each operator shall prepare current financial reports as specified in this paragraph and shall submit one copy each to the appropriate Region Director of the Maritime Administration and three copies each to the Director, Office of Financial and Rate Approvals, Maritime Administration, Washington, DC 20590. MARAD will accept electronic options (such as facsimile and Internet) for transmission of required information to MARAD, if practicable.

(1) *Internal management reports.* Each month the operator shall submit copies of such portions of its internal management reports that provide an estimate of its current operating results.

(2) *Quarterly balance sheets.* The operator shall prepare balance sheets as of March 31, June 30, and September 30 of each calendar year in conformity with

section 282.6(A) of the Uniform System of Accounts (Part 282 of this chapter) and shall submit each as soon as practicable but not later than 45 days after the end of the respective quarter.

(3) *Quarterly and cumulative income statements.* The operator shall prepare income statements for the quarterly periods January 1, to March 31, April 1 to June 30, and July 1 to September 30, and for cumulative periods from January 1 to the end of the second and third quarters of each calendar year in conformity with section 282.6(B) of the Uniform System of Accounts (Part 282 of this chapter) and shall submit each statement as soon as practicable but not later than 45 days after the end of the respective quarter.

(4) *Annual financial report.* The operator shall submit Maritime Administration Form 172 for each calendar year by March 31 of the succeeding year. If the operator is unable to submit Form 172 by March 31 of the succeeding year he shall, prior to such March 31, request an extension for the filing of Form 172 from the Director, Office of Financial and Rate Approvals and shall submit by such March 31:

(i) A balance sheet for the year ending on December 31, in conformity with section 282.6(A) of the Uniform Systems of Accounts; and

(ii) An income statement for the quarterly period October 1 to December 31 and an income statement for the year ending on December 31, in conformity with section 282.6(B) of the Uniform System of Accounts.

(5) *Vessel performance reports.* Vessel performance reports shall be prepared for the period January 1 to March 31 of each calendar year, and from January 1 to the end of each succeeding quarter of the calendar year, in the form provided in Exhibit A of paragraph (f)(7) of this section and consistent with the allocation bases provided in paragraph (f)(6) of this section and shall include:

(i) A grand summary of all terminated voyage results for the reporting period including any idle status period occurring during the reporting period and any additional charges or credits from prior terminated periods;

(ii) Summaries of each service by vessel type, as indicated in Exhibit (D) of paragraph (7) of this section, as of December 31 of each year;

(iii) Individual reports by vessel for each idle status period occurring during any reporting period.

(A) Vessel performance reports shall be submitted with the quarterly balance sheets and income statements required under paragraphs (f)(2) and (3) of this section and must be reconciled with voyage revenue and expense from all operations as reported in the income statement.

(B) "Depreciation Vessels" is an example of a reconciling item. Vessel performance reports which are properly prepared and filed will satisfy the reporting requirements for sub-schedules 3002 of the Maritime Administration Form 172.

(6) *Allocation bases.* The allocation bases to be applied in preparation of vessel performance reports required by paragraph (f)(5) of this section are as follows:

(i) *Terminal expenses.* Terminal expenses defined by accounts 855 through 866 of the Uniform System of Accounts (§ 282.3(E) of this chapter), including depreciation accounts, for each terminal shall be allocated between terminated and unterminated voyages on the basis of freight payable tons loaded and discharged on each vessel and voyage during the reporting period, except that in the case of terminals handling only one cargo carriage technology type (CCTT), which can be expressed in common units such as twenty-foot equivalent container units (TEU's) or the number of individual barges, such common unit may be used for allocating terminal expenses by vessel and voyage for each terminal, as shown in Exhibit B of paragraph (f)(7) of this section.

(ii) Container/barge expense—

(A) *Allocation of expense.* Container/barge expense defined by accounts 867 through 899 of the Uniform System of Accounts (§ 282.3(F) of this chapter), including depreciation accounts, shall be segregated between container and barge cost pools. Accounts 879, 880, and 894 shall be allocated between container and barge cost pools on an allocation basis developed by the operator.

(B) *Allocation of cost pools.* Container and barge cost pools shall be allocated

among vessels by voyage and idle status for each vessel in the same ratio that the total container or barge capacity of each vessel multiplied by vessel days bears to the total container or barge capacity of the operator's entire fleet multiplied by vessel days. Total container or barge capacity of a vessel means the total container or barge capacity of the vessel, expressed in TEU's for containers and single units for barges, multiplied by the total number of containers or barges acquired for each available container or barge slot on the vessel. Vessel days means the number of days in the period for which an allocation of cost pools is being made. Containers and barges purchased by an operator for utilization in a particular trade route shall be allocated by vessel capacity among the vessels in the trade route for which they were purchased. See Exhibit C of paragraph (f)(7) of this section.

(iii) *Administrative and general expenses.* Administrative and general expenses defined by accounts 901 through 979 of the Uniform System of Accounts (§282.3(G) of this chapter) shall be allocated to terminated voyages for each vessel type by service or for each vessel by voyage, as required by paragraph (f)(5) of this section, based on the ratio that total terminated voyage operating expenses (accounts 701–773 of the Uniform System of Accounts) plus total terminated voyage operating revenue (accounts 601–624 of the Uniform System of Accounts) for each bears to the total terminated voyage operating expense plus total terminated voyage operating revenue for the period, except that account 945 (advertising passengers) will be allocated directly to passenger vessels based on passengers carried, account 955 (contributions to pools) may be allocated as an administrative and general expense or directly to vessel and voyage based on pool statements, and that portion of accounts 960 and 961 (interest expense) representing interest on vessels shall be allocated to vessels and voyages in the same ratio that depreciation is distributed among all vessels in the fleet. In addition to the above exceptions, significant interest expenses related to purchases of containers and barges should be charged directly to container and barge pools prior to allocation of the container and barge pools.

(7) *Exhibits.*

A. Vessel performance report.[1]
B. Sample allocation of terminal expenses by vessel and voyage.
C. Sample allocation of container/barge expenses by vessel and voyage.
D. Examples of vessel types currently operated.

(g) *General.* All reports and other communications called for by the foregoing should be addressed to the Secretary, Maritime Administration, Washington, DC 20590.

EXHIBIT B—SAMPLE ALLOCATION OF TERMINAL EXPENSES BY VESSEL AND VOYAGE[1]

| Type of facility | Vessel | Total units loaded and discharged | | Voyage status end of the period | | Ratio vessel/voyage to Total (percent) | Terminal cost by vessel/voyage | | |
|---|---|---|---|---|---|---|---|---|---|
| | | Voyage | Total units[2] | Terminated | Unterminated | | Totals | Terminated | Unterminated |
| Container yard ..... | Cont–1 ..... | 1 | 500 | 500 | ..... | 31.7 | $326.51 | $326.51 | |
| | LASH–2 .... | 1 | 359 | ..... | 359 | 22.7 | 233.81 | ..... | $233.81 |
| | LASH–2 .... | 2 | 260 | 260 | ..... | 16.5 | 169.95 | 169.95 | |
| | B/B–4 ..... | 1 | 110 | 110 | ..... | 6.9 | 71.07 | 71.07 | |
| | Cont–6 ..... | 1 | 200 | 200 | ..... | 12.7 | 130.81 | 130.81 | |
| | Cont–6 ..... | 2 | 150 | ..... | 150 | 9.5 | 97.85 | ..... | 97.85 |
| | | | (a) 1,579 | 1,070 | 509 | 100.0 | 1,030.00 | | |
| Container freight station/ break bulk. | LASH–2 .... | 1 | 17,002 | 17,002 | ..... | 22.8 | 175.56 | 175.56 | |
| | LASH–2 .... | 2 | 11,002 | ..... | 11,002 | 14.8 | 113.96 | ..... | 113.96 |
| | RO/RO–3 | 1 | 30,525 | 30,525 | ..... | 41.0 | 315.70 | 315.70 | |
| | B/B–4 ..... | 1 | 1,000 | 1,000 | ..... | 1.3 | 10.01 | | |

[1] Exhibit A filed as part of the original document.

EXHIBIT B—SAMPLE ALLOCATION OF TERMINAL EXPENSES BY VESSEL AND VOYAGE [1]—Continued

| Type of facility | Vessel | Total units loaded and discharged | | Voyage status end of the period | | Ratio vessel/voyage to Total (percent) | Terminal cost by vessel/voyage | | |
|---|---|---|---|---|---|---|---|---|---|
| | | Voyage | Total units [2] | Terminated | Untermi-nated | | Totals | Terminated | Untermi-nated |
| | Bulk–5 ..... | 1 | 15,000 | 15,000 | ..... | 20.1 | 154.77 | 154.77 | |
| Barge terminal ..... | (b) 74,529 | 63,527 | 11,002 | 100.0 | 770.00 | | | | |
| | LASH–2 .... | 1 | 37 | 37 | ..... | 68.5 | 445.25 | 445.25 | |
| | LASH–2 .... | 2 | 17 | ..... | 17 | 31.5 | 204.75 | ..... | 204.75 |
| | | | (c) 54 | 37 | 17 | 100.0 | 650.00 | | |

[1] This allocation procedure shall be applied for each terminal maintained by an operator.
[2] (a) Units for container yard=twenty foot equivalent units (TEU's)
(b) Units for container freight station and break bulk operation=freight payable tons (FPT's).
(c) Units for barge terminal=number of barges unless barges differ in size. Barges of different capacity must be reduced to equivalent units.
(d) Other terminal facilities (not illustrated) handling many or all cargo carriage technology types will allocate period costs on freight payable tons load and discharged during the period.

EXHIBIT C—SAMPLE ALLOCATION OF CONTAINER/BARGE EXPENSES BY VESSEL AND VOYAGE

EXAMPLE

| (A) | (B) | (C) | (D) | | (E) | (F) | (G) | (H) | (I) | (J) |
|---|---|---|---|---|---|---|---|---|---|---|
| Service | Vessel | Voyage | Vessel days in period | | Actual container capacity of vessel | Containers acquired for each slot | Total container capacity col. (E)×(F) | Allocation base col. (D)×(G) | Allocation percentages | Allocation of container pool |
| | | | Terminated | Untermi-nated | | | | | | |
| | *Calculations:.* | | | | | | | | | |
| A | Container–1 .. | 1 | 90 | ..... | 1,050 | 2 | 2,100 | 189,000 | 39.3 | $162,967 |
| B | LASH–2 ..... | 1 | 60 | ..... | 450 | 4 | 1,800 | 108,000 | 22.4 | 92,887 |
| C | LASH–2 ..... | 2 | ..... | 30 | 450 | 4 | 1,800 | 54,000 | 11.2 | 46,444 |
| | RO/RO–3 ..... | 1 | 70 | ..... | 350 | 3 | 1,050 | 73,500 | 15.3 | 63,445 |
| | RO/RO–3 ..... | I.S. | 20 | ..... | 350 | 3 | 1,050 | 21,000 | 4.3 | 17,831 |
| | Break-Bulk–4 | 1 | ..... | 90 | 100 | 4 | 400 | 36,000 | 7.5 | 31,101 |
| | Totals ..... | ..... | 240 | 120 | ..... | ..... | ..... | 481,500 | 100.0 | 414,675 |

*Assumptions:*

Service A—One (1) Container vessel with an actual capacity of 1,050 containers with two (2) containers acquired for each container slot.

Service B—One (1) LASH vessel with an actual capacity of 450 containers with four (4) containers purchased for each container slot.

Service C—One (1) Roll on-roll off vessel with an actual capacity of 350 containers with three (3) containers acquired for each container slot.

W—One (1) Break-bulk vessel with an actual capacity of 100 containers with four (4) containers acquired for each container slot.

Total container pool costs for a ninety (90) day period equals $414,675.

EXHIBIT D—EXAMPLES OF VESSEL TYPES CURRENTLY OPERATED

| | | |
|---|---|---|
| C3–S–33a | C4–S–49a | C6–S–1gc |
| C3–S–38a | C4–S1–49a | C6–S–1w |
| C3–S–43a | C4–S–57a | C6–S–1x |
| C3–S–46a | C4–S–58a | C6–S–1xa |
| C3–S–46b | C4–S–60a | C6–S–6gc |
| C3–S–73b | C4–S–64a | C6–S–85a |
| C3–S–76a | C4–S–64b | C6–S–85b |
| C4–S–1a | C4–S–65a | C7–S–68c, |
| C4–S–1l | C5–S–37e | d, and e |
| C4–S–1g | C5–S–37f | C8–S–81b |
| C4–S–1sa | C5–S–73b | C8–S–82d |
| C4–S–1t | C5–S–75a | C9–S–81d |
| C4–S–1u | C5–S–78a | |
| C4–S–19a | C6–S–1ga | |

(Approved by the Office of Management and Budget under control number 2133–0009)

[G.O. 12, Rev., 14 FR 4785, Aug. 6, 1949, as amended by Supp. 2, Amdt. 1. 21 FR 328, Jan. 17, 1956; 33 FR 2944, Feb. 14, 1968; Supp. 3, Amdt. 3, 34 FR 13369, Aug. 19, 1969; 40 FR 7430, Feb. 20, 1975; 47 FR 25530, June 14, 1982; 68 FR 62537, Nov. 5, 2003; 69 FR 61449, Oct. 19, 2004]

## § 281.2 Definitions.

As used in §§ 281.2 through 281.6 of these regulations, except as otherwise indicated by the context;

(a) The word *operator* means an operator receiving operating-differential subsidy under title VI of the Merchant Marine Act, 1936, as amended (Act), for

a voyage on an essential service as described in section 211(a) of the Act;

(b) The term *Maritime Administrator* means Maritime Administrator, Department of Transportation;

(c) The term *Region Director* means the Region Director of the Maritime Administration having jurisdiction over the port or ports involved;

(d) The term *idle status* means any period in port between or during voyages for which the vessel's normal crew complement is reduced by 10 percent or more and *division of wages* is not paid for the missing men. The idle status period shall continue up to, but not including, the day that the vessel is remanned to the extent that the vessel's normal crew complement is restored to more than 90 percent or *division of wages* is paid for the missing men, or the vessel is temporarily or permanently withdrawn from subsidized service;

(e) *Normal crew complement* means the basic crew complement which has been approved for operating-differential subsidy under the provisions of section 603 of the Act, or as established by collective bargaining or other agreement for the voyage involved, whichever is less.

[G.O. 27, Rev. 2, 37 FR 18466, Sept. 12, 1972]

### §281.3 Method of commencing and terminating voyages and of determining idle status.

(a) *Voyage commencements.* Voyages shall commence as of 12:01 a.m. of the day that loading of cargo, stores, or fuel begins, or as of 12:01 a.m. of the day following the termination of the prior voyage or, in the event that an idle status period follows a voyage termination, as of 12:01 a.m. of the day following the day on which such idle status period ends.

(b) *Voyage termination.* Voyages shall terminate at a U.S. port of call at midnight of the day of completion of paying off the crew from foreign articles, or the completion of final discharge of cargo or ballast at the last U.S. port of discharge, or the completion of voyage repairs, whichever event occurs last: *Provided, however,* That if a vessel sails outward on a new voyage prior to midnight of the same day, the inward voyage shall terminate as of midnight of that day, and the outward voyage shall commence as of 12:01 a.m. of the succeeding day; and that where a portion of any particular voyage overlaps a portion of the next succeeding voyage and the quantity of inward cargo remaining aboard at the port at which major cargo activities for the outward voyage are begun does not, in the opinion of the operator, justify extension of the inward voyage beyond that port, the operator shall immediately request the Region Director for permission to treat the inward voyage as having terminated at midnight of the day specified in such request and shall advise the Region Director what cargo has been and is still to be discharged and loaded at each port of the inward voyage; and that where, in the opinion of the operator, voyages as a general practice should terminate at the home or terminal port rather than at the last port of discharge, or a voyage should terminate on the day prior to commencement of an idle status period, or on the day that the voyage would have terminated had strikes not interfered with normal operations, application for such terminations may be made to the Region Director, and in such cases the voyage termination date shall be as approved by the Region Director. The Region Director shall promptly advise the operator of his determination approving or disapproving any request filed under this paragraph (b), and the Region Director's decision as to such termination shall prevail, provided that all terminations shall be as f midnight of the day specified.

(c) *Idle status periods.* Idle status periods shall be identified separately, whether occurring during or between voyages, and, if occurring during a voyage shall be identified with the applicable voyage number. A separate accounting period shall be created to cover each idle status period, and all such periods shall be reported to the Region Director.

(d) *Excessive delays.* Whenever a vessel is delayed in port for a period of 10 days or more in excess of its normal period of operations in said port, the operator immediately shall report said circumstances, together with all pertinent facts, to the Region Director. The Region Director shall determine whether or not said delay was justified

and if operating costs for said period were reduced to a minimum in accordance with sound commercial practice.

[G.O. 27, Rev. 2, 37 FR 18466, Sept. 12, 1972]

### § 281.4 Treatment of subsidy during idle status and off-hire period.

During an idle status period, subsidy shall be payable only for such subsidizable items of expenses as are determined by the Maritime Administrator, after presentation by the operator of the facts relating to such idle status period, to be necessary for the maintenance, preservation, repair, or husbanding of the vessel during and under the circumstances involved; however, the Maritime Subsidy Board reserves the right to suspend at any time the payment of subsidy on idle vessels when, after consideration of the facts and circumstances regarding such period, it determines that an unreasonable period has elapsed or such idle period was not warranted: *Provided,* That as to a chartered ship operated under a "Use Agreement", operating-differential subsidy shall cease to accrue to the ship simultaneously with the time it goes "off hire" and subsidy shall not again accrue to said ship until it is reemployed in the subsidized service as determined in accordance with § 281.3. Nothing herein shall limit any other rights of the United States with respect to the payment or nonpayment of subsidy.

[G.O. 27, Rev. 2, 37 FR 18466, Sept. 12, 1972]

### § 281.5 Right of Maritime Administrator to recover subsidy for any period of idleness.

The Maritime Administrator may, prior to payment of subsidy for any voucher period which includes a period of idleness, require the operator to establish to the satisfaction of the Maritime Administrator that such period of idleness could not have been prevented in whole or in part through efficient and economical operation. The Maritime Administrator may recover any payment of subsidy for any item of expense allocable to such period of idleness which in the opinion of the Maritime Administrator could have been avoided by efficient and economical operation.

[G.O. 27, Rev. 2, 37 FR 18466, Sept. 12, 1972]

### § 281.6 Interpretation.

All questions of interpretation arising under the sections of this part shall be submitted to the Maritime Administrator for determination, whose decision thereon shall be final.

[G.O. 27, Rev. 2, 37 FR 18466, Sept. 12, 1972]

# PART 282—OPERATING-DIFFERENTIAL SUBSIDY FOR LINER VESSELS ENGAGED IN ESSENTIAL SERVICES IN THE FOREIGN COMMERCE OF THE UNITED STATES

## Subpart A—Introduction

Sec.
282.1 Purpose.
282.2 Definitions.
282.3 Waivers.

## Subpart B—Foreign-Flag Competition

282.10 Basis for determining foreign-flag competition.
282.11 Ranking of flags.

## Subpart C—Calculation of Subsidy Rates

282.20 Amount of subsidy payable.
282.21 Wages of officers and crew.
282.22 Maintenance (upkeep) and repairs.
282.23 Hull and machinery insurance.
282.24 Protection and indemnity insurance.

## Subpart D—Subsidy Payment and Billing Procedures

282.30 Payment of subsidy.
282.31 Subsidy billing procedures.
282.32 Appeal procedures.

AUTHORITY: Secs. 204(b), 603, 606 Merchant Marine Act, 1936, as amended (46 App. U.S.C. 1114(b), 1173, 1176); 49 CFR 1.66.

SOURCE: 51 FR 34609, Sept. 30, 1986, unless otherwise noted.

## Subpart A—Introduction

### § 282.1 Purpose.

This part prescribes regulations implementing Title VI of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1171–1176 and 1178–1181) governing operating-differential subsidy for liner vessels engaged in essential services in the foreign commerce of the United States.

### § 282.2 Definitions.

When used in this part:

(a) *Act* means the Merchant Marine Act, 1936, as amended (46 U.S.C. 1101–1294).

(b) *Board* means the Maritime Subsidy Board of the Maritime Administration (MARAD).

(c) *Contracting Officer* means the Associate Administrator for Maritime Aids.

(d) *Fiscal Period* means any annual period beginning on July 1 and ending on June 30.

(e) *Foreign-flag competition* means those foreign-flag vessels deemed by the Maritime Administrator to be competitive with the subsidized vessel.

(f) *Maritime Administrator* means the Maritime Administrator, Maritime Administration of the Department of Transportation.

(g) *Operating day* means any day or part of a day during which a subsidized vessel is operated in accordance with the terms and conditions of an operating-differential subsidy agreement.

(h) *Operating-differential subsidy (ODS)* means, except as the operator and the United States Government should agree upon a lesser amount, the excess of cost of subsidizable items of expense incurred in the operation under United States registry of a vessel over the estimated fair and reasonable cost of the same items of expense (excluding any increase in the cost of such items necessitated by features incorporated for national defense), if such vessel were operated under the registry of a foreign country whose vessels are substantial competitors of the vessel.

(i) *Operating-differential subsidy agreement (ODSA)* means the Agreement entered into by the operator and the United States Government for the payment of operating-differential subsidy.

(j) *ODS rate* means the method adopted by the Maritime Administrator for determining the amount of ODS that is to be paid for an item of subsidizable expense.

(k) *Operator* means any individual, partnership, corporation or association that contracts with the United States Government under Title VI of the Act to receive ODS.

(l) *Reduced crew period* means a period in port between or during voyages when the subsidized vessel's approved crew complement is reduced by 10 percent or more and division of wages (wages of an absent seaman are divided among the seamen who provide the absent seaman's work) is not paid for the missing men.

(m) *Region Director* means the Region Director of the Maritime Administration within whose region the principal office of the operator is located.

(n) *Subsidized service* means the operation of a vessel, other than in the coastal or intercoastal trade, in accordance with the terms and conditions of the ODSA.

(o) *Subsidized vessel* means a vessel covered by an ODSA.

(p) *U.S. foreign commerce* means the commerce or trade between the United States, its territories or possessions, or the District of Columbia, and a foreign country.

(q) *Vessel* means subsidized vessel, unless otherwise specified.

### § 282.3 Waivers.

In special circumstances and for good cause shown, the procedures prescribed in this part may be waived in writing, by mutual agreement of the parties, in keeping with the circumstances then present, so long as the procedures adopted are consistent with the Act and with the intent of these regulations.

## Subpart B—Foreign-Flag Competition

### § 282.10 Basis for determining foreign-flag competition.

The foreign-flag competition shall form the basis for determining the cost disadvantage of operating the subsidized vessels in the essential service. The Maritime Administrator shall determine the foreign-flag competition from those countries that have carried a significant amount of cargo in the service by using the following procedures:

(a) The primary source of information shall be commodity import/export data compiled by the Bureau of the Census. Cargo data shall be compiled in long tons. Trade publications which show advertised sailings shall be used

to verify the liner services offered by foreign-flag operators.

(b) The U.S. import/export data shall be compiled by reference to countries actually served by the subsidized operator, using the subsidized operator's own competition data for each country to eliminate the flags which are not substantial competitors with the subsidized vessels. An example of the weighting procedure follows:

EXAMPLE

| | Country A | Country B | Country C | Total |
|---|---|---|---|---|
| I. Determination of U.S.-Flag Weights: | | | | |
| U.S. Subsidized Carrier | 300 | 500 | 200 | 1,000 |
| Percent | 30 | 50 | 20 | 100 |
| II. Actual Foreign-Flag Carryings: | | | | |
| Flag 1 | 1,500 | 500 | 1,000 | 3,000 |
| Flag 2 | 4,000 | 6,000 | 0 | 10,000 |
| Flag 3 | 5,000 | 2,000 | 5,000 | 12,000 |
| III. Adjusted Foreign-Flag Carrying (Actual Foreign × U.S. wts): | | | | |
| Flag 1 | 450 | 250 | 200 | 900 |
| Flag 2 | 1,200 | 3,000 | 0 | 4,200 |
| Flag 3 | 1,500 | 1,000 | 1,000 | 3,500 |
| | | | | 8,600 |
| IV. Competition Computation: | | Actual percent | | Re-weight (percent) |
| Flag 2 | 4200/8600 | 49.0 | | 55.0 |
| Flag 3 | 3500/8600 | 41.0 | | 45.0 |
| | | 90.0 | | 100.0 |

(c) The principal foreign flags shall be those countries whose cargo carrying would rank the flag among those carriers that aggregate at least 50 percent of the total foreign-flag carryings.

(d) The total cargo carryings of each principal foreign flag shall be expressed as a percentage of total cargo carryings of all principal flags on the service. The resultant ratio shall be applied to the costs of that principal flag for determining its portion of the composite foreign cost, which shall be used for establishing the cost disadvantage of U.S. vessels in the service.

(e) The determination of the principal competitors and competition weight factors shall be based upon the import/export data for the twelve months of the penultimate calendar year preceding January 1 of the subsidized year to allow several months to collect foreign cost data.

### § 282.11 Ranking of flags.

The operators under each principal foreign flag shall be ranked as predominant, secondary, etc., for the purpose of establishing the priority of costs which are representative of the flag. For liner cargo vessels, the ranking of operators shall be based on the long tons of cargo carried.

(a) If the predominant operator is an agent, charterer or a joint venture in which the vessels are owned by two or more lines, under the name of such agent, charterer or joint venture, the predominant operator shall be the owner whose vessels carried the most cargo.

(b) If cost experience cannot be obtained for the foreign-flag operators in the subsidized service, MARAD may use the costs of another service, following the same ranking of operators, if possible.

## Subpart C—Calculation of Subsidy Rates

### § 282.20 Amount of subsidy payable.

(a) *Daily Rates.* Daily ODS rates shall be used to quantify the amount of ODS payable. The daily ODS rate represents the cost differential between the subsidized vessel and its foreign-flag competition. A daily rate shall be calculated for each subsidized item of expense identified in the ODSA, and the total of all items is the daily amount

of ODS payable for approved vessel operating days, excluding reduced crew periods.

(b) *Reduced Crew Periods.* For reduced crew periods, as defined in § 282.3 of this part, a man-day reduction amount, calculated separately for officers and unlicensed crew members, shall be used to reduce the daily wage ODS rate to conform to the complement remaining on the vessel. The man-day reduction amounts shall be determined by dividing the daily wage ODS for officers and unlicensed crew members by the number of subsidizable crew members in each category. For each day of a reduced crew period, the man-day amount shall be multiplied by the number of crew members missing for that day, and the resulting product shall be deducted from the daily ODS rate. The difference shall be the ODS payable for such day. (See illustration in Schedule D at § 282.31 of this part.)

(c) *Review of Rates.* Daily subsidy rates shall be reviewed every six months. For the item "wages of officers and crews," the daily rate shall be calculated for fiscal periods July 1 through June 30, in accordance with provisions of the Act. During the period January through June, adjustments—paid as a lump sum or as a daily amount—shall be made to wage ODS so that the correct amount of ODS for the full fiscal period is received by the operator. For other subsidizable items of expense, the daily rate shall be calculated for calendar years.

(d) *Negative Rates.* When an ODS rate in any category is less than zero, indicating that the subsidized operator is at an advantage rather than a disadvantage in such category, the negative rate shall be deducted from positive rates in determining the daily ODS amount payable.

(e) *Operator Comments.* The operator shall have the opportunity to comment on each subsidy rate as calculated by the Maritime Administration. The operator and contracting officer shall make every effort to resolve disagreements that arise. In the event of a disagreement that cannot be resolved, comments received from the operator and the contracting officer's recommendation shall be presented to the Maritime Administrator for consideration in determining subsidy rates.

### § 282.21 Wages of officers and crew.

(a) *Definitions.* When used in this part.

(1) *Base period.* The first base period under the wage index system, as provided in section 603 of the Act, is the period beginning July 1, 1970 and ending June 30, 1971. Thereafter, base period means any annual period beginning July 1 and ending June 30, with respect to which the Maritime Administrator establishes a base period cost. At intervals of not less than two years, nor more than four years, the Maritime Administrator shall establish a new base period. Base periods shall be announced by the Maritime Administrator prior to the December 31 date that would be included in the new base period.

(2) *Base period cost*—(i) *Initial base period.* For the initial base period of subsidized service, the term *base period cost* means the collective bargaining cost as of January 1 of that base period.

(ii) *Subsequent base periods.* For base periods subsequent to the initial base period, the term *base period cost* means the averaged of the collective bargaining cost as of January 1 of such fiscal year, and the base period cost of the previous base period, indexed to January 1 of the new base period by an index compiled by the Bureau of Labor Statistics. This index shall consist of the average annual change in wages and benefits placed into effect for employees covered by collective bargaining agreements, with equal weight to be given to changes affecting employees in the transportation industry (excluding the off-shore maritime industry) and to changes affecting employees in private non-agricultural industries other than transportation. However, such base period cost shall not be less than a minimum, nor more than a maximum amount, determined as a percentage of the collective bargaining cost computed for January 1 of such base period in accordance with the following schedule:

| | Minimum (percent) | Maximum (percent) |
|---|---|---|
| Base period following a: | | |
| 2-year cycle | 97½ | 102½ |
| 3-year cycle | 96¼ | 103¾ |
| 4-year cycle | 95 | 105 |

(3) *Collective bargaining cost (CBC)* means the annual cost, calculated on the basis of the per diem rate of expense, as of January 1 of the annual fiscal periods July 1 through June 30, of all items of expense required by the operator through a collective bargaining or other agreement, covering the employment of the approved manning complement of the subsidized vessel, including payments required by law to assure old-age pensions, unemployment benefits or similar benefits, and taxes or other governmental assessments on crew payrolls.

(4) *Approved manning complement* means the complement approved by the Board for subsidy.

(5) *U.S. wage cost (WC)* means the annual cost, calculated on the basis of the per diem rate of expense as of January 1 of the annual fiscal periods July 1 through June 30, of all items of expense required of the operator through a collective bargaining or other agreement, covering the employment of the normal manning complement of the subsidized vessel, including payments required by law to assure old-age pensions, unemployment benefits or similar benefits, and taxes or other governmental assessments on crew payrolls.

(6) *Normal manning complement* means the crew complement established by a collective bargaining or other agreement with the officers and unlicensed crew of the vessel. In cases where the complement may vary in number, the lowest number shall be the normal manning complement. When ratings of different salaries are in the same job during the year, the base wages of the rating carried most of the time shall be used.

(7) *Subsidizable wage cost* means, (i) with respect to a base period, the base period cost, and (ii) in any fiscal period other than a base period, the most recent base period cost, increased or decreased by the change from January 1 of the base period to January 1 of the non-base period in the index described above. The subsidizable wage cost shall not be less than 90 percent nor greater than 110 percent of the collective bargaining cost as of January 1 of such period.

(8) *Unpredictably timed costs* are collective bargaining costs that are not regularly incurred. Examples of unpredictably timed costs are such costs as severance pay, shortfalls, special assessments, and war zone bonuses.

(b) *Method of calculating collective bargaining cost (CBC).* CBC shall be determined by pricing out, for the approved crew complement, the per diem total of fixed costs specified in the collective bargaining agreement and adding a per diem total of variable costs obtained from the cost experience of the subsidized vessel during the first nine months of the preceding calendar year.

(1) *Fixed Costs.* The per diem total of fixed costs shall include all costs that are stated in specific or determinable amounts per time period and, based on operating experience, do not vary. In cases where a monthly amount is specified in the agreement, the per diem amount shall be determined by dividing the monthly amount by 30. When a daily amount is specified it shall be used. Example of fixed costs are:

(i) Base wages;

(ii) Non-watch pay;

(iii) Vacation pay (including contributions to vacation funds);

(iv) Tool allowance;

(v) Clothing and uniform allowances; and

(vi) Per diem contributions for pension, training, welfare, unemployment, including unallocated contributions placed in escrow.

(2) *Variable costs.* Variable costs are regularly incurred employment costs which vary with ship operating experience. The per diem aggregate of variable costs as of January 1 shall be determined by applying a ratio to the per diem aggregate of base wage costs as of January 1, the numerator of which shall be the total of variable costs for the first nine months of the preceding calendar year and the denominator of which shall be the total of base wage costs for the first nine months of the preceding calendar year. Variable costs include but are not limited to:

(i) Payroll taxes (including social security taxes);

(ii) Overtime and penalty pay;

(iii) Variable pension, training, welfare, unemployment, and vacation costs;

(iv) Pay in lieu of time off;

(v) Transportation and travel allowances;

(vi) Payments to relief officers and crews;

(vii) Wages and other expenses of USMMA cadets and extra messmen;

(viii) Board and lodging allowances;

(ix) Overlap in wages (a maximum of two days); and

(x) Penalty cargo bonuses.

(c) *Method of calculating U.S. wage cost (WC)* Two different calculations of WC are necessary—a per diem amount for every ship type on the service and a per month amount for the predominant ship type (most voyages) on the service. The purpose of the per month calculation is to make a comparison with the monthly foreign wage costs. The relationship of WC to foreign costs for the predominant ship is applied to the per diem WC for other ship types in the service to estimate comparable foreign costs for them.

(1) *Calculation of per diem WC.* The per diem WC shall be calculated by the same method that applies to CBC, except that the normal manning complement shall be used.

(2) *Calculation of per month WC.* The costs and manning level used in this calculation shall be the same as those used for the per diem WC.

(d) *Data submission requirements.* For purposes of calculating CBC and WC the operator shall each year submit Form MA–790 and, as appropriate, current copies of all collective bargaining or other agreements, memoranda of understanding, and arbitration awards, which specify the fixed costs as of January 1. Schedule A of Form MA–790, which covers wage costs on voyages terminated during the first nine months of the previous calendar year, shall be submitted by January 1 of the subsidized year. Schedule B of Form MA–790—normal manning complement, rates of pay, and contributions in effect on January 1 of the current year—shall be submitted by January 31. Form MA–790, Schedules A and B, shall be submitted to the Director, Office of Ship Operating Costs, Maritime Administration, 400 Seventh Street, SW., Washington, DC 20590.

(e) *Example calculation.* The following is a sample of calculation of CBC and WC:

ABC STEAMSHIP COMPANY

January 1, 1985, Collective Bargaining Costs (CBC) and U.S. Wage Cost (WC)

| | Per diem | |
|---|---|---|
| | WC | CBC |
| Crew complement | [1] 35 | [2] 31 |
| Fixed costs as of January 1, 1985: | | |
| Base wages and non-watch pay | $1,789.79 | $1,571.60 |
| Allowances (radio, telephone, clothing, etc.) | 5.75 | 5.75 |
| Vacation pay | 1,189.60 | 1,109.65 |
| Pension, welfare, training, unemployment fund contributions | 1,280.80 | 1,171.75 |
| Total fixed | $4,265.94 | $3,858.75 |
| Variable costs as of January 1, 1985: | | |
| Variable cost factor (based on 1984 cost experience) (in percent) | 104.69 | 104.69 |
| Total variable costs (January 1, 1985, base wages × variable cost factor) | $1,873.73 | $1,645.31 |
| Total wage costs as of January 1, 1985 | $6,139.67 | $5,504.06 |

[1] Normal manning complement.
[2] Approved manning complement.

(f) *Method of calculating foreign wage costs.* The foreign wage cost (FC) of the principal foreign-flag competitors and the comparable WC of the subsidized vessel are matched as of January 1 of the last fiscal year preceding the subsidized fiscal year for purposes of determining the wage cost of the principal foreign flags. The following procedures are used:

(1) *Manning.* The foreign manning complement in number and nationality for the principal foreign-flag competitors shall be constructed for the subsidized vessel type using the manning scales and practices of the competitors as developed through an examination of alien crew manifests, payrolls, and other reliable information. The commonly used crew complement of the competitors shall be adjusted to fit the predominant vessel type, in recognition of differences in physical characteristics that would affect manning scales. Where the manning complement cannot be estimated with reasonable substantiation, it will be deemed to be identical with that of the subsidized vessel.

(2) *Method.* The method of calculating FC shall be the same as that used for WC, provided that it is possible to obtain foreign cost data on the same basis as wage cost data. Preference shall be given to pricing out for fixed costs and to cost experience for variable costs. Where applicable, foreign currencies shall be converted into U.S. currency equivalents by using the average of end-month exchange rates for the period July through June that includes the January 1 for which FC is calculated. The exchange rates shall be obtained from the publication, "International Financial Statistics," published monthly by the International Monetary Fund. If exchange rates for particular foreign currencies are not available in this publication, they shall be obtained from the United States Department of the Treasury.

(3) *Foreign wage costs.* The per diem composite foreign wage cost is determined by multiplying the per diem WC for the U.S. ship type, calculated as of January 1 of the subsidized fiscal year, by the ratio of FC to WC, calculated as of January 1 of the last fiscal year preceding the subsidized fiscal year. The following is a sample calculation of the foreign cost percentage.

ABC STEAMSHIP COMPANY, INC., TRADE ROUTE 21—JANUARY 1, 1985—FOREIGN WAGE COST (FC)

| | United States | Belgium | United States | Germany | | Netherlands | United States | Norway |
|---|---|---|---|---|---|---|---|---|
| Crew Complement | 35 | 35 | 35 | 23 | | 22 | 35 | 28 |
| Base Wages | [1] 53,687 | [1] 24,779 | [1] 53,687 | [1] 25,192 | | [1] 23,127 | [1] 53,687 | [1] 27,257 |
| Allowances | [1] 1,074 | [1] 4,584 | [1] 1,074 | [1] 8,879 | | [1] 3,097 | [1] 1,074 | [1] 289 |
| Vacation Pay (leave) | [1] 35,681 | [1] 13,009 | [1] 35,681 | [1] 9,912 | | [1] 9,499 | [1] 35,681 | [1] 11,976 |
| Pension and Welfare | [1] 38,407 | [1] 2,065 | [1] 38,407 | [1] 124 | | [1] 3,923 | [3] 36,342 | [1] 124 |
| Social Security | [2] 6,608 | [2] 7,227 | [1] 3,717 | [1] 6,814 | | [1] 4,584 | [2] 6,608 | [2] 10,118 |
| Overtime and other variable costs (not elsewhere included) | [2] 48,732 | [2] 10,944 | [2] 48,732 | [2] 10,325 | | [2] 7,021 | [2] 48,732 | [2] 12,389 |
| Repatriation | ..... | ..... | ..... | ..... | ..... | ..... | ..... | [2] 413 |
| Total wage costs | 184,189 | 62,608 | 181,298 | 61,246 | | 51,251 | 182,124 | 62,566 |
| Unweighted Percentage FC to WC | | 33.99% | | 33.78% | | 28.27% | | 34.35% |
| Competition Weight Factor | | 22.1% | | 19.6% | | 19.1% | | 39.2% |
| Weighted Percentage | | 7.51% | | 6.62% | | 5.40% | | 13.47% |
| Composite Weighted Percentage | | | | | 33.00% | | | |

[1] Based on Jan. 1 priced out cost.
[2] Based on cost experience.
[3] Excludes training costs—foreign data not available.

(g) *Determination of daily wage rate.* The foreign wage cost is deducted from subsidizable wage costs to determine the daily wage subsidy rate. Table 1 is an example calculation of a daily wage subsidy rate using the procedures described in this section.

(h) *Unpredictably timed costs (UTC)* are subsidized by calculating costs incurred during the previous six months and converting them into a daily rate or, in the alternative, a lump sum amount will be paid for special lump sum assessments or for per man-day increases to benefit plans which become effective during the six months following the establishment of the daily rate. In either case, the percentage subsidy rate—which is the differential percentage between the subsidizable wage cost and the foreign wage cost—is used to establish the amount of subsidy payable for UTC incurred.

(1) UTC expenses such as severance pay and area bonuses are eligible for subsidy payment without obtaining prior approval and subsidy shall be paid as a lump sum amount.

(2) Expenses such as shortfalls in benefit fund contributions, special assessments for benefit funds, and retroactive wage increases may be treated as UTC if the cost increase was not negotiated. Such costs must be approved as UTC by the Director, Office of Ship Operating Costs. To the extent such expenses qualify for UTC, the Director shall determine the appropriate method of paying subsidy—added to the per diem wage subsidy rate and/or as a lump sum amount treated separately.

TABLE 1—ABC STEAMSHIP CO., INC., TRADE ROUTE 21

[Calculation of wage subsidy rates*]

| (1) | (2) | (3) | (4) | (5) | (6) | (7) | (8) | (9) | (10) | (11) | (12) | (13) |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Base period | Interim period | U.S. wage cost | Collective bargaining cost | Application of BLS index to base period cost | Averaging in base periods (4)+(5) / 2 | Appropriate limits | Base period cost | Subsidizable wage cost | Composite weighted percentage | Composite foreign wage cost | Wage subsidy daily rate | Wage subsidy percentage rate (12)+(9) |
| 1981 ... | ..... | 4,162.60 | 3,850.29 | ..... | ..... | ..... | 3,850.29 | 3,850.29 | 32.99 | 1,373.24 | 2,477.05 | 64.33 |
| | 1982 ... | 4,578.24 | 4,230.15 | 3,850.29×1.0845=4,175.64 | ..... | .9×(4)=3,807.14<br>1.1×(4)=4,653.17 | ..... | 4,175.64 | 32.98 | 1,509.90 | 2,665.74 | 63.84 |
| | 1983 ... | 5,013.80 | 4,560.38 | 3,850.29×1.1816=4,549.50 | ..... | .9×(4)=4,104.34<br>1.1×(4)=5,016.42 | ..... | 4,549.50 | 36.15 | 1,812.49 | 2,737.01 | 60.16 |
| | 1984 ... | 5,539.40 | 4,966.90 | 3,850.29×1.2992=5,002.30 | ..... | .9×(4)=4,470.21<br>1.1×(4)=5,463.59 | ..... | 5,002.30 | 34.77 | 1,926.05 | 3,076.25 | 61.50 |
| 1985 ... | ..... | 6,139.57 | 5,504.06 | 3,850.29×1.4044=5,407.35 | 5,455.71 | .95×(4)=5,228.86<br>1.05×(4)=5,779.26 | 5,455.71 | 5,455.71 | 33.00 | 2,026.06 | 3,429.65 | 62.86 |

*This computation is based on a new vessel entering subsidized service in May 1981.

[51 FR 34609, Sept. 30, 1986, as amended at 54 FR 5088, Feb. 1, 1989]

**§ 282.22 Maintenance (upkeep) and repairs.**

(a) *Basis for subsidy.* The fair and reasonable maintenance and repair costs not compensated by insurance, if eligible for subsidy under the ODSA and the regulations in 46 CFR part 272, shall be used for determining the daily amount of subsidy. The U.S.-foreign cost differential shall be determined from price estimates of representative items of maintenance and repair work and by using the repair practices of the foreign-flag competition.

(b) *U.S.-foreign cost differential.* MARAD shall use the following procedures for calculating the U.S.-foreign cost differential for M&R.

(1) *Cost Survey.* MARAD shall select a sample of jobs which are representative of the various types of maintenance and repair work—drydocking and underwater repairs, machinery repairs, hull and deck repairs, electrical repairs, exterior painting and interior painting, etc. The jobs shall be described fully and combined into a standard set of specifications based on a particular type of vessel. The same specifications shall be used for obtaining all price estimates. MARAD shall request reliable and mutually acceptable ship repair cost experts to ascertain the U.S. and foreign M&R prices. MARAD shall survey foreign countries during a three-year cycle. The survey year prices shall be adjusted in the years between surveys by price adjustments estimated by the ship repair cost experts.

(2) *Country cost differential.* A country cost differential shall be determined for each country where work was performed on the competitive vessels. The country cost differential shall be 100 percent minus the ratio of the estimated foreign price to the U.S. price estimate. The U.S. price estimate shall be representative of the coastal area included in the subsidized service (for example East Coast) or, if more than one coast is served, the coast where the company is home based. For example:

DETERMINATION OF COUNTRY COST DIFFERENTIAL—YEAR—1985—U.S. EAST COAST—FOREIGN COUNTRY—UNITED KINGDOM

| Repair category | Foreign price | U.S. price |
|---|---|---|
| Drydocking & Underwater Repairs | $49,598 | $70,662 |
| Boiler Repairs | 18,938 | 20,287 |
| Machinery Repairs | 33,004 | 36,193 |
| Hull and Deck Repairs | 16,729 | 20,853 |
| Electrical Repairs | 11,868 | 11,117 |
| Exterior Painting | 5,456 | 7,974 |
| Interior Painting | 681 | 1,162 |
| Estimate Totals | $136,274 | $168,248 |

Foreign/U.S. Price Ratio—81%
Country Cost Differential (100–81)—19%.

(3) *Distribution of repairs.* The distribution of repairs refers to the countries where M&R work was performed on the vessels of the foreign-flag competitor. When data on the repairing practices are obtained directly from the foreign competitor, they be used. If information about such practices is unavailable—or only partially available—data, published by the classification societies and Lloyd's Voyage Record, reporting the dates and localities of drydocking and completion of the various types of vessel surveys, shall be used for determining the geographical distribution of the unknown repairing practices. For diesel vessels, there are three basic types of surveys—drydocking, machinery, and hull. For steam vessels, there is a fourth survey—boiler—in addition to the other three surveys. Since these surveys may be performed in different countries, they are weighted in order to determine the distribution of repairs. The weighting factors shall be: drydocking—20 percent, machinery—40 percent (10 percent allocated to boiler survey on steam vessels), and hull—40 percent.

(4) *Proportionate cost differential.* A proportionate cost differential for each principal foreign-flag competitor shall be determined by multiplying the percentage distribution of repairs for each country where repair work was performed by the country cost differential for that country and by adding the resulting weighted percentages for all countries where repair work was performed.

(5) *U.S.-foreign cost differential.* The U.S.-foreign cost differential shall be

determined by multiplying the proportionate cost differential for each principal foreign-flag competitor by the competition weight factor for that competitor, and by adding the resulting differentials for all principal foreign-flag competitors, as shown in the following example.

ABC STEAMSHIP COMPANY, INC—TRADE ROUTE—X—U.S.-FOREIGN COST DIFFERENTIAL FOR MAINTENANCE (UPKEEP) AND REPAIRS SUBSIDY RATE—1985

| Principal competitors | (1) Distribution of repairs | | (2) Country cost differential (percent) | (3) Proportionate cost differential (1) × (2) (percent) | (4) Competition weight factor (Percent) | (5) Weighted differential (3) × (4) (Percent) |
|---|---|---|---|---|---|---|
| | Country | (Percent) | | | | |
| Japan | Japan | 85 | 36.21 | 30.78 | | |
| | U.S | 15 | 0 | 0 | | |
| | | 100 | | 30.78 | 23.4 | 7.20 |
| Norway | Norway | 15 | 44.72 | 6.71 | | |
| | Netherlands | 20 | 43.23 | 8.65 | | |
| | Japan | 45 | 36.21 | 16.29 | | |
| | U.S | 20 | 0 | 0 | | |
| | | 100 | | 31.65 | 31.1 | 9.84 |
| United Kingdom | U.K | 80 | 19.00 | 15.20 | | |
| | Hong Kong | 15 | 50.35 | 7.55 | | |
| | U.S | 5 | 0 | 0 | | |
| | | 100 | | 22.75 | 45.5 | 10.35 |
| U.S.-Foreign Cost Differential | | | | | | 27.39 |

(c) *Calculation*. The appropriate U.S.-foreign cost differential shall be applied to the subsidizable and audited maintenance and repair costs for the three-year period, discussed in paragraph (c)(1) of this section, to establish a relationship of the cost differentials between M&R and wages. This relationship shall be used to establish the M&R subsidy on a current basis by applying the percentage relationship to the per diem wage subsidy rate.

(1) *Historical period*. The relationship of calendar period M&R subsidy to fiscal period wage subsidy shall be measured for the three-year period commencing five years prior to January 1 of the subsidized year. The M&R subsidy and the wage subsidy shall be expressed as an amount per voyage day for purposes of establishing the relationship. This ratio shall be established for each subsidized service and applied to the per diem wage rate of each ship type in the service to factor a daily amount of subsidy for M&R. The following is an example of the determination of the relationship and the daily amount of subsidy for M&R.

DETERMINATION OF DAILY AMOUNT OF SUBSIDY FOR M&R

| T.R. 98 item | Calendar Year 1980 | Calendar Year 1981 | Calendar Year 1982 | Total |
|---|---|---|---|---|
| M&R C.Y. Expenses | $1,700,000 | $2,000,000 | $1,900,000 | |
| Subsidy Rate | 40.00% | 44.00% | 50.00% | |
| Subsidy | $680,000 | $880,000 | $950,000 | $2,510,000 |
| Voyage Days | 1,100 | 1,225 | 1,175 | 3,500 |
| Average Subsidy Per Voyage Day ($2,510,000÷3,500 days)=$717.14 | | | | |
| | Fiscal Year 1980 | Fiscal Year 1981 | Fiscal Year 1982 | Total |
| Wages F.Y. Per Diem Rate | $7,700 | $8,050 | $8,200 | |
| Voyage Days | 1,180 | 1,230 | 1,060 | 3,470 |
| Subsidy | $9,086,000 | $9,901,500 | $8,692,000 | $27,679,500 |
| Average Subsidy Per Voyage Day ($27,679,500÷3,470 days)=$7,976.80 | | | | |
| Ratio M&R ODS to Wage ODS $717.14÷$7,976.80=8.99% | | | | |

| T.R. 98 ship type | Daily wage ODS 1/1/85 | Ratio M&R to wage ODS (percent) | Daily M&R ODS 1/1/85 |
|---|---|---|---|
| C4–A | $9,000 | x 8.99 | $809.10 |
| C5–B | $9,300 | x 8.99 | $836.07 |
| C6–C | $9,600 | x 8.99 | $863.04 |

(2) *Data submission requirement.* The operator is required to submit annually a certified statement of eligible and audited M&R expenses, segregated by service, for the historical period referred to in paragraph (c)(1) of this section. The report shall be submitted to the Director, Office of Ship Operating Costs no later than January 1 of the subsidized year.

### § 282.23 Hull and machinery insurance.

(a) *Subsidy items.* The fair and reasonable net premium costs (including stamp taxes) of hull and machinery, increased value, excess general average, salvage, and collision liability insurance against risks and liabilities covered under the terms and conditions of policies approved as to form and coverage by MARAD, less lay-up returns, shall be eligible for subsidy and used for determining the U.S.-foreign cost differential. Port risk premiums are eligible for subsidy but not for determining the U.S.-foreign cost differential.

(b) *U.S.-foreign cost differential.* A U.S.-foreign cost differential shall be calculated for each service. Due to the difficulty of comparing forms and costs of hull and machinery insurance coverages, the following assumptions shall be used for estimating the composite premium cost of the foreign-flag competitor.

(1) *Coverage.* The foreign competitive vessels have the same types and amounts of insurance coverages and deductible averages as the subsidized vessels.

(2) *Premium rate.* The foreign competitive vessels are insured in the British market and the rate for such vessels is the same as the British market rate for the subsidized vessels. If the operator carries all of its insurance in the American market, the American market rate shall be assumed to be the same as the British market rate.

(3) *Repairs.* Insurable repairs of the foreign competitive vessels are performed in the same countries and in the same distribution as non-insurable repairs, and the cost differential for such repairs shall be the same as the maintenance and repair percentage differential.

(4) *Particular average.* The percentage of particular average repair claims for the foreign competitive vessels is the same as the percentage of particular average repair claims for the subsidized vessels. The particular average portion of the premium cost for the subsidized vessels shall be determined as follows:

(i) *Percentage.* The particular average portion of the premium cost shall be determined by applying a percentage to the hull and machinery premium cost after deducting the estimated total loss premium. The percentage is based on insured claims experience. The percentage shall be determined by dividing the total of underwriter's absorptions for particular average domestic repair claims paid and estimated by the total of underwriter's absorptions for all claims paid and estimated (excluding total loss and constructive total loss claims) under the hull and machinery portion of the insurance coverage, except that such percentage shall not exceed eighty-five (85) percent. The percentage is based on the claims experience of the subsidized vessels for the five (5) calendar year period preceding the subsidized year. For subsidized operators that do not have five years of claims experience, the average percentage of particular average domestic repair claims for all similar subsidized vessels shall be used unless the operator can submit data to substantiate its own claims cost experience on similar vessels.

(ii) *Data submission requirement.* The operator shall submit the five year claims experience, invoices showing net premium costs and coverages for

the subsidized year, and lay-up returns for the previous year to the Director, Office of Ship Operating Costs, not later than sixty (60) days after the cost of each calendar year.

(c) *Calculation*. In calculating the subsidized premium cost, the following steps shall be taken:

(1) The particular average portion of the premium cost shall be adjusted in order to give effect to the repair cost differential for the foreign competitive vessels by applying the complement of the maintenance and repairs percentage cost differential (100 percent minus the differential) to the particular average portion of the premium cost. The adjusted particular average foreign premium cost shall be added to the net premium cost excluding the particular average portion to determine the composite foreign premium cost.

(2) The foreign premium cost shall be substracted from the operator's total premium cost to determine the difference in dollars. The percentage differential is determined by dividing the dollar difference by the operators' total premium cost. An example calculation is included in Table 2.

(3) The net premium cost of the subsidized vessels shall be divided by the number of days in the calendar year and the resultant daily insurance cost shall be multiplied by the U.S.-foreign cost differential percentage applicable to the most recent year to determine the daily amount of subsidy for hull and machinery insurance.

TABLE 2—ABC STEAMSHIP COMPANY, INC.; CARGO VESSELS—TRADE ROUTE—X, U.S./FOREIGN COST DIFFERENTIAL FOR HULL AND MACHINERY INSURANCE

[1985]

| | | |
|---|---|---|
| 1. *COMPOSITE FOREIGN PREMIUM COST:* | | |
| A. *Hull and Machinery,* Total coverage | $92,741,996 | |
| Average Premium Rate in British Market | 1.00966% | |
| Premium Cost in British Market | | $936,379 |
| (Estimated Total Loss Payment $92,741,966@ .46500% [1] | $431,250) | |
| B. *Increased Value,* Total Coverage | $1,083,325 | |
| Average Premium Rate in British Market | .32550% | |
| Premium Cost in British Market | | $3,526 |
| C. *Excess Liability,* Total Coverage | | None |
| D. *Total Premium Cost if Insured 100% in British Market* | | $939,905 |
| E. *Deduct Particular Average Portion:* | | |
| $936,379 Less $431,250=$505,129×62% [2] | | 313,180 |
| F. *Net Premium Cost Exclusive of Particular Average* | | $626,725 |

| | Trade Route No. X Line A | Trade Route No. X Line B | Trade Route No. X LIne C |
|---|---|---|---|
| Particular Average Adjustment: | | | |
| P/A Portion of Premium Cost | $313,180 | $313,180 | $313,180 |
| M & R Subsidy Rate Complement [3] | 84.48% | 86.63% | 87.34% |
| Adjusted P/A Foreign Premium Cost | $264,574 | $271,308 | $273,531 |
| Add: Net Premium Cost (Excluding P/A) | $626,725 | $626,725 | $626,725 |
| 2. *Composite Foreign Premium Cost* | $891,299 | $898,033 | $900,256 |
| 3. *TOTAL PREMIUM COST TO SUBSIDIZED OPERATORS* | $1,068,998 | $1,068,998 | $1,068,998 |
| 4. DIFFERENTIAL IN DOLLARS [4] | 177.699 | 170,965 | $168,742 |
| 5. *COMPOSITE WEIGHTED DIFFERENTIAL* [5] | 16.62% | 15.99% | 15.79% |
| 6. *U.S.—FOREIGN COST DIFFERENTIAL* | 16.62% | 15.99% | 15.79% |

[1] Estimated gross total loss rate adjusted for broker's discounts, policy tax and other costs, as necessary.
[2] Percentage of particular average.
[3] 100% minus M&R subsidy rate of the same calendar year.
[4] Line 3 less line 2.
[5] Line 4 divided by line 3.

**§ 282.24 Protection and indemnity insurance.**

(a) *Subsidy items.* Items eligible for determination of subsidizable costs and the U.S.-foreign cost differential are:

(1) *Premiums.* The fair and reasonable net premium costs (including stamp taxes) of protection and indemnity, excess insurance, second seamen's insurance, "tovalop" or other forms of pollution insurance, bumbershoot (only that portion identified as applicable to P&I insurance), cargo liability if excluded from the primary policy, supplemental calls against liabilities covered under the terms and conditions of policies approved as to form and coverage by MARAD, less lay-up return premiums, shall be eligible for subsidy and used for determining the U.S.-foreign cost differential.

(2) *Deductibles.* The fair and reasonable cost of crew claims paid by and pending with the operator under the deductible provision of the protection and indemnity insurance policy approved as to form and coverage by MARAD, to the extent that such cost would have been paid by the insurance underwriter under the terms of the policy, except for the fact that it did not exceed the deductible provision of the policy, shall be eligible for subsidy. For subsidy purposes, the deductible absorption shall not exceed $50,000 for each accident or occurrence, provided however, that benefits paid on unearned wages, if excluded from coverage under the protection and indemnity insurance policy, shall be eligible, notwithstanding that the deductible provisions of the policy may be exceeded.

(b) *Assumption made in calculation.* For purposes of determining subsidy for protection and indemnity insurance, it shall be assumed that the cost differential between the subsidized vessels and the foreign competitive vessels is limited to those portions of premium costs and deductible absorptions which are related to crew liability and that the cost of all other liabilities is the same for both the subsidized vessels and the foreign competitive vessels.

(c) *Calculation.* The following is the method of calculating the U.S.-foreign cost differential for premiums:

(1) *General.* A differential shall be calculated for each subsidized service of the vessel. Since the premium cost for all other liabilities is assumed to be the same for both the U.S. and foreign competitive vessels, the calculation of the differential for protection and indemnity insurance premiums is in effect based on the difference between U.S. and foreign premium costs for crew liabilities. Premium costs are determined in costs per gross registered ton (GRT).

(2) *Reporting Requirement.* The operator shall submit the total premium cost for the subsidized year, plus any supplemental calls and lay-up return premiums not previously reported, to the Director, Office of Ship Operating Costs, not later than 60 days after the beginning of such year. The data shall be supported by invoices from the insurance underwriter.

(3) *U.S. crew liability cost.* The crew liability portion of the total premium cost shall be determined by applying a percentage to the total premium cost based on five (5) years of claims experience for the five years commencing six years prior to January 1 of the subsidized year. The percentage shall be determined by dividing the total of underwriter's absorptions for crew claims, paid and estimated, by the total of underwriter's absorptions for all claims, paid and estimated. The crew claims portion shall be limited to eighty-five (85) percent unless the operator can substantiate a higher percentage as a result of having crew liability and all other liabilities insured with different underwriters. The operator shall submit the five-year claims experience not later than 60 days following the close of each calendar year.

(4) *All other liabilities cost—U.S. and foreign.* The all other liabilities portion of the U.S. premium cost shall be determined by subtracting the crew liability portion from the total premium cost. The same cost shall be used for the all other liabilities portion of the foreign-flag competitor's premium cost.

(5) *Foreign crew liability cost.* The crew liability cost of each principal foreign-flag competitor shall be used, if reliable cost data can be obtained. If such data cannot be obtained for a principal

competitor, and it is determined that such competitor has a non-national crew, the crew liability cost for similar vessels registered under the flag of the crew's nationality may be used, at the Maritime Administrator's discretion, provided reliable cost data are obtained. If no reliable cost data are obtained for a competitor, the crew liability cost for that competitor shall be estimated by multiplying the subsidized operator's crew liability portion of the total premium cost by the ratio of that competitor's wage costs (FC) to the subsidized operator's wage costs (WC), as determined in the calculation of the wage differential.

(6) *U.S.-foreign cost differential.* The U.S.-foreign cost differential shall be the excess of the operator's total premium cost over the principal foreign-flag competitor's estimated total premium cost, expressed as a percentage, calculated in the following manner.

ABC STEAMSHIP COMPANY, INC., TRADE ROUTE X, PROTECTION AND INDEMNITY INSURANCE PREMIUMS, 1985

| Premium cost (per GRT) | United States | Greece | Pakistan | South Africa |
|---|---|---|---|---|
| Crew liability | [1] $3.98 | [2] $1.27 | [3] $0.45 | [2] 0.08 |
| All other liability | $1.06 | $1.06 | $1.06 | $1.06 |
| Total costs | $5.04 | $2.33 | $1.51 | $1.14 |
| Differential—Excess of U.S. cost over foreign cost | $2.71 | $3.53 | 3.90 | |
| Unweighted differential (percent) | 53.77 | 70.04 | 77.38 | |
| Competition weight factor (percent) | ..... | 24.3 | 24.9 | 50.8 |
| Weighted differential (percent) | ..... | 13.07 | 17.44 | 39.31 |
| U.S.-foreign cost differential (percent) | ..... | ..... | ..... | 69.82 |

[1] Determined by applying 79.03 percent (based on 5-year claims experience) to total GRT premium rate of $5.04.
[2] Crew liability data obtained by Maritime Administration.
[3] The unweighted percentage of Pakistani to U.S. wage costs of 11.23% was applied to $3.98 to estimate the foreign cost.

(d) *Daily Subsidy Rate.* The daily subsidy rate shall be calculated in the following manner:

(1) *Premiums.* The net premium costs per calendar day for the subsidized year shall be multiplied by the U.S.-foreign cost differential percentage determined for the most recent year. The product shall be the daily amount of subsidy for P&I premiums.

(2) *Deductibles.* (i) The eligible illness and injury crew claims paid and pending for each calendar year of a three-year period commencing six years prior to January 1 of the subsidized year shall be recalculated, if necessary, to reflect the operator's current deductible levels. These expenses, after audit, shall be multiplied by the percentage wage differential, as determined in the calculation of wage subsidy for the appropriate fiscal period. The resulting calendar period P&I deductible subsidy for the three-year period shall be divided by the voyage days for the period to arrive at an aggregate daily P&I deductible subsidy. The aggregate fiscal period wage subsidy accrued in the service for the three-year period shall be divided by the voyage days for the period to arrive at an aggregate daily wage subsidy amount. The aggregate daily P&I deductible subsidy for the three-year calendar period shall be divided by the aggregate daily wage subsidy for the three-year fiscal period. The resulting percentage shall be applied to the wage per diem calculated for each ship type in the service to derive the daily amount of subsidy for P&I deductibles. As to pending claims previously recognized in the historical period, only the amount of changes in cost with respect to such claims shall be subsequently recognized. The following methodology shall be used to determine subsidy for P&I deductibles.

DETERMINATION OF DAILY AMOUNT OF SUBSIDY FOR P&I DEDUCTIBLES

| T.R. 98 item | Calendar year 1979 | Calendar year 1980 | Calendar year 1981 | Total |
|---|---|---|---|---|
| P&I Deductible C.Y. Expenses | $1,680,000 | $1,220,000 | $1,400,000 | |
| Diff. Foreign/U.S. Wage Cost | 26.00% | 23.00% | 20.00% | |
| Subsidy | $436,800 | $280,600 | $280,000 | $997,400 |
| Voyage Days | 1,140 | 1,100 | 1,225 | 3,465 |
| Average Subsidy Per Voyage Day ($997,400÷3,465 days)=$287.85 | | | | |
| | Fiscal year 1979 | Fiscal year 1980 | Fiscal year 1981 | Total |
| Wages F.Y. Per Diem Rate | $7,660 | $7,700 | $8,050 | |
| Voyage Days | 1,090 | 1,180 | 1,230 | 3,500 |
| Subsidy | $8,349,400 | $9,086,000 | $9,901,500 | $27,336,900 |
| Average Subsidy Per Voyage Day ($27,336,900÷3,500 days)=$7,810.54 | | | | |
| Ratio P&I Deductible ODS to Wage ODS $287.85÷$7,810.54=3.69% | | | | |

| T.R. 98 ship type | Daily wage ODS 1/1/85 | Ratio P&I ded. to wage ODS (percent) | Daily P&I ded. ODS 1/1/85 |
|---|---|---|---|
| C4–A | $9,000 | ×3.69 | $332.10 |
| C5–B | 9,300 | ×3.69 | 343.17 |
| C6–C | 9,600 | ×3.69 | 354.24 |

(ii) In cases where national insurance schemes cover crew claims costs in their entirety, resulting in no cost to the foreign competitor for deductible absorptions, the composite percentage differential for wages shall be adjusted by substituting a zero cost for such foreign competitor in the calculation of the differential. The adjustment of the wage percentage differential shall not be used for Japan, where operators incur minimal costs for deductible absorptions, rather than no costs. For Japan, the insurance related costs which are normally included in the calculation of Japanese wage costs shall be excluded in adjusting the wage percentage differential for this purpose.

(3) *Data submission requirement.* The operator is required to submit annually a certified statement of eligible and audited crew claims, as identified in paragraph (d)(2) of this section, for the historical period identified therein. The report shall be submitted to the Director, Office of Ship Operating Costs no later than January 1 of the subsidized year.

## Subpart D—Subsidy Payment and Billing Procedures

### § 282.30 Payment of subsidy.

*Submission of voucher.* At the close of each calendar month, the subsidized operator may submit a voucher, and include for payment in such voucher the amount of ODS accrued for the voyages terminated during the period.

### § 282.31 Subsidy billing procedures.

(a) *Subsidy voucher*—(1) *Form.* Requests for payment of ODS shall be submitted on a public voucher, Standard Forms 1034 and 1034A, which can be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington DC 20402.

(2) *Copies.* The operator shall submit the original and 3 copies of the voucher to the MARAD Region Director for payment. The original and 2 copies must be supported by schedules and an affidavit. The third copy is the payee's copy and need not be supported.

(b) *Schedules and affidavit.* (1) The following schedules shall be used for calculating the amount of ODS payable:

SCHEDULE A

(Company)

ODSA No. _____

ODS Accrued During Fiscal Year 198____

ODS Payable for the Month of_____

| | Current voucher | Previous voucher | Total |
|---|---|---|---|
| Total Accrued ODS (Sched. B) | $ | $ | $ |
| Less ODS Reductions: DTR/Deviations (Sched. C) | $ | | |
| Reduced Crew (Sched. D) | $ | | |
| Net ODS Accrued | $ | $ | $ |
| Less Previous Payments | | | $ |
| ODS Payable | | | $ |

SCHEDULE B

_____

(Company)

ODS Accrued for the Month of_____

Trade Area _____

| Vessel name | Voy. No. | Voyage dates | | Voy. days [1] | Per diem rates [1] | Net subsidy |
|---|---|---|---|---|---|---|
| | | From | To | | | |
| | | | | | $ | $ |
| ODS payable for unpredictably timed expenses not included in daily amount (attach supporting information). | | | | | | $ |
| Total accrued subsidy (enter on Schedule A) .... | | | | | | $ |

[1] Place* next to applicable "Voy. days" or "Per diem rate" of vessel and voyage requiring reduction of ODS because of domestic trade operations or voyage deviations.

SCHEDULE C

_____

(Company)

Domestic Trade and Voyage Deviation ODS Reductions

Domestic Trade Reduction (DTR):

| Vessel name | Voy. no. | Gross voyage revenue | Domestic revenue | % of dom. to gross revenue | Per diem rate | Per diem reduction | DTR days | ODS reduction |
|---|---|---|---|---|---|---|---|---|
| | ..... | $ ..... | $ ..... | .....% | $ ..... | $ ..... | ..... | $ |

Deviation Reduction:

| Vessel name | Voy. no. | Deviation days or % of day | Per diem rate | ODS reduction |
|---|---|---|---|---|
| | ..... | ..... | $ ..... | $ |

(Enter total Reductions on Schedule A).

SCHEDULE D

_____

(Company)

Reduced Crew Period

| Vessel | Reduced crew dates | | No. of reduced crew days (a) | No. of crew reduced | Man-days | Man-day amount | Reduced crew reduction |
|---|---|---|---|---|---|---|---|
| | From | To | | | | | |
| ..... | ..... | ..... | × | = | × | $= | $ |
| ..... | ..... | ..... | × | = | × | $= | $ |
| ..... | ..... | ..... | × | = | × | $= | $ |
| ..... | ..... | ..... | × | = | × | $= | $ |
| Total Reduced Crew Reduction (Enter on Schedule A). | | | | | | | |

(a) If licensed crew, indicate (a), (b) If unlicensed crew, include (b).

(2) A notarized affidavit as shown below shall be signed by an official of the subsidized operator who is familiar with the ODSA, these regulations, the operation of the subsidized vessel and the accounts, books, records, and disbursements of the subsidized operator relating to such operation:

AFFIDAVIT

State of _____
City of _____
County/Parish of _____

I, _____, being duly sworn, depose and say, that I am (title) of the _____ (herein referred to as the "Operator"), and as such am familiar with (a) provisions of the Operating-Differential Subsidy Agreement, Contract No. _____, dated as of _____, as amended, to which the Operator is a party; and (b) the regulations governing the payment of operating-differential subsidy for liner vessels, PART 282, Title 46, CFR; and (c) the operation of the vessels covered by said Agreement and regulations; and (d) the accounts, books, records, and disbursements of the Operator relating to such operation.

Referring to the public voucher dated _____, covering voyage days allowed for subsidy during the periods commencing _____ and ending _____, and attached, submitted by said Operator concurrent herewith for a payment on account in the sum of _____, under said Agreement, I further depose and say that, to the best of my knowledge and belief, the Operator has fully complied with the terms and conditions of said Agreement and regulations, applicable orders, rulings and provisions of the Merchant Marine Act, 1936, as amended, and is entitled, under the provisions of said Agreement and regulations, orders and rulings applicable thereof, to the amount of the payment on account requested; and further depose and say that the vessels named in the attached schedules were in authorized service for the vessel operating days on which the payment is requested and has not included in the calculation of the amount of subsidy claimed in the attached voucher any costs of a character that the Maritime Administration, or Secretary of Transportation acting by and through the Maritime Subsidy Board or any predecessor or successor, had advised the Operator to be ineligible to be so included, or any costs collectible from insurance, or from any other source.

Payment by the Maritime Administration of all or part of the amount claimed herein shall not be construed as approval of the correctness of the amount stated to have been due, nor a waiver of any right of remedy the Maritime Administration, or Secretary of Transportation, acting by and through the Maritime Subsidy Board, or any predecessor or successor, may have under the terms of said Agreement, or otherwise.

I further depose and say that this affidavit is made for and on behalf and at the direction of the Operator for the purpose of inducing the Maritime Administration to make a payment pursuant to the provisions of the aforesaid Operating-Differential Subsidy Agreement, as amended.

Subscribed and sworn to before me, a Notary Public, in and for the aforesaid County and State, this _____ day of _____,

My commission expires _____
Notary Public _____

(3) The subsidized operator shall furnish its own supply of supporting schedules and affidavit.

## § 282.32 Appeal procedures.

(a) *Appeals of annual or special audits.* An operator who disagrees with the findings, interpretations or decisions in connection with audit reports of the Office of the Inspector General and who cannot settle said differences by negotiation with the Contracting Officer may submit an appeal to the Maritime Administrator from such findings, interpretations or decisions in accordance with part 205 of this chapter.

(b) *Appeals of administrative determinations*—(1) *Policy*. An operator who disagrees with the findings, interpretations or decisions of the Contracting Officer with respect to the administration of this part may submit an appeal from such findings, interpretations or decisions as follows:

(i) Appeals shall be made in writing to the Secretary, Maritime Subsidy Board, Maritime Administration, within 60 days following the date of the document notifying the operator of the administrative determination of the Contracting Officer. In the appeal to the Secretary, the operator shall indicate whether or not a hearing is desired.

(ii) MARAD will notify the appellant in writing if a hearing is to be held and whether the operator is required to submit additional facts for consideration in connection with the appeal.

(iii) When a decision has been rendered, the Board shall notify the appellant in writing.

(2) *Appeal to the Secretary of Transportation*. An operator who disagrees with the Board may appeal such findings and determinations by filing with the Secretary of Transportation, a written petition for review of the Board's action. The petition shall be filed in accordance with provisions of the Department of Transportation pertaining to Secretarial review.

(3) *Hearings*. MARAD shall follow the Rules of Practice and Procedure (46 CFR part 201, subpart M) for hearings granted under 46 U.S.C. 1176 and 46 CFR 282.32.

# PART 283—DIVIDEND POLICY FOR OPERATORS RECEIVING OPERATING-DIFFERENTIAL SUBSIDY

Sec.
283.1 Purpose.
283.2 Definitions.
283.3 Dividend policy criteria.
283.4 Alternate standards.
283.5 Notification and reporting requirements.

AUTHORITY: Sec. 204(b) Merchant Marine Act, 1936, as amended (46 U.S.C. 1114(b)); Reorganization Plans No. 21 of 1950 (64 Stat. 1273) and No. 7 of 1961 (75 Stat. 840), as amended by Pub. L. 91–469 (84 Stat. 1026); Dept. of Commerce Organization Order 10–8 (38 FR 19707, July 23, 1973).

SOURCE: 45 FR 37445, June 3, 1980, unless otherwise noted.

## § 283.1 Purpose.

(a) The rules of this part establish requirements for the declaration and payment of cash dividends by operators receiving operating-differential subsidy (ODS) under Title VI of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1101 et seq.) (Act). This part shall be applicable immediately unless otherwise provided for in the operators' operating-differential subsidy agreement (ODSA).

(b) One of the purposes of the Act is to foster the development and encourage the maintenance of the United States Merchant Marine. Subsidized operators are required to maintain the financial ability to assure adequate and timely reinvestment in the merchant marine. The policy contained herein takes into consideration the operators' contractual obligations to construct and acquire vessels, retire debt obligations secured by ship mortgages and maintain adequate working capital. However, this policy also takes into consideration the operators' need to attract new capital to the industry by paying dividends which are appropriate in light of the operators' earnings and long-range financial position.

## § 283.2 Definitions.

(a) *Long-Term Debt* means, as of any date, the total notes, bonds, debentures, equipment obligations and other evidence of indebtedness that would be included in Long-Term Debt in accordance with generally accepted accounting principles, less the balance of escrow fund deposits attributable to the principal of obligations guaranteed pursuant to Title XI of the Act, where deposits are required in accordance with § 298.33. Capitalized Lease Obligations shall be included, but deferred income taxes shall not be included.

(b) *Capitalized Lease Obligations* means, as of any date, an amount (excluding amounts already included in Long-Term Debt) equal to the sum of: (1) The present value of all capital leases, as defined and computed in accordance with the Financial Accounting Standards Board Statement No. 13, Accounting for Leases (FASB–13), and

(2) ½ of the minimum rentals (less operating components such as insurance, maintenance, property taxes, etc.) of all operating leases, as defined and includable in footnotes to the financial statements in accordance with FASB–13, for shipping property, i.e., vessels, containers, barges, terminals and other similar property.

(c) *Equity* (net worth) means, as of any date, the total of paid-in-capital stock, paid-in-capital, retained earnings and all other amounts that would be included in Equity in accordance with generally accepted accounting principles, but adjustable as follows. The net worth shall be reduced to the extent that the net worth computation includes any receivables from an affiliate of the company or any stockholder, director, officer, or employee (or any member of the employee's family) of the company, or of an affiliate of the company, other than (1) reasonable advances to affiliated agents required for the normal operation of the company's vessels, or (2) current receivables arising out of the ordinary course of business, and which are not outstanding for more than 120 days.

(d) *Floor net worth* means net worth computed as follows: The net worth requirement for existing operators shall be initially set at the greater of 90 percent of the operator's existing net worth or 50 percent of the operator's long-term debt contained in its audited financial statements for the year ended December 31, 1979. A new operator's net worth requirement shall initially be set at the greater of 90 percent of existing net worth or 50 percent of the original long-term debt issued with respect to the operator's vessel(s).

(e) *Adjusted floor net worth* means that the floor net worth requirement may be reduced with consent of the Maritime Administrator in an amount equivalent to amounts an operator could have paid in dividends under the previous policy set forth in this regulation prior to amendment in 1980, in the three years prior to the date of effectiveness of this policy, but chose not to pay out in dividends. The floor net worth requirement for both existing operators and new operators shall be further adjusted from time to time as follows:

(1) The net worth requirement shall be increased by an amount equal to 50 percent of the original long-term debt to be issued with respect to new vessel construction (with respect to existing operators, new vessel construction contracts executed after December 31, 1979), and

(2) the net worth requirements shall be decreased by an amount equal to 50 percent of the original long-term debt issued with respect to vessels which are removed from service or otherwise transferred or sold.

(f) *Working capital* means the difference between current assets and current liabilities, both determined in accordance with generally accepted accounting principles, adjusted as follows:

(1) Current assets shall be reduced with respect to:

(i) Amounts in any Title XI Reserve Fund, pursuant to 46 CFR 298.35(e) or Capital Construction Fund (CCF) Security Amount prescribed by 46 CFR 298.35(f), that is being maintained pursuant to an agreement covering a vessel owned or leased by the company, or in another similar fund required under any other mortgage, indenture or other agreement to which the company is a party;

(ii) Any securities, obligations or evidences of indebtedness of an affiliate of the company or of any stockholder, director, officer or employee (or any member of the family of an employee of the company or of such affiliate), except: (*a*) Reasonable advances to affiliated agents required for the normal current operation of the company's vessels, or (*b*) receivables outstanding for not more than 120 days, arising out of the ordinary course of business.

(2) Current assets shall be increased with respect to CCF accruals (but not actual deposits), if the operator has first met its prorated CCF minimum deposit schedule.

(3) Current liabilities shall be increased by one-half of the annual payment of all charter hire and other lease obligations having a term of more than twelve months, other than charter hire and other lease obligations already included and reported as a current liability on the company's balance sheet.

(4) Current liabilities shall be decreased by amounts on deposit in a CCF which are available for the payment of current liabilities.

(g) *Prior years' earnings* means the aggregate net income after tax for the three years immediately preceding the year in which the dividend is declared. An operator may include in prior years' earnings estimated net operating income after tax for the current fiscal year if such amount is based upon actual net operating income after tax for the first nine months of the current year. If an operator includes estimated current income in its prior years' earnings computation, it may also include earnings for only the immediately preceding two years, rather than three years, in the computation of prior years' earnings.

(h) *Funds available* shall mean the sum of:

(1) Amounts on deposit in any fund established pursuant to the Act plus accrued deposits, unless already included in working capital, (including interest thereon), less accrued withdrawals from any such fund;

(2) Gross book value, as shown on the operators' books of account, of subsidized vessels and related barges and containers, less accumulated depreciation;

(3) Progress payments made on subsidized vessels and related barges and containers undergoing construction, reconstruction, or reconditioning;

(4) Progress payments made on additional vessels and related barges and containers, if any, which the operator has agreed to construct or acquire pursuant to any contract entered into with the Maritime Administrator or the Maritime Subsidy Board (Board);

(5) Balance of trade-in allowances pursuant to section 510 of the Act;

(6) Capitalized Lease Obligations as defined in § 283.2(b); and

(7) Working capital as defined in § 283.2(f).

(i) *Funds required* means the sum of:

(1) 25 percent of the total cost to the operator of: (i) Subsidized vessels under construction, reconstruction or reconditioning, (ii) additional vessels under construction, reconstruction or reconditioning pursuant to any contract entered into between the operator and the Maritime Administrator or the Board, and (iii) barges and containers under construction or under contract to purchase, and to be used as part of the complement of such vessels;

(2) 25 percent of the total cost to the operator, estimated at the time a cash dividend is to be declared, of: (i) Replacement of subsidized vessels required to be replaced under the current ODSA (which cost must be indicated whether or not the operator anticipates leasing replacement vessels), (ii) additional vessels which the operator has agreed to construct or acquire pursuant to any contract entered into with the Maritime Administrator or the Board, and (iii) barges and containers required as part of the complement of such vessels. In making this computation, the operator shall obtain the prior written agreement of the Maritime Subsidy Board as to number of replacement vessels, type and commercial characteristics, projected award date of construction contract, projected delivery dates, estimated total cost (current) and method used to determine such cost, intended area of operation, and identity of vessels to be replaced.

(3) Capitalized Lease Obligations as defined in § 283.2(b), excluding that portion of any such amount payable within one year; and

(4) Outstanding indebtedness on, or secured by, subsidized vessels and related barges and containers, or incurred in connection with the acquisition, construction or reconstruction of such vessels and related barges and containers.

### § 283.3 Dividend policy criteria.

(a) *In general.* A subsidized operator may pay cash dividends at any time it desires up to the amount set forth in paragraph (b) of this section. Dividends may be paid pursuant to paragraph (c) of this section, as provided therein. The written approval of the Maritime Administrator shall be obtained prior to any declaration of dividends by the operator, if the payment of dividends does not meet the criteria of either paragraph (b) or (c) of this section. It is intended that dividend payments be

permitted under the provisions of either paragraph (b) or (c), whichever allows payment of the greatest amount of dividends. Nothing in this part shall alter restrictions on the payment of dividends which may affect the operator under any other agreements with the Maritime Administrator.

(b) *40 percent dividend criteria*—If the operator is able to meet the criteria of this paragraph after declaration and payment of the proposed dividend, it may declare a dividend of up to 40 percent of prior years' earnings, less any dividends that were paid in such years, unless there is an operating loss in the fiscal year to the date of proposed payment of dividend, as well as operating losses in the immediately preceding two years. If in any of the years included in the prior years' earnings calculation dividends were paid under the 100 percent rule, those years' earnings and dividends may be excluded from the prior years' earnings calculation, and then only the earnings and dividends associated with the remaining years of the three year period may be used. This provision enables an operator to pay dividends under the 40 percent rule when in past years it has paid dividends under the 100 percent rule. The criteria which must be satisfied are as follows:

(1) *Working Capital*—Working Capital must equal or exceed one dollar.

(2) *Long-term Debt to Equity ratio*—Long-Term Debt must not exceed two times Equity. (The Maritime Administrator may modify this requirement during periods of vessel construction).

(3) *Net Worth Floor*—Net Worth must exceed the adjusted net worth floor as computed in § 283.2.

(c) An operator may declare a dividend in an amount up to 100 percent of retained earnings, unless there is an operating loss in the fiscal year to the date of proposed payment of dividend, as well as operating losses in the immediately preceding two years, if the following criteria are satisfied:

(1) *Working Capital*—Working Capital must equal or exceed one dollar.

(2) *Long-Term Debt to Equity ratio*—Long-Term debt must not exceed Equity.

(3) *Net Worth Floor*—Net worth must exceed the Adjusted Net Worth floor as computed in § 283.2.

(4) *Funding for Replacement Vessels*—Funds available must exceed Funds Required, and the basis for Funds Required for replacement vessels must receive prior approval, as provided in § 283.2(i) herein.

### § 283.4 Alternate standards.

(a) The Maritime Administrator may waive or modify any of the financial terms or requirements otherwise applicable in part 283, upon determining that other factors exist which make alternate terms or requirements appropriate. An example of such a situation would involve an operator that: (1) Has no replacement obligation and (2) has a guarantee of charter hire or other guarantees sufficient to cover capital costs. In such cases, the Government's interest may be sufficiently protected although the operator cannot meet the standard part 283 requirements. Another example may be to include receivables otherwise excluded if they are properly guaranteed by an acceptable guarantor.

(b) [Reserved]

### § 283.5 Notification and reporting requirements.

(a) *Notice*—The operator shall give written notice of a dividend declaration to the Maritime Administrator immediately upon such declaration.

(b) *Reports*—The operator shall submit a report as described below whenever it declares a dividend or applies for approval under § 283.3 to declare a dividend as of the approximate date of such declaration or request. Such statements shall include information no less current than 30 days. If no dividends are declared during the calendar year, the operator is not required to submit a statement.

If the Maritime Administration determines that the operator was, for any reason, not qualified to pay the dividend, then the operator shall, in writing, request the approval of the Maritime Administrator for any subsequent dividend declaration. If such approval is then granted, the operator may follow the requirements of this part 283 once again. The reports required by

this section shall be prepared in accordance with the definitions set forth in § 283.2. A separate statement shall be submitted showing the adjustments made to working capital, long-term debt and net worth, and shall conform to the definitions of such items as contained herein. As appropriate, reports shall include the following:

(1) The ratio of debt to equity, floor net worth and prior years' earnings in the format set forth in Schedule A;

(2) The excess of "funds available" over "funds required" in the format as set forth in Schedule B;

(3) Working capital as set forth in Schedule C; and

(4) Other applicable limitations prescribed in any agreements between the operator and the Maritime Administrator affecting the payment of dividends.

(c) *Officials to whom notices and reports are to be directed.* Operators shall submit, in triplicate, all notices, reports and requests prescribed in this part to the Secretary, Maritime Administration, Washington, DC 20590, with a copy of such notice or request to the appropriate Maritime Administration Region Director.

SCHEDULE A—RATIO OF DEBT TO EQUITY, FLOOR NET WORTH, AND PRIOR YEARS' EARNINGS

Company _____

_____, 19___

| | |
|---|---|
| Long-term debt | $..... |
| Retained earnings | $..... |
| Equity | $..... |
| Ratio of Long-Term Debt to Equity. | |
| Adjusted Floor Net Worth as computed in accordance with § 283.2. | $..... |
| Prior years' earnings as defined in § 283.2 | $..... |

_____

(Signature of Chief Financial Officer or other authorized officer)

SCHEDULE B—FUNDS AVAILABLE AND FUNDS REQUIRED

Company _____

_____, 19___

I. FUNDS AVAILABLE

| | |
|---|---|
| A. On deposit in statutory funds: | |
| Capital construction fund | $..... |
| Construction reserve fund. | |
| Construction and escrow funds. | |
| Plus accrued deposits to funds (or less accrued withdrawals from funds) | $..... |
| B. Gross book value of vessels and related barges and containers employed in subsidized services: | |
| Subsidized vessels. | |
| Related barges. | |
| Related containers. | |
| Less accumulated depreciation | (.....) |
| C. Progress payments made on subsidized vessels and related barges and containers undergoing construction, reconstruction or reconditioning. | |
| D. Progress payments made on additional vessels and related barges and containers agreed to be constructed or acquired. | |
| E. Balance of trade-in allowances (section 510 of the Act). | |
| F. Capitalized Lease Obligations as defined in § 283.2(b). | |
| G. Net Working Capital (from Schedule D). | |
| TOTAL FUNDS AVAILABLE | $..... |

II. FUNDS REQUIRED

A. Cost of current commitments:

1. ODSA vessels under construction or reconstruction:

| Number of vessels | Total cost | Less Government contributions | Cost to operator |
|---|---|---|---|
| ..... | $ ..... | ($.....) | |

25% of cost to operator.

2. Additional vessels under construction, reconstruction or reconditioning pursuant to a contract with the Assistant Secretary or the Board:

| Number of vessels | Total cost | Less Government contributions | Cost to operator |
|---|---|---|---|
| ..... | $ ..... | ($.....) | |

25% of cost to operator.

3. Barges and containers under construction or contract to purchase:

| Number of: | | Cost to operator |
|---|---|---|
| Barges | $ | |
| Containers | $ | |

25% of Cost to Operator.

B. Estimated cost of additional vessels (whether to be owned or leased):

1. Subsidized vessels to be replaced under ODSA:

| Number of vessels | Total cost | Less Government contributions | Cost to operator |
|---|---|---|---|
| ..... | $ ..... | ($.....) | $. |
| | 25% of cost to operator .... | | $. |

2. Additional vessels agreed to be constructed or acquired:

| Number of vessels | Total cost | Less Government contributions | Cost to operator |
|---|---|---|---|
| ..... | $ ..... | ($.....) | $. |
| | 25% of cost to operator .... | | $. |

3. Additional barges and containers required as the complement of vessels agreed to be constructed or acquired in items B1 and B2 above:

| Number of: | Cost to operator |
|---|---|
| Barges ..... | $ |
| Containers ..... | $ |
| 25% of Cost to Operator ..... | $. |

| | |
|---|---|
| C. Outstanding indebtedness on, or secured by, subsidized vessels and related barges and containers, or incurred in connection with the acquisition, construction, or reconstruction of such vessels and related barges and containers. | $. |
| D. The present value of Capitalized Lease Obligations as defined in § 283.2(b), excluding that portion of any such amount payable within one year. | $. |
| TOTAL FUNDS REQUIRED ..... | $. |
| III. EXCESS FUNDS (DEFICIENCY OF FUNDS). | $. |

_____

(Signature of Chief Financial Officer or other authorized officer)

SCHEDULE C—DETERMINATION OF WORKING CAPITAL (AS DEFINED IN 46 CFR 283.2)

Company _____

_____, 19____

| | | |
|---|---|---|
| A. CURRENT ASSETS: | | |
| Cash and marketable securities ..... | $..... | |
| Accounts receivable (current) ..... | ..... | |
| Other current assets (specify) ..... | ..... | |
| Total ..... | $..... | |
| Accrued deposits to CCF, (provided operator has met prorated deposit schedule). | $..... | |
| Other adjustments (specify) ..... | ..... | $..... |
| B. CURRENT LIABILITIES: | | |
| Current liabilities ..... | $..... | |
| Add one-half annual charter hire (if not included above). | ..... | |
| Less current liabilities for which payment is available from CCF deposits. | ..... | |
| Other adjustments (specify) ..... | ..... | $..... |
| C. WORKING CAPITAL: | | |
| Current assets less current liabilities ..... | | $..... |

_____

(Signature of Chief Financial Officer or other authorized officer)

# PART 287—ESTABLISHMENT OF CONSTRUCTION RESERVE FUNDS

Sec.
287.1 Definitions.
287.2 Scope of section 511 of the Act and the regulations in this part.
287.3 Requirements as to vessel operations.
287.4 Application to establish fund.
287.5 Tentative authorization to establish fund.
287.6 Establishment of fund.
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AUTHORITY: Secs. 204, 511, 49 Stat. 1987, as amended, 54 Stat. 1106, as amended; 46 U.S.C. 1114, 1161.

SOURCE: General Order 38 (2d Rev.), 30 FR 7215, May 29, 1965; 30 FR 8162, June 25, 1965, unless otherwise noted.

EDITORIAL NOTE: The regulations contained in this part were codified by the Internal Revenue Service in Treasury Decision 6820, 30 FR 6030, Apr. 29, 1965. For text see also 26 CFR part 2.

## § 287.1 Definitions.

(a) As used in the regulations in this part, except as otherwise expressly provided—

(1) *Act* means the Merchant Marine Act, 1936, as amended (46 U.S.C., ch. 27).

(2) *Section* means one of the sections of the regulations in this part.

(3) *Administration* means the Maritime Administration of the Department of Transportation.

(4) *Citizen* means a person who, if an individual, was born or naturalized as a citizen of the United States or, if other than an individual, meets the requirements of section 905(c) of the Act and section 2 of the Shipping Act, 1916, as amended (46 U.S.C. 802).

(5) *Taxpayer* means a citizen who has established or seeks to establish a construction reserve fund under the provisions of section 511 of the Act and the regulations in this part, and may include a partnership.

(6) *Corporation* includes associations, joint-stock companies and insurance companies.

(7) *Stock* includes the shares in an association, joint-stock company, or insurance company.

(8) *Affiliate* or *associate* means a person directly or indirectly controlling, controlled by, or under common control with, another person.

(9) *Control,* as used in paragraph (a)(8) of this section, means the possession of the power to direct in any manner the management and policies of a person, and the terms *controlling* and *controlled* shall have the meanings correlative to the foregoing.

(10) *Person* means an individual, a corporation, a partnership, an association, an estate, a trust, or a company.

(11) *Partnership* includes a syndicate, group, pool, joint venture, or other unincorporated organization.

(12) *Construction,* if so determined by the Administration, shall include reconstruction and reconditioning.

(13) *Reconstruction and reconditioning* shall include the reconstruction, reconditioning, or modernization of a vessel for exclusive use on the Great Lakes, including the Saint Lawrence River and Gulf, if the Administration determines that the objectives of the Act will be promoted by such reconstruction, reconditioning, or modernization, and, notwithstanding any other provisions of law, such vessel shall be deemed to be a *new vessel* within the meaning of section 511 of the Act for such reconstruction, reconditioning, or modernization.

(14) *Purchase-money indebtedness* means any indebtedness, or evidence thereof, created as the result of the purchase of a vessel by the taxpayer.

(15) *Contract, contract for the construction,* and *construction contract* shall include, if so determined by the Administration, a contract for reconstruction or reconditioning and shall include, in the case of a taxpayer who constructs a new vessel in a shipyard owned by such taxpayer, an agreement, between such taxpayer and the Administration with respect to such construction, and containing provisions deemed necessary or advisable by the Administration to carry out the purposes and policy of section 511 of the Act.

(b) Insofar as the computation and collection of taxes are concerned, other terms used in the regulations in this part, except as otherwise provided, have the same meaning as in the Internal Revenue Code and the regulations thereunder.

### § 287.2 Scope of section 511 of the Act and the regulations in this part.

(a) *Applicability of regulations.* The regulations prescribed in this part—

(1) Apply to gain realized from the sale or loss of vessels, earnings from the operation of vessels, and interest (or otherwise) with respect to amounts previously deposited in the construction reserve fund, for a taxable year beginning after December 31, 1964, and

(2) Apply to the expenditure, obligation, or withdrawal, during a taxable year beginning after December 31, 1964, of any deposits of gain, earnings, and interest (or otherwise) of the character referred to in paragraph (a)(1) of this section without regard to the taxable year in which the deposits were made.

(b) *Nonrecognition and accumulation.* Section 511 of the Act provides, under conditions specified, for the nonrecognition, for income and excess-profits tax purposes, of the gain realized from the sale or indemnification for loss of certain vessels including certain vessels in the course of construction, or shares therein. It also permits the accumulation of the proceeds of such sales or indemnification and of certain earnings without liability under part I (section 531 and following), subchapter G, chapter 1 of the Internal Revenue Code of 1954, and the regulations thereunder (26 CFR 1.531 through 1.537–1 (Income Tax Regulations)).

(c) *Availability of benefits.* The benefits of section 511 of the Act are available to any citizen as defined in paragraph (a)(4) of § 287.1, who, during any taxable year owns, in whole or in part, a vessel or vessels within the scope of § 287.3. A citizen operating such a vessel or vessels owned by any other person or persons can derive no benefit from the

provisions relating to the nonrecognition of gain from the sale or loss of such vessel or vessels so owned, but may establish a construction reserve fund in which he may deposit earnings from the operation of such vessel or vessels.

(d) *Applicability of section 511.* Section 511 of the Act applies only with respect to sales or losses of vessels within the scope of § 287.3 or in respect of earnings derived from the operation of such vessels. A loss to be within section 511 of the Act must be an actual or constructive total loss. Whether there is a total loss, actual or constructive, will be determined by the Administration.

### § 287.3 Requirements as to vessel operations.

Section 511 of the Act applies with respect to vessels operated in the foreign or domestic commerce of the United States or in the fisheries of the United States and vessels acquired or being constructed for the purpose of such operation. The foreign commerce of the United States includes commerce or trade between the United States (including the District of Columbia), the territories and possessions which are embraced within the coastwise laws, and a foreign country or other territories and possessions of the United States. The domestic commerce of the United States includes commerce or trade between ports of the United States and its territories and possessions, embraced within the coastwise laws and on inland rivers. The fisheries include the fisheries of the United States and its territories and possessions. Section 511 of the Act does not apply to vessels operated in the foreign commerce or fisheries of any country other than the United States.

### § 287.4 Application to establish fund.

(a) Any person claiming to be entitled to the benefits of section 511 of the Act may make application, in writing, to the Administration for permission to establish a construction reserve fund. The original application shall be executed and verified by the taxpayer, or if the taxpayer is a corporation, by one of its principal officers, in triplicate, and shall be accompanied by eight conformed copies when filed with the Administration. MARAD will accept electronic options (such as facsimile and Internet) for transmission of required information to MARAD, if practicable.

(b) Form of application:

APPLICATION FOR PERMISSION TO ESTABLISH A CONSTRUCTION RESERVE FUND UNDER SEC. 511, MERCHANT MARINE ACT, 1936, AS AMENDED

The undersigned applicant, _____, hereby applies, under section 511, Merchant Marine Act, 1936, as amended, and the regulations prescribed by the Secretary of Transportation acting by and through the Maritime Administrator (hereinafter referred to as "Administrator") (46 CFR Part 287) and the Secretary of the Treasury, Internal Revenue Service (26 CFR Part 2) for permission to establish a construction reserve fund to be used for the construction or acquisition of a new vessel or vessels as defined by subsection (a) of said section 511, and submits in support of its application the following information:

A. *Identity and nationality of applicant.*

1. Exact name.

2. Status (individual, partnership, corporation, etc.).

3. Give the place of incorporation—whether under the laws of the United States, or of a State, Territory, District, or possession thereof.

4. Address of principal executive offices.

5. A statement, if applicant is an individual or a partnership, should be attached in the application in affidavit form, containing information that applicant is a citizen of the United States by virtue of birth in the United States, naturalization, etc.; give place and date of birth and/or naturalization; if derivative U.S. citizenship is alleged through naturalization of parent while a minor, the number, date and place of issue of the certificate of derivative citizenship of applicant should be cited together with any other pertinent details relative thereto.

6. (a) The name, office, and nationality of each officer and director of the applicant owning shares of stock in the corporation should be submitted together with the number and class of capital shares owned.

(b) In order that the U.S. citizenship status of a corporation applicant may be determined by the Administration, an affidavit as in accordance with Part 355 of this Chapter shall be furnished together with a current copy of the Articles or Certificate of Incorporation certified by the Secretary of the State where incorporated (or appropriate officer, if other than a State, as provided in "A.3" above), and a copy of the current By-Laws certified by the Secretary of the Corporation.

7. The name, address and nationality of, and number and class of capital shares owned by, each person not named in answer to Item 6, owning of record, or beneficially if known, 5 percent or more of the outstanding capital shares of any class of the applicant. (The applicant shall be required, upon request, to furnish such additional data as may be deemed necessary to establish the U.S. citizenship of the applicant pursuant to section 2, Shipping Act, 1916, or section 905(c), Merchant Marine Act, 1936, as amended.)

8. A brief statement of the general effect of each voting agreement, voting trust, or other arrangement whereby the voting rights in any shares of the applicant are owned, controlled or exercised, or whereby the control of the applicant is in any way held or exercised by any person not the holder of legal title to such shares. Give the name, address, nationality, and business of any such person, and, if not an individual, the form of organization.

B. *Business of the applicant and proposed use of the new vessel.*

9. A brief description of (a) the shipping business, or (b) the fishing business, and (c) any other business activities of the applicant.

10. If engaged in the domestic or foreign commerce of the United States, full details concerning the services, routes, or lines on which vessels owned or chartered by the applicant are or have been operated.

11. If applicant is engaged in the fisheries of the United States, full details concerning the location of the fishing operations and the method employed.

C. *Proceeds to be deposited.*

12. If applicant proposes to deposit the proceeds from the sale of a vessel, a description of the transaction from which the funds were obtained, including the name of the vessel sold, name of purchaser, selling price, date and terms of sale, consideration received by the applicant, amount and description of any mortgage or other lien on the vessel at the time of sale, whether such mortgage or lien was satisfied from the proceeds of sale, brief description of vessel as to size, speed, tonnage, etc., age of vessel at the time of sale, and value and accrued depreciation for income tax purposes at time of sale.

13. If applicant proposes to deposit proceeds of indemnity from loss of a vessel, the name of the vessel, date and description of the loss, amount of indemnity and date received, name of underwriter, amount and description of any mortgage or other lien on the vessel at time of loss, whether such mortgage or lien was satisfied from the proceeds of the indemnity, age of vessel at time of loss, brief description of vessel as to size, speed, tonnage, etc., and value and accrued depreciation for income tax purposes at time of loss.

14. If applicant proposes to deposit earnings from the operation of vessels, a statement of the amount of such earnings to be deposited, the period during which earned, and their source, including the vessels, services, routes, or lines involved.

D. *The new vessel.*

15. Statement whether applicant proposes: (a) To have a new vessel built to specifications, or (b) to acquire a vessel already constructed or under construction. If the former, and a contract for construction has been entered into at the time of the making of this application, state the date said contract was entered into, the parties thereto, the terms thereof, and date of delivery thereunder. If the latter, give name of vessel, builder, from whom purchased, or to be purchased, date when construction commenced, and date when delivered, or if vessel is still under construction, anticipated date of delivery.

16. The general characteristics of the proposed new vessel, including (a) principal dimensions; (b) gross, net and deadweight tonnage; (c) bale and grain capacities of all cargo holds; (d) capacities of all tanks, storage spaces, refrigerator cargo spaces and separately chilled cargo spaces; (e) number and classes of passenger accommodations; (f) type and power, and in case of steam machinery, the gauge pressure, total temperature, and vacuum expected of propulsive machinery; (g) kind of fuel to be burned; and (h) sustained sea speed at designed load draft.

17. If the proposed new vessel is to operate in the domestic or foreign commerce of the United States, a statement of how it will meet the needs of the service, route or line for which it is intended, with emphasis on the following factors: (a) Cargo accommodations—cargo space and fittings and appliances for handling and stowing cargo; (b) passenger accommodations; (c) construction and design; and (d) accommodations for officers and crews.

18. If the proposed new vessel is to be operated in the fisheries of the United States, a description of the vessel, and a statement of how the vessel will meet the needs of such operations.

19. If the proposed new vessel is intended to replace a vessel or vessels requisitioned or purchased by the United States, a statement of how the proposed replacement vessel will meet the needs of the service, route, line, or use for which it is intended.

20. If the proposed new vessel is less than 2,000 gross tons or of less speed than 12 knots, a description of the features which would make it desirable for use by the United States in case of war or national emergency.

E. *The construction reserve fund.*

21. A description of the deposit or deposits which the applicant proposes to make in the construction reserve fund, including the

amounts to be deposited in cash, notes, mortgages or other evidences of indebtedness, irrevocable commitments, or securities, giving reference to the source as described in items C–12, C–13, or C–14.

22. Name and address of proposed depository or depositories for the construction reserve fund.

F. *Taxable year of applicant.*

23. Whether applicant files its Federal income tax return on a calendar year or fiscal year basis and if on the latter, the beginning of its fiscal year.

G. *Exhibits to be furnished.*

24. The following documents shall be filed as exhibits attached to the application:

*Exhibit I*—If available at the time this application is filed, an authenticated copy of any irrevocable commitment to finance the construction or acquisition of the new vessel proposed to be deposited in the construction reserve fund pursuant to the provisions of 46 CFR 287.13(d).

*Exhibit II*—If the applicant is a corporation, a copy of each contract or agreement presently in effect, referred to in answer to Item 8.

H. *Covenants of the applicant.*

25. The applicant hereby agrees as follows:

(a) That the construction reserve fund shall be subject to the provisions of section 511, Merchant Marine Act, 1936, as amended, to the regulations prescribed by the Administrator, and the Secretary of the Treasury with respect to the establishment, maintenance, expenditure, and use of such fund, and to such resolutions as may be adopted by the Administrator with respect to such fund;

(b) That it will furnish copies of any contracts entered into for the construction or acquisition of new vessels which the Administrator may require;

(c) That it will furnish hull plans and specifications, machinery plans and specifications, and data with respect to communication facilities if and to the extent required by the Administrator; and

(d) If no contract for the construction of a new vessel as set forth in paragraph D, subdivision 15(a) hereof, has been entered into at the time of making of this application, it will, upon entering into said contract, furnish to the Administrator the date thereof, the parties thereto, the terms thereof and date of delivery thereunder. Name of applicant:

(Date) _____

By _____

(Name, typed)

_____

(Title)

_____

(Signature)

I, _____, certify that I am the _____ (Title of office) of _____ (Exact name of applicant) the applicant on whose behalf I am authorized to execute the foregoing application and agreements; that the applicant is a citizen of the United States, in accordance with the requirements of the Merchant Marine Act, 1936, as amended; that this application is made for the purpose of inducing the Secretary of Transportation, represented by the Maritime Administrator to grant to the applicant, pursuant to the provisions of section 511 of the Merchant Marine Act, 1936, as amended, and the regulations promulgated by the Secretary of the Treasury and the Maritime Administrator thereunder, with all of which I am familiar, permission to establish a construction reserve fund; that I have carefully examined the application and all documents submitted in connection therewith and, to the best of my knowledge, information and belief, the statements and representations contained in said application and related documents are full, complete, accurate, and true.

*Date:*

_____

(Name)

_____

(Title)

_____

(Signature)

Attention: A false statement in this application is punishable by law (18 U.S.C. 1001).

INSTRUCTIONS AS TO PREPARATION OF APPLICATION

1. Applications shall be prepared in the form provided according to the lettered items and serially numbered paragraphs. They must be signed and sworn to as provided. Eleven copies of the applications shall be filed with the Maritime Administrator, at least one copy of which shall be signed.

2. Each application shall be complete. Items or part of items which are inapplicable may, however, be omitted. The information required by Article 25 need be furnished only as stated in that item. The applicant may incorporate by specific reference information previously furnished the Maritime Administrator provided that such information so incorporated shall have been furnished at least in triplicate.

3. If any information called for by an applicable item is not furnished, and explanation of the omission shall be given. The applicant may furnish such relevant information as it may desire, in addition to that specified in the form.

4. Any additional information called for by the Maritime Administrator from time to time shall be furnished as an amendment or amendments to the application. The original and 11 copies of each amendment shall be filed, shall refer to the application, and shall be identified as an amendment and dated.

Without any specific request from the Maritime Administrator the applicant shall file from time to time as amendments any information necessary to keep the information contained therein or furnished in connection therewith current and correct while the application is pending.

(c) *Fee.* Each such application shall be accompanied by the sum of $225, which sum will be retained to recover the cost of processing the application.

(Approved by the Office of Management and Budget under control number 2133–0032)

[G.O. 38, 2d Rev., 30 FR 7215, May 29, 1965, as amended by Amdt. 1, 31 FR 3397, Mar. 4, 1966; 47 FR 25530, June 14, 1982; 68 FR 62537, Nov. 5, 2003; 69 FR 61451, Oct. 19, 2004]

### § 287.5 Tentative authorization to establish fund.

Where the time between the receipt by the Administration of the application for permission to establish a construction reserve fund and the date prior to which an amount received from the sale or loss of a vessel must be deposited to come within the scope of section 511 of the Act is insufficient to permit a determination of the eligibility of the applicant, the Administration may tentatively authorize the establishment of a construction reserve fund and the deposit of such amount therein. Such tentative authorization shall be subject to rescission by the Administration if subsequently it is determined that the applicant is not entitled to the benefits of section 511 of the Act, or has not complied with the statutory requirements. For example, a tentative authorization will be rescinded if the Administration ascertains that the applicant is not a citizen. Upon such determination, the fund shall be closed and all amounts on deposit therein shall be withdrawn.

### § 287.6 Establishment of fund.

(a) *Authorization by the Administration.* If the application is approved by the Administration, the Administration will adopt Orders authorizing the establishment of a construction reserve fund with the depository or depositories designated by the taxpayer and approved by the Administration. The Orders will provide for joint control by the Administration and the taxpayer over such fund, will set forth the conditions governing the establishment and maintenance of the fund and the making of deposits therein and withdrawals therefrom, and will designate the representatives authorized to execute instruments of withdrawal on behalf of the Administration.

(b) *Resolution or agreement of the taxpayer.* A certified copy of the Orders of the Administration will be furnished the taxpayer. If the taxpayer is a corporation, it shall promptly adopt, through its board of directors, a resolution satisfactory in form and substance to the Administration, authorizing the establishment and maintenance of the fund in conformity with the action of the Administration. If the taxpayer is not a corporation, it shall promptly execute an agreement with the depository satisfactory in form and substance to the Administration to conform to the action of the Administration as set forth in the Orders. Certified copies of the Orders of the Administration and of the resolution of the taxpayer (if it is a corporation) will be furnished to the depository by the Administration and the taxpayer, respectively, for its guidance in maintaining the fund and honoring instruments of withdrawal. The taxpayer, if a corporation, shall also furnish the Administration with a certified copy of its resolution, or if not a corporation a duplicate original of its agreement with the depository.

NOTE: The resolutions referred to in this section shall be retained 2 years after a final release or settlement agreement is completed between the Maritime Administration/Maritime Subsidy Board and the taxpayer.

(c) *Constructive action not recognized.* Constructive deposits, substitutions or withdrawals will not be recognized by the Administration in the establishment and maintenance of the fund.

(d) *Failure to make deposits as basis for termination of fund.* In the event no deposit is made into the fund for more than five years, any amounts remaining in the fund shall be removed from the fund at the discretion of the Administration and, if so removed, the fund shall be terminated. In the event of such termination, see § 287.23 for recognition of gain.

### § 287.7 Circumstances permitting reimbursement from a construction reserve fund.

(a) *Payments prior to establishment of fund.* If, prior to the establishment of a construction reserve fund under the regulations in this part, a taxpayer has made necessary payments under a contract which satisfies the provisions of the regulations in this part and section 511 of the Act for the construction or acquisition of a new vessel, such taxpayer may, if subsequently authorized to establish a construction reserve fund under the regulations in this part, draw against such fund as reimbursement for the amount, if any, of other funds which, with the approval or ratification of the Administration, the taxpayer used for making such necessary payments prior to the establishment of the fund.

(b) *Payments subsequent to establishment of fund.* If, subsequent to the establishment of a construction reserve fund under the regulations in this part, the taxpayer has made necessary payments under a contract which satisfies the provisions of the regulations in this part and section 511 of the Act for the construction or acquisition of a new vessel, such taxpayer may draw against such fund as reimbursement for the amount, if any, of other funds which, with the approval or ratification of the Administration, the taxpayer had used for the purpose of making such necessary payments.

### § 287.8 Investment of funds in securities.

(a) *Obligations of or guaranteed by the United States.* Interest-bearing direct obligations of the United States, or obligations fully guaranteed as to principal and interest by the United States may be deposited in the construction reserve fund in lieu of cash, may be purchased with cash on deposit in the fund, or may be substituted for securities or commitment to finance in the fund, subject to the provisions of paragraph (b) of this section.

(b) *Other securities.* In cases where the taxpayer desires to deposit any securities in the fund in lieu of cash other than those of or guaranteed by the United States or to purchase such other securities with cash on deposit in the fund, or to substitute such other securities for securities or commitment to finance in the fund, the taxpayer shall make written application to the Administration and shall not consummate the transaction until the written consent of the Administration shall have been received. The application shall describe the securities fully. Every approval by the Administration of such application shall be conditioned upon agreement by the taxpayer forthwith to dispose of such securities upon subsequent request by the Administration. Immediately upon the purchase of any securities for deposit in the fund, the taxpayer shall advise the Administration, giving the date of purchase, a description of the securities, and the price paid therefor (net, brokerage and other charges, and gross). Ordinarily, the Administration will not approve the deposit in the fund in lieu of cash, or the purchase with cash on deposit in the fund or the substitution for securities in the fund of securities not actively traded in on exchanges registered under the Securities Exchange Act of 1934 (15 U.S.C. Chapter 2B), or securities which are not legal for investment of trust funds. Whenever the Administration approves the substitution of other securities for securities in the fund, such substitution shall be effected only upon or after the deposit of the substituted securities into the fund.

(c) *Cash.* Cash may be substituted for amounts which are on deposit in the fund in any other form.

(d) *Devalued securities.* In the event the Administration determines that the market value at any date of any securities in the fund has decreased to a figure which is less than 90 percent of the market value at the time of deposit into the fund, then within 60 days after the taxpayer receives notice of such determination the taxpayer shall (except as otherwise provided in this paragraph) deposit into the fund cash or securities in an amount equal to the difference between the current market value of the devalued securities and the market value of such securities at the time of their original deposit. However, if any securities in the fund are valued at the time of their deposit at less than the market value of such securities at

the time of their deposit the taxpayer shall be required to deposit only an amount equal to that portion of the difference between the current market value of the devalued securities and the market value of such securities at the time of their original deposit which bears the same ratio to such total difference as the amount at which the securities were valued at the time of their deposit bears to the market value at the time of such deposit.

### § 287.9 Valuation of securities in fund.

(a) *Equipment values.* In cases where securities are deposited in the fund in lieu of cash, or are purchased with cash on deposit in the fund, or are substituted for securities in the fund, the value of such securities must not be less than the amount of cash in lieu of which they are so deposited or with which they are so purchased, or the value at the time of deposit of the securities for which they were so substituted. If the securities on deposit in the fund are replaced by cash from the general funds of the taxpayer, the amount of cash to be deposited in the fund in lieu thereof shall be not less than the amount at which such securities were valued at the time of their deposit in the fund.

(b) *Determination of value.* (1) For the purpose of determining the amount in the fund, the value of securities shall be their "market value" (which shall be the basis for determining value, unless otherwise agreed to by the administration) and shall be determined in the following manner:

(i) In instances where no actual purchase is involved, such as the initial deposit of securities in the fund in lieu of cash, the last sales price thereof on the principal exchange on the day the deposit was made shall be deemed to be the "market value" thereof, or, if no such sales were made, the "market value" thereof will be determined by the Administration on such basis as it may deem to be fair and reasonable in each case.

(ii) In instances where the purchase of securities with cash on deposit in the fund is involved, "market value" shall be the gross price paid (adjusted for accrued interest); *Provided,* That if such securities are purchased otherwise than upon a registered exchange the price shall be within the range of transactions on the exchange on the date of such purchase, or, if there were no such transactions, then the "market value" thereof will be determined by the Administration on such basis as it may deem to be fair and reasonable in each case.

(2) Purchase-money obligations secured by mortgages on vessels sold or irrevocable commitments to finance the construction or acquisition of new vessels which are deposited in the construction reserve fund as provided in § 287.13 ordinarily will be considered as equivalent to their face value.

### § 287.10 Withdrawals from fund.

(a) *Withdrawals for obligations or liquidation.* (1) Checks, drafts, or other instruments of withdrawal to meet obligations under a contract for the construction or acquisition of new vessel or vessels or for the liquidation of existing or subsequently incurred purchase-money indebtedness, after having been executed by the taxpayer, shall be forwarded to the Administration in Washington, DC, with appropriate explanation of the purpose of the proposed withdrawal, including properly certified invoices or other supporting papers. Such instruments of withdrawal, if payable to the Administration, will be deposited by the Administration for collection, and the proceeds thereof, upon collection, will be credited to the appropriate contract with the Administration; but if drawn to the order of payees other than the Administration, after countersignature on behalf of the Administration, will ordinarily be forwarded to the payees.

(2) An amount obligated under a contract for the construction or acquisition of a new vessel or vessels or for the liquidation of existing or subsequently incurred purchase-money indebtedness, whether the obligor has the entire or a partial interest therein within the scope of section 511 of the Act, may not, so long as the contract or indebtedness continues in full force and effect, be withdrawn except to meet payments due or to become due under such contract or for such liquidation.

(b) *Other withdrawals.* Checks, drafts, or other instruments of withdrawal executed by the taxpayer for purposes other than to meet obligations under a contract for the construction or acquisition of a new vessel or vessels or for the liquidation of existing or subsequently incurred purchase-money indebtedness, whether the taxpayer has the entire or a partial interest therein, shall be drawn by the taxpayer to its own order and forwarded to the Administration in Washington, DC, with appropriate explanation of the purpose of the proposed withdrawal. Such withdrawals may occur by reason of a determination by the Administration that the taxpayer is not entitled to the benefits of section 511 of the Act (see § 287.5), or that a particular deposit has been improperly made (see § 287.13), or by reason of the election of the taxpayer to make such withdrawals. Upon receipt of such checks, drafts, or other instruments of withdrawal, the Administration will give notice thereof to the Commissioner of Internal Revenue. The Commissioner will advise the Administration of the receipt of the notice and the date it was received. The Administration shall not countersign such checks, drafts, or other instruments of withdrawal or transmit them to the taxpayer until the expiration of 30 days from the date of receipt of the notice by the Commissioner, unless the Commissioner or such official of the Internal Revenue Service as he may designate for the purpose consents in writing to earlier countersignature by the Administration and transmittal to the taxpayer. Upon the expiration of such 30-day period, or prior thereto if the aforesaid consent of the Commissioner has been obtained, the Administration will countersign the check, draft, or other instrument of withdrawal and forward it to the taxpayer.

(c) *Inapplicability to certain transactions.* The provisions of this section shall not be applicable to transactions deemed to be withdrawals by reason of the sale of securities held in the fund for an amount less than the market value thereof at the time of their deposit (see § 287.23), nor to the cancellation of an irrevocable commitment deposited in the fund, upon proof satisfactory to the Administration that the terms of such commitment have been fully satisfied.

### § 287.11 Time deposits.

Deposits in the construction reserve fund not invested in securities may be placed in time deposits when, in the judgment of the taxpayer, it is desirable and feasible so to do. The taxpayer shall promptly advise the Administration of any time deposit arrangements made with the depository. The Administration reserves the right at any time to require the termination or modification of any such arrangements. With prior approval of the Administration a time deposit may be made in a depository other than the one with which the construction reserve fund is established.

### § 287.12 Election as to nonrecognition of gain.

(a) *Election requirements.* As a prerequisite to the nonrecognition of gain on the sale or loss of a vessel (or of a part interest therein) for Federal income tax purposes, the taxpayer, after establishing a construction reserve fund, must make an election with respect to such vessel or interest in the manner set forth in this paragraph.

(1) *In general.* Except as provided in paragraph (a)(2) of this section, the election must be made in the taxpayer's Federal income tax return (or, in the case of a partnership, in the partnership return of income) for the taxable year in which the gain with respect to the sale or loss of the vessel is realized. The election as to the nonrecognition of gain shall be shown by a statement to that effect, submitted as a part of, and attached to, the return. The statement, which need not be on any prescribed form, shall set forth a computation of the amount of the realized gain, the identity of the vessel, the nature and extent of the taxpayer's interest therein, whether such vessel was sold or lost and the date of sale or loss, the full sale price or full amount of indemnity, and the amount and date of each payment thereof, the basis of tax purposes and any other data affecting the determination of the realized gain.

(2) *Certain Government payments.* In case a vessel is purchased or requisitioned by the United States, or is

lost, in any taxable year and the taxpayer receives payment for the vessel so purchased or requisitioned, or receives from the United States indemnity on account of such loss, subsequent to the end of such taxable year, the taxpayer shall make his election by filing notice thereof with the Commissioner of Internal Revenue, Washington, DC, 20224, prior to the expiration of 60 days after receipt of the payment or indemnity. The taxpayer shall file a copy of the notice with the Secretary, Maritime Administration, Washington, DC, 20590. The form of the notice of election shall be prepared by the taxpayer and shall be substantially as follows:

ELECTION RELATIVE TO NONRECOGNITION OF GAIN UNDER SECTION 511(C)(2), MERCHANT MARINE ACT, 1936

Pursuant to the provisions of section 511(c)(2) of the Merchant Marine Act, 1936, as amended, notice is hereby given that the undersigned taxpayer elects that gain in respect of the sale to the United States, or indemnification received from the United States on account of the loss, of the vessel named below or share therein shall not be recognized. The circumstances involved in the computation of such gain are as follows:

Name and other identification of vessel ____

Nature and extent of the taxpayer's interest in the vessel _____

Nature of disposition, i.e., sale or loss _____

Date of disposition _____

Full sale price or full amount of indemnity received by taxpayer _____

Amount and date of each payment of sale price or indemnity received by taxpayer __

Amount and date of each previous deposit of such payments in construction reserve fund _____

Identification of each check or other instrument by which payment made to taxpayer

Tax basis of taxpayer's interest in vessel ____

Any other data affecting the determination of the realized gain _____

Amount of gain (submit computation) _____

_____
(Name of taxpayer)

By _____

(Date of execution) _____

## § 287.13 Deposit of proceeds of sales or indemnities.

(a) *Manner of deposit.* The deposit required by section 511 of the Act must be made in a construction reserve fund established with a depository or depositories approved by the Administration and subject to the joint control of the Administration and the taxpayer. It is not necessary to establish a separate fund with respect to each vessel or share in a vessel sold or lost.

(b) *Amount of deposit.* With respect to any vessel sold or lost, or a share therein, the deposit must be in an amount equal to the "net proceeds" of the sale, or the "net indemnity" for the loss. By "net proceeds" and "net indemnity" is meant (1) the depositor's interest in the adjusted basis of the vessel plus (2) the amount of gain which would be recognized for tax purposes in the absence of section 511 of the Act. In determining "net proceeds", the amount necessarily paid or incurred for brokers' commissions is to be deducted from the gross amount of the sales price. In the event the taxpayer is an affiliate or associate of the buyer, the amount of the sales price shall not exceed the fair market value of the vessel or vessels sold as determined by the Administration. In such case the taxpayer shall furnish evidence sufficient, in the opinion of the Administration, to establish that the sales price is not in excess of the fair market value. In determining "net indemnity", the amount necessarily paid or incurred purely for collection, or rate of exchange discounts on the payment, of the indemnity is to be deducted from the gross amount of collectible indemnity. In case of the sale or loss of several vessels or share therein, a deposit of the "net proceeds" or "net indemnity" with respect to one or more of the vessels or shares is permissible. Where several vessels or shares are sold for a lump sum, the "net proceeds" allocated to each vessel or share shall be determined in accordance with any reasonable rule satisfactory to the Commissioner of Internal Revenue. The taxpayer must deposit the full amount of each payment (including cash, notes, or other evidences of indebtedness) as a

single deposit in the construction reserve fund. A payment divided between two or more depositories will be regarded as a single deposit. Amounts received by the taxpayer prior to the date of consummation of the sale of the vessel shall be considered as having been received by the taxpayer at the time the sale is consummated.

(c) *Purchase-money obligations.* Where the proceeds from the sale of a vessel include purchase-money obligations, such obligations together with the entire collateral therefor, or, in the case of deposit of the proceeds of a share in the vessel, a proportionate part of the obligations and collateral as determined by the Administration, shall be deposited, with the remainder of the proceeds, in the construction reserve fund as a part of the "net proceeds". The depository shall receive payment of all amounts due on such purchase-money obligations and such amounts shall be placed in the fund in substitution for the portion of the obligations paid. All installments of purchase-money obligations shall be paid directly into the fund by the obligor. In the event any such installment is not so deposited, the Administration, at any time after the due date, may require the taxpayer to deposit an amount equal to such installment. If the taxpayer so desires, he may deposit in the construction reserve fund cash or approved securities in an amount equal to the face value of any purchase-money obligations in lieu of depositing such obligations.

(d) *Vessel subject to mortgage at time of sale or loss.* Where a vessel is subject to a mortgage or other encumbrance at the time of its sale or loss and the taxpayer actually receives only an amount representing the equity therein or a share in such equity corresponding to his share in the vessel, he shall deposit in the construction reserve fund such amount and concurrently therewith other funds in an amount equal to the difference between the amount received and the "net proceeds" or "net indemnity". Such other funds may be in the form of cash, or, subject to the approval of the Administration, (1) interest-bearing securities, or (2) an irrevocable and unconditional commitment to finance the construction or acquisition of a new vessel in whole or in part by an obligor approved by the Administration in an amount equal to the amount by which the "net proceeds" exceed the cash or securities deposited in the fund.

(e) *Unauthorized deposits.* A deposit which is not provided for by section 511 of the Act shall, without unreasonable delay, be withdrawn from the fund and tax liability will be determined as though such deposit had not been made. (See §§ 287.10 and 287.24.)

### § 287.14 Deposit of earnings and receipts.

(a) *Earnings.* A citizen may deposit all or any part of earnings derived from the operation, within the scope of § 287.3, of a vessel or vessels owned either by himself or any other person, if such earnings are intended for construction or acquisition of new vessels. Such earnings may include payments received by an owner, as compensation for use of his vessel, from other persons by whom it is so operated. Earnings from other sources may not be deposited. The earnings from operation of vessels which are eligible for deposit are the net earnings determined without regard to any deduction for depreciation, obsolescence, or amortization with respect to such vessels.

(b) *Receipts.* Receipts from deposited funds, in the form of interest or otherwise, may be deposited.

### § 287.15 Time for making deposits.

(a) *Proceeds of sale or indemnification.* Deposits of amounts representing proceeds of the sale or indemnification for loss of a vessel or share therein must be made within 60 days after receipt by the taxpayer.

(b) *Earnings and receipts.* Earnings and receipts for the taxable year may be deposited at any time. (See § 287.14.)

### § 287.16 Tax liability as to earnings deposited.

Deposit in the construction reserve fund of earnings from the operation of a vessel or vessels, or receipts, in the form of interest or otherwise, with respect to amounts previously deposited does not exempt the taxpayer from tax liability with respect thereto nor postpone the time such earnings or receipts

are includible in gross income. Earnings and receipts deposited in a construction reserve fund established in accordance with the provisions of section 511 of the Act and the regulations in this part will be deemed to have been accumulated for the reasonable needs of the business within the meaning of part 1 (section 531 and following), subchapter G, chapter 1 of the Internal Revenue Code of 1954, so long as the requirements of section 511 of the Act and the regulations in this part are satisfied relative to the use of the fund in the construction, reconstruction, reconditioning, or acquisition of new vessels, or for the liquidation of purchase-money indebtedness on such vessels. For incurrence of tax liability due to noncompliance with the requirements of section 511 of the Act and the regulations in this part with respect to deposits in the construction reserve fund, see the provisions of § 287.23.

### § 287.17 Basis of new vessel.

The basis for determining gain or loss and for depreciation for the purpose of the Federal income tax with respect to a new vessel constructed, reconstructed, reconditioned, or acquired by the taxpayer, or with respect to which purchase-money indebtedness is liquidated as provided in section 511(g) of the Act, with funds deposited in the construction reserve fund, is reduced by the amount of the unrecognized gain represented in the funds allocated under the provisions of the regulations in this part to the cost of such vessel. (See § 287.18.)

### § 287.18 Allocation of gain for tax purposes.

(a) *General rules of allocation.* As provided in § 287.17, if amounts on deposit in a construction reserve fund are expended, obligated, or withdrawn for construction, reconstruction, reconditioning, or acquisition of new vessels, or for the liquidation of purchase-money indebtedness of such vessels, the portion thereof which represents gain shall be applied in reduction of the basis of such new vessels. The rules set forth below in this paragraph shall apply in allocating the unrecognized gain to the amounts so expended, obligated, or withdrawn:

(1) If the "net proceeds" of a sale or "net indemnity" in respect of a loss are deposited in more than one deposit, the portion thereof representing unrecognized gain shall be considered as having been deposited first.

(2) Amounts expended, obligated, or withdrawn from the construction reserve fund shall be applied against amounts deposited in the order of deposit.

(3) If any deposit consists in part of gain not recognized under section 511(c) of the Act, then any expenditure, obligation, or withdrawal applied against such deposit shall be considered to consist of gain in the same proportion that the part of the deposit which constitutes gain bears to the total amount of the deposit.

(b) *Date of obligation.* The date funds are obligated under a contract for the construction, reconstruction, reconditioning, or acquisition of new vessels, or for the liquidation of purchase-money indebtedness on such vessels, rather than the date of payment from the fund, will determine the order of application against the deposits in the fund. When a contract for the construction, reconstruction, reconditioning, or acquisition of new vessels, or for the liquidation of purchase-money indebtedness on such vessels is entered into, amounts on deposit in the construction reserve fund will be deemed to be obligated to the extent of the amount of the taxpayer's liability under the contract. Deposits will be deemed to be so obligated in the order of deposit, each new contract obligating the earliest deposit not previously expended, obligated, or withdrawn. If the liability under the contract exceeds the amount in the construction reserve fund, the contract will be deemed to obligate, to the extent of that part of such excess not otherwise satisfied, the earliest deposit or deposits thereafter made.

(c) *Illustration.* The foregoing rules are illustrated in the following example:

*Example.* (1) A taxpayer who makes his returns on the calendar year basis sells a vessel in 1963 for $1,000,000, realizing a gain of $400,000. Payment of $100,000 is received in March 1963 when the contract is signed, and the balance of $900,000 is received in June 1963 on delivery of the vessel. The $1,000,000 is deposited in a construction reserve fund in

July 1963. In December 1963, the taxpayer also deposits $150,000, representing earnings of that year. In 1964, he sells another vessel for $1,000,000, realizing a gain of $250,000. The sale price of $1,000,000 is received on delivery of the vessel in February 1964, and deposited in the construction reserve fund in March 1964. In September 1964, the taxpayer purchases for cash out of the construction reserve fund a new vessel for $1,750,000. To the cost of this vessel must be allocated the 1963 deposits of $1,150,000 and $600,000 of the March 1964 deposit. This leaves in the fund $400,000 of the March 1964 deposit. The amount of the unrecognized gain to be applied against the basis of the new vessel is $550,000, computed as follows: Gain of $400,000 represented in the 1963 deposits, plus the same proportion of the $250,000 gain represented in the March 1964 deposit ($1,000,000) which the amount ($600,000) allocated to the vessel is of the amount of the deposit, i.e., $400,000 plus 600,000/1,000,000 of $250,000 or $150,000, a total of $550,000. This reduces the basis of the new vessel to $1,200,000 ($1,750,000 less $550,000).

(2) In 1965, the taxpayer sells a third vessel for $3,000,000, realizing a gain of $900,000. The $3,000,000 is received and deposited in the construction reserve fund in June 1965, making a total in the fund of $3,400,000. In December 1965, the taxpayer contracts for the construction of a second new vessel to cost a maximum of $3,200,000, thereby obligating that amount of the fund, and in June 1966, receives permission to withdraw the unobligated balance amounting to $200,000. To the cost of the second new vessel must be allocated the $400,000 balance of the March 1964 deposit and $2,800,000 of the June 1965 deposit. The unrecognized gain to be applied against the basis of such new vessel is that proportion of the gain represented in each deposit which the portion of the deposit allocated to the vessel bears to the amount of such deposit, i.e., 400,000/1,000,000 of $250,000, or $100,000 plus 2,800,000/3,000,000 of $900,000, or $840,000 making a total of $940,000. The $200,000 withdrawal is applied against the June 1965 deposit and the portion thereof which represents gain will be recognized as income for 1965, the year in which realized. The computation of the recognized gain is as follows: 200,000/3,000,000 of $900,000, or $60,000.

### § 287.19 Requirements as to new vessels.

(a) *Requirements.* For the purposes of section 511 of the Act and the regulations in this part, the new vessel must be—

(1) Documented under the laws of the United States when it is acquired by the taxpayer, or the taxpayer must agree that when acquired it will be documented under the laws of the United States;

(2)(i) Constructed in the United States after December 31, 1939, or (ii) its construction has been financed under Title V or Title VII of the Act, or (iii) its construction has been aided by a mortgage insured under Title XI of the Act; and

(3) Either (i) of such type, size, and speed as the Administration determines to be suitable for use on the high seas or Great Lakes in carrying out the purposes of the Act, but of not less than 2,000 gross tons or of less speed than 12 knots, except that a particular vessel may be of lesser tonnage or speed if the Administration determines and certifies that the particular vessel is desirable for use by the United States in case of war or national emergency, or (ii) constructed to replace a vessel or vessels requisitioned or purchased by the United States, in which event it must be of such type, size, and speed as to constitute a suitable replacement for the vessel requisitioned or purchased, but if a vessel already built is acquired to replace a vessel or vessels requisitioned or purchased by the United States, such vessel must meet the requirements set forth in paragraph (a)(3)(i) of this section. Ordinarily, under paragraph (a)(3)(i) of this section, a vessel constructed more than five years before the date on which deposits in a construction reserve fund are to be expended or obligated for acquisition of such vessel will not be considered suitable for use in carrying out the purpose of the Act, except that the five-year age limitation provided above in this sentence shall not apply to a vessel to be reconstructed before being placed in operation by the taxpayer.

(b) *Time of construction.* A vessel will be deemed to be constructed after December 31, 1939, only if construction was commenced after that date. Subject to the provisions of this section, a new vessel may be newly built for the taxpayer, or may be acquired after it is built.

(c) *Replacement of vessels.* It is not necessary that vessels shall be replaced vessels for vessel. The new vessels may be more or less in number than the replaced vessels, provided the other requirements of this section are met.

**§ 287.20 Obligation of deposits.**

(a) *Time for obligation.* Within three years from the date of any deposit in a construction reserve fund, unless extension is granted as provided in § 287.22, such deposit must be obligated under a contract for the construction or acquisition of a new vessel or vessels (or in the discretion of the Administration for a share therein), with not less than 12½ percent of the construction or contract price of the entire vessel or vessels actually paid or irrevocably committed on account thereof or must be expended or obligated for the liquidation of existing or subsequently incurred purchase-money indebtedness to persons other than a parent company of, or a company affiliated or associated with, the mortgagor on a new vessel or vessels. Amounts on deposit in a construction reserve fund will be deemed to be obligated for expenditure when a binding contract of construction or acquisition has been entered into or when purchase-money indebtedness has been incurred and, if obligated under a contract of construction or acquisition, will be deemed to be irrevocably committed when due and payable in accordance with the terms of the contract of construction or acquisition.

(b) *Requirements for obligation.* Unless otherwise authorized by the Administration, contracts for the construction of new vessels must be for a fixed price, or provide for a base price that may be adjusted for changes in labor and material costs not exceeding 15 percent of the base price. The fixed or base price, as the case may be, shall be fair and reasonable as determined by the Maritime Administration. Any financial or other interests between the taxpayer and the contractor shall be disclosed to the Administration by the taxpayer. Plans and specifications for the new vessel or vessels must be approved by the Administration to the extent it deems necessary. A deposit in a construction reserve fund may be expended or obligated for expenditure for procurement under an acquisition or construction contract of a part interest in a new vessel or vessels only after obtaining the written consent of the Administration. The granting of such consent shall be entirely in the discretion of the Administration and it may impose such conditions with respect thereto as it may deem necessary or advisable for the purpose of carrying out the provisions of section 511 of the Act. Applications for such consent shall be executed in triplicate, and, together with eight conformed copies thereof, filed with the Administration.

**§ 287.21 Period for construction of certain vessels.**

A new vessel constructed otherwise than under the provisions of Title V of the Act, and not purchased from the Administration must, within six months from the date of the construction contract, or within the period of any extension, be completed to the extent of not less than 5 percent as estimated by the Administration and certified by it to the Secretary of the Treasury. In case of a contract covering more than one vessel it will be sufficient if one of the vessels is 5 percent completed within the six months' period from the date of the contract or within the period of any extension, and so certified. All construction must be completed with reasonable dispatch as determined by the Administration. If, for causes within the control of the taxpayer, the entire construction is not completed with reasonable dispatch, the Administration will so certify to the Secretary of the Treasury. For the effect of such certification, see § 287.23.

**§ 287.22 Time extensions for expenditure or obligation.**

(a) *Extensions.* The Administration, upon application and a showing of proper circumstances, (1) may allow an extension of time within which deposits shall be expended or obligated, not to exceed one year, and upon a second application received before the expiration of the first extension, may allow an additional extension not to exceed one year, and (2) may allow an extension or extensions of time within which five percent of the construction shall have been completed as provided in § 287.21 not to exceed one year in the aggregate, and (3) may allow any other extensions that may be provided by amendment to the Act.

(b) *Application required.* A taxpayer seeking an extension of time shall make application therefor, and transmit it with an appropriate statement of the circumstances, including the reasons justifying the requested extension or extensions, and appropriate documents in substantiation of the statement, to the Administration. The Administration will notify the Commissioner of Internal Revenue of any extension granted. In case an application for extension is denied, the taxpayer will be liable for delay as though no application had been made.

### § 287.23 Noncompliance with requirements.

(a) *Noncompliance.* The amount of the gain which is that portion of the construction reserve fund otherwise constituting taxable income under the law applicable to the taxable year in which such gain was realized shall be included in the taxpayer's gross income for such taxable year for income or excess-profits tax purposes, if:

(1) A portion of such fund is withdrawn for purposes other than—

(i) The construction, reconstruction, reconditioning, or acquisition of a new vessel; or

(ii) The liquidation of existing or subsequently incurred purchase-money indebtedness to persons other than a parent company of, or a company affiliated or associated with, the mortgagor on a new vessel or vessels; or

(2) The taxpayer fails to comply with the requirements of section 511 of the Act or the regulations in this part relating to the utilization of construction reserve funds in the construction, reconstruction, reconditioning, or acquisition of a new vessel, or the liquidation of purchase-money indebtedness on such a vessel.

If securities on deposit in a construction reserve fund are sold and the amount placed in the fund in lieu thereof is less than the value of the securities at the time of their deposit, the difference between such market value and the amount placed in the fund in lieu of the securities will be deemed to have been withdrawn. With respect to the substitution of new financing in the case of an irrevocable commitment, see paragraph (d) of § 287.13.

(b) *Amount recognized.* In the event of noncompliance with the prescribed conditions relative to any contract for construction, reconstruction, reconditioning, or acquisition of new vessels, or for the liquidation of purchase-money indebtedness on such vessels, recognition will extend to the entire amount of the gain represented in that portion of the construction reserve fund obligated under such contract. Thus, if the Administration determines and certifies to the Secretary of the Treasury that for causes within the control of the taxpayer construction under a contract is not completed with reasonable dispatch, the entire amount of the gain represented in the portion of the construction reserve fund obligated under the contract will be recognized even though all other conditions have been satisfied. In case of noncompliance with the requirements of section 511 of the Act or the regulations in this part, see the provisions of § 287.18 as to the allocation of gain.

(c) *Unreasonable accumulation.* Noncompliance with the provisions of section 511 of the Act or the regulations in this part relative to the utilization of the deposited amounts may also, inasmuch as the provision of section 511(f) of the Act is then inapplicable, warrant an examination to ascertain whether such amounts constitute an unreasonable accumulation of earnings and profits within the meaning of part I (section 531 and following), subchapter G, chapter 1 of the Internal Revenue Code of 1954, or corresponding provisions of prior law. If amounts are deposited and the fund maintained in good faith for the purpose of construction, reconstruction, reconditioning, and acquisition of new vessels, or for the liquidation of purchase-money indebtedness on such vessels, such amounts will be deemed to have been accumulated for the reasonable needs of the business.

### § 287.24 Extent of tax liability.

(a) *Declared value excess-profits tax.* Gain which is includible in gross income under § 287.23 shall be included in gross income for all income and excess-profits tax purposes, but not for the

purposes of the declared value excess-profits tax and the capital stock tax as provided in section 511(i) of the Act. In lieu of any adjustment with respect to such declared value excess-profits tax, there is imposed for any taxable year ending on or before June 30, 1945, in which the gain is realized an additional tax of 1.1 percent of the amount of the gain. No additional capital stock tax liability is incurred.

(b) *Improper deposits.* In the case of deposits in the construction reserve fund of amounts derived from sources other than those specified in section 511 of the Act, or in the case of failure to deposit an amount equal to the "net proceeds" or "net indemnity" within the period prescribed in section 511(c) of the Act and § 287.15, the taxpayer obtains no suspension or postponement of any tax liability and the tax is collectible without regard to the provisions of section 511(c) of the Act.

(c) *Time for filing claim subsequent to election under section 511(c)(2).* If an election is made under section 511(c)(2) of the Act, and paragraph (a)(2) of § 287.12, and if computation or recomputation in accordance therewith is otherwise allowable but is prevented, on the date of filing of notice of such election, or within six months thereafter, by any statute of limitation, such computation or recomputation nevertheless shall be made notwithstanding such statute if a claim therefor is filed within six months after the date of making such election. If as the result of such computation or recomputation an overpayment is disclosed, a claim for refund on Form 843 should also be filed within such six months' period.

### § 287.25 Assessment and collection of deficiencies.

Any additional tax, including the 1.1 percent amount imposed by section 511(i) of the Act, due on account of withdrawal from a construction reserve fund, or failure to comply with section 511 of the Act or the regulations in this part, is collectible as a deficiency. Interest upon such deficiency will run from the date the withdrawal or noncompliance occurs. The amount of any deficiency, including interest and additions to the tax, determined as a result of such withdrawal or noncompliance, may be assessed, or a proceeding in court for the collection thereof may be begun without assessment, at any time and without regard to any period of limitations or any other provisions of law or rule of law, including the doctrine of res judicata.

### § 287.26 Reports by taxpayers.

(a) *Information required.* With each income tax return filed for a taxable year during any part of which a construction reserve fund is in existence the taxpayer shall submit a statement setting forth a detailed analysis of such fund. The statement, which need not be on any prescribed form, shall include the following information with respect to the construction reserve fund:

(1) The actual balance in the fund at the beginning and end of the taxable year;

(2) The date, amount, and source of each deposit during the taxable year;

(3) If any deposit referred to in paragraph (a)(2) of this section consists of proceeds from the sale, or indemnification of loss, of a vessel or share thereof, the amounts of the unrecognized gain;

(4) The date, amount, and purpose of each expenditure or withdrawal from the fund; and

(5) The date and amount of each contract, under which deposited funds are deemed to be obligated during the taxable year, for the construction, reconstruction, reconditioning, or acquisition of new vessels, or for the liquidation of purchase-money indebtedness on such vessels, and the identification of such vessels.

(b) *Records required.* Taxpayers shall keep such records and make such additional reports as the Commissioner of Internal Revenue or the Administration may require.

NOTE: The records referred to in this section shall be retained for a period of six months beyond the termination or closing out of the reserve fund.

### § 287.27 Controlled corporation.

For the purpose of section 511 of the Act and the regulations in this part a new vessel is considered as constructed, reconstructed, reconditioned, or acquired by the taxpayer if constructed, reconstructed, reconditioned,

or acquired by a corporation at a time when the taxpayer owns not less than 95 percent of the total number of shares of each class of stock of the corporation.

### § 287.28 Administrative jurisdiction.

Sections 287.3 to 287.11, inclusive, §§ 287.13 to 187.15, inclusive, and §§ 287.19 to 287.22, inclusive, deal primarily with matters under the jurisdiction of the Administration. Sections 287.12, 287.16 to 287.18, inclusive, and §§ 287.23 to 287.27, inclusive, deal primarily with matters under the jurisdiction of the Commissioner of Internal Revenue. Generally, matters relating to the establishment, maintenance, expenditure, and use of construction reserve funds and the construction, reconstruction, reconditioning, or acquisition of new vessels are under the jurisdiction of the Administration; and matters relating to the determination, assessment, and collection of taxes are under the jurisdiction of the Commissioner of Internal Revenue. Correspondence should be addressed to the particular authority having jurisdiction in the matter.

## PART 289—INSURANCE OF CONSTRUCTION-DIFFERENTIAL SUBSIDY VESSELS, OPERATING-DIFFERENTIAL SUBSIDY VESSELS AND OF VESSELS SOLD OR ADJUSTED UNDER THE MERCHANT SHIP SALES ACT 1946

Sec.

289.1 Definition.
289.2 Vessels included.
289.3 Provision in subsidy agreements and mortgages.
289.4 Insurance by owners.
289.5 Insurance by the United States.

AUTHORITY: Sec. 204, 49 Stat. 1987, as amended; 46 U.S.C. 1114. Interpret or apply sec. 12, 60 Stat. 49, as amended; 50 U.S.C. App. 1745.

SOURCE: General Order 67 Rev., 18 FR 230, Jan. 10, 1953, unless otherwise noted.

### § 289.1 Definition.

For the purpose of this part, when reference is made to the phrase *interest of the United States,* it shall mean:

(a) As to vessels constructed or sold with construction-differential subsidy and/or national defense feature allowance under Title V or VII of the Merchant Marine Act, 1936, as amended, the value of the construction-differential subsidy allowance, plus the allowance for national defense features;

(b) As to vessels constructed or sold under Title V or VII of the Merchant Marine Act of 1936, as amended, and adjusted in price pursuant to section 9 of the Merchant Ship Sales Act of 1946, the difference between the pre-war domestic cost and the statutory sales price as defined in the Merchant Ship Sales Act of 1946.

### § 289.2 Vessels included.

Vessels subject to the provisions of this part are:

(a) All vessels which may in the future be constructed or sold with construction-differential subsidy allowances and/or national defense features allowance under Title V or VII of the Merchant Marine Act 1936, as amended.

(b) All vessels which have previously been constructed or sold with construction-differential subsidy allowances and national defense features allowances under Title V or VII of the Merchant Marine Act, 1936, as amended;

(c) All vessels which have previously been constructed with construction-differential subsidy allowances or national defense features allowance under Title V or VII of the Merchant Marine Act of 1936, as amended, and later adjusted in price pursuant to section 9 of the Merchant Ship Sales Act of 1946;

(d) All vessels which are subsidized under operating-differential subsidy agreements.

### § 289.3 Provision in subsidy agreements and mortgages.

(a) All construction-differential subsidy agreements and mortgages relative to vessels covered in § 289.2(a) shall provide, wherever possible, that the Maritime Administrator may, in his discretion, require the owner to insure, with commercial underwriters, the interest of the United States.

(b) All future construction-differential subsidy agreements and future operating subsidy agreements shall require that owners insure vessels covered in §289.2 (a) and (d) in amounts acceptable to the Maritime Administration.

### §289.4 Insurance by owners.

Owners of vessels covered in §289.2 will not be required to arrange commercial insurance to cover the interest of the United States, exclusive of its mortgage interest, but the United States reserves the right to require, whenever the contracts so provide, that this be done at some future date, should it deem it necessary.

### §289.5 Insurance by the United States.

The United States will self-insure its interest, exclusive of mortgage interest, as defined in §289.1.

# PART 295—MARITIME SECURITY PROGRAM (MSP)

## Subpart A—Introduction

Sec.
295.1 Purpose.
295.2 Definitions.
295.3 Waivers.

## Subpart B—Establishment of MSP Fleet and Eligibility

295.10 Eligibility requirements.
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295.12 Priority for awarding agreements.

## Subpart C—Maritime Security Program Operating Agreements

295.20 General conditions.
295.21 MSP assistance conditions.
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## Subpart D—Payment and Billing Procedures

295.30 Payment.
295.31 Criteria for payment.

## Subpart E—Appeals Procedures

295.40 Administrative determinations.

AUTHORITY: 46 App. U.S.C. 1171 *et seq.;* 46 App. U.S.C. 1114 (b), 49 CFR 1.66.

SOURCE: 62 FR 37737, July 15, 1997, unless otherwise noted.

## Subpart A—Introduction

### §295.1 Purpose.

This part prescribes regulations implementing the provisions of subtitle B (Maritime Security Fleet Program) of title VI of the Merchant Marine Act, 1936, as amended, governing Maritime Security Program payments for vessels operating in the foreign trade or mixed foreign and domestic commerce of the United States allowed under a registry endorsement issued under 46 U.S.C. 12105.

### §295.2 Definitions.

For the purposes of this part:

(a) *Act,* means the Merchant Marine Act, 1936, as amended by the Maritime Security Act of 1996 (MSA)(46 App. U.S.C. 1101 *et seq.*).

(b) *Administrator,* means the Maritime Administrator, U.S. Maritime Administration (MARAD), U.S. Department of Transportation, who is authorized to administer the MSA.

(c) *Agreement Vessel,* means a vessel covered by a MSP Operating Agreement.

(d) *Applicant,* means an applicant for a MSP Operating Agreement.

(e) *Bulk Cargo,* means cargo that is loaded and carried in bulk without mark or count.

(f) *Chapter 121,* means the vessel documentation provisions of chapter 121 of title 46, United States Code.

(g) *Citizen of the United States,* means an individual or a corporation, partnership or association as determined under section 2 of the Shipping Act, 1916, as amended (46 App. U.S.C. 802).

(h) *Contracting Officer,* means the Associate Administrator for National Security, MARAD.

(i) *Contractor,* means the owner or operator of a vessel that enters into a MSP Operating Agreement for the vessel with MARAD pursuant to §295.20 of this part.

(j) *DOD,* means the U.S. Department of Defense.

(k) *Domestic Trade,* means trade between two or more ports and/or points in the United States.

(l) *Eligible Vessel,* means a vessel that meets the requirements of §295.10(b) of this part.

(m) *Emergency Preparedness Program Agreement,* means the agreement, required by section 653 of the act, between a Contractor and the Secretary of Transportation (acting through MARAD) to make certain commercial transportation resources available during time of war or national emergency.

(n) *Enrollment,* means the entry into a MSP Operating Agreement with the MARAD to operate a vessel(s) in the MSP Fleet in accordance with § 295.20 of this part.

(o) *Fiscal Year,* means any annual period beginning on October 1 and ending on September 30.

(p) *LASH Vessel,* means a lighter aboard ship vessel.

(q) *Militarily Useful,* is defined according to DOD Joint Strategic Planning Capabilities Plan (JSCAP) guidance as follows:

(1) *U.S. Sources*—All active and inactive ocean-going ships (and certain other specially selected vessels) within the following types and criteria from United States sources with a minimum speed of 12 knots.

(2) *Dry Cargo*—All dry cargo ships, including integrated tug/barges (ITBs) with a minimum capacity of 6,000 tons (DWT) capable of carrying, without significant modification, any of the following cargoes: unit equipment, ammunition, or sustaining supplies.

(r) *MSP Fleet,* means the fleet of vessels operating under MSP Operating Agreements.

(s) *MSP Operating Agreement,* means the MSP Operating Agreement, providing for MSP payments entered into by a Contractor and MARAD.

(t) *MSP Payments,* means the payments made for the operation of U.S.-flag vessels in the foreign trade or mixed foreign and domestic trade of the United States allowed under a registry endorsement issued under 46 U.S.C. 12105, to maintain intermodal shipping capability and to meet national defense and security requirements in accordance with the terms and conditions of the MSP Operating Agreement.

(u) *Ocean Common Carrier,* means a carrier that meets the requirements of the MSA, section 654(3).

(v) *ODS,* means Operating-Differential Subsidy provided by Subtitle A, Title VI, of the Act.

(w) *Operating Day,* means any day during which a vessel is operated in accordance with the terms and conditions of the MSP Operating Agreement.

(x) *Related party,* means:

(1) a holding company, subsidiary, affiliate, or associate of a contractor who is a party to an operating agreement under Subtitle B, Title VI, of the Act; and

(2) an officer, director, agent, or other executive of a contractor or of a person referred to in paragraph (x)(1) of this section.

(y) *Roll-on/Roll-off Vessel,* means a vessel that has ramps allowing cargo to be loaded and discharged by means of wheeled vehicles so that cranes are not required.

(z) *Secretary,* means the Secretary of Transportation.

(aa) *United States Documented Vessel,* means a vessel documented under Chapter 121 of Title 46, United States Code.

### § 295.3 Waivers.

In special circumstances, and for good cause shown, the procedures prescribed in this part may be waived in writing by the Maritime Administration, by mutual agreement of the Maritime Administration and the Contractor, so long as the procedures adopted are consistent with the Act and with the objectives of these regulations.

## Subpart B—Establishment of MSP Fleet and Eligibility

### § 295.10 Eligibility requirements.

(a) *Applicant.* Any person may apply to MARAD for Enrollment of Eligible Vessels in MSP Operating Agreements for inclusion in the MSP Fleet pursuant to the provisions of subtitle B, title VI, of the act. Applications shall be addressed to the Secretary, Maritime Administration, 400 Seventh Street, S.W., Washington, D.C. 20590.

(b) *Eligible Vessel.* A vessel eligible for enrollment in a MSP Operating Agreement shall be self-propelled and meet the following requirements:

(1) *Vessel Type*—(i) *Liner Vessel.* The vessel shall be operated by a person as an Ocean Common Carrier.

(ii) *Specialty vessel.* Whether in commercial service, on charter to the DOD, or in other employment, the vessel shall be either:

(A) a Roll-on/Roll-off vessel with a carrying capacity of at least 80,000 square feet or 500 twenty-foot equivalent units; or

(B) a LASH vessel with a barge capacity of at least 75 barges; or

(iii) *Other vessel.* Any other type of vessel that is determined by the MARAD to be suitable for use by the United States for national defense or military purposes in time of war or national emergency; and

(2) *Vessel Requirements*—(i) *U.S. Documentation.* Except as provided in paragraph (b)(2)(iv) of this section, the vessel is a U.S.-documented vessel; and

(ii) *Age.* Except as provided in paragraph (b)(2)(iii), on the date a MSP Operating Agreement covering the vessel is first entered into is:

(A) a LASH Vessel that is 25 years of age or less; or

(B) any other type of vessel that is 15 years of age or less.

(iii) *Waiver Authority.* In accordance with section 651(b)(2) of the act, MARAD is authorized to waive the application of paragraph (b)(2)(ii) of this section if MARAD, in consultation with the Secretary of Defense, determines that the waiver is in the national interest.

(iv) *Intent to document U.S.* Although the vessel may not be a U.S.-documented vessel, it shall be considered an Eligible Vessel if the vessel meets the criteria for documentation under 46 U.S.C. chapter 121, the vessel owner has demonstrated an intent to have the vessel documented under 46 U.S.C. chapter 121, and the vessel will be less than 10 years of age on the date of that documentation; and

(3) *MARAD's determination.* MARAD determines that the vessel is necessary to maintain a United States presence in international commercial shipping and the applicant possesses the ability, experience, resources and other qualifications necessary to execute the obligations of the MSP Operating Agreement, or MARAD, after consultation with the Secretary of Defense, determines that the vessel is militarily useful for meeting the sealift needs of the United States.

### § 295.11 Applications.

(a) *Action by MARAD*—(1) *Time Deadlines.* Not later than 30 days after the enactment of the Maritime Security Act of 1996, Pub. L. 104–239, MARAD shall accept applications for Enrollment of vessels in the MSP Fleet. Within 90 days after receipt of a completed application, MARAD shall enter into a MSP Operating Agreement with the applicant or provide in writing the reason for denial of that application.

(2) *Closure of Applications.* Applications for MSP Operating Agreements shall be made only at such time as, and in response to, publication of invitations to apply by MARAD in the FEDERAL REGISTER. After the Administrator has fully allocated authorized contracting authority through the award of the maximum number of vessels allowed under § 295.30(a), MARAD will not accept any applications for award of new Operating Agreements until additional contracting authority becomes available, or existing contracting authority reverts back to MARAD.

(3) *Reflagging for Eligible vessels.* Except as provided in paragraph (a)(4) of this section, an applicant may remove a vessel from U.S. registry without MARAD approval if an application for a MSP Operating Agreement has been filed for that vessel, the applicant is qualified, and it has been determined by MARAD to be eligible under MSA section 651(b)(1) under a priority for which sufficient funds are available and the Administrator has not awarded an Operating Agreement for the vessel within 90 days of that application.

(4) *Reflagging ODS and MSC chartered vessels.* Vessels eligible under MSA section 651(b)(1) which are also subject to ODS contracts or on charter to MSC, and for which applications have been denied pursuant to § 295.11(a)(1) of this part, may be removed from U.S. registry only after those agreements have expired and only after the age requirement in section 9(e)(3) of the Shipping Act, 1916 (46 App. U.S.C. 808) has been met.

(b) *Action by the Applicant.* Applicants for MSP Payments shall submit information on the following (Note: MARAD will accept electronic options (such as facsimile and Internet) for transmission of required information to MARAD, if practicable):

(1) *Intermodal network.* A statement describing its operating and transportation assets, including vessels, container stocks, trucks, railcars, terminal facilities, and systems used to link such assets together;

(2) *Diversity of trading patterns.* A list of countries and trade routes serviced along with the types and volumes of cargo carried;

(3) *Vessel construction date;*

(4) *Vessel type and size;* and

(5) *Military Utility.* An assessment of the value of the vessel to DOD sealift requirements.

(Approved by the Office of Management and Budget under Control Number 2133–0525)

[62 FR 37737, July 15, 1997, as amended at 68 FR 62537, Nov. 5, 2003; 69 FR 61451, Oct. 19, 2004]

### § 295.12 Priority for awarding agreements.

Subject to the availability of appropriations, MARAD shall enter into individual MSP Operating Agreements for Eligible Vessels according to the following priorities:

(a) *First priority requirements.* First priority shall be accorded to any Eligible Vessel meeting the following requirements:

(1) *U.S. citizen ownership.* Vessels owned and operated by persons who are Citizens of the United States as defined in § 295.2; or

(2) *Other corporations.* Vessels less than 10 years of age and owned and operated by a corporation that is:

(i) eligible to document a vessel under 46 U.S.C. chapter 121; and

(ii) affiliated with a corporation operating or managing for the Secretary of Defense other vessels documented under 46 U.S.C. chapter 121, or chartering other vessels to the Secretary of Defense.

(3) *Limitation on number of vessels.* Limitation on the total number of Eligible Vessels awarded under paragraph (a) of this section shall be:

(i) For any U.S. citizen under paragraph (a)(1), the number of vessels may not exceed the sum of:

(A) the number of U.S.-flag documented vessels that the Contractor or a related party operated in the foreign commerce of the United States on May 17, 1995, except mixed coastwise and foreign commerce; and

(B) the number of U.S.-flag documented vessels the person chartered to the Secretary of Defense on that date; and

(ii) For any corporation under paragraph (a)(2) of this section, not more than five Eligible Vessels.

(4) *Related party.* For the purpose of this section a related party with respect to a person shall be treated as the person.

(b) *Second priority requirements.* To the extent that appropriated funds are available after applying the first priority in paragraph (a) of this section, the MARAD shall enter into individual MSP Operating Agreements for Eligible Vessels owned and operated by a person who is:

(1) *U.S. citizen.* A Citizen of the United States, as defined in § 295.2(g), that has not been awarded a MSP Operating Agreement under the priority in paragraph (a) of this section, or

(2) *Other.* A person (individual or entity) eligible to document a vessel under 46 U.S.C. chapter 121, and affiliated with a person or corporation operating or managing other U.S.-documented vessels for the Secretary of Defense or chartering other vessels to the Secretary of Defense.

(c) *Third priority.* To the extent that appropriated funds are available after applying the first and second priority, any other Eligible Vessel.

(d) *Number of MSP Operating Agreements Awarded.* If appropriated funds are not sufficient to award agreements to all vessels within a priority set forth herein, MARAD shall award to each eligible applicant in that priority a number of Operating Agreements that bears approximately the same ratio to the total number of Operating Agreements requested under that priority, and for which timely applications have been made, as the amount of appropriations

available for MSP Operating Agreements for Eligible Vessels in the priority bears to the amount of appropriations necessary for MSP Operating Agreements for all Eligible Vessels in the priority.

## Subpart C—Maritime Security Program Operating Agreements

### § 295.20 General conditions.

(a) *Approval.* MARAD may approve applications to enter into a MSP Operating Agreement and make MSP Payments with respect to vessels that are determined to be necessary to maintain a United States presence in international commercial shipping or those that are deemed, after consultation with the Secretary of Defense, to be militarily useful for meeting the sealift needs of the United States in national emergencies.

(b) *Effective date*—(1) *General Rule.* Unless otherwise provided in the contract, the effective date of a MSP Operating Agreement is the date when executed by the Contractor and MARAD.

(2) *Exceptions.* In the case of an Eligible Vessel to be included in a MSP Operating Agreement that is subject to an ODS contract under subtitle A, title VI, of the act or on charter to the U.S. Government, other than a charter under the provisions of an Emergency Preparedness Program Agreement provided by section 653 of the act, unless an earlier date is requested by the applicant, the effective date for a MSP Operating Agreement shall be:

(i) The expiration or termination date of the ODS contract or Government charter covering the vessel, respectively, or

(ii) Any earlier date on which the vessel is withdrawn from that contract or charter.

(c) *Replacement Vessels.* MARAD may approve the replacement of an Eligible Vessel in a MSP Operating Agreement provided the replacement vessel is eligible under § 295.10.

(d) *Notice to shipbuilders.* The Contractor agrees that no later than 30 days after soliciting any offer or bid for the construction of any vessel in a foreign shipyard, and before entering into any contract for construction of a vessel in a foreign shipyard, the Contractor shall provide notice of its intent to enter into such a contract (for vessels being considered for U.S.-flag registry) to MARAD. Within 10 business days after the receipt of such notification, MARAD shall issue a notice in the FEDERAL REGISTER of the Contractor's intent. The Contractor is prohibited from entering into any such contract until 10 business days after the date of publication of such notice.

(e) *Early termination.* A MSP Operating Agreement shall terminate on a date specified by the Contractor if the Contractor notifies MARAD not later than 60 days before the effective date of the proposed termination, that the Contractor intends to terminate the Agreement. The Contractor shall be bound by the provisions relating to vessel documentation and national security commitments to the extent and for the period contained in section 652(m) of the Act.

(f) *Non-renewal for lack of funds.* If, by the first day of a fiscal year, insufficient funds have been appropriated under section 655 of the act for that fiscal year, MARAD shall notify the Congress that MSP Operating Agreements for which insufficient funds are available will be terminated on the 60th day of that fiscal year if sufficient funds are not appropriated or otherwise made available by that date. If only partial funding is appropriated by the 60th day of such fiscal year, then MSP Operating Agreements for which funds are not available shall be terminated using the pro rata distribution method used to award MSP Operating Agreements set forth in § 295.12(d). With respect to each terminated agreement the Contractor shall be released from any further obligation under the agreement, and the Contractor may transfer and register the applicable vessel under a foreign registry deemed acceptable by MARAD. In the event that no funds are appropriated, then all MSP Operating Agreements shall be terminated and each Contractor shall be released from its obligations under the agreement. Final payments under the terminated agreements shall be made in accordance with § 295.30. To the extent that funds are appropriated in a subsequent

fiscal year, existing operating agreements may be renewed if mutually acceptable to the Administrator and the Contractor and the MSP vessel remains eligible.

(g) *Operation under a Continuing Resolution.* In the event a Continuing Resolution (CR) is in place that does not provide sufficient appropriations to fully meet obligations under MSP Operating Agreements, a Contractor may request termination of the agreement in accordance with paragraph (f), herein, and § 295.30.

(h) *Requisition authority.* To the extent section 902 of the act is applicable to any vessel transferred foreign under this section, the vessel shall remain available to be requisitioned by the Maritime Administration under that provision of law.

(i) *Transfer of Operating Agreements.* A Contractor subject to an Agreement may transfer that Agreement (including all rights and obligations thereunder) to any person eligible to enter into an Agreement under the same priority established in section 652(i)(1)(A) of the act as the Contractor, provided that:

(1) The Contractor gives notice of any such transfer to the Maritime Administrator by filing a completed application;

(2) The transfer is not disapproved in writing by the Maritime Administrator within 90 days of the notification; and

(3) the vessel to be covered by the Agreement after transfer is the same vessel originally covered by the Agreement or is an eligible vessel under section 651(b) of the act and is the same type, and comparable to, the vessel originally covered by the Agreement.

### § 295.21 MSP assistance conditions.

(a) *Term of MSP Operating Agreement.* MSP Operating Agreements shall be effective for a period of not more than one fiscal year, and unless otherwise specified in the Agreement, shall be renewable, subject to the availability of appropriations or amounts otherwise made available, for each subsequent fiscal year through the end of FY 2005. In the event appropriations are enacted after October 1 with respect to any subsequent fiscal year, October 1 shall be considered the effective date of the renewed agreement, provided sufficient funds are made available and subject to the Contractor's rights for early termination pursuant to section 652(m) of the act.

(b) *Terms under a Continuing Resolution (CR).* In the event funds are available under a CR, the terms and conditions of the MSP Operating Agreements shall be in force provided sufficient funds are available to fully meet obligations under MSP Operating Agreements, and only for the period stipulated in the applicable CR. If funds are not appropriated at sufficient levels for any portion of a fiscal year, the terms and conditions of any applicable MSP Operating Agreement may be voided and the Contractor may request termination of the MSP Operating Agreement in accordance with § 295.20(f).

(c) *National security requirements.* Each MSP Operating Agreement shall require the owner or operator of an Eligible Vessel included in that agreement to enter into an Emergency Preparedness Program Agreement pursuant to section 653 of the act.

(d) *Vessel operating requirements.* The MSP Operating Agreement shall require that during the period an Eligible Vessel is included in that Agreement, the Eligible Vessel shall:

(1) *Documentation.* Be documented as a U.S.-flag vessel under 46 U.S.C. chapter 121; and

(2) *Operation.* Be operated exclusively in the U.S.-foreign trade or in mixed foreign and domestic trade allowed under a registry endorsement issued under 46 U.S.C. 12105, and shall not otherwise be operated in the coastwise trade of the United States.

(e) *Limitations.* Limitations on Contractors with respect to the operation of foreign-flag vessels shall be in accordance with section 804 of the act, as amended. The operation of vessels, other than Agreement Vessels, in the noncontiguous trades shall be limited in accordance with service levels and conditions permitted in section 656 of the act.

(f) *Non-Contiguous Domestic Trade.* [Reserved]

(g) *Obligation of the U.S. Government.* The amounts payable as MSP Payments under a MSP Operating Agreement shall constitute a contractual obligation of the United States Government to the extent of available appropriations.

### § 295.22 Commencement and termination of operations.

(a) *Time frames.* A Contractor that has been awarded a MSP Operating Agreement shall commence operations of the Eligible Vessel, under the applicable agreement or a subsequently renewed agreement, within the time frame specified as follows:

(1) *Existing vessel.* Within one year after the initial effective date of the MSP Operating Agreement in the case of a vessel in existence on that date and after notification to MARAD within 30 days of the Contractor's intent; or

(2) *New building.* Within 30 months after the initial effective date of the MSP Operating Agreement in the case of a vessel to be constructed after that date.

(b) *Unused authority*. In the event of a termination of unused authority pursuant to paragraph (a) of this section, such authority shall revert to MARAD.

### § 295.23 Reporting requirements.

The Contractor shall submit to the Director, Office of Financial and Rate Approvals, Maritime Administration, 400 Seventh St., SW., Washington, DC 20590, one of the following reports, including management footnotes where necessary to make a fair financial presentation [Note: MARAD will accept electronic options (such as facsimile and Internet) for transmission of required information to MARAD, if practicable.]:

(a) *Form MA–172.* Not later than 120 days after the close of the Contractor's semiannual accounting period, a Form MA–172 on a semiannual basis, in accordance with 46 CFR 232.6; or

(b) *Financial Statement.* Not later than 120 days after the close of the Contractor's annual accounting period, an audited annual financial statement in accordance with 46 CFR 232.6 and the most recent vessel operating cost data submitted as part of its Emergency Preparedness Agreement.

(Approved by the Office of Management and Budget under Control Number 2133–0525)

[62 FR 37737, July 15, 1997, as amended at 68 FR 62538, Nov. 5, 2003; 69 FR 61451, Oct. 19, 2004]

## Subpart D—Payment and Billing Procedures

### § 295.30 Payment.

(a) *Amount payable.* A MSP Operating Agreement shall provide, subject to the availability of appropriations and to the extent the agreement is in effect, for each Agreement Vessel, an annual payment of $2,100,000 for each fiscal year. This amount shall be paid in equal monthly installments at the end of each month. The annual amount payable shall not be reduced except as provided in paragraph (b) of this section and § 295.31(a)(3).

(b) *Reductions in amount payable.* (1) The annual amount otherwise payable under a MSP Operating Agreement shall be reduced on a pro rata basis for each day less than 320 in a fiscal year that an Agreement Vessel is not operated exclusively in the U.S.-foreign trade or in mixed foreign and domestic trade allowed under a registry endorsement issued under 46 U.S.C. 12105. Days during which the vessel is drydocked or undergoing survey, inspection, or repair shall be considered to be days during which the vessel is operated, provided the total of such days within a fiscal year does not exceed 30 days, unless prior to the expiration of a vessel's 30 day period, approval is obtained from MARAD for an extension of the 30 day provision.

(2) There shall be no payment for any day that a MSP Agreement Vessel is engaged in transporting more than 7,500 tons (using the U.S. English standard of short tons, which converts to 6,696.75 long tons, or 6,803.85 metric tons) of civilian bulk preference cargoes pursuant to section 901(a), 901(b), or 901b of the act, provided that it is bulk cargo.

### § 295.31 Criteria for payment

(a) *Submission of voucher.* For contractors operating under more than

one MSP Operating Agreement, the contractor may submit a single monthly voucher applicable to all its agreements. Each voucher submission shall include a certification that the vessel(s) for which payment is requested were operated in accordance with § 295.21(d) and applicable MSP Operating Agreements with MARAD, and consideration shall be given to reductions in amounts payable as set forth in § 295.30. All submissions shall be forwarded to the Director, Office of Accounting, MAR–330 Room 7325, Maritime Administration, 400 Seventh Street, SW., Washington, DC 20590. Payments shall be paid and processed under the terms and conditions of the Prompt Payment Act, 31 U.S.C. 3901.

(1) Payments shall be made per vessel, in equal monthly installments, of $175,000.

(2) To the extent that reductions under § 295.30(b) are known, such reductions shall be applied at the time of the current billing. The daily reduction amounts shall be based on the annual amounts in 295.30(a) of this part divided by 365 days (366 days in leap years) and rounded to the nearest cent. Daily reduction amounts shall be applied as follows:

FY 1997—$5,753.42
FY 1998—$5,753.42
FY 1999—$5,753.42
FY 2000—$5,737.70
FY 2001—$5,753.42
FY 2002—$5,753.42
FY 2003—$5,753.42
FY 2004—$5,737.70
FY 2005—$5,753.42

(3) In the event a monthly payment is for a period less than a complete month, that month's payment shall be calculated by multiplying the appropriate daily rate in § 295.31(a)(2) by the actual number of days the Eligible Vessel operated in accordance with § 295.21.

(4) MARAD may require, for good cause, that a portion of the funds payable under this section be withheld if the provisions of § 295.21(d) have not been met.

(5) Amounts owed to MARAD for reductions applicable to a prior billing period shall be electronically transferred using MARAD's prescribed format, or a check may be forwarded to the Maritime Administration, P.O. Box 845133, Dallas, Texas 75284–5133, or the amount owed can be credited to MARAD by offsetting amounts payable in future billing periods.

(b) [Reserved]

## Subpart E—Appeals Procedures

### § 295.40 Administrative determinations.

(a) *Policy*. A Contractor who disagrees with the findings, interpretations or decisions of the Contracting Officer with respect to the administration of this part may submit an appeal to the Maritime Administrator. Such appeals shall be made in writing to the Maritime Administrator, within 60 days following the date of the document notifying the Contractor of the administrative determination of the Contracting Officer. Such an appeal should be addressed to the Maritime Administrator, Att.: MSP Contract Appeals, Maritime Administration, 400 Seventh St., S.W. Washington, D.C. 20590.

(b) *Process*. The Maritime Administrator may require the person making the request to furnish additional information, or proof of factual allegations, and may order any proceeding appropriate in the circumstances. The decision of the Maritime Administrator shall be final.

# PART 296—MARITIME SECURITY PROGRAM (MSP)

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AUTHORITY: Pub. L. 108–136, Pub. L. 109–163; 49 U.S.C. 322(a), 49 CFR 1.66.

SOURCE: 70 FR 55588, Sept. 22, 2005, unless otherwise noted.

## Subpart A—Introduction

### §296.1 Purpose.

This part prescribes regulations implementing the provisions of Subtitle C, Maritime Security Fleet Program, Title XXXV of the National Defense Authorization Act for Fiscal Year 2004, the Maritime Security Act of 2003 (MSA 2003), governing Maritime Security Program (MSP) payments for vessels operating in the foreign trade or mixed foreign and domestic commerce of the United States allowed under a registry endorsement issued under 46 U.S.C. 12105. The MSA 2003 provides for joint responsibility between the Department of Defense (DOD) and the Department of Transportation (DOT) for administering the law. These regulations provide the framework for the coordination between DOD and DOT in implementing the MSA 2003. Implementation of the MSA 2003 has been delegated by the Secretary of Transportation to the Maritime Administrator, U.S. Maritime Administration and by the Secretary of Defense to the Commander, U.S. Transportation Command, respectively.

### §296.2 Definitions.

For the purposes of this part:

*Act* means the Merchant Marine Act, 1936, as amended (46 App. U.S.C. 1101 *et seq.*).

*Administrator* means the Maritime Administrator, U.S. Maritime Administration (MARAD), U.S. DOT, who is authorized by the Secretary of Transportation to administer the MSA 2003, in consultation with the Commander, U.S. Transportation Command (USTRANSCOM).

*Agreement Vessel* means a vessel covered by an MSP Operating Agreement.

*Applicant* means an applicant for an MSP Operating Agreement. The term, "applicant" excludes a trust.

*Bulk Cargo* means cargo that is loaded and carried in bulk without mark or count.

*Chapter 121* means the vessel documentation provisions of chapter 121 of title 46, United States Code.

*Coastwise Trade* means trade between points in the United States.

*Commander* means Commander, USTRANSCOM, who is authorized by the Secretary of Defense to administer the MSA 2003, in consultation with the Administrator.

*Contracting Officer* means the Associate Administrator for National Security, MARAD.

*Contractor* means the owner or operator of a vessel that enters into an MSP Operating Agreement for the vessel with the Secretary of Transportation (acting through MARAD) pursuant to §53103 of the MSA 2003. The term, "Contractor" excludes a trust.

*Defense Contractor* means a person that operates or manages United States documented vessels for the Secretary of Defense or charters vessels to the Secretary of Defense and has entered into a special security agreement with the Secretary of Defense.

*Documentation Citizen* means an entity able to document a vessel under 46 U.S.C. chapter 121. This definition includes a trust.

*DOD* means the U.S. Department of Defense.

*Domestic Trade* means trade between points in the United States.

*Eligible Vessel* means a vessel that meets the requirements of §53102(b) of the MSA 2003.

*Emergency Preparedness Agreement* means an agreement, required by

§ 53107 of the MSA 2003, between a Contractor and the Secretary of Transportation (acting through MARAD) to make certain commercial transportation resources available during time of war or national emergency or whenever determined by the Secretary of Defense to be necessary for national security or contingency operation.

*Enrollment* means the entry into an MSP Operating Agreement with MARAD to operate a vessel(s) in the MSP Fleet in accordance with § 296.30.

*Fiscal Year* means any annual period beginning on October 1 and ending on September 30.

*Foreign Commerce* means:

(1) For any vessel other than a liquid or a dry bulk carrier, a cargo freight service, including direct and relay service, operated exclusively in the foreign trade or in mixed foreign and domestic trade allowed under a registry endorsement under section 12105 of title 46, United States Code, where the origination point or the destination point of any cargo carried is the United States, regardless of whether the vessel provides direct service between the United States and a foreign country, or commerce or trade between foreign countries; and

(2) For liquid and dry bulk cargo carrying services, includes trading between ports in the United States and foreign ports or trading between foreign ports in accordance with normal commercial bulk shipping practices in such manner as will permit United States-documented vessels to freely compete with foreign-flag bulk carrying vessels in their operation or in competing for charters.

*LASH Vessel* means a lighter aboard ship vessel.

*Militarily Useful* is defined, in terms of minimum military capabilities, according to DOD Joint Strategic Planning Capabilities Plan (JSCAP) guidance.

*MSA 2003* means the Maritime Security Act of 2003.

*MSP Fleet* means the fleet of vessels established under section 53102(a) of the MSA 2003 and operated under MSP Operating Agreements.

*MSP Operating Agreement* means the assistance agreement between a Contractor and MARAD that provides for MSP payments, but is not a "procurement contract."

*MSP Payments* means the payments made for the operation of U.S.-flag vessels in the foreign commerce.

*Noncontiguous Domestic Trade* means transportation of cargo between a point in the contiguous 48 states and a point in Alaska, Hawaii, or Puerto Rico, other than a point in Alaska north of the Arctic Circle.

*Operating Day* means any calendar day during which a vessel is operated in accordance with the terms and conditions of the MSP Operating Agreement.

*Operator* is a person that either owns a vessel and operates that vessel directly or charters in a vessel at a financial risk through a demise charter that transfers virtually all the rights and obligations of the vessel owner to the vessel operator, such as that of crewing, supplying, maintaining, insuring and navigating the vessel.

*Owner* means an entity that has title and/or beneficial ownership of a vessel. Only an owner that is a person is eligible to enter into an MSP Operating Agreement.

*Participating Fleet Vessel* means any vessel that:

(1) On October 1, 2005—

(i) Meets the citizenship requirements of paragraph (1), (2), (3), or (4) of section 53102(c) of the MSA 2003;

(ii) Is less than 25 years of age, or is less than 30 years of age in the case of a LASH vessel; and

(2) On December 31, 2004, is covered by an MSP Operating Agreement.

*Person* includes corporations, limited liability companies, partnerships, and associations existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country. For purposes of holding an MSP Operating Agreement, the term "person" excludes a trust.

*Roll-on/Roll-off Vessel* means a vessel that has ramps allowing cargo to be loaded and discharged by means of wheeled vehicles so that cranes are not required.

*SecDef* means Secretary of Defense acting through the Commander USTRANSCOM.

*Section 2 Citizen* means a United States citizen within the meaning of section 2 of the Shipping Act, 1916, 46 U.S.C. 802, without regard to any statute that "deems" a vessel to be owned and operated by a Section 2 Citizen.

*Secretary* means the Secretary of Transportation acting through the Maritime Administrator.

*Tank Vessel* means, as stated in 46 U.S.C. 2101(38), a self-propelled tank vessel that is constructed or adapted to carry, or that carries, oil or hazardous material in bulk as cargo or cargo residue. In addition, the vessel must be double hulled and capable of carrying simultaneously more than two separated grades of refined petroleum products.

*Transfer of an MSP Operating Agreement* includes any sale, assignment or transfer of the MSP Operating Agreement, either directly or indirectly, or through any sale, reorganization, merger, or consolidation of the MSP Contractor.

*United States* includes the 50 U.S. States, the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, Guam, American Samoa, and the Virgin Islands.

*United States Citizen Trust* means:

(1) Subject to paragraph (3) of this definition, a trust that is qualified under this definition.

(2) A trust is qualified only if:

(i) Each of the trustees is a Section 2 Citizen; and

(ii) The application for documentation of the vessel under 46 U.S.C. chapter 121, includes the affidavit of each trustee stating that the trustee is not aware of any reason involving a beneficiary of the trust that is not a Section 2 Citizen, or involving any other person that is not a Section 2 Citizen, as a result of which the beneficiary or other person would hold more than 25 percent of the aggregate power to influence or limit the exercise of the authority of the trustee with respect to matters involving any ownership or operation of the vessel that may adversely affect the interests of the United States.

(3) If any person that is not a Section 2 Citizen has authority to direct or participate in directing a trustee for a trust in matters involving any ownership or operation of the vessel that may adversely affect the interests of the United States or in removing a trustee for a trust without cause, either directly or indirectly through the control of another person, the trust instrument provides that persons who are not Section 2 Citizens may not hold more than 25 percent of the aggregate authority to so direct or remove a trustee.

(4) This definition shall not be considered to prohibit a person who is not a Section 2 Citizen from holding more than 25 percent of the beneficial interest in a trust.

*United States Documented Vessel* means a vessel documented under 46 U.S.C. chapter 121.

## § 296.3 Applications.

(a) *Action by MARAD—Time Deadlines.* Applications for enrollment of vessels in the MSP were due by October 15, 2004 to the Secretary, Maritime Administration, Room 7218, Maritime Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Any applications received before October 15, 2004 were deemed to have been submitted on October 15, 2004. Within 90 days after receipt of a completed application, the Secretary was obligated to approve the application, in conjunction with the SecDef, or provide in writing the reason for denial of that application. Execution of a standard MSP Operating Agreement took place reasonably soon after approval of the application. Contractors of MSP Operating Agreements were required to submit ownership information and signed charters to MARAD for approval by July 1, 2005.

(b) *Action by the Applicant.* Each applicant for an MSP Operating Agreement was required to submit an application under OMB control number 2133–0525 to the Secretary, Maritime Administration in the manner prescribed on that form. Application forms were made available from MARAD's Office of Sealift Support, or the application form could be downloaded from the MARAD Web site, *http://www.marad.dot.gov,* Information required included:

(1) An *Affidavit of Section 2 Citizenship* that comports with the requirements of 46 CFR part 355, if applying as a Section 2 Citizen. Otherwise, an affidavit which demonstrates that the applicant is qualified to document a vessel under 46 U.S.C. chapter 121 is required. If the applicant is a vessel operator and proposes to employ a vessel manager, then the applicant must supply an affidavit for the vessel manager that meets the same citizenship requirements applicable to the applicant;

(2) *Certificate of Incorporation;*

(3) *Copies of by-laws or other governing instruments;*

(4) *Maritime related affiliations;*

(5) *Financial data:*

(i) Provide an audited financial statement or a completed MARAD Form MA–172 dated within 120 days after the close of the most recent fiscal period; and

(ii) Provide estimated annual forecast of maritime operations for the next five years showing revenue and expense, including explanations of any significant increase or decrease of these items;

(6) *Intermodal network:*

(i) If applicable, a statement describing the applicant's operating and transportation assets, including vessels, container stocks, trucks, railcars, terminal facilities, and systems used to link such assets together;

(ii) The number of containers and their twenty-foot equivalent units (TEUs) by size and type owned and/or long-term leased by the applicant distinguishing those that are owned from those that are leased; and

(iii) The number of chassis by size and type owned and/or long-term leased by the applicant distinguishing those that are owned from those that are leased;

(7) *Diversity of trading patterns:* A list of countries and trade routes serviced along with the types and volumes of cargo carried;

(8) *Applicant's record of owning and/or operating vessels:* Provide number of ships owned and/or operated, specifying flag, in the last ten years, trades involved, number of employees in your ship operations department, vessel or ship managers utilized in the operation of your vessels, and any other information relevant to your record of owning or operating vessels;

(9) *Bareboat charter arrangements,* if applicable;

(10) *Vessel data including vessel type, size, and construction date;*

(11) *Military Utility:* Provide an assessment of the value of the vessel to DOD sealift requirements. Provide characteristics which indicate the value of the vessels to DOD including items of specific value, *e.g.*, ramp strengths, national defense sealift features;

(12) *Special Security Agreements:* If applicable, provide a copy of any Special Security Agreement;

(13) If applicable, *Certification from documentation citizen who is the demise charterer of the MSP vessel:* In a letter submitted at the time of the application addressed to the Administrator and the Commander from the Chief Executive Officer, or equivalent, of a documentation citizen that is the proposed Contractor of an MSP Operating Agreement, provide a statement that there are no treaties, statutes, regulations, or other laws of the foreign country(ies) of the parent, that would prohibit the proposed Contractor from performing its obligations under an MSP Operating Agreement. The statement should be substantially in the following format:

"I, _____, Chief Executive Officer of _____, certify to you that there are no treaties, statutes, regulations, or other laws of the foreign country(ies) of ____'s ultimate foreign parent or intermediate parents that would prohibit ____ from performing its obligations under an Operating Agreement with the Maritime Administration pursuant to the Maritime Security Act of 2003.";

(14) *Agreement from the ultimate foreign parent of the documentation citizen:* An agreement to be signed and submitted at the time of application from the equivalent of the Chief Executive Officer of the ultimate foreign parent of a documentation citizen not to influence the operation of the MSP vessel in a manner that will adversely affect the interests of the United States. The Agreement should be substantially in the following format:

"I, _____, am the Chief Executive Officer [or equivalent] of _____, the ultimate foreign parent of _____, a documentation citizen of

the United States that is applying for an MSP Operating Agreement. I agree on behalf of the "foreign parent" that neither _____ (the ultimate foreign parent) nor any representative of _____ (the ultimate foreign parent) will in any way influence the operation of the MSP vessel in a manner that will adversely affect the interests of the United States.";

(15) *Replacement Vessel Plan and Age Waiver:* If applicable, an applicant must submit a replacement vessel plan along with an age waiver request if the applicant seeks an age waiver for an existing vessel(s). The vessel replacement plan shall include the vessel's characteristics, a letter of intent or other document indicating agreement for purchase of vessel, and a forecast of operations for five years for the replacement vessel. The age restriction for over-age vessels shall not apply to a Participating Fleet Vessel during the 30-month period beginning on the date the vessel begins operating under an MSP Operating Agreement under the MSA 2003 provided that the Secretary has determined that the Contractor has entered into an arrangement for a replacement vessel that will be eligible to be included in an MSP Operating Agreement, and;

(16) *Anti-Lobbying Certificate:* A certificate as required by 49 CFR part 20 stating that no funds provided under MSP have been used for lobbying to obtain an Operating Agreement.

(Approved by the Office of Management and Budget under Control Number 2133–0525)

### § 296.4 Waivers.

In General—In special circumstances, and for good cause shown, the procedures prescribed in this part may be waived in writing by the Secretary, by mutual agreement of the Secretary in consultation with the SecDef, and the Contractor, so long as the procedures adopted are consistent with the MSA 2003 and with the objectives of these regulations.

## Subpart B—Eligibility

### § 296.10 Citizenship requirements of owners, charterers and operators.

Citizenship requirements are deemed to have been met if during the entire period of an MSP Operating Agreement under this chapter that applies to the vessel, all of the conditions of any of the paragraphs (a), (b), (c), or (d) of this section are met, and subject to conditions in paragraph (e):

(a) A vessel to be included in an MSP Operating Agreement is owned and operated by one or more persons that are Section 2 Citizens.

(b) A vessel to be included in an MSP Operating Agreement is owned by either a person that is a Section 2 Citizen or a United States Citizen Trust, and the vessel is demise chartered to a non-Section 2 Citizen—

(1) That is eligible to document the vessel under 46 U.S.C. chapter 121;

(2) Whose chairman of the board of directors, chief executive officer, and a majority of the members of the board of directors are Section 2 Citizens, and are appointed and subject to removal only upon approval by the Secretary as follows:

(i) Proposed changes to the chairman of the board, chief executive officer, and membership of the board of directors must be submitted to the Administrator 60 days before scheduled to take effect; and

(ii) MARAD must approve or disapprove changes within 30 days of receiving the proposed changes;

(3) That certifies to the Secretary in a format substantially similar to the format at § 296.3(b)(13) that there are no treaties, statutes, regulations, or other laws that would prohibit the Contractor from performing its obligations under an MSP Operating Agreement at the time of application for an MSP Operating Agreement; and

(4) The ultimate foreign parent of that person proffers, at the time of application for an MSP Operating Agreement, an agreement in a format substantially similar to the format at § 296.3(b)(14) not to influence the vessel's operation in a way that is detrimental to the United States.

(c) A vessel to be included in an MSP Operating Agreement is owned and operated by a defense contractor or a related person to include affiliated or related companies within the same corporate group that:

(1) Is eligible to document the vessel under 46 U.S.C. chapter 121;

(2) Operates or manages other United States-documented vessels for the SecDef, or charters other vessels to the SecDef;

(3) Has entered into a special security agreement with the SecDef;

(4) Certifies to the Secretary, at the time of application, in a format substantially similar to the format of § 296.3(b)(13), that there are no treaties, statutes, regulations, or other laws that would prohibit the Contractor from performing its obligations under an MSP Operating Agreement; and

(5) Has its ultimate foreign parent proffer, at the time of application for an MSP Operating Agreement, an agreement in a format substantially similar to the format of § 296.3(b)(14) not to influence the vessel's operation in a way that is detrimental to the United States.

(d) The vessel is owned by a documentation citizen and demise chartered to a Section 2 Citizen.

(e) Where applicable, the Secretary and the SecDef shall notify the Senate Committees on Armed Services, and Commerce, Science, and Transportation and the House of Representatives Committee on Armed Services that they concur with the certifications by the documentation citizens under § 296.3(b)(13) and that they have reviewed the agreements proffered by the ultimate foreign parent under § 296.3(b)(14), and agree that there are no other legal, operational, or other impediments that would prohibit the contractors for the vessels from performing their obligations under MSP Operating Agreements.

### § 296.11 Vessel requirements.

(a) *Eligible Vessel.* A vessel is eligible to be included in an MSP Operating Agreement if:

(1) The vessel is:

(i) Determined by the SecDef to be suitable for use by the United States for national defense or military purposes in time of war or national emergency; and

(ii) Determined by the Secretary to be commercially viable;

(2) The vessel is operated or, in the case of a vessel to be purchased or constructed, will be operated to provide transportation in the foreign commerce;

(3) The vessel is self-propelled and is:

(i) A Roll-on/Roll-off vessel with a carrying capacity of at least 80,000 square feet or 500 twenty-foot equivalent units and is 15 years of age or less on the date the vessel is included in the MSP;

(ii) A tank vessel that is constructed in the United States after November 24, 2003;

(iii) A tank vessel that is 10 years of age or less on the date the vessel is included in the MSP Fleet;

(iv) A LASH vessel that is 25 years of age or less on the date the vessel is included in the MSP fleet; or

(v) Any other type of vessel that is 15 years of age or less on the date the vessel is included in the MSP fleet;

(4) The vessel is:

(i) A United States documented vessel under 46 U.S.C. chapter 121; or

(ii) Not a United States-documented vessel under 46 U.S.C. chapter 121, but the owner of the vessel has demonstrated an intent to have the vessel documented under 46 U.S.C. chapter 121 at the time the vessel is to be included in the MSP fleet; and

(A) The vessel is eligible for a certificate of inspection if the Secretary of the Department in which the United States Coast Guard is operating determines that:

(*1*) The vessel is classed and designed in accordance with the rules of the American Bureau of Shipping (ABS) or another classification society accepted by such Secretary;

(*2*) The vessel complies with applicable international agreements and associated guidelines as determined by the country in which the vessel was documented immediately before becoming a U.S.-flag vessel; and

(*3*) The flag country has not been identified by such Secretary as inadequately enforcing international vessel regulations.

(B) [Reserved]

(b) *Waiver of Age Restriction of Vessels.* The SecDef, in conjunction with the Secretary, may waive the age restriction in paragraph (a) of this section if the Secretaries jointly determine that the waiver:

(1) Is in the national interest;

(2) Is appropriate to allow the maintenance of the economic viability of the vessel and any associated operating network; and

(3) Is necessary due to the lack of availability of other vessels and operators that comply with the requirements of the MSA 2003.

(c) *Telecommunications and Other Electronic Equipment.* The telecommunications and other electronic equipment on an existing vessel that is redocumented under the laws of the United States for operation under an MSP Operating Agreement shall be deemed to satisfy all Federal Communications Commission equipment certification requirements, if

(1) Such equipment complies with all applicable international agreements and associated guidelines as determined by the country in which the vessel was documented immediately before becoming documented under the laws of the United States;

(2) That country has not been identified by the Secretary as inadequately enforcing international regulations as to that vessel; and

(3) At the end of its useful life, such equipment will be replaced with equipment that meets Federal Communications Commission equipment certification standards (*see* 47 CFR Chapter I).

[70 FR 55588, Sept. 22, 2005; 70 FR 59400, Oct. 12, 2005]

### § 296.12 Applicants.

*Applicant.* Owners or operators of an eligible vessel may apply to MARAD for inclusion of that vessel in the MSP Fleet pursuant to the provisions of the MSA 2003. Applications shall be addressed to the Secretary, Maritime Administration, Room 7218, Maritime Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

## Subpart C—Priority for Granting Applications

### § 296.20 Tank vessels.

(a) First priority for the award of MSP Operating Agreements under MSA 2003 shall be granted to a tank vessel that is constructed in the United States after October 1, 2004.

(b) First priority for the award of MSP Operating Agreements under the MSA 2003 may be granted to a tank vessel that is less than ten years of age on the date it enters an MSP Operating Agreement:

(1) *Provided:* (i) That the Contractor agrees to execute a binding agreement approved by the Secretary for a replacement vessel to be operated under the MSP Operating Agreement and to be built in the United States not later than nine months after the first date appropriated funds are available for construction and operating assistance for a minimum of three tank vessels;

(ii) A tank vessel under this section is eligible to be included in the MSP under § 296.11(a); and

(iii) A tank vessel under this section is owned and operated during the period of the MSP Operating Agreement by one or more persons that are Section 2 Citizens;

(2) No payment can be made for an existing tank vessel granted priority one status after the earlier of:

(i) Four years following the date this MSP Operating Agreement is effective, except if amounts are available for construction of a minimum of three tank vessels under the National Defense Tank Vessel Construction Assistance Program (NDTVCP) by October 1, 2007, then no payments shall be made for the existing "tank vessel" after four years following the date such amounts are available; or

(ii) The date of delivery of the replacement tank vessel constructed in the United States after October 1, 2004.

(3) The Secretary will not enter into more than five MSP Operating Agreements for tank vessels under this priority. If the five tank vessel MSP Operating Agreement slots are not fully subscribed, the Secretary, in consultation with the SecDef, may award the non-subscribed slots to lower priority vessels, if deemed appropriate. If the Secretary determines that no funds are, or are likely to be, allocated for any tank vessel construction in the United States, the five slots may nevertheless be awarded to existing tank vessels or the slots may be awarded permanently to any eligible vessels.

The Secretary may temporarily award a slot reserved for a tank vessel under construction to a lower priority vessel during the construction period of that vessel if an existing tank vessel offered by the tank vessel Contractor is not eligible for priority for that slot. If no existing tank vessel is offered by the tank vessel Contractor, the Secretary may temporarily award an MSP Operating Agreement to any eligible vessel of another Contractor until a new tank vessel's construction is completed in the United States. Such temporary MSP Operating Agreements may be terminated under terms set forth in the temporary MSP Operating Agreement.

**§ 296.21 Participating Fleet Vessels.**

(a) *Priority*. To the extent that appropriated funds are available after applying the first priority, tank vessels, in § 296.20, the second priority is applicable to Participating Fleet Vessels.

(b) *Number of MSP Operating Agreements.* MARAD will not enter into more than 47 MSP Operating Agreements for Participating Fleet Vessels.

(c) *Reduction of Participating Fleet Vessel MSP Operating Agreements.* The number of MSP Operating Agreements available to Participating Fleet Vessels shall be reduced by one for:

(1) Each Participating Fleet Vessel for which an application for enrollment in the MSP is not received by the Secretary, Maritime Administration on October 15, 2004; or

(2) Each Participating Fleet Vessel for which an application for enrollment in the MSP is received by the Secretary, Maritime Administration on October 15, 2004, but the application is not approved by the Secretary of Transportation and the SecDef by January 12, 2005.

(d) *Authority to Enter into an MSP Operating Agreement.* (1) Applications for inclusion of a Participating Fleet Vessel under the priority in paragraph (a) of this section will be accepted only from a person that has authority to enter into an MSP Operating Agreement for the vessel with respect to the full term of the MSP Operating Agreement. Applicants must certify that they have the requisite authority as of October 1, 2005 and for the full period of the MSP Operating Agreement thereafter and provide the basis on which they rely for such certification, such as a copy of a vessel title of ownership or a demise charter that remains in effect until September 30, 2015.

(2) The full term of the MSP Operating Agreement is the period from October 1, 2005 through September 30, 2015. If a vessel proposed to be included in the MSP will become ineligible for the program prior to September 30, 2015, due to vessel age restrictions, then the full term of the MSP Operating Agreement for that vessel for purposes of paragraph (d)(1) of this section is the period the vessel meets the applicable age restrictions. MARAD may still award an MSP Operating Agreement through September 30, 2015, to an applicant having authority to enter into an MSP Operating Agreement for a vessel whose age eligibility expires before that date. For companies requesting an age waiver, the Applicant must submit an appropriate replacement vessel at least 120 days prior to the date of expiration of age eligibility.

(3) For the purposes of paragraph (d)(1) of this section, in the case of a vessel that is subject to a demise charter that terminates by its terms on September 30, 2005 (without giving effect to any extension provided therein for completion of a voyage or to effect the actual redelivery of the vessel), or that is terminable at will by the owner of the vessel after such date, only the owner of the vessel (provided the owner of the vessel is a "person" as defined in § 296.2) shall be treated as having the authority referred to in paragraph (d)(1) of this section.

(4) If two or more applicants claim authority for the same vessel, the Secretary may request additional information bearing on the issue of which party has authority to enter into an MSP Operating Agreement, and the Secretary shall, in his/her sole discretion, decide the matter as he/she deems appropriate.

(e) During the 30-month period commencing October 1, 2005, the age restrictions set forth under § 296.11(a) and § 296.41(c) do not apply to a Participating Fleet Vessel operating under an MSP Operating Agreement, provided:

(1) The Contractor has entered into an arrangement to obtain and operate under that MSP Operating Agreement a replacement vessel for that Participating Fleet Vessel; and

(2) The Secretary determines that the replacement vessel will be eligible to be included in the MSP Fleet under § 296.11(a).

(f) In the event that a Participating Fleet Vessel will be unavailable to participate in the MSP on October 1, 2005, due to an unforeseen casualty to the vessel, a Contractor may offer an eligible replacement vessel. The replacement vessel must subsequently be approved by MARAD and DOD. The replacement vessel must operate under an MSP Operating Agreement in sufficient time to meet the 180 minimum operation days required during the fiscal year to avoid being in default of the MSP Operating Agreement.

### § 296.22 Other vessels.

(a) *Third Priority*. To the extent that appropriated funds are available after applying the first priority, tank vessels, in § 296.20, and the second priority, Participating Fleet Vessels, in § 296.21, the third priority is for any other vessel that is eligible to be included in an MSP Operating Agreement under § 296.11(a), and that, during the period of that MSP Operating Agreement, will be:

(1) Owned and operated by one or more persons that are Section 2 Citizens; or

(2) Owned by a person that is eligible to document the vessel under 46 U.S.C. chapter 121 and operated by a person that is a Section 2 Citizen.

(b) *Fourth Priority*. To the extent that appropriations are available after applying the first priority in § 296.20, the second priority in § 296.21, and the third priority in paragraph (a) of this section, the fourth priority is for any other vessel that is eligible to be included in an MSP Operating Agreement under § 296.11(a).

### § 296.23 Discretion within priority.

The Secretary—

(a) Subject to paragraph (b) of this section, may award MSP Operating Agreements within each priority as the Secretary considers appropriate; and

(b) Shall award MSP Operating Agreements within a priority—

(1) In accordance with operational requirements specified by the SecDef;

(2) In the cases of the Priorities III and IV, according to the applicants' records of owning and operating vessels; and

(3) Subject to the approval of the SecDef.

(c) The Secretary does not have discretion to override the priority requirements with respect to the initial award of MSP Operating Agreements.

### § 296.24 Subsequent awards of MSP Operating Agreements.

(a) Until October 1, 2005, if, for any reason, after the award of an MSP Operating Agreement, the Applicant is unwilling or unable to commence operations pursuant to the terms of the MSP Operating Agreement, MARAD may, pursuant to the priority criteria, award that MSP Operating Agreement to an Applicant having an eligible vessel that applied but was not awarded an MSP Operating Agreement.

(b) After October 1, 2005, MARAD intends to ensure that all available MSP Operating Agreements are fully utilized at all times, in order to maximize the benefit of the MSP. Accordingly, when an MSP Operating Agreement becomes available through termination by the Secretary, expiration of a temporary MSP Operating Agreement or early termination by the MSP contractor, and no transfer under 46 U.S.C. 53105(e) is involved, MARAD will reissue the MSP Operating Agreement pursuant to the following criteria.

(1) The proposed vessel must meet the requirements for vessel eligibility in 46 U.S.C. 53102(b);

(2) The applicant must meet the vessel ownership and operating requirements for priority in 46 U.S.C. 53103(c); and

(3) Priority will be assigned in accordance with operational requirements specified by the SecDef.

(c) MARAD will use the following procedures in reissuing an MSP Operating Agreement. MARAD and USTRANSCOM will determine if the applications received on October 15, 2004 form an adequate pool for award of a reissued MSP Operating Agreement.

If so, MARAD will award a reissued MSP Operating Agreement from that pool of qualified applicants in its discretion, subject to approval of the SecDef. MARAD and USTRANSCOM may decide to open a new round of applications. Applicants for reissued MSP Operating Agreements must meet the citizenship requirements of Priority III. Inasmuch as MSP furthers a public purpose and MARAD does not acquire goods or services through MSP, the selection process for award of MSP Operating Agreements does not constitute an acquisition process subject to any procurement law or the Federal Acquisition Regulations.

## Subpart D—Maritime Security Program Operating Agreements

### § 296.30 General conditions.

(a) *Approval.* (1) The Secretary, in conjunction with the SecDef, may approve applications to enter into an MSP Operating Agreement and make MSP Payments with respect to vessels that are determined by the Secretary to be commercially viable and those that are deemed by the SecDef to be militarily useful for meeting the sealift needs of the United States in time of war or national emergencies. The Secretary announced an initial award of 60 MSP Operating Agreements on January 12, 2005. In addition, the Secretary advised those applicants found to be eligible but not included in the initial award that those applicants will be wait-listed for an award of an MSP Operating Agreement if additional slots become available.

(2) The Commander established general evaluation criteria for operational requirements for considering replacement vessels described in § 296.21(e), and for vessels eligible under the third and fourth priorities described in § 296.22. These general evaluation criteria were made available by the Commander in sufficient time for preparing applications.

(b) *Effective date*—(1) *General Rule.* Unless otherwise provided, the effective date of an MSP Operating Agreement is October 1, 2005.

(2) *Exceptions.* In the case of an Eligible Vessel to be included in an MSP Operating Agreement that is on charter to the U.S. Government, other than a charter under the provisions of an Emergency Preparedness Agreement (EPA) provided by § 53107 of the MSA 2003, unless an earlier date is requested by the applicant, the effective date for an MSP Operating Agreement shall be:

(i) The expiration or termination date of the Government charter covering the vessel; or

(ii) Any earlier date on which the vessel is withdrawn from that charter, but not before October 1, 2005.

(c) *Replacement Vessels.* A Contractor may replace an MSP vessel under an MSP Operating Agreement with another vessel that is eligible to be included in the MSP under § 296.11(a), if the Secretary, in conjunction with the SecDef, approves the replacement vessel. The replacement vessel must qualify with the same or with more militarily useful capability as the MSP vessel to be replaced for operational requirements as determined by the Commander.

(d) *Termination by the Secretary.* If the Contractor materially fails to comply with the terms of the MSP Operating Agreement:

(1) The Secretary shall notify the Contractor and provide a reasonable opportunity for the Contractor to comply with the MSP Operating Agreement;

(2) The Secretary shall terminate the MSP Operating Agreement if the Contractor fails to achieve such compliance; and

(3) Upon such termination, any funds obligated by the relevant MSP Operating Agreement shall be available to the Secretary to carry out the MSP.

(e) *Early termination by Contractor, generally.* An MSP Operating Agreement shall terminate on a date specified by the Contractor if the Contractor notifies the Secretary not later than 60 days before the effective date of the proposed termination that the Contractor intends to terminate the MSP Operating Agreement. The Contractor shall be bound by the provisions relating to vessel documentation and national security commitments, and by its EPA for the full term, from October 1, 2005 through September 30, 2015, of the MSP Operating Agreement.

(f) *Early termination by Contractor, with available replacement.* An MSP Operating Agreement shall terminate without further obligation on the part of the Contractor upon the expiration date of the three-year period beginning on the date a vessel begins operating under the MSP, if:

(1) The Contractor notifies the Secretary, by not later than two years after the date the vessel begins operation under an MSP Operating Agreement, that the Contractor intends to terminate the MSP Operating Agreement; and

(2) The Secretary, in conjunction with the SecDef, determines that:

(i) An application for an MSP Operating Agreement has been received for a replacement vessel that is acceptable to the Secretaries; and

(ii) During the period of an MSP Operating Agreement that applies to the replacement vessel, the replacement vessel will be:

(A) Owned and operated by one or more persons that are Section 2 Citizens; or

(B) Owned by a person that is a Documentation Citizen and operated by a person that is a Section 2 Citizen.

(g) *Non-renewal for lack of funds.* If, by the first day of a fiscal year, sufficient funds have not been appropriated under the authority of MSA 2003 for that fiscal year, the Secretary will notify the Senate's Committees on Armed Services and Commerce, Science, and Transportation, and the House of Representatives' Committee on Armed Services, that MSP Operating Agreements for which sufficient funds are not available, will not be renewed for that fiscal year if sufficient funds are not appropriated by the 60th day of that fiscal year. If only partial funding is appropriated by the 60th day of such fiscal year, then the Secretary, in consultation with the SecDef, shall select the vessels to retain under MSP Operating Agreements, based on the Secretaries' determinations of the most militarily useful and commercially viable vessels. In the event that no funds are appropriated, then all MSP Operating Agreements shall be terminated and, each Contractor shall be released from its obligations under the MSP Operating Agreement. Final payments under the terminated MSP Operating Agreements shall be made in accordance with § 296.41. To the extent that funds are appropriated in a subsequent fiscal year, former MSP Operating Agreements may be reinstated if mutually acceptable to the Administrator and the Contractor provided the MSP vessel remains eligible.

(h) *Release of Vessels from Obligations:* If an MSP Operating Agreement is terminated by the Contractor, with available replacement under paragraph (f) of this section, or if sufficient funds are not appropriated for payments under an MSP Operating Agreement for any fiscal year by the 60th day of that fiscal year, then—

(1) Each vessel covered by the terminated MSP Operating Agreement is released from any further obligation under the MSP Operating Agreement;

(2) The owner and operator of a non-tank vessel or a tank vessel not built under the NDTVCP may transfer and register the applicable vessel under a foreign registry deemed acceptable by the Secretary and the SecDef, notwithstanding section 9 of the Shipping Act, 1916 (46 App. U.S.C. 808) and 46 CFR part 221;

(3) The owner and operator of a tank vessel built under the NDTVCP must formally apply to MARAD pursuant to section 9 of the Shipping Act, 1916 to transfer and register the vessel under a foreign registry; and

(4) If section 902 of the Act is applicable to a vessel that has been transferred to a foreign registry due to a terminated MSP Operating Agreement, then that vessel is available to be requisitioned by the Secretary pursuant to section 902 of the Act.

(5) Paragraph (h) of this section is not applicable to vessels under MSP Operating Agreements that have been terminated for any other reason.

(i) *Foreign Transfer of Vessel.* A Contractor may transfer a non-tank vessel to a foreign registry, without approval of the Secretary, if the Secretary, in conjunction with the SecDef, determines that the contractor will provide a replacement vessel:

(1) Of equal or greater military capability or of a capacity that is equivalent or greater as measured in deadweight tons, gross tons, or container equivalent units, as appropriate;

(2) That is a documented vessel under 46 U.S.C. chapter 121 by the owner of the vessel to be placed under a foreign registry; and

(3) That is not more than 10 years of age on the date of that documentation.

(j) *Transfer of MSP Operating Agreements.* A Contractor subject to an MSP Operating Agreement may transfer that MSP Operating Agreement (including all rights and obligations under that MSP Operating Agreement) to any person eligible to enter into an MSP Operating Agreement under § 296.10 and of the same or more restrictive U.S. citizen priority, provided that prior approval to transfer the MSP Operating Agreement is granted by the Secretary and the SecDef. The Contractor should allow at least 90 days for processing of a transfer request.

### § 296.31 MSP assistance conditions.

(a) *Term of MSP Operating Agreement.* MSP Operating Agreements are authorized for 10 years, starting on October 1, 2005, and ending on September 30, 2015, but payments to Contractors are subject to annual appropriations each fiscal year. MARAD may enter into MSP Operating Agreements for a period less than the full term authorized under the MSA 2003.

(b) *Terms under a Continuing Resolution (CR).* In the event funds are available under a CR, the terms and conditions of the MSP Operating Agreements shall be in force provided sufficient funds are available to fully meet obligations under MSP Operating Agreements, and only for the period stipulated in the applicable CR. If funds are not appropriated under a CR at sufficient levels for any portion of a fiscal year, the Secretary will select the vessels to retain within the funding level of the previous fiscal year, in consultation with the SecDef, based on the Secretaries' determination of the most militarily useful and commercially viable vessels. With regard to an MSP Operating Agreement that does not receive funds, the terms and conditions of any applicable MSP Operating Agreement may be voided and the Contractor may request termination of the MSP Operating Agreement.

(c) *National security requirements.* Each MSP Operating Agreement shall require the owner or operator of an Eligible Vessel included in that MSP Operating Agreement to enter into an EPA pursuant to section 53107 of the MSA 2003. The EPA shall be a document incorporating the terms of the Voluntary Intermodal Sealift Agreement (VISA), as approved by the Secretary and the SecDef, or other agreement approved by the Secretaries.

(d) *Vessel operating agreements.* The MSP Operating Agreement shall require that during the period an Eligible Vessel is included in that MSP Operating Agreement, the Eligible Vessel shall:

(1) *Documentation:* Be documented as a U.S.-flag vessel under 46 U.S.C. chapter 121;

(2) *Operation:* Be operated exclusively in the foreign commerce, except for tankers, which may be operated in foreign-to-foreign commerce, and shall not otherwise be operated in the coastwise trade of the United States; and

(3) *Noncontiguous Domestic Trade:* Not receive MSP payments during a period in which the Contractor participates, *i.e.*, directly or indirectly owns, charters, or operates, a vessel engaged in noncontiguous domestic trade unless the Contractor is a Section 2 Citizen.

(e) *Obligation of the U.S. Government.* The amounts payable as MSP payments under an MSP Operating Agreement shall constitute a contractual obligation of the United States Government to the extent of available appropriations.

(f) *U.S. Merchant Marine Academy cadets.* The MSP Operator shall agree to carry on the MSP vessel two U.S. Merchant Marine Academy cadets, if available, on each voyage.

### § 296.32 Reporting requirements.

The Contractor shall submit to the Director, Office of Financial and Rate Approvals, Maritime Administration, 400 Seventh St., SW., Washington, DC 20590, one of the following reports, including management footnotes where necessary to make a fair financial presentation:

(a) *Form MA–172:* Not later than 120 days after the close of the Contractor's semiannual accounting period, a Form MA–172 on a semiannual basis, in accordance with 46 CFR 232.6; or

(b) *Financial Statement:* Not later than 120 days after the close of the Contractor's annual accounting period, an audited financial statement in accordance with 46 CFR 232.6 and the most recent vessel operating cost data submitted as part of its EPA, or if not current year data, a Schedule 310 of the MA–172.

(Approved by the Office of Management and Budget under Control Number 2133–0005)

## Subpart E—Billing and Payment Procedures

### § 296.40 Billing procedures.

*Submission of voucher.* For contractors operating under more than one MSP Operating Agreement, the contractor may submit a single monthly voucher applicable to all its MSP Operating Agreements. Each voucher submission shall include a certification that the vessel(s) for which payment is requested were operated in accordance with § 296.31(d) and applicable MSP Operating Agreements with MARAD, and consideration shall be given to reductions in amounts payable as set forth in § 296.41(b) and (c). All submissions shall be forwarded to the Director, Office of Accounting, MAR–330, Room 7325, Maritime Administration, 400 Seventh Street, SW., Washington, DC 20590. Payments shall be paid and processed under the terms and conditions of the Prompt Payment Act, 31 U.S.C. 3901.

### § 296.41 Payment procedures.

(a) *Amount payable.* An MSP Operating Agreement shall provide, subject to the availability of appropriations and to the extent the MSP Operating Agreement is in effect, for each Agreement Vessel, an annual payment equal to $2,600,000 for FY 2006, FY 2007, FY 2008; $2,900,000 for FY 2009, FY 2010, FY 2011; and $3,100,000 for FY 2012, FY 2013, FY 2014, FY 2015. This amount shall be paid in equal monthly installments at the end of each month. The annual amount payable shall not be reduced except as provided in paragraphs (b) and (c) of this section.

(b) *Reductions in amount payable.* (1) The annual amount otherwise payable under an MSP Operating Agreement shall be reduced on a pro rata basis for each day less than 320 in a fiscal year that an Agreement Vessel:

(i) Is not operated exclusively in the foreign commerce, except for tank vessels, which may be operated in foreign-to-foreign commerce;

(ii) Is operated in the coastwise trade; or

(iii) Is not documented under 46 U.S.C. chapter 121.

(2) To the extent that a Contractor operates MSP vessels less than 320 days under the provisions of § 296.31(d), payments will be reduced for each day less than 320 days.

(c) *No payment.* (1) Regardless of whether the Contractor has or will operate for 320 days in a fiscal year, a Contractor shall not be paid:

(i) For any day that an Agreement Vessel is engaged in transporting more than 7,500 tons (using the U.S. English standard of short tons, which converts to 6,696.75 long tons, or 6,803.85 metric tons) of civilian bulk preference cargoes pursuant to section 901(a), 901(b), or 901b of the Act, provided that it is bulk cargo;

(ii) During a period in which the Contractor participates in noncontiguous domestic trade, unless that Contractor is a Section 2 Citizen;

(iii) While under charter to the United States Government other than a charter pursuant to an EPA under § 53107 of the MSA 2003. A voyage charter that is essentially a contract of affreightment will not be considered to be a charter;

(iv) For a vessel in excess of 25 years of age, except for a LASH vessel in excess of 30 years of age or a tank vessel which is limited to 20 years of age, unless the vessel is a Participating Fleet Vessel meeting the requirements of § 296.21(e);

(v) For days in excess of 30 days in a fiscal year in which a vessel is drydocked or undergoing survey, inspection, or repair unless prior to the expiration of the vessel's 30-day period, approval is obtained from MARAD for an extension beyond 30 days.

Drydocking, survey, inspection, or repair periods of 30 days or less are considered operating days; and

(vi) If the contracted vessel is not operated or maintained in accordance with the terms of the MSP Operating Agreement.

(2) To the extent that non-payment days under paragraph (c) of this section are known, Contractor payments shall be reduced at the time of the current billing. The daily reduction amounts shall be based on the annual amounts in paragraph (a) of this section divided by 365 days (366 days in leap years) and rounded to the nearest cent. Daily reduction amounts shall be applied.

(3) MARAD may require, for good cause, that a portion of the funds payable under this section be withheld if the provisions of § 296.31(d) have not been met.

(4) Amounts owed to MARAD for reductions applicable to a prior billing period shall be electronically transferred using MARAD's prescribed format, or a check may be forwarded to the Maritime Administration, P.O. Box 845133, Dallas, Texas 75284–5133, or the amount owed can be credited to MARAD by offsetting amounts payable in future billing periods.

## Subpart F—Appeals Procedures

### § 296.50 Administrative determinations.

(a) *Policy.* A Contractor who disagrees with the findings, interpretations or decisions of the Maritime Administration or the Contracting Officer with respect to the administration of this part or any other dispute or complaint concerning MSP Operating Agreements may submit an appeal to the Administrator. Such appeals shall be made in writing to the Secretary, within 60 days following the date of the document notifying the Contractor of the administrative determination of the Contracting Officer. Such an appeal should be addressed to the Maritime Administrator, Attn.: MSP Operating Agreement Appeals, Maritime Administration, 400 Seventh St., SW., Washington, DC 20590. Such an appeal is a prerequisite to exhausting administrative remedies.

(b) *DOD determinations.* The MSA 2003 assigns joint and separate roles and responsibilities to the Secretary and to the SecDef. The Administrator and the Commander will make joint and separate findings, interpretations, and decisions necessary to implement the MSA 2003. A Contractor who disagrees with the initial findings, interpretations or decisions regarding the implementation of the MSA 2003—whether joint or separate in nature—shall communicate such disagreement to the Contracting Officer. Any disagreement or dispute of a Contractor may, where appropriate, be transferred to the Director, Policy and Plans, U.S. Transportation Command (Director), for resolution. A Contractor who disagrees with the findings, interpretations, or decisions of the Director, with respect to the administration of this part, may submit an appeal to the Commander. Such an appeal shall be made in writing to the Commander within 60 days following the date of the document notifying the Contractor of the administrative determination of the Director. Such an appeal should be addressed to the Commander, U.S. Transportation Command, 508 Scott Drive, Scott Air Force Base, IL 62225–5357.

(c) *Process.* The Administrator, or the Commander in the case of a DOD determination, may require the person making the request to furnish additional information, or proof of factual allegations, and may order any proceeding appropriate in the circumstances. The decision of the Administrator, or the Commander in the case of a DOD determination, shall be final.

## Subpart G—Maintenance and Repair Reimbursement Pilot Program

### § 296.60 Applications.

(a) *Introduction.* This section sets forth MARAD's regulations governing its Maintenance and Repair (M&R) Reimbursement Pilot Program. The M&R program is presently a 5-year program, authorized at $19.5 million per year for FY 2006–2011.

(b) *M&R participants.* Every existing Contractor in MSP may enter into an agreement under 46 U.S.C. 3517, to perform qualified M&R of one or more

MSP vessels in United States shipyards, subject to the terms of this section. Every MSP Contractor entering into an MSP operating agreement, including those agreements transferred from an existing MSP Contractor, or newly issued or reissued from MARAD, after March 8, 2007, must agree to enter into an agreement under 46 U.S.C. 3517, to perform qualified M&R of one or more MSP vessels in United States shipyards, subject to the terms of this section. Each vessel that is subject to an M&R agreement will receive a priority in the allocation of MSP payments if the amount available for a fiscal year for making payments under MSP operating agreements is not sufficient to pay the full amount authorized under each agreement for such fiscal year.

(c) *Terms of Agreement.* An agreement under this section:

(1) Will require that except as provided in paragraph (d) of this section, all qualified M&R on the vessel will be performed in the United States;

(2) Will require the Administrator to reimburse the Contractor in accordance with paragraph (j) of this section for the costs of qualified M&R performed in the United States; and

(3) Will apply to qualified M&R performed during the 5-year period beginning on the date the vessel begins operating under the operating agreement under chapter 531 of title 46, United States Code.

(d) *Exception to Requirement to Perform Work in the United States.* A Contractor will not be required to have qualified M&R work performed in the United States under this section if:

(1) The Administrator determines that there is no facility capable of meeting all technical requirements of the qualified M&R in the United States located in the geographic area in which the vessel normally operates available to perform the work in the time required by the Contractor to maintain its regularly scheduled service;

(2) The Administrator determines that there are insufficient funds to pay reimbursement under paragraph (j) of this section with respect to the work; or

(3) The Administrator fails to make the certification described in paragraph (h)(2) of this section.

(e) *Qualified M&R.* In this section the term "qualified M&R" means:

(1) Except as provided in paragraph (e)(2) of this section:

(i) Any inspection of a vessel that is—

(A) Required under chapter 33 of title 46, United States Code; and

(B) Performed in the period in which the vessel is subject to an agreement under this section;

(ii) Any M&R of a vessel that is determined, in the course of an inspection referred to in paragraph (e)(1)(i) of this section, to be necessary; and

(iii) Any additional M&R the Contractor intends to undertake at the same time as the work described in paragraph (e)(1)(ii) of this section; but

(2) does not include:

(i) M&R not agreed to by the Contractor to be undertaken at the same time as the work described in paragraph (e)(1) of this section;

(ii) Work carried out as part of continuous machinery surveys and other similar requirements not associated with a drydocking of the vessel; or

(iii) Any emergency work that is necessary to enable a vessel to return to a port in the United States.

(f) *Qualification of Shipyard.* MARAD will assess the following factors in determining whether a proposed shipyard is capable of undertaking the proposed M&R:

(1) The dimension of the facility relative to the size of the vessel;

(2) The capacity and the reach of the lifting cranes necessary for performing the specified work; and

(3) The skills and experience of sufficient numbers of workers to complete the job in time to maintain the vessel's schedule.

(g) *Required information.* Under each M&R agreement, the participant must provide within 30 days of enrollment a schedule for regular and special surveys for each vessel in the agreement. At the same time, and on an annual basis by January 1 of each calendar year, each M&R participant must submit a schedule of anticipated M&R for each vessel under an M&R agreement for the coming year. In addition, the

M&R participant must provide for each such vessel the anticipated itinerary for the coming year.

(h) *Notification Requirements.* (1) NOTIFICATION BY CONTRACTOR.—The Administrator is not required to pay reimbursement to a Contractor under this section for qualified M&R, unless the Contractor—

(i) Notifies the Administrator of the intent of the Contractor to obtain the qualified M&R, by not later than 90 days before the date of the performance of the qualified M&R; and

(ii) Includes in such notification:

(A) A description of all qualified M&R that the Contractor should reasonably expect may be performed;

(B) A description of the vessel's normal route and port calls in the United States;

(C) An estimate of the cost, with supporting documentation, of obtaining the qualified M&R described under paragraph (h)(1)(ii)(A) of this section in the United States; and

(D) An estimate of the cost, with supporting documentation, of obtaining the qualified M&R described under paragraph (h)(1)(ii)(A) of this section outside the United States, in the country in which the Contractor otherwise would undertake the qualified M&R.

(2) CERTIFICATION BY ADMINISTRATOR.—

(i) Not later than 30 days after the date of receipt of notification under paragraph (h)(1) of this section, the Administrator will certify to the Contractor—

(A) Whether the cost estimates provided by the Contractor are fair and reasonable;

(B) If the Administrator determines that such cost estimates are not fair and reasonable, the Administrator's estimate of fair and reasonable costs for such work;

(C) Whether there are available to the Administrator sufficient funds to pay reimbursement under paragraph (j) of this section with respect to such work; and

(D) That the Administrator commits such funds to the Contractor for such reimbursement, if such funds are available for that purpose.

(ii) If the Contractor notification described in paragraph (h)(1) of this section does not include an estimate of the cost of obtaining qualified M&R in the United States, then not later than 30 days after the date of receipt of such notification, the Administrator will:

(A) Certify to the Contractor whether there is a facility capable of meeting all technical requirements of the qualified M&R in the United States located in the geographic area in which the vessel normally operates available to perform the qualified M&R described in the notification by the Contractor under paragraph (h)(1) of this section in the time period required by the Contractor to maintain its regularly scheduled service; and

(B) If there is such a facility, require the Contractor to resubmit such notification with the required cost estimate for such facility.

(i) *Allocation of available funds.* If the funds available to MARAD are insufficient to accommodate every M&R project required to be performed in U.S. shipyards, MARAD will select those work projects suitable for accomplishment in United States shipyards, for which MARAD will reimburse the differential costs of the M&R. MARAD will base such determinations on the amount of funds available, the projected cost of each repair, the number of vessels operated by the vessel operator and the proximity of the vessels' itineraries to suitable U.S. shipyard locations.

(j) *Reimbursement.* (1) IN GENERAL.—The Administrator will, subject to the availability of appropriations, reimburse a Contractor for costs incurred by the Contractor for qualified M&R performed in the United States under this section.

(2) AMOUNT.—The amount of reimbursement will be equal to the difference between—

(i) The fair and reasonable cost of obtaining the qualified M&R in the United States; and

(ii) The fair and reasonable cost of obtaining the qualified M&R outside the United States, in the country in which the Contractor would otherwise undertake the qualified M&R.

(3) DETERMINATION OF FAIR AND REASONABLE COSTS.—

(i) The Administrator will determine fair and reasonable costs for purposes

of paragraph (j)(2) of this section after considering the supporting documentation submitted by the Contractor. If it is too difficult to accurately ascertain the foreign costs of anticipated M&R, the Maritime Administrator may decide to compute the foreign cost of M&R by reference to a percentage of the domestic cost of the M&R, based on available general information.

(ii) MARAD will also pay for other costs borne by the M&R participant reasonably associated with the qualified M&R performed in a U.S. shipyard that would not be incurred if the vessel was repaired in a foreign shipyard. Such costs include:

(A) Any additional vessel maintenance and repair preparation costs, including costs for additional engineering, design and contract bid proposal costs;

(B) Costs (including capital and operating costs) for "lost time" for transit to a U.S. shipyard in excess of the transit period to a foreign shipyard on the same trade route to which the vessel is assigned and for the time spent in a U.S. shipyard which exceeds the estimated time required by a foreign shipyard for the same work.

(C) Costs for additional labor, supervision, overhead and other work involving shore-side personnel.

(iii) Upon approval of each specific M&R project, the Administrator will establish with the Contractor a set level of funding to be provided by MARAD. If, during the course of performing M&R in a U.S. shipyard, it is discovered that the repairs will entail additional unanticipated costs, the Administrator shall provide MARAD's share of funding corresponding to the percentage of the domestic M&R costs originally agreed to by MARAD, but not in excess of 20 percent of the original funding level agreed to by MARAD. Cost overruns will be the obligation of the M&R participant unless MARAD determines that it is fair to reimburse the M&R participant and sufficient funds are available to do so.

(iv) Payment of MARAD's share of the shipyard contract price may be made as work progresses or upon completion of the M&R and finalization of costs, as MARAD may determine. Vouchers for payment may be submitted to the Associate Administer for Marine Asset Development. Payments shall be paid and processed under the terms and conditions of the Prompt Payment Act, 31 U.S.C. 3901. However, pursuant to 31 U.S.C. 3902(f), interest on late payments will be paid only if appropriated funds for paying reimbursement under the M&R Pilot Program are available.

[72 FR 5344, Feb. 6, 2007]

# SUBCHAPTER D—VESSEL FINANCING ASSISTANCE

## PART 298—OBLIGATION GUARANTEES

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AUTHORITY: 46 App. U.S.C. 1114(b), 1271 *et seq.*; 49 CFR 1.66.

SOURCE: 65 FR 45152, July 20, 2000, unless otherwise noted.

## Subpart A—Introduction

### § 298.1 Purpose.

This part prescribes regulations implementing Title XI of the Merchant Marine Act, 1936, as amended, governing Federal ship financing assistance (46 App. U.S.C. 1271 *et seq.*). This part uses "you" and "we" throughout. You and your refer to the applicant for Title XI financing assistance unless we note or imply otherwise. We, us, and our refer to the Maritime Administration, the Secretary of the Maritime Administration, or the Secretary of Transportation, as applicable.

### § 298.2 Definitions.

For the purpose of this part:

*Act* means the Merchant Marine Act, 1936, as amended (46 App. U.S.C. 1101 through 1294).

*Actual Cost of a Vessel or Shipyard Project* means, as of any specified date, the aggregate, as determined by us, of all amounts paid by or for the account of the Obligor on or before that date and all amounts which the Obligor is then obligated to pay from time to time thereafter, for the construction, reconstruction or reconditioning of such Vessel or Shipyard Project.

*Advanced Shipbuilding Technology* means:

(1) Numerically controlled machine tools, robots, automated process control equipment, computerized flexible manufacturing systems, associated computer software, and other technology for improving shipbuilding and related industrial production which advance the state-of-the-art; and

(2) Novel techniques and processes designed to improve shipbuilding quality, productivity, and practice, and to

promote sustainable development, including engineering design, quality assurance, concurrent engineering, continuous process production technology, energy efficiency, waste minimization, design for recyclability or parts reuse, inventory management, upgraded worker skills, and communications with customers and suppliers; and

(3) Other elements contributing to a shipyard's efficiency or productivity assisting it to more effectively operate in the shipbuilding industry.

*Citizen of the United States* means a person who, if an individual, is a Citizen of the United States by birth, naturalization or as otherwise authorized by law or, if other than an individual, meets the requirements of Section 2 of the Shipping Act, 1916, as amended (46 App. U.S.C. 802), as further described at 46 CFR 221.3(c).

*Closing* means a meeting of various participants or their representatives in a Title XI financing, at which a commitment to issue Guarantees is executed, or at which all or part of the Obligations are authenticated and issued and the proceeds are made available for a purpose set forth in section 1104(a) of the Act, or at which a Vessel is delivered and a Mortgage is executed as security to us or a Shipyard Project is completed and a Mortgage or other security is executed to us.

*Commitment Closing* means a meeting of various participants or their representatives in a Title XI financing at which a commitment to issue Guarantees is executed and the forms of the Obligations and the related Title XI documents are also either agreed upon or executed.

*Depository* means the U.S. Department of Treasury, acting in its capacity under Section 1109 of the Act.

*Depreciated Actual Cost of a Vessel or Shipyard Project* means the Actual Cost of the Vessel or Shipyard Project, as defined in this section (less a residual value of 2½ percent of United States shipyard construction cost or, in the case of Shipyard Project, a residual value as appropriate), depreciated on a straightline basis over the useful life of the Vessel or Shipyard Project as determined by us, not to exceed twenty-five years from the date the Vessel or Shipyard Project was delivered by the shipbuilder or manufacturer or, if the Vessel or Shipyard Project has been reconstructed or reconditioned, the Actual Cost of the Vessel or Shipyard Project depreciated on a straightline basis from the date the Vessel or Shipyard Project was delivered by the shipbuilder or manufacturer to the date of such reconstruction or reconditioning, on the basis of the original useful life of the Vessel or Shipyard Project, and from the date of said reconstruction or reconditioning on a straightline basis and on the basis of a useful life of the Vessel or Shipyard Project determined by us, plus all amounts paid or obligated to be paid for the reconstruction or reconditioning, depreciated on a straightline basis and on the basis of a useful life of the Vessel or Shipyard Project determined by us.

*Documentation* means all or part of the agreements relating to an entire Title XI financing which must be furnished to us, irrespective of whether we are a party to each agreement.

*Eligible Export Vessel* means a Vessel constructed, reconstructed, or reconditioned in the United States for use in world-wide trade which will, upon delivery or redelivery, be placed under or continued to be documented under the laws of a country other than the United States.

*Eligible Shipyard* means a private shipyard located in the United States.

*General Shipyard Facility* means:

(1) For operations on land, any structure or appurtenance thereto designed for the construction, repair, rehabilitation, refurbishment, or rebuilding of any Vessel, including graving docks, building ways, ship lifts, wharves and pier cranes; the land necessary for any structures or appurtenances; and equipment necessary for the performance of any function referred to in this definition; and

(2) For operations other than on land, any Vessel, floating drydock, or barge constructed in the United States, within the meaning of §298.11(a), and used for, or a type that is usually used for, activities referred to in paragraph (1) of this definition.

*Guarantee* means the contractual commitment of the United States of America, represented by us, endorsed on each Obligation, to make payment

to the Obligee or an agent, upon demand, of the unpaid interest on, and the unpaid balance of the principal of such Obligation, including interest accruing between the date of default and the date of payment.

*Guarantee Fee* means the fee payable to us in consideration for the issuance of the Guarantees.

*Indenture Trustee* means a bank with corporate trust powers, or a trust company, with a capital and surplus of at least $25,000,000, which is located in and organized and doing business under the laws of the United States, any State or territory thereof, the District of Columbia or the Commonwealth of Puerto Rico, which has duties under the terms of a Trust Indenture, entered into with the Obligor, providing for the issuance and registration of the ownership and transfer of Obligations, the disbursement of funds held in trust by the Indenture Trustee for the redemption and payment of interest and principal with respect to Obligations, demands by the Indenture Trustee for payment under the Guarantees in the event of default and the remittance of payments received to the Obligees. Pursuant to our specific authorization, the Indenture Trustee may also authenticate the Guarantees.

*Letter Commitment* means a letter from us to you, setting forth specific determinations made by us with respect to your proposed project, as required by the Act and regulations of this part, and stating our commitment to execute Guarantees, subject to compliance by you with any conditions specified therein.

*Maritime Administration* means the agency created within the Department of Transportation by Reorganization Plan No. 21 of 1950 (64 Stat. 1273), amended by Reorganization Plan No. 7 of 1961 (75 Stat. 840), as amended by Public Law 91–469 (84 Stat. 1036).

*Modern Shipbuilding Technology* means a technology to be introduced into the shipyard that is comprised of the best available proven technology, techniques, and processes appropriate to advancing the state-of-the-art of the applicant shipyard, or exceeds the best available processes of American shipbuilding, and that will enhance its productivity and make it more competitive internationally.

*Mortgage* means a first Preferred Mortgage on any Vessel or a first mortgage with respect to a Shipyard Project.

*Obligation* means any note, bond, debenture, or other evidence of indebtedness, as defined in section 1101(c) of the Act, issued for one of the purposes specified in section 1104(a) of the Act.

*Obligee* means the holder of an Obligation.

*Obligor* means any party primarily liable for payment of principal of or interest on any Obligation.

*Paying Agent* means any Person appointed by the Obligor to pay the principal of or interest on the Obligations on behalf of the Obligor.

*Person* means any individual, estate, foundation, corporation, partnership, limited partnership, joint venture, association, joint-stock company, trust, unincorporated organization or other acceptable legal business entity, government, or any agency or political subdivision thereof.

*Preferred Mortgage* means:

(1) In the case of a mortgage on a Vessel documented under United States law, whenever made, a mortgage that—

(i) Includes the whole of a Vessel;

(ii) Is filed in substantial compliance with 46 U.S.C. 31321;

(iii) Covers a documented Vessel or a Vessel for which an application for documentation has been filed that is in substantial compliance with the requirements of 46 U.S.C. Ch. 121 and the regulations prescribed under that Chapter by the United States Coast Guard; and

(iv) Is otherwise in compliance with the provisions of Chapter 313 of Title 46 of the U.S. Code.; and

(2) In the case of a mortgage on an Eligible Export Vessel, whenever made, a mortgage that—

(i) Constitutes a mortgage that is established as security on an Eligible Export Vessel under the laws of a foreign country;

(ii) Was executed under the laws of that foreign country and under which laws the ownership of the Vessel is documented;

(iii) Is registered under the laws of that foreign country in a public register at the port of registry of the Vessel or at a central office;

(iv) Otherwise satisfies the requirements of 46 U.S.C. 31301(6)(B) to constitute a Preferred Mortgage; and

(v) Has us as the mortgagee, or such other mortgagee as is permitted by the applicable foreign law and approved by us.

*Related Party* means as that term is defined by generally accepted accounting principles outlined in paragraph 24 of Statement of Financial Accounting Standards No. 57, Related Party Disclosures.

*Secretary* means the Secretary of Transportation, acting by and through the Maritime Administrator, Department of Transportation, the Maritime Administrator or any official of the Maritime Administration to whom is duly delegated the authority, from time to time, to perform the functions of the Secretary of Transportation or the Maritime Administrator, Department of Transportation.

*Secretary's Note* means a promissory note from the Obligor to the Secretary in an amount equal to the aggregate amount of the Obligations, which is issued simultaneously with the Guarantees.

*Security Agreement* means the primary contract between the Obligor and the Secretary, providing for the transfer to the Secretary by the Obligor of all right, title and interest of the Obligor in certain described property (including rights under contracts in existence or to be entered into), and containing other provisions relating to representations and responsibilities of the Obligor to the Secretary as security for the issuance of Guarantees.

*Shipyard Project* means Advanced Shipbuilding Technology and Modern Shipbuilding Technology or both unless otherwise specified.

*Vessel* means all types of vessels, whether in existence or under construction, including passenger, cargo and combination passenger-cargo carrying vessels, tankers, towboats, barges and dredges which are or will be documented under the laws of the United States, floating drydocks which have a capacity of at least thirty-five thousand or more lifting tons and a beam of one hundred and twenty-five feet or more between the wing walls and oceanographic research or instruction or pollution treatment, abatement or control vessels, which are owned by citizens of the United States; except that an Eligible Export Vessel will not be documented under the laws of the United States.

[65 FR 45152, July 20, 2000, as amended at 67 FR 61282, Sept. 30, 2002]

## § 298.3 Applications.

(a) *Process and certification.* When you apply for a commitment to execute Guarantees, you must:

(1) Complete Form MA–163 and send it to the Secretary, Maritime Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. [Note: MARAD will accept electronic options (such as facsimile and Internet) for transmission of required information (excluding closing documents and documents submitted in connection with defaults) to MARAD, if practicable.]

(2) Certify the application in the manner that Form MA 163 prescribes.

(b) *Required information.* You must include all required information on Form MA 163 or in attached exhibits and schedules submitted with the application. You must also include the following regarding the Vessel or Vessels, if applicable:

(1) Any demise charters,

(2) Time charters in excess of six months,

(3) Contracts of affreightment,

(4) Drilling contracts, and/or

(5) Other contractual arrangements.

(c) *Declaration of Lobbying form.* You must also file the Declaration of Lobbying form as required by 31 U.S.C. 1352 with the initial application as part of the formal submission.

(d) *Attachments.* Each exhibit, schedule, and attachment must contain a statement, on the first page clearly identifying the document as an attachment to the application. You must state on each attachment the:

(1) Name of the applicant; and

(2) Date of the application.

(e) *Amendment.* You must mark "Amendment," on any amendment of data contained in the application. Each

first page must contain a statement clearly identifying the document as an amendment to your application and must include the:

(1) Name of the applicant;

(2) Date of application; and

(3) Certification required on Form MA 163.

(f) *Application time schedule.* You must submit each application to us at least four (4) months prior to the anticipated date by which you require a Letter Commitment.

(1) We may consider applications with less than four (4) months notice, prior to the anticipated date by which you require a Letter Commitment, if you submit written documentation to us that extenuating circumstances exist.

(2) During the first fifteen (15) calendar days after you submit your application, we will preliminarily review your application for adequacy and completeness.

(i) If we find that your application is incomplete, or if we require additional data, we will notify you promptly in writing, and you will have fifteen (15) calendar days, from the date of each request for additional information, to correct deficiencies.

(ii) If you have not corrected the deficiencies or have not made substantial progress toward correcting them, within the 15 calendar days, then we may terminate the processing of your application without prejudice.

(3) Once we consider your Title XI application complete, we will act on the application within a period of 60 calendar days, unless for good cause, we find it necessary to extend the 60 day period.

(4) If you do not complete your application and we do not act upon your application within four (4) months from the submission date, unless we extend the time period, we will notify you in writing that processing of the application is terminated and that you may reapply at a later date.

(i) If we terminate your application without prejudice, we will not require you to pay a new filing fee for a later application for a similar project that you file within one year of the termination date.

(ii) If you submit an application for a substantially different project, you must pay a new filing fee. We will determine whether the application is substantially different on a case-by-case basis.

(5) If we issue you a Letter Commitment, you must submit two (2) sets of the Closing documentation to us for review at least six (6) weeks prior to the anticipated Closing. The six weeks time period will give us time to complete an adequate review of the documentation. You must use our standard form of documentation.

(g) *Degrees of risk.* When processing applications, we will consider the different degrees of risk involved with different applications.

(h) *Additional assurances.* Before we approve your application, we may require additional assurances if you are not a well established firm with strong financial qualifications and strong market shares seeking financing guarantees for replacement vessels in an established market in which projected demand exceeds supply. The additional assurances may include:

(1) Firm charter commitments;

(2) Parent company guarantees;

(3) Greater equity participation;

(4) Private financing participation;

(5) Security interest on other property; and

(6) Similar arrangements to any of these additional assurances.

(i) *Filing Fee.* When you submit your application, you must include a $5,000 filing fee, which will be non-refundable, irrespective of whether we issue a Letter Commitment. However, the $5,000 filing fee is credited toward the investigation fee described in § 298.15(b).

(j) *Confidential Information.* (1) If we receive a request for release of your information, we will notify you. If you believe that your application, including attachments, contains information you consider to be trade secrets or commercial or financial information and privileged or confidential, or otherwise exempt from disclosure under the Freedom of Information Act (FOIA) (5 U.S.C. 552), you may assert a claim of confidentiality. When submitting your application, you should mark "Confidential" on the pages that you

consider confidential. The same requirement applies to any amendment to the application.

(2) *FOIA requests.* We will apply the procedures contained in the Department of Transportation's regulations at 49 CFR 7.17 regarding FOIA requests for information that the submitter has designated as confidential. We will consider your claim of confidentiality at the time someone requests the information under FOIA.

(3) *Statement of objections.* If we receive a request for release of your information, we will notify you. We will give you a reasonable period of time to give us a written, detailed statement explaining your objections to our release of the information. We will not give you notice if:

(i) We determine that we should not disclose the information;

(ii) The information has been lawfully published or made available to the public; or

(iii) Law (other than 5 U.S.C. 552) requires us to disclose the information.

(4) *Our notification of intent to disclose.* If your objections to release of the information do not persuade us, we will notify you of our intent to disclose in a reasonable number of days before we intend to disclose the information. The written notice will include:

(i) A statement explaining our reasons for not accepting the submitter's disclosure objections;

(ii) A description of the business information that we will disclose; and

(iii) A specific disclosure date.

(k) *Priority.* We will give priority for processing applications to:

(1) Vessels capable of serving as a United States naval and military auxiliary in time of war or national emergency,

(2) Requests for financing construction of equipment or vessels less than one year old as opposed to the refinancing of existing equipment or vessels that are one year old or older,

(3) Any applications involving the purchase of vessels currently financed under Title XI if the purpose is to process the assumption of the obligations,

(4) Applications from those willing to take guarantees for less than the normal term for that class of vessel.

(5) *Eligible Export Vessels.* We may issue a commitment to guarantee Obligations for an Eligible Export Vessel if we determine, in our sole discretion, that the issuance of a commitment to guarantee Obligations for an Eligible Export Vessel will not cause us to deny an economically sound application to issue a commitment to guarantee Obligations for vessels documented under the laws of the United States operating in the domestic or foreign commerce of the United States, after considering:

(i) The status of pending applications for commitments to guarantee obligations for vessels documented under the laws of the United States and operating or to be operated in the domestic or foreign commerce of the United States;

(ii) The economic soundness of the applications referred to in paragraph (k)(5)(i) of this section; and

(iii) The amount of guarantee authority available.

(Unless indicated otherwise in this part 298, information collection requirements have been approved by the Office of Management and Budget under control number 2133–0018.)

[65 FR 45152, July 20, 2000, as amended at 68 FR 62538, Nov. 5, 2003; 69 FR 61451, Oct. 19, 2004]

## Subpart B—Eligibility

### § 298.10 Citizenship.

(a) *Applicability.* Before you receive a legal or beneficial interest in a Vessel financed under Title XI of the Act which is operating in or will be operated in the U.S. coastwise trade, you and any other Person, (including the shipowner and any bareboat charterer), must establish your United States citizenship, within the definition of "Citizen of the United States" in § 298.2.

(b) *Prior to Letter Commitment.* Before we issue the Letter Commitment, you and any Person identified in paragraph (a) of this section, who is required to establish United States citizenship must establish United States citizenship in the form and manner stated in 46 CFR part 355.

(c) *Commitment Closing.* (1) Within 10 days before every Commitment Closing, unless we waive this requirement for good cause, you and all Persons identified with the project who have

previously established United States citizenship in accordance with paragraphs (a) and (b) of this section, must submit pro forma Supplemental Affidavits of Citizenship which we have approved for Closing as to form and substance, and

(2) On the date of the Closing, three (3) executed copies of Supplemental Affidavits of Citizenship that:

(i) Show evidence of the continuing United States citizenship of the Persons in paragraph (a) of this section; and

(ii) Bear the date of the Closing.

(d) *Additional information.* If we request additional material essential to clarify or support evidence of U.S. citizenship, you, the Obligor, or any Person identified in paragraph (a) of this section must submit the additional information.

(Approved by the Office of Management and Budget under control number 2133–0012)

### § 298.11 Vessel requirements.

When you apply for a Guarantee, the Vessel for which you intend to receive financing for construction, reconstruction, or reconditioning must meet the following criteria:

(a) *United States Construction.* A Vessel, including an Eligible Export Vessel, financed by an Obligation Guarantee must be constructed in the United States. United States construction means that the Vessel is assembled in a shipyard geographically located within the United States.

(1) A U.S.-flag Vessel must meet the applicable United States Coast Guard requirements.

(2) An Eligible Export Vessel must be constructed in accordance with the requirements of the International Maritime Organization and must meet the applicable:

(i) Laws, rules, and regulations of its country of documentation,

(ii) Treaties, conventions on international agreements to which that country is a signatory, and

(iii) Laws of the ports it serves.

(b) *Actual Cost.* We must approve your estimated Actual Cost for the construction, reconstruction, or reconditioning of a Vessel as a condition for issuance of the Letter Commitment. The estimated cost of the Vessel may include escalation for the anticipated construction period of the Vessel. We may contact the shipyard directly and may require you to have the shipyard that has contracted to build the Vessel to submit additional technical data, backup cost details, and other evidence if we have insufficient data.

(c) *Class, condition, and operation.* The Vessel must be constructed, maintained, and operated so as to meet the highest classification, certification, rating, and inspection standards for vessels of the same age and type imposed by:

(1) The American Bureau of Shipping (ABS), or

(2) Another classification society that also meets the inspection standards of the United States Coast Guard with respect to the documentation of U.S.-flag vessels, or

(3) In the case of an Eligible Export Vessel, such standards as may be imposed by a member of the International Association of Classification Societies (IACS), classification societies to be ISO 9000 series registered or Quality Systems Certificate Scheme qualified IACS members who have been recognized by the United States Coast Guard as meeting acceptable standards with such recognition including, at a minimum, that the society meets the requirements of IMO Resolution A.739(18) with appropriate certificates required at delivery, so long as the home country of the IACS member accords equal reciprocity, as determined by us, to United States classification societies.

(4) Except in the case of an Eligible Export Vessel, the Vessel must be in compliance with all applicable laws, rules, and regulations as to condition and operation, including, but not limited to, those administered by the:

(i) United States Coast Guard,

(ii) Environmental Protection Agency,

(iii) Federal Communications Commission,

(iv) Public Health Service, or

(v) Their respective successor agencies, and

(vi) All applicable treaties and conventions to which the United States is a signatory, including, but not limited to, the International Convention for Safety of Life at Sea.

(d) *Documentation.* (1) An Eligible Export Vessel must be documented in a country that is party to the International Convention for Safety of Life at Sea, or other treaty, convention, or international agreement governing vessel inspection to which the United States is a signatory, and must comply with the applicable laws, rules, and regulations of its country of documentation, all applicable treaties, conventions on international agreements to which that country is a signatory, and the laws of the ports it serves.

(2) All other Eligible Vessels must be documented under U.S. registry.

(e) *Reconstruction or reconditioning.* Repairs necessary for the Vessel to meet the classification standards approved by us, or any regulatory body, or for previous inadequate maintenance and repair, will not constitute reconstruction or reconditioning within the meaning of this paragraph.

(f) *Condition survey.* If your application involves a reconstructed or reconditioned Vessel, you must make the Vessel available at a time and place acceptable to us so that we may conduct a condition survey. You must:

(1) Pay the cost of the condition survey.

(2) Ensure that the scope and extent of the condition survey will not be less effective than that required by the last ABS special survey completed (if the Vessel is classified), next due or overdue, whichever date is nearest in accordance with the Vessel's age.

(3) Ensure that the Vessel meets the standard of the survey necessary for retention of class (if the Vessel is classified), and

(4) Ensure that the operating records of the Vessel reflect normal operation of the Vessel's main propulsion and other machinery and equipment, consistent with accepted commercial experience and practice.

(g) *Metric Usage.* Our preferred system of measurement and weights for Vessels and Shipyard Projects is the metric system.

### § 298.12 Applicant and operator's qualifications.

(a) *Operator's qualifications.* We will not issue a Letter Commitment without a prior determination that you, the bareboat charterer, or other Person identified in the application as the operator of the Vessel(s) or Shipyard Project, possesses the necessary experience, ability and other qualifications to properly operate and maintain the Vessel(s) or Shipyard Project which serve as security for the Guarantees. You must also comply with all requirements of this part.

(b) *Identity and ownership of applicant.* In order for us to assess the likelihood that the project will be successful, we need information about you and the proposed project. To permit this assessment, you must provide the following information in your application for Title XI guarantees:

(1) *Incorporated companies.* If you or any bareboat charterer is an incorporated company, you must submit the following identifying information:

(i) Name of company, place and date of incorporation, and tax identification number, or if appropriate, international identification number of the company;

(ii) Address of principal place of business; and

(iii) Certified copy of certificate of incorporation and bylaws.

(2) *Partnerships, limited partnerships, limited liability companies, joint ventures, associations, unincorporated companies.* If you or any bareboat charterer is a partnership, limited partnership, limited liability company, joint venture, association, or unincorporated company, you must submit the following identifying information:

(i) Name of entity, place and date of formation, and tax identification number, or if appropriate, international identification number of entity;

(ii) Address of principal place of business; and

(iii) Certified copy of certificate of formation, partnership agreement or other documentation forming the entity.

(3) *Other entities.* For any entity that does not fit the descriptions in paragraphs (b)(1) and (b)(2) of this section, we will specify the information that the entity must submit regarding its identity and ownership.

(4) You and any bareboat charterer must provide a brief statement of the

general effect of each voting agreement, voting trust or other arrangement whereby the voting rights of any interest in you or the bareboat charterer are controlled or exercised by any person who is not the holder of legal title to such interest.

(5) You and any bareboat charterer must provide the following information regarding the entity's officers, directors, partners or members:

(i) Name and address;

(ii) Office or position; and

(iii) Nationality and interest owned (for example, shares owned and whether voting or non-voting).

(c) *Business and affiliations of applicants.* You must include:

(1) A brief description of your principal business activities during the past five years.

(2) A list of all business entities that directly or indirectly, through one or more intermediaries, control, are controlled by, or are under common control with you.

(3) The nature of the business transacted by each listed entity and the relationship between these entities. This information may be presented in the form of a chart.

(4) Whether any of the affiliated entities have previously applied for or received Title XI assistance.

(5) A statement indicating whether the applicant, any predecessor or affiliated entity has been in bankruptcy or reorganization under any insolvency or reorganization proceeding and if so, give details.

(6) A statement indicating whether the applicant or any predecessor or affiliated entity is now, or during the past five years has been, in default under any agreement or undertaking with others or with the United States of America, or is currently delinquent on any Federal debt, and if so, provide explanatory information.

(7) A list of your banking references:

(i) Principal bank(s) or lending institutions(s)—name and address;

(ii) Nature of relationship; and

(iii) Individual references—name(s), telephone and fax number of banking officer(s).

(d) *Management of applicant.* You must include:

(1) A brief description of the principal business activities during the past five years of each officer, director, partner or member you listed in paragraph (b)(5) of this section and if these persons (have) act(ed) as executive officers in other entities, indicate the names of these entities and whether such entities have defaulted on any U.S. Government debt, and

(2) The name and address of each organization engaged in business activities which have a direct financial relationship to those carried on or to be carried on by you with which any person listed in paragraph (d)(1) of this section has any present business connection, the name of each such person and, briefly, the nature of such connection.

(e) *Applicant's property and activity.* You must provide:

(1) A brief description of the general character and location of the principal assets employed in your business and those of your affiliate, other than vessels. Describe financial encumbrances, if any;

(2) A general description of the vessels currently owned and/or operated by you or your affiliates and a description of the areas of operation; and,

(3) In the case of an Eligible Shipyard which is an applicant for a guarantee for a Shipyard Project, a brief description of the general character (that is, the number of building ways, launch method, drydocks and size) and location (that is, water depth, length of riverfront) of the principal properties of the applicant employed in its business. You must also describe any financial encumbrances.

(f) *Operating ability.* (1) You must submit a detailed statement showing your ability to successfully operate the financed Vessel(s).

(2) If a company other than you will operate the Vessel(s), then the information in paragraph (f)(1) of this section must be provided for the operating company together with a copy of the operating agreement.

(3) You must submit a copy of any management agreement(s) between you and any related or unrelated organization(s) which will affect the management of the Title XI Vessel or shipyard.

(4) In the case of an Eligible Shipyard, which is an applicant for a guarantee for a Shipyard Project, a detailed statement must be submitted showing your ability to successfully operate the Shipyard Project and construct/reconstruct Vessels, including name, education, background of, and licenses held by, all senior supervisory personnel concerned with the physical operation of the Shipyard Project.

(5) Where an operator has an historical performance record, we will consider this record in evaluating your operating ability. For newly formed entities, we will evaluate the performance of affiliates and/or companies associated with the principals (where the principals have a significant degree of control) in determining your operating ability. However, unless the affiliates or principals have an obligation with respect to the debt, we will not consider historical performance in evaluating your creditworthiness.

**§ 298.13 Financial requirements.**

(a) *In general.* To be eligible for guarantees, you and/or your parent organization (when applicable), and any other participants in the project having a significant financial or contractual relationship with you must submit information, respectively, on their financial condition. You must submit this information at the time of the application. You must supplement this information if we require it in subsequent requests. You must submit information satisfactory to us to show that financial resources are available to support the Title XI project.

(b) *Cost of the project.* You must submit the following cost information with respect to the project:

(1) *Vessel financing Guarantees.* A detailed statement of the estimated Actual Cost of construction, reconstruction, or reconditioning of the Vessel(s) including those items which would normally be capitalized as Vessel construction costs. Net interest during construction is the total estimated construction period interest on non-equity funds less estimated earnings from the escrow fund, if such fund is to be established prior to Vessel(s) delivery.

(2) *Foreign components.* (i) You must exclude each item of foreign components and services from Actual Cost, unless we specifically grant a waiver for the item. We will not grant a waiver for major foreign components of the hull and superstructure.

(ii) In deciding whether to grant a waiver for foreign components and services, we will consider your certification, to be reviewed by us, stating that:

(A) A foreign item or service is not available in the United States on a timely or price-competitive basis, or

(B) The domestic item or service is not of sufficient quality.

(iii) Although excluded from Actual Cost, foreign components of the hull and superstructure can be regarded as owner-furnished equipment that may be used in satisfying your equity requirements imposed by paragraph (f) of this section.

(3) *Costs incurred by written contracts.* If any of the costs have been incurred by written contracts such as shipyard contract, management or operating agreement, you should forward signed copies with the application. We may require you to have the contracting shipyard submit back-up cost details and technical data. You must submit this information in the format given in the Title XI application procedures.

(4) *Shipyard Project.* In the case of Shipyard Project, a detailed statement of the actual cost of such technology, including those items which would normally be capitalizable. If you incurred any of the costs through written contracts, you should forward signed copies of the contract with the application. We may require you to have manufacturers submit back-up cost details and technical data. You must submit this information in the format given in the Title XI application procedures.

(5) *Shore facilities, cargo containers, etc.* A detailed statement showing the actual cost of any shore facilities, cargo containers, etc., required to be purchased in conjunction with the project.

(6) *Additional project costs.* A detailed statement showing any other costs associated with the project which were not included in paragraphs (b)(1) through (5) of this section, such as:

(i) Legal and accounting fees;

(ii) Printing costs;

(iii) Vessel insurance;

(iv) Underwriting fees;

(v) Fee to a Related Party; and

(vi) Other fees.

(7) *Request for Actual Cost Approval and Reimbursement.* If the project involves refinancing, you must also submit the exhibit entitled Request for Actual Cost Approval and Reimbursement, its summary sheet and supplemental schedules at the time of filing the application.

(c) *Financing.* (1) You must:

(i) Describe, in detail, how the costs of the project (sums referred to in paragraph (b) of this section) will be funded and the timing of such funding.

(ii) Include any vessel trade-ins, related or third party financings, etc.

(iii) Provide the proposed terms and conditions of all private funding, from both equity and debt sources and clearly identify all parties involved.

(iv) Obtain our approval of the terms and conditions for co-financing (involving a blend of Title XI and private financing for the debt portion), including the ability of the co-financiers to exercise their rights against collateral shared with us for any transaction.

(v) Demonstrate with financial statements that at least 12½ percent, or 25 percent as applicable, of the construction or reconstruction costs of the Vessel(s) or the cost of the Shipyard Project will be in the form of equity and not additional debt, except to the extent allowed by paragraph (h) of this section.

(vi) Disclose all of the Vessel(s), Shipyard Project financing in the format given in the Title XI application procedures.

(2) *Financial Information.* You must provide us with financial statements, prepared in accordance with U.S. generally accepted accounting principles (GAAP), and include notes that explain the basis for arriving at the figures except that for Eligible Export Vessels, your financial statements must be in accordance with GAAP if formed in the U.S., or reconciled to GAAP if formed in a foreign country unless a satisfactory justification is provided explaining the inability to reconcile. The financial statements must include the following [Note: MARAD will accept electronic options (such as facsimile and Internet) for transmission of required information to MARAD, if practicable.]:

(i) The most recent financial statements for you, your parent company and other significant participants, as applicable (year end or intermediate), and the three most recent audited statements with details of all existing debt. If you are a new entity and are to be funded from or guaranteed by external source(s), you must provide such statements for such source(s);

(ii) Your pro forma balance sheet and that of any guarantor (if applicable) as of the estimated date of execution of the Guarantees reflecting the assumption of the Title XI Obligations, including the current liability; and

(iii) Your pro forma balance sheets and that of the guarantor (if applicable) for five years after the Closing.

(Approved by the Office of Management and Budget under control number 2133–0005)

(d) *Financial definitions.* For the purpose of this section and §§ 298.35 and 298.42 of this part:

(1) "Company" means any Person subject to financial requirements imposed under paragraph (f) of this section and in § 298.35, as well as the reporting requirements imposed by § 298.42.

(2) "Working Capital" means the excess, if any, of current assets over current liabilities, both determined in accordance with GAAP and adjusted as follows:

(i) In determining current assets you must exclude:

(A) Any securities, obligations or evidence of indebtedness of a Related Party or of any stockholder, director, officer or employee (or any member of his family) of the Company or of such Related Party, except advances to agents required for the normal current operation of the Company's vessels and current receivables arising out of the ordinary course of business and not outstanding for more than 60 days; and

(B) An amount equal to any excess of unterminated voyage revenue over unterminated voyage expenses.

(ii) In determining current liabilities, you must deduct any excess of unterminated voyage expenses over unterminated voyage revenue and add

one half of all annual charter hire and other lease obligations (having a term of more than six months) due and payable within the succeeding fiscal year, other than charter hire and such other lease obligations already included and reported as a current liability on the Company's balance sheet.

(3) "Equity" or "net worth" means, as of any date, (the total of paid-in-capital stock, paid-in surplus, earned surplus and appropriated surplus,) and all other amounts that would be included in net worth in accordance with GAAP, but does not include:

(i) Any receivables from any stockholder, director, Officer or employee (or their family) of the Company or from any Related Party (other than current receivables arising out of the ordinary course of business and not outstanding for more than 60 days), and

(ii) Any increment resulting from the reappraisal of assets.

(4) "Long-Term Debt" means, as of any date, the total notes, bonds, debentures, equipment obligations and other evidence of indebtedness that would be included in long term debt in accordance with GAAP. You must include any guarantee or other liability for the debt of any other Person not otherwise included on the balance sheet.

(5) "Capitalizable Cost" means the aggregate of the Actual Cost of the Vessel or Shipyard Project and those other items which customarily would be capitalized as Vessel costs or Shipyard Project costs under GAAP.

(6) "Depreciated Capitalizable Cost" means the Capitalizable Cost of a Vessel or Shipyard Project, depreciated on a straightline basis over the same useful life as determined by us for Actual Cost, and depreciated as required by § 298.21(g).

(e) *Applicability*. The financial resources must be adequate to meet the Equity requirements in the project and Working Capital requirements, as set forth in paragraph (f) of this section.

(1) The various financial requirements shall be met by the owner of the Vessel or Vessels or Shipyard Project to be security to us for the Guarantees, except that if the owner is not the operator, the overall financial requirements will be allocated among the owner, the operator and other parties as determined by us.

(2) The Company must satisfy the applicable financial requirements, in addition to any other financial requirements already imposed or which may be imposed upon it in connection with other Vessels financed under the Title XI program or in connection with other Shipyard Project financed under the Title XI program.

(3) A determination as to whether the Company has satisfied all financial requirements shall be based on the assumption that the projected financing has been completed. Accordingly, you must submit:

(i) A pro forma balance sheet at the time of the application, reflecting any adjustment made pursuant to paragraph (f)(1)(i) of this section, and

(ii) A revised pro forma balance sheet, reflecting the completion of the projected financing, at least five business days before the first Closing at which the Obligations are issued.

(f) *Financial requirements at Closing.* Financial requirements can apply to one or more Companies, and are determined as follows:

(1) Owner as operator. Where the owner is to be the Vessel operator, minimum requirements at Closing usually are as follows:

(i) Working Capital. The Company's Working Capital shall not be less than one dollar. This Working Capital requirement is based on the premise that the Company engages in a service-type activity with only normal vessel inventory. If Working Capital includes other inventory, in addition to such normal Vessel inventory, we may adjust the requirement as appropriate. Also, if we determine that the Company's Working Capital includes amounts receivable that it reasonably could not expect to collect within one year, we may make adjustments to the Working Capital requirements.

(ii) Long-Term Debt. The Company's Long-Term Debt must not be greater than twice its Equity.

(iii) Equity (net worth). The Company's Equity must be:

(A) The greater of:

*(1)* 50 percent of its Long-Term Debt; or

*(2)* 90 percent of its Equity as shown on the last audited balance sheet, dated not earlier than six months before the date of issuance of the Letter Commitment; or

(B) Such other amount as may be specified by us.

(2) Lessee or charterer as operator. Where a lessee or charterer is to be the Vessel operator, minimum requirements at Closing usually are as follows:

(i) Working Capital. The operator's Working Capital requirement will be the same as that which would have otherwise been imposed on the owner as operator under paragraph (f)(1)(i) of this section and based on the same premise stated in that paragraph.

(ii) Long-Term Debt. The operator's Long-Term Debt will be the same as that which would have otherwise been imposed on the owner as operator under paragraph (f)(1)(ii) of this section.

(iii) Equity (net worth). The operator's equity requirement will be the same as that which would have otherwise been imposed on the owner as operator under paragraph (f)(1)(iii) of this section.

(iv) The owner's Equity shall at least be equal to the difference between the Capitalizable Cost or Depreciated Capitalizable Cost of the Vessel (whichever is applicable) and the total amount of the Guarantees.

(3) Owner as General Shipyard Facility. Where the owner of Shipyard Project is a General Shipyard Facility, minimum requirements at Closing will be the same as those set forth in paragraph (f)(1) of this section for an owner as operator.

(g) *Adjustments to financial requirements at Closing.* If the owner, although not operating a Vessel, assumes any of the operating responsibilities, we may adjust the respective Working Capital and Equity requirements of the owner and operator, otherwise applicable under paragraph (f) of this section, by increasing the requirements of the owner and decreasing those of the operator by the same amount.

(h) *Subordinated debt considered to be Equity.* With our consent, part of the Equity requirements applicable under paragraphs (c) and (f) of this section may be satisfied by debt, fully subordinated as to the payment of principal and interest on the Secretary's Note and any claims secured as provided for in the Security Agreement or the Mortgage. Repayment of subordinated debt may be made only from funds available for payment of dividends or for other distributions, in accordance with requirements of the Title XI Reserve Fund and Financial Agreement (described in § 298.35). Such subordinated debt shall not be secured by any interest in property that is security for Guarantees under Title XI, unless the Obligor and the lender enter into a written agreement, satisfactory to us, providing, among other things, that if any Title XI financing or advance by us to the Obligor shall occur in the future, such security interest of the lender shall become subordinated to any indebtedness to us incurred by the Obligor and to any security interest obtained by us in that property or other property, with respect to the subsequent indebtedness.

(i) *Modified requirements.* We may waive or modify the financial terms or requirements otherwise applicable under this section and §§ 298.35 and 298.42, upon determining that there is adequate security for the Guarantees. We may impose similar financial requirements on any Person providing other security for the Guarantees.

[65 FR 45152, July 20, 2000, as amended at 68 FR 62538, Nov. 5, 2003; 69 FR 61451, Oct. 19, 2004]

### § 298.14 Economic soundness.

(a) *Economic Evaluation.* We shall not issue a Letter Commitment for guarantees unless we find that the proposed project, regarding the Vessel(s) or Shipyard Project for which you seek Title XI financing or refinancing, will be economically sound. The economic soundness and your ability to repay the Obligations will be the primary basis for our approval of a Letter Commitment. We will consider the value of the collateral for which we will issue the Obligations as only a secondary consideration in determining your ability to repay the Obligations.

(b) *Basic feasibility factors.* In making the economic soundness findings, we

shall consider all relevant factors, including, but not limited to:

(1) The need in the particular segment of the maritime industry for new or additional capacity, including any impact on existing equipment for which a guarantee under this title is in effect;

(2) The market potential for the employment of the Vessel or utilization of the Shipyard Project of a General Shipyard Facility over the life of the guarantee;

(3) Projected revenues and expenses associated with employment of the Vessel or utilization of the Shipyard Project of a General Shipyard Facility;

(4) Any charters, contracts of affreightment, transportation agreements, or similar agreements or undertakings relevant to the employment of the Vessel or utilization of the Shipyard Project of a General Shipyard Facility;

(5) For inland waterways, the need for technical improvements including but not limited to increased fuel efficiency, or improved safety; and

(6) Other relevant criteria.

(c) *Project Feasibility*. To demonstrate the economic feasibility of the project over the Guarantee period, you must submit the following information:

(1) *Purpose.* A detailed purpose for the obligations to be guaranteed.

(2) *Necessary exhibits.* Necessary exhibits to support your project feasibility as supplements to the application.

(3) *Relevant market information*. Information regarding the relevant market including a written narrative of the market (or potential market) for the project including full details on the following, as applicable:

(i) Nature and amount of cargo/passengers available for carriage and your projected share (provide also the number of units; that is containers, trailers, etc.);

(ii) Services or routes in which the Vessel(s) will be employed, including an itinerary of ports served, with the arrival and departure times, sea time, port time, hours working or idle in port, off hire days and reserve or contingency time, proposed number of annual sailings and number of annual working days for the Vessel(s) or, with respect to Shipyard Project, how the equipment will be employed;

(iii) Suitability of the Vessel(s) or Shipyard Project for their anticipated use;

(iv) Significant factors influencing your expectations for the future market for the Vessel(s) or Shipyard Project, for example, competition, government regulations, alternative uses, and charter rates; and

(v) Particulars of any charters, contracts of affreightment, transportation agreements, etc. You should supplement the narrative by providing copies of any marketing studies and/or supporting information (for instance, existing or proposed charters, contracts of affreightment, transportation agreements, and letters of intent from prospective customers).

(vi) The potential for purchasing existing equipment of a reasonable condition and age from another source, including information regarding:

(A) Market assessment concerning the availability and cost of existing equipment that may be an alternative to new construction or the new Shipyard Project;

(B) The cost of modification, reconditioning, or reconstruction of existing equipment to make it suitable for intended use; and

(C) Descriptions of any bids or offers which you had made to purchase existing equipment, especially Vessels which currently are financed with Title XI Obligations including date of offer, Vessels, and amount of offer.

(4) *Revenues.* A detailed statement of the revenues expected to be earned from the project based upon the information in paragraph (c) of this section. Vessel revenue projections shall include shipping/hire rates for current market conditions or market conditions expected to exist at the time of Vessel delivery taking into account seasonal or temporary fluctuations. The revenues shall be based on a realistic estimate of the Vessel(s) or the new Shipyard Project utilization rate and at a breakeven rate for the project. A justification for the utilization rate shall be supplied and should indicate the number of days per year allowed for maintenance, drydocking, inspection, etc.

(5) *Expenses for Vessel financing.* For applications for Vessel financing, a detailed statement of estimated Vessel expenses including the following (where applicable):

(i) Estimated Vessel daily operating expenses, including wages, insurance, maintenance and repair, fuel, etc. and a detailed projection of anticipated costs associated with long term maintenance of the Vessel(s) such as drydocking and major mid-life overhauls, with a time frame for these events over the period of the Guarantee;

(ii) If applicable, a detailed breakdown of those expenses associated with the Vessel(s) voyage, such as port fees, agency fees and canal fees that are assessed as a result of the voyage; and

(iii) A detailed breakdown of annual capital costs and administrative expenses, segregated as to:

(A) Interest on debt;

(B) Principal amortization; and

(C) Salaries and other administrative expenses (indicate basis of allocation).

(6) *Expenses for a Shipyard Project.* For applications for a Shipyard Project, a statement of estimated expenses related to the Shipyard Project, including the following (where applicable):

(i) A detailed breakdown of estimated daily operating expenses for the shipyard, such as wages, including staffing, and segregated as to straight-time, overtime and fringe benefits; utility costs; costs of stores, supplies, and equipment; maintenance and repair cost; insurance costs; and, other expenses (indicate items included); and

(ii) A detailed breakdown of annual capital costs and administrative expenses, segregated as to:

(A) Interest on debt;

(B) Principal amortization; and

(C) Salaries and other administrative expenses (indicate basis of allocation).

(7) *Forecast of Operations.* Utilizing the revenues and expenses provided in paragraphs (c)(4),(5) and (6) of this section, you shall provide a forecast of operating cash flow, as defined in paragraph (d)(4) of this section, for the Title XI project for the first full year of operations and the next four years. The cash flow statements should be footnoted to explain the assumptions used.

(d) *Objective Criteria.* We must make a finding of economic soundness as to each project based on an assessment of the entire project. In order for the project to receive approval, we must determine that a project meets the following criteria:

(1) The projected long-term demand (equal to length of time that you request financing) for the particular Vessel(s) or new Shipyard Project to be financed must exceed the supply of similar vessels or new shipyard project in the applicable markets. We will determine the supply of similar vessels and similar shipyard projects based on:

(i) Existing equipment,

(ii) Similar vessels or new shipyard project under construction, and

(iii) The projected need for new equipment in that particular segment of the maritime industry.

(2) We will base our determination of the project's economic soundness on the following:

(i) Conformity of your projections with our supply and demand analyses;

(ii) Availability of charters, letters of intent, outstanding contractual commitments, contracts of affreightment, transportation agreements or similar agreements or undertakings; and

(iii) Your existing market share compared with the market share necessary to meet projected revenues.

(3) In cases where market conditions are temporarily inadequate for you to service the Obligation indebtedness at the time of Vessel delivery, or completion of the Shipyard Project, we may approve your application only if you have sufficient outside sources of cash flow to service your indebtedness during this temporary period.

(4) With respect to the asset for which Obligations are to be issued, the operating cash flow to Obligation debt service ratio over the term of the Guarantee must be in excess of 1:1. Operating cash flow means revenues less operating and capital expenses including taxes paid but exclusive of interest, accrued taxes, depreciation and amortization for the Title XI asset. Debt service means interest plus principal.

### § 298.15 Investigation fee.

(a) *In general.* Before we issue a Letter Commitment, you shall pay us an

investigation fee. The Letter Commitment will state the fee which is based on the formula in paragraph (b) of this section.

(1) The investigation fee covers the cost of the investigation of the project described in the application and the participants in the project, the appraisal of properties offered as security, Vessel inspection during construction, reconstruction, or reconditioning (where applicable) and other administrative expenses.

(2) If, for any reason, we disapprove the application, you shall pay one-half of the investigation fees.

(b) *Base Fee.* (1) The investigation fee shall be one-half (½) of one percent on Obligations to be issued up to and including $10,000,000, plus

(2) One-eighth (⅛) of one percent on all Obligations to be issued in excess of $10,000,000.

(c) *Credit for filing fee.* You will receive credit for the $5,000 filing fee that you paid upon filing the original application (described in § 298.3) towards the investigation fee.

### § 298.16 Substitution of participants.

(a) You may request our permission to substitute participants to a Mortgage and/or Security Agreement in a financing that is receiving assistance authorized by Title XI of the Act.

(b) A non-refundable fee of $3,000 is due, payable at the time of the request. The fee defrays all costs of processing and reviewing a joint application by a mortgagor and/or Obligor and a proposed transferee of a Vessel or Shipyard Project, which is security for Title XI debt, if the proposed transferee is to assume the Mortgage and/or the Security Agreement.

### § 298.17 Evaluation of applications.

(a) In evaluating project applications, we shall also consider whether the application provides for:

(1) The capability of the Vessel(s) serving as a naval and military auxiliary in time of war or national emergency.

(2) The financing of the Vessel(s) within one year after delivery.

(3) The acquisition of Vessel(s) currently financed under Title XI by assumption of the total obligation(s).

(4) The Guarantees extend for less than the normal term for that class of vessel.

(5) In the case of an Eligible Shipyard, the capability of the shipyard to engage in naval vessel construction in time of war or national emergency.

(6) In the case of Shipyard Project, the Guarantees extend for less than the technological life of the asset.

(b) In determining the amount of equity which you must provide, we will consider, among other things, the following:

(1) Your financial strength;

(2) Adequacy of collateral; and

(3) The term of the Guarantees.

### § 298.18 Financing Shipyard Projects.

(a) *Initial criteria.* We may issue Guarantees to finance a Shipyard Project at a General Shipyard Facility. We may approve such Guarantees after we consider whether the Guarantees will result in shipyard modernization and support increased productivity.

(b) *Detailed statement.* You must provide a detailed statement, with the Guarantee application, which will provide the basis for our consideration.

(c) *Required conditions.* We shall approve your application for loan guarantees under this section if we determine the following:

(1) The term for such Guarantees will not exceed the reasonable economic useful life of the collective assets which comprise this Shipyard Project;

(2) There is sufficient collateral to secure the Guarantee; and

(3) Your application will not prevent us from guaranteeing debt for a Shipyard Project that, in our sole opinion, will serve a more desirable use of appropriated funds. In making this determination, we will consider:

(i) The types of vessels which will be built by the shipyard,

(ii) The productivity increases which will be achieved,

(iii) The geographic location of the shipyard,

(iv) The long-term viability of the shipyard,

(v) The soundness of the financial transaction,

(vi) Any financial impact on other Title XI transactions, and

(vii) The furtherance of the goals of the Shipbuilding Act.

### § 298.19 Financing Eligible Export Vessels.

(a) *Notification to Secretary of Defense.* (1) We will provide prompt notice of our receipt of an application for a loan Guarantee for an Eligible Export Vessel to the Secretary of Defense.

(2) During the 30-day period, beginning on the date on which the Secretary of Defense receives such notice, the Secretary of Defense may disapprove the loan guarantee if the Secretary of Defense makes an assessment that the Vessel's potential use may cause harm to United States national security interests.

(3) The Secretary of Defense may not disapprove a loan Guarantee under this section solely on the basis of the type of vessel to be constructed with the loan Guarantee. The authority of the Secretary of Defense to disapprove a loan Guarantee under this section may not be delegated to any official other than a civilian officer of the Department of Defense appointed by the President, by and with the advice and consent of the Senate. We will not approve a loan guarantee disapproved by the Secretary of Defense.

(b) *Vessel eligibility*. We may not approve a Guarantee for an Eligible Export Vessel unless:

(1) We find that the construction, reconstruction, or reconditioning of the Vessel will aid in the transition of United States shipyards to commercial activities or will preserve shipbuilding assets that would be essential in time of war or national emergency;

(2) The owner of the Vessel agrees with us that the Vessel shall not be transferred to any country designated by the Secretary of Defense as a country whose interests are hostile to the interests of the United States; and

(3) We determine that the countries in which the shipowner, its charterers, guarantors, or other financial interests supporting the transaction, if any, have their chief executive offices or have located a substantial portion of their assets, present an acceptable financial or legal risk to our collateral interests. Our determination will be based on confidential risk assessments provided by the Inter-Agency Country Risk Assessment System and will take into account any other factors related to the loan guarantee transaction that we deem pertinent.

## Subpart C—Guarantees

### § 298.20 Term, redemptions, and interest rate.

(a) *In general.* The maturity date of the Obligations must be satisfactory to us and must not exceed the anticipated physical and economic life of the Vessel or Vessels or Shipyard Project, and may be less than but no more than:

(1) Twenty-five years from the date of delivery from the shipbuilder of a single new Vessel which is to be security for Guarantees;

(2) Twenty-five years from the date of delivery from the shipyard of the last of multiple Vessels which are to be security for the Guarantees but that the amount of the Guarantees will relate to the amount of the depreciated actual cost of the multiple Vessels as of the Closing;

(3) The later of twenty-five years from the date of original delivery of a reconstructed, or reconditioned Vessel which is to be security for the Guarantees, or at the expiration of the remaining useful life of the Vessel, as we determine; or

(4) The technological life of the Shipyard Project.

(b) *Required redemptions.* Where multiple Vessels or multiple Shipyard Project assets are to be used as security for the Guarantees, as set forth in paragraph (a) of this section, we may require payments of principal prior to maturity (redemptions) regarding all related Obligations, as we may deem necessary to maintain adequate security for the Guarantees.

(c) *Interest rate.* We will make a determination as to the reasonableness of the interest rate of each Obligation, taking into account the range of interest rates prevailing in the private market for similar loans and the risks that we assume.

### § 298.21 Limits.

(a) *Actual Cost basis.* We will issue a guarantee on an amount of the Obligation satisfactory to us based on the

economic soundness of the transaction. The Obligation amount may be less than but not more than 75 percent or 87½ percent, whichever is applicable, under the provisions of section 1104A(b)(2) or section 1104B(b)(2) of the Act of the Actual Cost of the Vessel or Vessels or Shipyard Project asset(s).

(1) If minimum horsepower of the main engine is a requirement for Guarantees up to 87½ percent of the Actual Cost, the standard for the horsepower will be continuous rated horsepower.

(2) Where we refinance existing debt, the amount of new Obligations we issue for the existing debt may not exceed the lesser of:

(i) The amount of outstanding debt being refinanced (whether or not receiving assistance under Title XI); or

(ii) Seventy-five or 87½ percent, whichever is applicable, of the Depreciated Actual Cost of the Vessel or Shipyard Project with respect to which the new Obligations are being issued.

(b) *Actual Cost items.* Actual Cost is comprised essentially of those items which would customarily be capitalized as Vessel or Shipyard Project construction costs such as designing, engineering, constructing (including performance bond premiums that we approve), inspecting, outfitting and equipping.

(1) Cost items include those items usually specified in Vessel or Shipyard Project construction contracts, *e.g.*, changes and extras, cost of owner furnished equipment, shoreside spare parts and commitment fees and interest on the Obligations or other borrowings incurred during the construction period (excluding interest paid on subordinated debt considered to be Equity), and less income realized from investment of Escrow Fund deposits during the construction period.

(2) Commissions (which represent a portion of the total shipyard contract price) may be included in the foreign equipment and services amount of the Actual Cost of an export project, provided:

(i) A majority of the work done by the parties receiving the commissions is in the form of design and engineering work, and

(ii) The commissions represent a small amount of the total contract price.

(3) You may include Guarantee Fees determined in accordance with the provisions of section 1104(e) of the Act as an item of Actual Cost.

(4) In approving an item of Actual Cost, we will consider all pertinent factors.

(c) *Items excludible from Actual Cost.* Actual Cost shall not include any other costs such as the following:

(1) Legal fees or expenses;

(2) Accounting fees or expenses;

(3) Commitment fees or interest other than those specifically allowed;

(4) Fees, commissions or charges for granting or arranging for financing;

(5) Fees or charges for preparing, printing and filing an application for Title XI Guarantees and supporting documents, for services rendered to obtain approval of the application and for preparing, printing and processing documents relating to the application for Guarantees;

(6) Underwriting or trustee's fees;

(7) Foreign, federal, state or local taxes, user fees, or other governmental charges;

(8) Investigation fee determined in accordance with section 1104(f) of the Act and § 298.15;

(9) Predelivery Vessel operating expenses, Vessel insurance premiums and other items which may not be properly capitalized by the owner as costs of the Vessel under GAAP;

(10) The cost of the condition survey required by § 298.11(f) and all work necessary to meet the standards set forth in that paragraph;

(11) The cost to the Shipowner of a Vessel which is to be reconstructed, or reconditioned, *e.g.*, cost of acquisition or repair work;

(12) Generally, any amount payable to the shipyard for early delivery of the Vessel;

(13) Generally, any amount payable to the manufacturer of the Shipyard Project for early delivery of the equipment to the General Shipyard Facility;

(14) Predelivery Shipyard Project expenses which may not be properly capitalized by the General Shipyard Facility as costs of the Shipyard Project under GAAP; and

(15) The cost of major foreign components and other foreign components for

which there is no waiver and their assembly when comprising any part of the hull and superstructure of a Vessel.

(d) *Substantiation of Actual Cost.* (1) Before we make distribution from the Escrow Fund or Construction Fund (described in §§ 298.33 and 298.34), and prior to our final Actual Cost determination for each Vessel or Shipyard Project, you must submit to us documents substantiating all claimed costs eligible under paragraph (b) of this section or, alternatively, appropriate certification of such costs by an agent who has received our approval.

(2) These documents may include, but need not be limited to, copies of invoices, change orders, subcontracts, and where we require, statements from independent certified or independent licensed public accountants that the costs for which you seek payment or reimbursement were actually paid or are payable for the construction of a Vessel or Shipyard Project.

(3) You must summarize, index and arrange these documents according to cost categories by following the directions contained in our forms.

(e) *Escalation as part of Actual Cost.* Escalation clauses in construction contracts shall be subject to our approval. After a review of the base contract price and the escalation clauses, we shall, in order to estimate the Actual Cost amount to be stated in the Letter Commitment, add to the approved base contract price the amount of estimated escalation as approved by us. We must subsequently approve the amount of escalation cost you claimed as a component of Actual Cost.

(f) *Monies received in respect of construction.* (1) If you or any Person acting on your behalf, from time to time receives moneys due for construction of a Vessel or Shipyard Project (described in the Security Agreement) from the shipbuilder, guarantors, sureties or other Persons, you shall give us written notice of such fact.

(2) As long as we have not paid the Guarantees, you or other recipient shall promptly deposit these moneys with us to be held by the Depository in accordance with the Depository Agreement.

(3) We will determine the extent to which Actual Cost is to be reduced by these moneys.

(4) In no event shall Actual Cost be reduced with respect to payments by the shipyard to a Vessel or Shipyard Project owner of liquidated damages for late delivery of the Vessel or Shipyard Project .

(5) If we have paid the Guarantees, you or other recipient must promptly pay these moneys, including any liquidated damages, to us for deposit into the Maritime Guaranteed Loans account.

(g) *Depreciated Actual Cost.* After a Vessel or Shipyard Project has been delivered or redelivered (in the case of reconstruction or reconditioning), the limitation on the amount of Guarantees will be 75 or 87½ percent, whichever is applicable, of the Depreciated Actual Cost of the Vessel or Shipyard Project.

[65 FR 45152, July 20, 2000, as amended at 67 FR 61282, Sept. 30, 2002]

### § 298.22 Amortization of Obligations.

(a) Generally, after delivery or completion of Shipyard Project, and until maturity of the Obligations, provisions of the Trust Indenture or other part of the Documentation require you to make periodic payment of principal and interest on the Obligations.

(b) Usually, the payment of principal (amortization) shall be made semi-annually, but in no event, less frequently than on an annual basis, and in either case the amortization shall be in equal payments of principal (level principal), unless we consent to the periodic payment of a constant aggregate amount, comprised of both interest and principal components which are variable in amount (level payment). No other proposed method of amortization will be allowed which would reduce the amount of periodic amortization below that determined under the level principal or level payment basis at any time prior to maturity of the Obligations, except where:

(1) You can demonstrate to our satisfaction that there will be adequate funds to discharge the Obligations at maturity;

(2) You establish a fund with the Depository in which you deposit an equal

annual amount necessary to redeem the outstanding Obligations at maturity; or

(3) With regard to Eligible Export Vessels, in accordance with such other terms as we determine to be more favorable and to be compatible with export credit terms offered by foreign governments for the sale of vessels built in foreign shipyards.

[65 FR 45152, July 20, 2000, as amended at 67 FR 61282, Sept. 30, 2002]

### § 298.23 Refinancing.

(a) We may approve guarantees of Obligations to be secured by one or more Vessels or a Shipyard Project issued to refinance existing Title XI debt for either Vessels or for Shipyard Project and existing non-Title XI debt, so long as the existing debt has been previously issued for one of the purposes set forth in sections 1104(a)(1) through (4) of the Act. Section 1104 (a) (1) of the Act requires that, if the existing indebtedness was incurred more than one year after the delivery or redelivery of the related Vessel or Shipyard Project, the proceeds of such Obligations will be applied to the construction, reconstruction or reconditioning of other Vessels or Shipyard Project or as provided in § 298.24.

(b) We shall require any security lien on the Vessel(s) or Shipyard Project to be discharged immediately before we place a Mortgage or other security interest on any of the above assets. You must satisfy all necessary eligibility requirements as set forth in subpart B of this part, including economic soundness.

### § 298.24 Financing a Vessel more than a year after delivery.

(a) We may approve Guarantees for a Vessel which has been delivered (or redelivered in the case of reconstruction or reconditioning of a Vessel) more than one year prior to the issuance of the Guarantees only if:

(1) The issuance of the Guarantees would otherwise satisfy the requirements of the Act and the regulations in this part, and

(2) The proceeds of the Obligation financing such existing Vessel are used to finance:

(i) The construction, reconstruction, or reconditioning of a different Vessel within one year of that Vessel's delivery or redelivery, as the case may be, or

(ii) Facilities or equipment pertaining to marine operations. Such facilities or equipment must be of a specialized nature, used principally for servicing vessels and in handling waterborne cargo in the close proximity of the berthing area, excluding over-the-road equipment (other than chassis and containers), permanent or semipermanent structures and real estate, as well as new or less than one year old.

(b) At the Closing of Guarantees covered by this section, you must deposit the proceeds of the Obligation into an Escrow Fund established to pay for the cost unless you demonstrate to our satisfaction that all such costs have been paid.

### § 298.25 Excess interest or other consideration.

We shall not execute Guarantees if any agreement in the Documentation directly or indirectly provides for:

(a) The payment to an Obligee of interest, or other compensation for services which have not been performed, in a manner that such compensation or payment is being provided as interest in excess of the rate approved by us; or

(b) Grants of security to an Obligee in addition to the Guarantees.

### § 298.26 Lease payments.

You must obtain our approval of the amount and conditions of lease or charter hire payments if the payment of principal and interest on Obligations would be dependent, in any way, upon the lease or charter hire payments for a Vessel or Shipyard Project.

### § 298.27 Advances.

(a) *In general.* (1) In accordance with section 207 and Title XI of the Act, we have the discretion to make or commit to make an advance or payment of funds to, or on behalf of the owner, or operator or directly to any other person or entity for items, including, but not limited to:

(i) Principal,

(ii) Interest,

(iii) Insurance, and

(iv) Other vessel-related expenses or fees.

(2) We will make advances or payments only to protect, preserve or improve the collateral held as our security for Title XI debt.

(3) When requesting an advance, you must demonstrate that:

(i) Your problems are short term (less than two years) by using market and cash flow analysis and other projections.

(ii) An advance(s), would assist you over temporary difficulties; and

(iii) There is adequate collateral for the advance.

(b) *Filing requirements.* (1) You shall apply for an advance or other payment as early as is reasonably possible.

(2) *Principal and interest payments.* We must receive a request for an advance for principal and interest payments at least 30 days before the initial payment date.

(3) *Insurance payments.* We must receive a request for an advance of insurance payments at least 30 days before a renewal or termination date.

(4) *Extenuating circumstances.* We may consider requests for assistance with less notice, upon written documentation of extenuating circumstances.

(5) *Supporting data.* Any requests for assistance must be accompanied by supporting data regarding:

(i) Need for the advance,

(ii) Financial assistance you sought from other sources,

(iii) The measures that you are taking and have taken to alleviate the situation,

(iv) Financial projections,

(v) Proposed term of the repayment,

(vi) Current and projected market conditions,

(vii) Information on other available collateral,

(viii) Liens and other creditor information, and

(ix) Any other information which we may request.

## Subpart D—Documentation

### § 298.30 Nature and content of Obligations.

(a) *Single page.* An Obligation, in the form of a note, bond of any type, or other debt instrument, when engraved, printed or lithographed on a single sheet of paper must include on its face the:

(1) Name of the Obligor,

(2) Principal sum,

(3) Rate of interest,

(4) Date of maturity, and

(5) Guarantee of the United States, authenticated by the Indenture Trustee, if any.

(b) *Several pages.* If the Obligation is typewritten, printed or reproduced by other means on several pages of paper, the Guarantee of the United States and the authentication certificate of the Indenture Trustee, if any, may appear at the end of the typewritten Obligation.

(c) *Rights and responsibilities.* The instrument which is evidence of indebtedness shall also contain all information necessary to apprise the Obligees of their rights and responsibilities including, but not limited to:

(1) Time and manner for payment of principal and interest,

(2) Redemptions,

(3) Default procedure, and

(4) Notification (in case of registered Obligations) of sale or other transfer of the instruments.

### § 298.31 Mortgage.

(a) *In general.* Under normal circumstances, a Guarantee shall not be endorsed on any Obligation until we receive satisfactory evidence that we hold a Mortgage in one or more Vessels or a Mortgage or other security interest in the Shipyard Project. During construction of a new Vessel or any Shipyard Project, a security interest may be perfected by a filing under the Uniform Commercial Code.

(b) *Ensuring validity of security interest.* In order to ensure that our Mortgages or other security interests are valid and enforceable, we shall require that the Obligor obtain legal opinions, in form and substance satisfactory to us, from independent, outside legal counsel satisfactory to us, including foreign independent outside legal Counsel for Eligible Export Vessels, which opinions shall state, among other things, that the Mortgage or other security interest(s) are valid and enforceable:

(1) In the country in which the Vessel is documented (or, in the case of a security interest, in jurisdictions acceptable to us);

(2) In the United States; and

(3) For vessels operating on specified trade routes, in the country or countries involved in this service, unless we determine that those destinations are too numerous, in which case, we will instead require an opinion of foreign validity and enforceability in the Vessel's primary port of operation.

(c) *Alternative forms of security.* In the case where a Mortgage or security interest on the financed assets may not be available or enforceable, we will require alternative forms of security.

(d) *Mortgage in our favor.* The Security Agreement shall provide that upon delivery of a new Vessel or upon final completion of the Shipyard Project, or at the time Guarantees are issued with respect to an existing Vessel or the Shipyard Project, a Mortgage on the Vessel and a Mortgage or other security interest on the Shipyard Project will be executed in our favor, unless we determine that a Mortgage or a security interest is not available or enforceable in accordance with paragraph (c) of this section.

(e) *Filing.* You must file the Mortgage with the United States Coast Guard's National Vessel Documentation Center. You must file the Mortgage for an Eligible Export Vessel with the proper foreign authorities. For assets of a General Shipyard Facility, you must file a Mortgage and security interest with the proper authorities within the appropriate state for recording. After you have recorded the Mortgage, you must deliver to us the Mortgage and evidence of the filing of the security interest.

(f) *Mortgage secured by multiple Vessels.* (1) When two or more Vessels are to be security for Guarantees, the Security Agreement may provide that one Mortgage relating to all the Vessels (Fleet Mortgage) shall be executed, perfected and delivered to us by the Obligor.

(2) If the Fleet Mortgage relates to undelivered Vessels, the Fleet Mortgage will be executed upon delivery of the first vessel. At the time of each subsequent Vessel delivery, the Obligor shall execute a supplement to the Fleet Mortgage which makes that Vessel subject to our Mortgage lien.

(3) The Fleet Mortgage shall provide that payment by the Obligor of the entire amount of Obligations covered or to be covered by Guarantees shall be required to discharge the Fleet Mortgage, regardless of the amount of the Secretary's Note or Notes issued and outstanding at the time of execution and delivery of the Fleet Mortgage or the number of Vessels covered by the Fleet Mortgage.

(4) The discharge date of the Fleet Mortgage shall be the maturity date of the Secretary's Note. We may require, as authorized by section 1104(c)(2) of the Act, such payments of principal prior to maturity (redemptions), regarding all related Obligations, as deemed necessary to maintain adequate security for the Guarantees.

(5) Each Fleet Mortgage shall provide that in the event of constructive total loss, requisition of title or sale of any Vessel covered by the Fleet Mortgage, indebtedness represented by the Obligations shall be paid, unless we otherwise determine that there remains adequate security for the Guarantees, and the Vessel shall be discharged from the Mortgage lien.

(g) Adequacy of collateral. (1) Under normal circumstances, a First Preferred Mortgage on the Vessel(s) or Shipyard Project will be adequate security for the Guarantees.

(2) If, however, we determine that the Mortgage on the Vessel(s) or Shipyard Project is not sufficient to provide adequate security, as a condition to approving the Letter Commitment or processing the application, we may require additional collateral, such as a mortgage(s) on other vessel(s) or Shipyard Project or on other assets, special escrow funds, pledges of stock, charters, contracts, notes, letters of credit, accounts receivable assignments, and guarantees.

### § 298.32 Required provisions in documentation.

(a) Performance under shipyard and related contracts. Generally, shipyard and related contracts must contain provisions for:

(1) Furnishing by the shipyard or contractor of the Shipyard Project of satisfactory insurance and a satisfactory performance bond where Obligations are issued during the construction period, except that if the shipyard or contractor of the Shipyard Project demonstrates to our satisfaction that it has sufficient financial resources and operational capacity to complete the project, posting of a bond will not be required;

(2) Allowing access to the Vessel or Shipyard Project, as well as all related work projects being performed by the contractor and subcontractors, to our representative, at all reasonable times, to inspect performance of the work and to observe trials and other tests for the purpose of determining that the Vessel or Shipyard Project is being constructed, reconstructed, or reconditioned in accordance with contract plans and specifications approved by us;

(3) Submitting to us, upon request, one set of shipyard plans, in form and substance satisfactory to us, for the Vessel or Shipyard Project as built;

(4) Making periodic payments for the work in accordance with an agreed schedule, submitted by the shipyard or contractor, as appropriate, in a form acceptable to us, based on percentage of completion, after such percentage and satisfactory performance are certified by the Obligor, shipyard or contractor, as appropriate, and our representative as to each payment;

(5) Prohibiting the use of proceeds from the sale of Obligations for the payment of work performed outside the shipyard, unless we consent in writing to such use; and

(6) Requiring that all components of the hull and superstructure of a U.S.-documented Vessel and an Eligible Export Vessel shall be assembled in the United States.

(7) If Obligation will not be issued during the construction period of the Vessel and Shipyard Project, requiring that shipyard-related contracts shall generally include the provisions specified in paragraphs (a)(2), (a)(3) and (a)(6) of this section.

(b) *Assignments and general covenants from Obligor to us.* The Obligor shall assign rights and shall covenant with us, as we require, including, but not limited to, the following:

(1) Assignment of all or part of the right, title and interest under the construction contract and related contracts, except those rights expressly reserved therein by the Obligor relating to such things as patent infringement and liquidated damages;

(2) Assignment of rights to receive all moneys which from time to time become due regarding Vessel or Shipyard Project construction;

(3) Assignment, where applicable, of all or a part of the bareboat charter, time charter, contracts of affreightment or other agreements relating to the use of the Vessel or Shipyard Project and all hire payable to the Obligor, and delivery to us of required consents by appropriate parties to any such assignments;

(4) Covenants relating to the filing of satisfactory evidence of continuing United States citizenship, in accordance with 46 CFR part 355, with the exception of Eligible Export Vessels and shipyards with Shipyard Projects; warranty of Vessel or Shipyard Project title free from all liens other than those specifically excepted; maintaining United States documentation of the Vessel or documentation under the laws of a country other than the United States with regard to an Eligible Export Vessel; compliance with the provisions of 46 U.S.C. 31301–31343, except that Eligible Export Vessels shall comply with the definition of a "preferred mortgage" in 46 U.S.C. 31301(6)(B), requiring, among other things, that the Mortgage shall comply with the mortgage laws of the foreign country where the Vessel is documented and shall have been registered under those laws in a public register; Notice of Mortgage, payment of all taxes (except if being contested in good faith); annual financial statements audited by independent certified or independent licensed public accountant.

(5) Covenants to keep records of construction costs paid by or for the Obligor's account and to furnish us with a detailed statement of those costs, distinguishing between:

(i) Items paid or obligated to be paid, attested to by independent certified

public accountants unless otherwise verified by us; and

(ii) Costs of American and foreign materials (including services) in the hull and superstructure.

(6) Covenants to maintain Marine and War Risk Hull and Machinery insurance on the Vessel or Eligible Export Vessel in an amount equal to 110% of the outstanding Obligations or up to the full commercial value of the Vessel or Eligible Export Vessel, whichever is greater; Marine and War Risk Protection and Indemnity insurance; Interim War Risk Binders for Hull and Machinery, and Protection and Indemnity coverages underwritten by us as authorized by Title XII of the Act; and such additional insurance as may be required by us. All insurance required to be maintained shall be placed with the United States Government and American and/or British (and/or other foreign, if permitted by us by prior written notice) insurance companies, underwriters' associations or underwriting funds approved by us through marine insurance brokers and/or underwriting agents approved by us. All insurance required to be maintained shall be placed under the latest (at the time of issue) forms of American Institute of Marine Underwriters policies approved by us and/or under such other forms of policies which we may approve in writing and/or policies issued by or for us insuring the Vessel or Eligible Export Vessel against the usual risks provided for under such forms, including such amounts of increase value or other forms of "that total loss only" insurance permitted by the Hull and Machinery insurance policies;

(7) Collateralize other debt due to us under other Title XI financings;

(8) Covenants to maintain shipyard insurance on the Shipyard Project in an amount equal to 110% of the outstanding Obligations or up to the full commercial value of the Shipyard Project, whichever is greater, and such additional insurance as may be required by us; and

(9) Covenants to maintain additional types of insurance as may be required by us with respect to Eligible Export Vessels, *i.e.* political risk insurance, to cover such items as the political, financial, and/or economic risk in a foreign country.

**§ 298.33 Escrow fund.**

(a) *Escrow Fund Deposits.* At the time of the sale of the Obligations, the Obligor shall deposit with the Depository in an escrow fund (the "Escrow Fund") all of the proceeds of that sale unless the Obligor is entitled to withdraw funds under paragraph (b) of this section. The Obligor must also deposit into the Escrow Fund on the Closing date an amount equal to six months interest at the rate borne by the Obligations, unless we find the existence of adequate consideration or accept other consideration in lieu of the interest deposit.

(b) *Escrow Fund Withdrawals.* You, as Obligor, may make a written request for us to disburse funds from the Escrow Fund. Within a reasonable time thereafter, we shall disburse directly to the Indenture Trustee, any Paying Agent for such Obligations, or any other Person entitled to payment any amount which you are obligated to pay or have paid, on account of the items and amounts or any other item approved by us, provided that we are satisfied with the accuracy and completeness of the information contained in the following submissions:

(1) A responsible officer of the Obligor shall deliver an officer's certificate, in form and substance satisfactory to us, stating that:

(i) There is no default under the construction contract or the Security Agreement;

(ii) There have been no occurrences which have or would adversely and materially affect the condition of the Vessel, its hull or any of its component parts, or the Shipyard Project;

(iii) The amounts of the request are in accordance with the construction contract including the approved disbursement schedule and each item in these amounts is properly included in our approved estimate of Actual Cost;

(iv) With respect to the request, once the contractor is paid there will be no liens or encumbrances on the applicable Vessel, its hull or component parts, or the Shipyard Project for which the withdrawal is being requested except for those already approved by us; and

(v) If the Vessel or Shipyard Project has already been delivered or completed, it is in class, if required, and is being maintained in the highest and best condition. The Obligor must also attach an officer's certificate of the shipyard and other general contractors, in form and substance satisfactory to us, stating that there are no liens or encumbrances as provided in paragraph (b)(1)(iv) of this section and attaching the invoices and receipts supporting each proposed withdrawal to our satisfaction.

(2) No payment or reimbursement under this section shall be made:

(i) To any Person until the total amount paid by or for the account of the Obligor from sources other than the proceeds of such Obligations equals at least 12½ percent or 25 percent as applicable, of the Actual Cost of the Vessel or Shipyard Project is made;

(ii) To the Obligor which would have the effect of reducing the total amounts paid by the Obligor pursuant to paragraph (b)(2)(ii) of this section; or

(iii) To any Person on account of items, amounts or increases representing changes and extras or owner furnished equipment, if any, unless such items, amounts and increases shall have been previously approved by us; provided, however, that when the amount guaranteed by us equals 75 percent or less of the Actual Cost and the Obligor demonstrates to our satisfaction the ability to pay in the remaining 25 percent, or more, then after the initial 12½ percent of Actual Cost has been paid by or on behalf of the Obligor for such Vessel or completed Shipyard Project and up to 37½ percent of Actual Cost has been withdrawn from the Escrow Fund for such Vessel or Shipyard Project, the Obligor must pay the remaining Obligor's equity of at least 12½ percent (as determined by us) before additional monies can be withdrawn from the Escrow Fund relating to such Vessel or Shipyard Project.

(3) We will not be required to make any disbursement except out of the cash available in the Escrow Fund. If any sale or payment on maturity results in a loss in the principal amount of the Escrow Fund invested in securities so sold or matured, the requested disbursement from the Escrow Fund shall be reduced by an amount equal to such loss, and the Obligor must pay to any Person entitled thereto, the balance of the requested disbursement from the Obligor's funds other than the proceeds of such Obligations.

(4) If we assume the Obligor's rights and duties under the Obligations or we pay the Guarantees, all amounts in the Escrow Fund (including realized income which has not yet been paid to the Obligor), shall be paid to us and be credited against any amounts due or to become due to us under the Security Agreement and the Secretary's Note.

(5) Other rights and duties with respect to withdrawals from the Escrow Fund shall be set out in the closing documentation in form and substance satisfactory to us.

(c) *Investment and liquidation of the Escrow Fund.* We may invest the Escrow Fund in obligations of the United States. We will deposit amounts in the Escrow Fund into an account with the U.S. Treasury Department and upon agreement with the Obligor, shall deliver to the U.S. Treasury Department instructions for the investment, reinvestment and liquidation of the Escrow Fund. We will have no liability to the Obligor for acting in accordance with such instructions.

(d) *Income on the Escrow Fund.* Unless there is an existing default, any income realized on the Escrow Fund shall be paid to the Obligor upon our receipt of such income.

(e) *Termination date of the Escrow Fund.* The Escrow Fund shall terminate 90 days after the delivery date of the last Vessel or Shipyard Project covered by the Security Agreement (the "Termination Date"). In the event that on such date the payment of the full amount of the aggregate Actual Cost of all of the Vessels or Shipyard Project has not been made or the amounts with respect to such Actual Cost are not then due and payable, then we and the Obligor by written agreement shall extend the Termination Date for such period as we and the Obligor shall determine is sufficient to allow for such contingencies. Any amounts remaining in the Escrow Fund on the Termination Date which

are in excess of 87½ percent or 75 percent of Actual Cost, as the case may be, shall be applied to retire a pro rata portion of the Obligations.

[65 FR 45152, July 20, 2000, as amended at 67 FR 61282, Sept. 30, 2002]

### § 298.34 [Reserved]

### § 298.35 Title XI Reserve Fund and Financial Agreement.

(a) *Purpose.* In order to provide us with further security and to ensure payment of the interest and principal due on the Obligations, we will require the Company to enter into a Title XI Reserve Fund and Financial Agreement (Agreement) at the first Closing at which the Company issues Obligations. We may waive or modify provisions of the Agreement based on our evaluation of the aggregate security for the Guarantees.

(b) *Financial covenants.* There will be two sets of covenants. One set of covenants will be imposed regardless of the Company's financial condition (primary covenants). The other set of covenants will be imposed only if the Company does not meet specific financial conditions (supplemental covenants). The primary and supplemental covenants are to be set forth in the Agreement. Covenants shall be imposed on the Company as follows:

(1) *Primary covenants.* So long as Guarantees are in effect the Company shall not, without our prior written consent:

(i) Make any distribution of earnings, except as may be permitted as follows:

(A) From retained earnings in an amount specified in paragraph (b)(1)(i)(C) of this section, provided that, in the fiscal year in which the distribution of earnings is made there is no operating loss to the date of such payment of such distribution of earnings, and there was no operating loss in the immediately preceding three fiscal years, or there was a one-year operating loss during the immediately preceding three fiscal years, but such loss was not in the immediately preceding fiscal year, and there was positive net income for the three year period;

(B) If distributions of earnings may not be made under paragraph (b)(1)(i)(A) of this section, a distribution can be made in an amount equal to the total operating net income for the immediately preceding three fiscal year period, provided that:

(*1*) There were no two successive years of operating losses;

(*2*) There is no operating loss to the date of such distribution in the fiscal year in which such distribution is made; and

(*3*) The distribution of earnings made would not exceed an amount specified in paragraph (b)(1)(i)(C) of this section;

(C) Distributions of earnings may be made from earnings of prior years in an aggregate amount equal to 40 percent of the Company's total net income after tax for each of the prior years, less any distributions that were made in such years; or the aggregate of the Company's total net income after tax for such prior years, provided that, after making such distribution, the Company's Long-Term Debt does not exceed its Net Worth. In computing net income for purposes of this paragraph (b)(1)(i)(C), extraordinary gains, such as gains from the sale of assets, will be excluded;

(ii) Enter into any service, management or operating agreement for the operation of the Vessel or the Shipyard Project (excluding husbanding type agreements), or appoint or designate a managing or operating agent for the operation of the Vessel or the Shipyard Project (excluding husbanding agents) unless approved by us;

(iii) Sell, mortgage, transfer, or demise charter the Vessel or the Shipyard Project or any assets to any non-Related Party except as permitted in paragraph (b)(1)(vii) of this section or sell, mortgage, transfer, or demise charter the Vessel or any assets to a Related Party, unless such transaction is at a fair market value as determined by an independent appraiser acceptable to us, and is a total cash transaction;

(iv) Enter into any agreement for both sale and leaseback of the same assets so sold unless the proceeds from such sale are at least equal to the fair market value of the property sold;

(v) Guarantee, or otherwise become liable for the obligations of any other Person, except with respect to any undertakings as to the fees and expenses

of the Indenture Trustee, except endorsement for deposit of checks and other negotiable instruments acquired in the ordinary course of business and except as otherwise permitted in this section;

(vi) Directly or indirectly embark on any new enterprise or business activity not directly connected with the business of shipping or other activity in which the Company is actively engaged;

(vii) Enter into any merger or consolidation or convey, sell, demise charter, or otherwise transfer, or dispose of any portion of its properties or assets (any and all of which acts are encompassed within the words "sale" or "sold" as used in this section), provided that, the Company will not be deemed to have sold such properties or assets if the net book value of the aggregate of all the assets sold by the Company during any period of 12 consecutive calendar months does not exceed ten percent of the total net book value of all of the Company's assets; the Company retains the proceeds of the sale of assets for use in accordance with the Company's regular business activities; and the sale is not otherwise prohibited by paragraph (b)(1)(iii) of this section. The Company may not consummate such sale without our prior written consent if the Company has not, prior to the time of such sale, submitted to us, as required, its most recently audited financial statements referred to in § 298.42(a) and any attempt to consummate a sale absent such approval will be null and void *ab initio*.

(2) *Supplemental Covenants which may become applicable.* Unless, after giving effect to such transaction or transactions, during any fiscal year of the Company, the Company's Working Capital is equal to at least one dollar, the Company's Long-Term Debt does not exceed two times the Company's Net Worth and the Company's Net Worth is at least the amount specified by us, the Company shall not, without our prior written consent:

(i) Withdraw any capital;

(ii) Redeem any share capital or convert any of the same into debt;

(iii) Pay any dividend (except dividends payable in capital stock of the Company);

(iv) Make any loan or advance (except advances to cover current expenses of the Company), either directly or indirectly, to any stockholder, director, officer, or employee of the Company, or to any other Related Party;

(v) Make any investments in the securities of any Related Party;

(vi) Prepay in whole or in part any indebtedness to any stockholder, director, officer, or employee of the Company, or to any Related Party, which has a stated maturity of more than one year from such date;

(vii) Increase any direct employee compensation (as defined in this paragraph) paid to any employee in excess of $100,000 per annum; nor increase any direct employee compensation which is already in excess of $100,000 per annum; nor initially employ or re-employ any person at a direct employee compensation rate in excess of $100,000 per annum; provided, however, that beginning with January 1, 2000 the $100,000 limit may be increased annually based on the previous years' closing Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics. For the purpose of this paragraph, the term "direct employee compensation" is the total amount of any wage, salary, bonus commission, or other form of direct payment to any employee from all companies with guarantees under the Act as reported to the Internal Revenue Service for any fiscal year.

(viii) Acquire any fixed assets other than those required for the maintenance of the Company's existing assets, including normal maintenance and operation of any vessel or vessels owned or chartered by the Company;

(ix) Either enter into or become liable (directly or indirectly) under charters and leases (having a term of six months or more) for the payment of charter hire and rent on all such charters and leases which have annual payments aggregating in excess of an amount specified by us;

(x) Pay any indebtedness subordinated to the Obligations or to any other Title XI obligations;

(xi) Create, assume, incur, or in any manner become liable for any indebtedness, except current liabilities, or short term loans, incurred or assumed in the ordinary course of business as such business presently exists;

(xii) Make any investment whether by acquisition of stock or indebtedness, or by loan, advance, transfer of property, capital contribution, guarantee of indebtedness or otherwise, in any Person, other than obligations of the United States, bank deposits or investments in securities of the character permitted for monies in the Title XI Reserve Fund; and,

(xiii) Create, assume, permit or suffer to exist or continue any mortgage, lien, charge or encumbrance upon, or pledge of, or subject to the prior payment of any indebtedness, any of its property or assets, real or personal, tangible or intangible, whether now owned or thereafter acquired, or own or acquire, or agree to acquire, title to any property of any kind subject to or upon a chattel mortgage or conditional sales agreement or other title retention agreement, except loans, mortgages and indebtedness guaranteed by us under Title XI of the Act or related to the construction of a vessel approved for Title XI by us, and liens incurred in the ordinary course of business as such business presently exists.

(c) *Title XI Reserve Fund Net Income.* The Agreement shall provide that within 105 days after the end of its accounting year, the Company will compute its net income attributable to the operation of the Vessel(s) that were constructed, reconstructed, reconditioned or refinanced with Title XI financing assistance (Title XI Reserve Fund Net Income). The computation utilizes a ratio expressed as a percentage, and applies this percentage to the Company's total net income after taxes. The numerator of the ratio is be the total original capitalized cost of all Company Vessels (whether leased or owned) which were constructed, reconstructed, reconditioned or refinanced with the assistance of Guarantees. The denominator shall be the total original capitalized cost of all the Company's fixed assets. In the case of Shipyard Project, the Agreement shall provide that within 105 days after the end of its accounting year, the Company shall submit its audited financial statements showing its net cash flow in a manner acceptable to us, in lieu of any other computation of Reserve Fund Net Income specified in this section for Vessels. The net income after taxes, computed in accordance with GAAP, will be adjusted as follows:

(1) The depreciation expense applicable to the accounting year shall be added back.

(2) There shall be subtracted:

(i) An amount equal to the principal amount of debt required to be paid or redeemed, and actually paid or redeemed by the Company (other than from the Title XI Reserve Fund) during the year; and

(ii) The principal amount of Obligations retired or paid (as defined in the Security Agreement), prepaid or redeemed, in excess of the required redemptions or payments which may be used by the Company as a credit against future required redemptions or other required payments with respect to the Obligations.

(d) *Deposits.* Unless the Company, as of the close of its accounting year, was subject to and in compliance with the financial requirements set forth in paragraph (b)(2) of this section, the Company shall make one or more deposits to us to be held by the Depository (the Title XI Reserve Fund), as further provided for in the Depository Agreement. The amount of deposit as to any year, or period less than a full year, where applicable, will be determined as follows:

(1) Fifty percent of the Title XI Reserve Fund Net Income, less an amount equal to 10% of the Company's total original equity investment in the Vessel or Vessels, (if the Company is the owner of the assets), will be deposited into the Title XI Reserve Fund.

(2) In the case of Shipyard Project, the shipyard shall make a deposit at two percent of its net cash flow, as defined by GAAP, and as shown on its audited financial statements.

(3) Any additional amounts that may be required pursuant to the Security Agreement or any other agreement in the documentation to which the Company is a party.

(4) Any additional amounts that may be required, pursuant to provisions of the Security Agreement or any other agreement in the documentation to which the Company is a party.

(5) Irrespective of the Company's deposit requirement, as stated in paragraphs (d) (1) through (4) of this section, the Company will not be required to make any deposits into the Title XI Reserve Fund if any of the following events will have occurred:

(i) The Company will have discharged the Obligations and related Secretary's Note and will have paid other sums secured under the Security Agreement and Preferred Mortgage;

(ii) All Guarantees with respect to outstanding Obligations will have terminated pursuant to the provisions of the Security Agreements, other than by reason of payment of the Guarantees; or

(iii) The amount in the Title XI Reserve Fund, (including any securities at market value), is equal to, or in excess of 50 percent of the principal amount of outstanding Obligations.

(e) *Fund in lieu of Title XI Reserve Fund.* If the Company has established a Capital Construction Fund (CCF), pursuant to section 607 of the Act, whether interim or permanent, at any time when a deposit would otherwise be required to be made into the Title XI Reserve Fund, and the Company elects to make such deposits to the CCF, the Company must enter into an agreement, satisfactory to us, providing that all such deposits of assets therein will be security (CCF Security Amount) to the United States in lieu of the Title XI Reserve Fund. The deposit requirements of the Title XI Reserve Fund and Financial Agreement will be deemed satisfied by deposits of equal amounts in the CCF, and withdrawal of the CCF Security Amount will be subject to our prior written consent. If, for any reason, the CCF terminates prior to the payment of the Obligations, the Secretary's Note and all other amounts due under or secured by the Security Agreement or Mortgage, the CCF Security Amount will be deposited or redeposited in the Title XI Reserve Fund.

[65 FR 45152, July 20, 2000, as amended at 67 FR 61282, Sept. 30, 2002]

## § 298.36 Guarantee Fee.

(a) *Rates in general.* (1) For annual periods, beginning with the date of the Security Agreement and prior to the delivery date of a Vessel or Shipyard Project, we shall charge a Guarantee Fee set at a rate of not less than ¼ of 1 percent and not more than ½ of 1 percent of the excess of the average principal amount of the Obligations estimated to be outstanding during the annual periods covered by said Guarantee Fee over the average principal amount, if any, on deposit in the Escrow Fund during said annual period (Average Principal Amount of Obligations Outstanding).

(2) For annual periods beginning with the delivery date of a Vessel or Shipyard Project, the Guarantee Fee shall be set at an annual rate of not less than ½ of 1 percent and not more than 1 percent of the Average Principal Amount of Obligations Outstanding during the annual periods covered by the Guarantee Fee. You will be responsible for payment of the Guarantee Fee.

(b) *Rate calculation.* (1) The Guarantee Fee rate generally shall vary inversely with the ratio of Equity to Long-Term Debt (Variable Rate) of the Person who we consider to be the primary source of credit in the transaction (Credit Source), for example,

(i) The long term time charterer (where the charter hire represents the source of payment of interest and principal with respect to the Obligations),

(ii) The guarantor of the Obligations,

(iii) The Obligor, or

(iv) The bareboat charterer.

(2) Where the Variable Rate is used, we may make such adjustments to the computation of Equity and Long-Term Debt considered necessary to reflect more accurately the financial condition of the Credit Source.

(3) We shall base our determination of Equity and Long-Term Debt on information contained in forms or statements on file with us prior to the date on which the Guarantee Fee is to be paid.

(4) With our consent, you may include in Equity and exclude from Long-Term Debt, any subordinated indebtedness representing loans from any credit source.

(5) We may establish a fixed rate or other method of calculation of the Guarantee Fee, upon an evaluation of the aggregate security for the Guarantees.

(c) *Variable Rate prior to Vessel or Shipyard Project.* For annual periods beginning prior to the delivery date of a Vessel or Shipyard Project being constructed, reconstructed, or reconditioned, the Guarantee Fee shall be determined as follows:

(1) If the Equity is less than 15 percent of the Long-Term Debt, the Guarantee Fee rate shall be ½ of 1 percent of the Average Principal Amount of Obligations Outstanding during the annual period covered by the Guarantee Fee.

(2) If the Equity is at least 15 percent of the Long-Term Debt, but less than the Long-Term Debt, the Guarantee Fee rate shall be ⅜ of 1 percent of the Average Principal Amount of Obligations Outstanding during the annual period covered by the Guarantee Fee.

(3) If the Equity is equal to or exceeds the Long-Term Debt, the Guarantee Fee rate shall be ¼ of 1 percent of the Average Principal Amount of Obligations Outstanding during the annual period covered by the Guarantee Fee.

(d) *Variable Rate after Vessel or Shipyard Project delivery or completion.* For annual periods beginning on or after the Vessel or Shipyard Project delivery date, the Guarantee Fee shall be determined as follows:

(1) If the Equity is less than 15 percent of the Long-Term Debt, the Guarantee Fee rate shall be 1 percent of the Average Principal Amount of Obligations Outstanding during the annual period covered by the Guarantee Fee.

(2) If the Equity is at least 15 percent of the Long-Term Debt but less than 60 percent of the Long-Term Debt, the Guarantee Fee rate shall be ¾ of 1 percent of the Average Principal Amount of Obligations Outstanding during the annual period covered by the Guarantee Fee.

(3) If the Equity is at least 60 percent of the Long-Term Debt, but less than the Long-Term Debt, the Guarantee Fee rate shall be ⅝ of 1 percent of the Average Principal Amount of Obligations outstanding during the annual period covered by the Guarantee Fee.

(4) If the Equity is equal to or exceeds the Long-Term Debt, the Guarantee Fee rate shall be ½ of 1 percent of the Average Principal Amount of Obligations outstanding during the annual period covered by the Guarantee Fee.

(e) *Payment of Guarantee Fee.* (1) The Guarantee Fee covering the full period of the stated maturity of the Obligations commencing with the date of the Security Agreement shall be paid to us concurrently with the execution and delivery of said Agreement. The project's entire Guarantee Fee payment shall be made by you to us in an amount equal to the sum of the present value of the separate products obtained by applying the pertinent pre or post delivery Guarantee Fee rate or rates to the projected amount of the Average Principal Amount of Obligations Outstanding for each year of the stated maturity of the Obligations. In calculating the present value used in determining the amount of the Guarantee Fee to be paid, we shall use a discount rate based on information contained in the President's most recently submitted budget.

(2) The Guarantee Fee may be included in Actual Cost, is eligible to be financed, and is non-refundable.

(f) *Proration of Guarantee Fee.* The Guarantee Fee shall be prorated where a Vessel delivery is scheduled to occur during the annual period with respect to which payment of said Guarantee Fee is being made, as follows:

(1) Undelivered Vessel. If the Guarantee Fee relates to an undelivered Vessel, the predelivery rate is applicable to the Average Principal Amount of Obligations Outstanding for the period from the date of the Security Agreement to the delivery date, and the delivered Vessel rate is applicable for the balance of the annual period in which the delivery occurs.

(2) Multiple Vessels. If the Guarantee Fee relates to more than one Vessel, the amount of outstanding Obligations will be allocated to each Vessel in the manner prescribed in § 298.33(d), and an amount shall be determined for each Vessel by using the rate that is applicable under paragraph (c) or (d) of this

section. The Guarantee Fee shall be the aggregate of the amounts calculated for each Vessel.

### § 298.37 Examination and audit.

(a)(1) We shall have the right to examine and audit the books, records (including original logs, cargo manifests and similar records) and books of account, which pertain directly to the project, of the Obligor, bareboat charterer, time charterer or any other Person who has an agreement with respect to control of, or a financial interest in, a Vessel or Shipyard Project, as well as records of a Related Party and domestic agents connected with such Persons, and shall have full, free and complete access to these items at all reasonable times.

(2) We shall have the right to full, free and complete access, at all reasonable times, to each Vessel or Shipyard Project for which Guarantees are in force.

(3) When a Vessel is in port or undergoing repairs, we may make photostatic or other copies of any books, records and other relevant documents or papers being examined or audited.

(b) The Person in control of the premises where we conduct the examination or audit must furnish, without charge, adequate office space and other facilities that we reasonably require in performing the examination, audit or inspection.

### § 298.38 Partnership agreements and limited liability company agreements.

Partnership and limited liability company agreements must be in form and substance satisfactory to us prior to any Guarantee Closing, especially relating, but not limited to:

(a) Duration of the entity;

(b) Adequate partnership or limited liability company funding requirements and mechanisms;

(c) Dissolution of the entity and withdrawal of a general partner or member;

(d) The termination, amendment, or other modification of the entity without our prior written consent; and

(e) Distribution of funds or ownership interest.

### § 298.39 Exemptions.

We may exempt an applicant from any requirement of this part, unless required by statute or other regulations, in exceptional cases, on written findings that:

(a) The case materially involves factors not considered in the promulgation of this part;

(b)(1) A national emergency makes it necessary to approve the exemption, or

(2) The exemption will substantially relieve the financial liability of the United States;

(c) The exemption will not substantially impact effective regulation of the Title XI program, consistent with the objectives of this part;

(d) The exemption will not be unjustly discriminatory; and

(e) For Eligible Export Vessels, such exemption would assist in creating financing terms that would be compatible with export credit terms for the sale of vessels built in shipyards other than those in the United States.

## Subpart E—Defaults and Remedies, Reporting Requirements, Applicability of Regulations

### § 298.40 Defaults.

(a) *In General.* Provisions concerning the existence and declaration of a default and demand for payment of the Obligations (described in paragraphs (b) and (c) of this section) shall be included in the Security Agreement and in other parts of the Documentation.

(b) *Principal and interest Payment Default.* Unless we have assumed the Obligor's rights and duties under the Obligation and agreements and have made any payments in default under terms in the Obligation or related agreements, the following procedures regarding principal and interest payment default shall apply:

(1) No demand shall be made for payment under the Guarantees unless the default shall have continued for 30 days (Payment Default).

(2) After the expiration of said 30-day period, demand for payment of all amounts due under the Guarantees must be made no later than 60 days afterward.

(3) After demand for payment is made by or on behalf of the Obligees, we shall make payment under the Guarantees, except if we determine that a Payment Default has not occurred or that such Payment Default has been remedied prior to demand being made.

(c) *Security Default.* If a default occurs under the Security Agreement which is other than a Payment Default (Security Default), section 1105(b) of the Act allows us, in our sole discretion, to declare such default a Security Default, and we may notify the Obligee or agent of the Obligee of such Security Default, stating that demand for payment under the Guarantees must be made no later than 60 days after the date of such notification.

(d) *Payment of Guarantees.* If we receive notice of demand for payment of the Guarantees, we shall, no later than 30 days after the date of such demand (provided that we shall not have, upon such terms as may be provided in the Obligations or related agreements, prior to that demand, assumed the Obligor's rights and duties under the Obligation and agreements and shall have made any payments in default), make payment to the Obligees, Indenture Trustee or any other agent of the unpaid principal amount of Obligations and unpaid interest accrued and accruing thereon up to, but not including, the date of payment.

### § 298.41 Remedies after default.

(a) *In general.* The Security Agreement or other parts of the Documentation shall include provisions governing remedies after a default, which relate to our rights and duties, the rights and duties of the Obligor, and other appropriate Persons.

(b) *Action by the Secretary.* (1) We may take the Vessel or Shipyard Project and hold, lease, charter, operate or use the Vessel or Shipyard Project, accounting only for the net profits to the Obligor after a default has occurred and is continuing and before making payment required under the Guarantees.

(2) After making payment required under the Guarantees, we may initiate or otherwise participate in legal proceedings of every type, or take any other action considered appropriate, to protect rights and interests granted to us under:

(i) Sections 1105(c), 1105(e) and 1108(b) of the Act,

(ii) The Security Agreement,

(iii) Other applicable provisions of law, and

(iv) The Documentation.

(c) *Security proceeds to Secretary.* Our interest in proceeds realized from the disposition of or collection regarding the security granted to us in consideration for the Guarantees (except all proceeds from the sale, requisition, charter or other disposition of property purchased by us at a foreclosure or other public sale, which proceeds shall belong to and vest exclusively in us ), shall be an amount equal to, but not in excess of, the sum of (in order of priority of application of the proceeds):

(1) All moneys due and unpaid and secured by the Mortgage or Security Agreement;

(2) All advances, including interest thereon, by us, under the Security Agreement and all our reasonable charges and expenses;

(3) The accrued and unpaid interest on the Secretary's Note;

(4) The accrued and unpaid balance of the principal of the Secretary's Note; and

(5) To the extent of any collaterization by the Obligor of other debt due to us from the Obligor under other Title XI financings, such other Title XI debt.

(d) *Security proceeds to Obligor.* You shall be entitled to the proceeds from the sale or other disposition of security, described in paragraph (c) of this section, if and to the extent that the proceeds realized are in excess of the amounts described in paragraphs (c)(1) through (5) of this section.

### § 298.42 Reporting requirements—financial statements.

(a) *In general.* The financial statements of the Company shall be audited at least annually, in accordance with generally accepted auditing standards, by independent certified public accountants licensed to practice by the regulatory authority of a State or other political subdivision of the United States or, licensed public accountants licensed to practice by the

regulatory authority or other political subdivision of the United States on or before December 31, 1970.

(b) *Eligible Export Vessels.* In the case of Eligible Export Vessels, the accounts of the Company shall be audited at least annually, and unless otherwise agreed to by us, we shall require that the financial statements be in accordance with generally accepted accounting principles, by accountants as described in paragraph (a) of this section or by independent public accountants licensed to practice by the regulatory authority or other political subdivision of a foreign country, provided such accountants are satisfactory to us. The accountants performing such audits may be the regular auditors of the Company.

(c) *Reports of Company and other Persons.* Except as we require otherwise, the Company must file a semiannual financial report and an annual financial report, prepared in accordance with generally accepted accounting principles, with us as specified in the Documentation. You must include:

(1) The balance sheet and a statement of paid-in-capital and retained earnings at the close of the required reporting period,

(2) A statement of income for the period, and

(3) Any other statement that we consider necessary to accurately reflect the Company's financial condition and the results of its operations.

(d) *Required form.* We will specify in a letter to the Company the form required for reporting and the number of copies that you must submit

(e) *Other Persons.* We may after providing the Company notice, also require the Company to submit financial statements of any other Person, directly or indirectly participating in the project, if the financial condition of that Person affects our security for the Guarantees.

(f) *Timeliness.* The required financial report for the annual period will be due within 105 days after the close of each fiscal year of the Company, commencing with the first fiscal year ending after the date of the Security Agreement. The required semiannual report will be due within 105 days after each semiannual period, commencing with the first semiannual period ending after the date of the Security Agreement.

(g) *Public accountant's report.* The annual report will be accompanied by the public accountant's report based on an audit of the company's financial statements. We may require an audit by the public accountants of the financial statements contained in the company's semiannual report. We also may require certification of the semiannual report by the accountants. Where independent certification is not required, a responsible corporate officer will attach a certification that such report is based on the accounting records and, to the best of that officer's knowledge and belief, is accurate and complete.

(h) *Leveraged lease financing.* If the method of financing involved is a leveraged lease financing, or a trust is the owner of the Vessels, we may modify the requirements for annual and semiannual accounting reports of the Obligor accordingly.

(i) *Letter of confirmation.* The Company must furnish, along with its financial report, a letter of confirmation issued by its insurance underwriter(s) or broker(s) that the Company has paid premiums on insurance applicable to the preservation, protection and operation of the asset, which information must state the term for which the insurance is in force.

### § 298.43 Applicability of the regulations.

(a) The regulations in this part are effective August 21, 2000, and apply to all applications made, Letter Commitments, Commitments to Guarantee Obligations or Guarantees issued or entered into on or after August 21, 2000, under section 1104(a) of the Merchant Marine Act, 1936, as amended.

(b) The regulations in this part do not apply to any applications made, Letter Commitments, Commitments to Guarantee Obligations, or Guarantees issued under those regulations in effect before August 21, 2000. See 46 CFR, parts 200 to 499, edition revised as of October 1, 1996 and 46 CFR, parts 200 to 499, edition revised as of October 1, 1999 for regulations that apply to applications made, Letter Commitments,

Commitments to Guarantee Obligations, or Guarantees issued before August 21, 2000.

## Subpart F—Administration [Reserved]

# SUBCHAPTER E [RESERVED]

# SUBCHAPTER F—POSITION REPORTING SYSTEM

## PART 307—ESTABLISHMENT OF MANDATORY POSITION REPORTING SYSTEM FOR VESSELS

Sec.
307.1 Purpose.
307.3 Definitions.
307.5 Provisions of general applicability.
307.7 Information required in report.
307.9 When to report.
307.11 Report changes.
307.13 Where to report.
307.15 Release of information from reports.
307.17 Distress messages and hostile action reports.
307.19 Penalties.

AUTHORITY: Secs. 204(b), 212(A), 1203(a), Merchant Marine Act, 1936, as amended (46 U.S.C. 1114(b), 1122(a), 1283)); Pub. L. 97–31; 46 CFR 1.66.

SOURCE: 51 FR 18329, May 19, 1986, unless otherwise noted.

### § 307.1 Purpose.

This part establishes that operators of U.S.-flag oceangoing vessels in U.S. foreign trade and certain foreign-flag vessels as described in 46 U.S.C. 1283 must report on their locations according to the provisions of this regulation to enhance the safety of vessel operations at sea and provide a contingency for events of national emergency.

### § 307.3 Definitions.

As used in this part:

(a) *Administrator* means the Maritime Administrator of the Department of Transportation.

(b) *MARAD* means the Maritime Administration, Department of Transportation.

(c) *Coast Guard* means the United States Coast Guard, Department of Transportation.

(d) *AMVER* means the Automated Mutual-Assistance Vessel Rescue System operated by the U.S. Coast Guard as it applies to U.S.-flag ships and certain non-U.S.-flag ships in U.S. foreign commerce under this regulation.

### § 307.5 Provisions of general applicability.

(a) The following operators must comply with the reporting requirements contained in this part:

(1) Operators of United States-flag vessels of one thousand gross tons or more, operating in the foreign commerce of the United States.

(2) Operators of foreign-flag vessels of one thousand gross tons, or more, for which an Interim War Risk Insurance Binder has been issued under the provisions of Title XII, Merchant Marine Act, 1936, as amended (46 U.S.C. 1281 *et seq.*).

(b) Operators of other merchant vessels may choose to submit reports and have voyage information forwarded to MARAD, when approved by the Coast Guard and MARAD. Information voluntarily provided by them will be released by Coast Guard only for safety purposes or to satisfy certain advance notification requirements of 33 CFR part 160. Requests should be addressed to the Maritime Administration, 400 Seventh Street, SW., Washington, DC 20590, Attn: MAR–742.

### § 307.7 Information required in report.

(a) *Types of Reports.* Reports on vessel departure, arrival, position and deviation are required under this part. Sailing plans are optional, and may be sent prior to departure, or may be combined with departure reports.

(b) *Report Content.* Content of each type of required report are specified below. Note that the word "MAREP" must be included in the text of each message if MARAD is to receive the information.

(1) *Sailing Plan Report.* Sailing plan reports, though optional, must contain the following:

(i) Vessel name,

(ii) International Radio Call Sign,

(iii) Intended time of departure,

(iv) Port of departure and latitude/longitude,

(v) Port of destination and latitude/longitude,

(vi) Estimated time of arrival,

(vii) Route information, and

(viii) The keyword "MAREP".

If optional remarks are included, they must follow at the end of the text.

(2) *Departure Report.* Departure reports must contain the following:

(i) Vessel name,

(ii) International Radio Call Sign,

(iii) Time of departure,

(iv) Port of departure,

(v) Latitude and longitude, and

(vi) The keyword "MAREP".

If optional remarks are included, they must follow at the end of the text.

(3) *Position Report.* Position reports must contain the following:

(i) Vessel name,

(ii) International Radio Call Sign,

(iii) Time at reported position,

(iv) Latitude and longitude, and

(v) The keyword "MAREP".

If optional remarks are included, they must follow at the end of the text.

(4) *Deviation Report.* Deviation reports are necessary to report sailing plan changes or other changes and must contain the following:

(i) Vessel name,

(ii) International Radio Call Sign,

(iii) The changes to prior reports, and

(iv) The keyword "MAREP".

If optional remarks are included, they must follow at the end of the text.

(5) *Arrival Report.* Arrival reports must contain the following:

(i) Vessel name,

(ii) International Radio Call Sign,

(iii) Port name,

(iv) Latitude and longitude,

(v) Time of arrival, and

(vi) The keyword "MAREP".

If optional remarks are included, they must follow at the end of the text.

### § 307.9 When to report.

(a) Operators required to report under this regulation shall send reports during the Radio Officer's normal duty hours.

(b) Operators shall send reports as follows:

(1) Departure Reports must be sent as soon as practicable upon leaving the Port of Departure.

(2) Position Reports must be sent within twenty-four hours of departure, and subsequently, no less frequently that every forty-eight hours until arrival.

(3) Arrival Reports must be sent immediately prior to or upon arrival at the Port of Destination.

(4) Deviation Reports may be sent at the discretion of the vessel operator. Reports may be sent more frequently than the above schedule, as, for example, in heavy weather or under other adverse conditions.

### § 307.11 Report changes.

The Administrator, through MARAD advisory or special warning, may direct changes in reporting frequency and specify particular information to be included in the comments section of AMVER messages.

### § 307.13 Where to report.

To ensure that no charge is applied, all AMVER reports must be passed through specified radio stations. Those stations which currently accept AMVER reports and apply no coastal station, ship station, or landline charge are listed in each issue of the "AMVER Bulletin" publication, together with respective International Radio Call Sign, location, frequency bands, and hours of operation. The "AMVER Bulletin" is available from AMVER Maritime Relations Office, U.S. Coast Guard, Battery Park Building, New York, NY 10004. Although AMVER reports may be sent through other stations, the Coast Guard cannot reimburse the sender for any charges applied.

[51 FR 18329, May 19, 1986, as amended at 65 FR 47678, Aug. 3, 2000]

### § 307.15 Release of information from reports.

(a) The information collected under these instructions will be released to recognized search-and-rescue authorities, to make advance notice to the U.S. Coast Guard of arrival in U.S. ports as required by certain sections of 33 CFR. The information collected will also be forwarded to the MARAD.

(b) AMVER reports will remain voluntary for foreign ships unless otherwise directed by their governments, and will be kept strictly confidential by the U.S. Coast Guard. Information collected from such foreign ships will not be forwarded to MARAD.

(c) any information provided in the remarks line will be stored in AMVER's automatic data processing system for later review. However, no immediate action will be taken, nor will the information be routinely passed to other organizations. The remarks line cannot be used as a substitute for sending information to other search-and-rescue authorities or organizations. However, AMVER will, at the request of other SAR authorities, forward remarks line information to the requesting agencies.

### § 307.17 Distress messages and hostile action reports.

(a) AWVER reports shall not replace distress messages and hostile action reports prescribed by Chapter 5, Defense Mapping Agency (DMA) Publication 117.

(b) Vessel owners or operators subject to this part shall summarize distress messages or hostile action reports in the comments sections of AMVER reports.

### § 307.19 Penalties.

The owner or operator of a vessel in the waterborne foreign commerce of the United States is subject to a penalty of $50 for each day of failure to file an AMVER report required by this part. Such penalty shall constitute a lien upon the vessel, and such vessel may be libeled in the district court of the United States in which the vessel may be found.

# SUBCHAPTER G—EMERGENCY OPERATIONS

## PART 308—WAR RISK INSURANCE

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Subpart G—Records Retention

308.600 Records retention requirement.

AUTHORITY: Secs. 204, 1202, 1203, 1209, Merchant Marine Act of 1936, as amended (46 App. U.S.C. 1114, 1282, 1283, 1289; 49 CFR 1.66).

SOURCE: 61 FR 1131, Jan. 16, 1996, unless otherwise noted.

## Subpart A—General

### § 308.1 Eligibility for vessel insurance.

Any vessel within one of the following categories shall be eligible for insurance, but shall remain eligible only while meeting the qualifications criteria in one of said categories. An eligible vessel is not insured unless and until an application is submitted as required in subpart B, C, or D of this part 308 and the Maritime Administrator, Department of Transportation, (Maritime Administrator) Maritime Administration (MARAD), approves said application.

(a) A vessel registered, enrolled, or licensed under the laws of the United States of America (United States); any undocumented vessel owned or chartered by or made available to the United States or any department or agency thereof; any tug or barge or other watercraft (documented under the laws of the United States, or undocumented) owned by a citizen of the United States and used in essential water transportation; and United States citizen-owned watercraft used in the fishing trade or industry, except when used exclusively in or for sport fishing.

(b) Any vessel, other than a vessel described in paragraph (a) of this section determined by the Maritime Administrator to be engaged in the national defense or the national economy of the United States and subject to an unqualified Contract of Commitment with the United States in a form required by the Maritime Administrator, and which is:

(1) Owned by a United States corporation, or a foreign corporation in which a majority of the stock is owned and controlled by a citizen or citizens of the United States, whether direct or through intervening corporations, foreign or domestic. Where such intervening corporations are foreign, the ultimate majority ownership and control of the stock of such corporations must be vested in a citizen or citizens of the United States as defined in section 1201(d), Merchant Marine Act, 1936, as amended (46 App. U.S.C. 1281(d));

(2) Owned by a foreign corporation which is not directly or beneficially owned by a citizen or citizens of the

United States, but which vessel is under a long-term charter or other long-term contract covering the use of the vessel on terms deemed by the Maritime Administrator to subject the vessel to United States control in the event of an emergency. The charterer of such vessel must be either a citizen or citizens of the United States or a foreign corporation in which a majority of the stock is owned and controlled by a citizen or citizens of the United States, whether direct or indirect through intervening corporations, foreign or domestic. Where such intervening corporations are foreign, ultimate majority ownership and control of the stock of such corporations must be vested in a citizen or citizens of the United States, as defined in 46 App. U.S.C. 1281(d).

(c) Any other vessel, at the sole discretion of the Maritime Administrator, but only while engaged in a service which has been determined by the Maritime Administrator to be in the interest of the national defense or the national economy of the United States. Vessels in this category are not eligible for war risk insurance interim binders.

### § 308.2 Requirements for eligible vessels.

(a) *Restrictions—foreign-flag vessels.* Interim insurance is available on any vessel described in § 308.1 (a) and (b) of this part, provided application for interim insurance is submitted as required in subparts B, C, or D of this part 308, and the Maritime Administrator approves said application: Provided, That only vessels of Panamanian, Honduran, Bahamian, Republic of the Marshall Islands or Liberian registry not more than 20 years old will be considered eligible under § 308.1 (b) of this part for interim insurance, subject at all times to the determination specified in paragraph (b) of this section.

(b) *Special rules—foreign-flag vessels.* For the purpose of providing interim insurance on vessels described in § 308.1(b), the Maritime Administrator shall consider the characteristics, employment, and general management of the vessel. The Maritime Administrator formally determines that the following vessels are engaged in a service in the interest of the national defense or the national economy of the United States and qualify for an interim binder:

(1) Vessels substantially engaged in the foreign commerce of the United States or which would be required in the event of war or national emergency;

(2) Tankers of not less than 2,000 deadweight tons;

(3) Dry cargo vessels, including containerships, breakbulk, and dry bulk vessels;

(4) Heavy lift vessels;

(5) Refrigerated vessels and other classes of ships in short supply in the United States-flag fleet;

(6) Passenger vessels; and

(7) Other vessels with special capabilities, as determined by the Maritime Administrator.

(c) *Vessel Position Reports.* All vessels for which war risk insurance interim binders have been issued shall file a Vessel Position Report. The purpose of this report is to inform cognizant U.S. agencies of vessel arrivals, departures and at-sea locations. Failure to make required regular reports will cause MARAD to issue a one-time notice of default. If failure to report continues, MARAD shall cancel the interim binder for the subject vessel and any insurance attaching thereunder. MARAD will issue reporting instructions and formats with the binders.

(d) *Notice of change in status of vessel after binder issued.* Any breach of the warranty prescribed hereunder as to vessels in all categories with respect to Department of Commerce Transportation Orders T–1 and T–2 (44 CFR Parts 401, 402 and 403), as well as the additional warranties as to vessels in categories (b)(1) and (b)(2) of this section, with respect to maintenance of eligibility for insurance and availability of the insured vessels to the U.S. Government in time of emergency, shall terminate the binders and any insurance attaching thereunder. In the event of the sale, demise charter, requisition, confiscation, change of flag, total loss, or any other change in status which, by the terms of the binder causes the binder to terminate, prompt notice shall be given in writing to the American War Risk Agency, 14 Wall Street, New York, NY 10005.

(e) *Nature of change in status of other vessels.* It is the intention of the parties that any breach of the warranty as to operation in the approved service of vessels described in § 308.1(c) shall terminate the insurance. In the event of the sale, demise charter, requisition, confiscation, change of flag, total loss, any other change in status or change in operation of the vessel in the approved service prompt notice shall be given to the American War Risk Agency, 14 Wall Street, New York, NY 10005.

### § 308.3 Applications for insurance; warranties; supporting documents; payment of binder fees.

(a) *Application, binder forms.* A single application for War Risk Insurance shall be filed on Form MA–528, specifying the types of insurance coverages for which the applicant is applying. A single application may be submitted for several vessels, if the application identifies each vessel to be insured and the coverage(s) required, by completing appendices A and B to that form. An interim binder for war risk insurance coverage, of the types described in subparts B, C and D of this part, shall be on Form MA–942, which may be obtained from the American War Risk Agency or from the Office of Subsidy and Insurance.

(b) *Warranties*—(1) *In general.* Applications for war risk hull and protection and indemnity insurance in any eligible category of this Part 308 shall include a warranty that, at all times during the effective period of the binder and any insurance attaching thereunder, the insured vessel, regardless of its nation of registry, will comply with Department of Commerce Transportation Orders T–1 and T–2 (44 CFR parts 401, 402, and 403), or any modifications thereof so long as they remain in force and that the vessel will not be chartered, unless in accordance with the provisions of § 221.11 and 221.13 of this chapter, which requirement is applicable to any charter in existence at the time the applicant applies for insurance.

(2) *Vessels described in § 308.1(a).* Applications for war risk insurance on a vessel described in § 308.1(a) shall contain the warranty that at, and from the date of issuance of the interim binder, and for and during the term of any insurance attaching thereunder, such vessel will remain eligible within its category.

(3) *Vessels described in § 308.1(b).* Applications for war risk insurance on a vessel described in § 308.1(b) shall contain the warranties that at all times the vessel will remain eligible within its applicable category; that the vessel will be made available for use by the United States pursuant to the signed Contract of Commitment submitted with the insurance applications, as required by the Maritime Administration; that the vessel will remain in the approved service; and that no controlling interest in the vessel shall be transferred by a subsequent sale or long-term charter, except on the condition that the successor in interest agrees to be bound by the terms of the applicant's Contract of Commitment. All instruments transferring any controlling interest in the vessel, including long-term charter or merger agreements, shall be submitted to the Maritime Administration for prior approval.

(4) *Vessels described in § 308.1(c).* Applications for war risk insurance on a vessel described in § 308.1(c) shall contain warranties that the vessel will remain in the approved service and that any change in flag or service will be reported in advance to the Maritime Administration for a new determination as to whether the vessel's service is in the interest of the national defense or the national economy of the United States. Vessels in this category are not eligible for war risk insurance interim binders.

(5) *Vessel locator filing requirements.* Applications for insurance on vessels in all categories, except tugs and barges and vessels used exclusively in the fishing trade or industry, described in § 308.1(a), shall contain a warranty that at all times the vessel will file reports as required under the U.S. Merchant Vessel Locator Filing System (USMER) as prescribed in § 308.2(c) of this section.

(c) *Filing applications for insurance.* All applications for insurance on a vessel shall be made to the American War Risk Agency, 14 Wall Street, New York, New York 10005, underwriting

agent for the Maritime Administration.

(d) *Required submissions with*—(1) *In general.* An application for insurance on a vessel described in § 308.1(b) shall be accompanied by:

(i) A contract of commitment, in the form prescribed in § 308.5 of this part. In the event the vessel is determined to be ineligible under the terms of this part 308, the applicant will be so advised and the executed contract of commitment and any official foreign government action or approval will be returned to the applicant by the Maritime Administration.

(ii) An executed agreement contained in the application for insurance that any charter or other contract covering the use of the vessel during the period of the binder or any insurance attaching thereunder shall be subject to termination or suspension without notice in the event the United States requires the use of the vessel under the voluntary contract of commitment submitted by the applicant.

(2) *Certification of citizenship.* An application for insurance on such a vessel shall be supported by execution of the citizenship certification, in the format set out in appendix C to Form MA–528, as described in paragraph (a) of this section. That certification shall be required to establish the U.S. citizenship of the majority ownership and control of the vessel-owning corporation, whether that ownership is direct or through intervening corporations.

(3) *Existing long-term charters.* An application for a vessel in this category which is at the time of application under long-term charter or other long-term contract, either to the applicant or from the applicant to a third party, shall be jointly submitted by the owner and the charterer, and in addition to the other materials required under this paragraph, shall be accompanied by a copy of the long-term contract covering the use of the vessel and all addenda thereto, certified to be full and complete copies (except as to rate of hire or freight) and a completed appendix C to Form MA–528, establishing the U.S. citizenship of the majority of the shareholders and control of the charterer. The charterer shall also furnish to MARAD a certified copy of any amendment to such charter which may be issued subsequent to the issuance of any binder of insurance under this Part 308.

(4) *Foreign government action or approval.* An application for a vessel in this category also shall be accompanied by a certified copy of the evidence of any official action or approval required by the government of the country of registry as a prerequisite to the execution of a contract of commitment with the United States.

(5) *Additional materials.* With respect to a vessel in this category, the applicant shall submit the following additional materials:

(i) A statement describing the service in which the vessel is engaged, including a listing of the vessel's voyages and ports of call during the immediately preceding six (6) month period, indicating the tonnage and type of cargo carried on such voyages and the reasons why such service should be deemed to be in the interest of the national defense or the national economy of the United States;

(ii) Material demonstrating the management and financial capabilities of the applicant; and

(iii) In the case of a new vessel or a vessel which has not for the six (6) months immediately prior to the date of the application been engaged in the foreign commerce of the United States, a statement, signed by a responsible company official, certifying the extent to which the vessel will be engaged in the foreign commerce of the United States for the six (6) months immediately following the issuance of any interim binder of insurance under this part 308.

(e) *Requests for changes in binders.* All requests for changes in binders and inquiries relative to the insurance after the interim binders have been issued shall be directed to the American War Risk Agency, 14 Wall Street, New York, NY 10005.

(f) *Fees.* A check payable in U.S. funds to the "Maritime Administration, Department of Transportation" for the total amount of all binder fees payable by such applicant shall accompany each application. Binder fees are not returnable.

(g) *Availability of Application Forms.* Form MA–528 may be obtained from either the American War Risk Agency (Underwriting Agent), at the address in paragraph (e) of this section, or the Maritime Administration, Attention: Director, Office of Subsidy and Insurance, 400 Seventh Street, SW., Washington, DC 20590.

(Approved by the Office of Management and Budget under control number 2133–0011)

### § 308.4 [Reserved]

### § 308.5 Voluntary contract of commitment.

Applications for insurance on vessels described in § 308.1(b) shall be accompanied by a contract of commitment, in triplicate originals, executed by the owner (or by the owner and the charterer where required by § 308.3). Contracts of commitment to make the vessel available to the United States during any period in which vessels may be requisitioned under section 902 of the Act (46 App. U.S.C. 1242) shall be submitted on standard contract form which may be obtained from the American War Risk Agency or MARAD. The effective date of the contract of commitment will be the effective date of the binder and will be inserted in the contract of commitment by MARAD.

### § 308.6 Period of interim binders, updating application information and new applications.

(a) All existing interim binders remain in full force and effect without the necessity of re-application or the payment of additional fees so long as the Secretary of Transportation's authority to provide such insurance has been extended and is continuous.

(b) Assureds under interim binders are required to notify the American War Risk Agency annually, by June 30th, of any change in the information provided in their original binder applications including, but not limited to, change of address, vessel name or vessel characteristics.

(c) New applications for interim binders on U.S.-flag vessels, with necessary attachments (as specified in S 308.3), as well as checks for the binder fees prescribed made payable to "Maritime Administration, Department of Transportation," shall be filed with the American War Risk Agency, 14 Wall Street, New York, New York 10005. All interim binders on U.S.-flag vessels shall become effective as of the date of determination of eligibility by the Maritime Administration.

(d) New applications for interim binders on U.S. citizen-owned or controlled foreign-flag vessels, with necessary attachments (as specified in § 308.3), as well as checks for the binder fees prescribed made payable to "Maritime Administration, Department of Transportation," shall be filed for review in accordance with eligibility requirements specified in § 308.2, and mailed to the American War Risk Agency, 14 Wall Street, New York, New York 10005. All interim binders on foreign-flag vessels will become effective on the date the owner's contract of commitment is executed by the Maritime Administration.

(Approved by the Office of Management and Budget under control number 2133–0011)

### § 308.7 Premiums and payment thereof.

Rate to be fixed promptly upon the happening of the event causing the American Institute Hull War Risks and Strikes Clauses dated December 1, 1977 (including Automatic Termination and Cancellation Provisions) for attachment to American Institute Hull Clauses dated June 2, 1977 of any war risk policies to become operative and premium shall be payable within ten days after receipt of notice of the amount thereof by the assured. Premiums shall be paid to the Underwriting Agent that issued the binders by check payable to the order of "Maritime Administration, Department of Transportation." In the event that it is subsequently determined that insurance under interim binders did not attach, premiums paid will be refunded by the Maritime Administrator.

### § 308.8 War risk insurance underwriting agency agreement.

Standard form MA–355 of underwriting agency agreement applicable shall be executed by the Maritime Administrator and domestic insurance

companies or groups of domestic insurance companies authorized to do a marine insurance business in any States of the United States, appointing such companies or groups of companies as Underwriting Agents to issue binders and policies covering hull, protection and indemnity, and Second Seamen's war risk insurance under subparts B, C, and D of this part. It shall contain provisions including, but not limited to the appointment of the agent, duties of the agent, books and records, compensation, standard of performance, indemnification effective date, amendment and termination, and nondiscrimination.

## Subpart B—War Risk Hull and Disbursements Insurance

### § 308.100 Insured amount.

An applicant for war risk hull insurance shall state the amount of insurance desired but any payment of claim for damage to or actual or constructive total loss of the vessel insured shall be made as provided in § 308.103(a). An applicant desiring disbursements insurance may at his option obtain such additional insurance but any claim for loss of disbursements as a consequence of the actual or constructive total loss of the vessel insured shall be made as provided in § 308.103(c).

### § 308.101 [Reserved]

### § 308.102 Issuance of interim binder; terms and conditions; fees.

Upon acceptance of an application, an interim binder in the form set forth in § 308.106, will be issued and there shall be deemed to be incorporated therein by references all the terms, conditions, and warranties contained in the application for war risk hull and disbursements insurance and the standard war risk hull insurance policy (set forth in § 308.107), to the same extent as if such application and policy were made a part of the binder. The binder fee (not refundable) for U.S.-flag vessels shall be $25 per application for vessels under 500 gross tons; $100 per application for vessels 500 gross tons or over; and $100 per LASH or similar type barge application. The binder fee (not refundable) for foreign-flag vessels shall be $50 per application for vessels under 500 gross tons; $200 per application for vessels 500 tons or over; and $200 per LASH or similar type barge application. All fees are payable in U.S. funds by check to order of the "Maritime Administration, Department of Transportation."

### § 308.103 Insured amounts under interim binder.

(a) *Valuation*. The valuation in the policy for damage to, or actual or constructive total loss of the vessel insured shall be a stated valuation (exclusive of National Defense features paid for by the Government) determined by the Secretary of Transportation which shall not exceed the amount that would be payable if the vessel had been requisitioned for title under section 902(a) of the Merchant Marine Act, 1936, as amended (46 App. U.S.C. 1242(a)) at the time of the attachment of the insurance under said policy: Provided, however, That in the case of a construction subsidized vessel, for the period of insurance prior to requisition for title or use, the valuation so determined shall be reduced by such proportion as the amount of construction subsidy paid with respect to the vessel bears to the entire construction cost and capital improvements thereof (excluding the cost of national defense features), and for the period of insurance after requisition for use the valuation so determined shall not exceed the amount which would be payable under 46 App. U.S.C. 1242(a) in the case of requisition for title or use: Provided, further, that the insured shall have the right within sixty days after the attachment of the insurance under said policy, or within sixty days after determination of such valuation by the Secretary of Transportation, whichever is later, to reject such valuation, and shall pay, at the rate provided for in said policy, premiums upon such asserted valuation as the insured shall specify at the time of rejection, but such asserted valuation shall not operate to the prejudice of the Government in any subsequent action on the policy. In the event of the actual or constructive total loss of the vessel, if the insured has not rejected such valuation the amount of any claim therefor

which is adjusted, compromised, settled, adjudged, or paid shall not exceed such stated amount, but if the insured has so rejected such valuation, the insured shall be paid as a tentative advance only, 75 per centum of such valuation so determined by the Secretary of Transportation and shall be entitled to sue the United States in a court having jurisdiction of such claims to recover such valuation as would be equal to the just compensation which such court determines would have been payable if the vessel had been requisitioned for title under 46 App. U.S.C. 1242(a) at the time of the attachment of the insurance under said policy: Provided, however, That in the case of a construction-subsidized vessel, the valuation determined by the court as such just compensation for any period of insurance prior to actual requisition for title or use of the vessel shall be reduced by such proportion as the amount of construction subsidy paid with respect to the vessel bears to the entire construction cost and capital improvements thereof (excluding the cost of national defense features), and for any period of insurance after actual requisition for use, the valuation determined by the court shall be the amount which would have been payable under 46 App. U.S.C. 1212 in the case of requisition for title: And provided further, that in the event of an election by the insured to reject the stated valuation fixed by the Secretary of Transportation and to sue in the courts, the amount of the judgment will be payable without regard to any limitations provided by statute, although the excess of any amounts advanced on account of just compensation that is over the amount of the court judgment shall be required to be refunded by the insured. In the event of such court determination, premiums under the policy shall be adjusted on the basis of the valuation as finally determined and of the rate provided for in said policy. The "stated valuation" of the vessel insured refers to the vessel as described in § 309.5 of this chapter.

(b) *Insurance risks.* Insurance risks covered by the terms of the standard form of war risk hull insurance policy (§ 308.107), except damage to or actual or constructive total loss of the vessel insured as set forth in paragraph (a) of this section and loss of disbursements (limited to consumable and subsistence stores, slop chests, bar stock and bunker fuel lost as a consequence of the actual or constructive total loss of the vessel insured) as set forth in paragraph (c) of this section and identified as disbursements, shall be insured for an amount not in excess of the "sum insured" as referred to in said policy.

(c) *Disbursements.* Disbursements shall be insured as authorized under section 1203(c), Title XII, Merchant Marine Act, 1936, as amended, (46 App. U.S.C. 1283(c)) and shall be limited to consumable and subsistence stores, slop chests, bar stock and bunker fuel. Disbursements insurance shall be optional and is insurance additional to the war risk hull insurance provided under this subpart, and payment of claim shall be limited to the actual value of the disbursements lost as a consequence of the actual or constructive total loss of the vessel insured.

### § 308.104 Additional war risk insurance.

Owners or charterers may obtain, on an excess basis, additional war risk insurance in such amounts as desired and such insurance shall not inure to the benefit of the Maritime Administrator as underwriter.

### § 308.105 Reporting casualties and filing claims.

All casualties occurring after insurance under a binder has attached shall be reported promptly to the Underwriting Agent that issued the binder and all claim documents shall likewise be filed with such Underwriting Agent, but payment of the amounts due in settlement of claims will be made by the Maritime Administrator.

### § 308.106 [Reserved]

### § 308.107 War risk hull insurance policy.

Standard Form MA–240, issued by the Maritime Administrator, acting for the United States, through authority delegated by the Secretary of Transportation, may be obtained from the American War Risk Agency or MARAD.

## Subpart C—War Risk Protection and Indemnity Insurance

### § 308.200 Insured amount—application.

An applicant for war risk protection and indemnity insurance shall state the amount of insurance desired but such amount shall not exceed $750 per gross ton of the Vessel.

### § 308.201 [Reserved]

### § 308.202 Issuance of interim binder; terms and conditions.

Upon acceptance of an application, an interim binder in form as set forth in § 308.3 will be issued and there shall be deemed to be incorporated therein by reference all the terms, conditions, and warranties contained in the application for war risk protection and indemnity insurance (set forth in § 308.3) and the standard war risk protection and indemnity insurance policy (set forth in § 308.207) to the same extent as if such application and policy were made a part of the binder. The binder fee (not refundable) shall be $100 per application for U.S.-flag LASH or similar type barges; $25 per application for all other U.S.-flag vessels; $200 per application for foreign-flag LASH or similar type barges; and $50 per application for all other foreign-flag vessels. All fees are payable in U.S. funds by check to the order of "Maritime Administration, Department of Transportation."

### § 308.203 Amount insured under interim binder.

The amount insured shall be the amount stated in the application, but not in excess of $750 per gross ton of the vessel.

### § 308.204 Additional war risk protection and indemnity insurance.

Owners or charterers may obtain, on an excess basis, additional war risk protection and indemnity insurance in such amounts as desired and such insurance shall not inure to the benefit of the Maritime Administrator, as underwriter.

### § 308.205 Reporting casualties and filing claims.

All casualties occurring after insurance under a binder has attached shall be reported promptly to, and all claim documents filed with the Office of Subsidy and Insurance, Maritime Administration, Department of Transportation, Washington, DC, 20590.

### § 308.206 [Reserved]

### § 308.207 War risk protection and indemnity insurance policy.

The standard form of war risk protection and indemnity insurance policy, Form MA–241, may be obtained from the American War Risk Agency or MARAD.

## Subpart D—Second Seamen's War Risk Insurance

### § 308.300 Insured amount—application.

An applicant for Second Seamen's war risk insurance shall not state the amount of insurance desired, which shall be as provided in § 308.303.

### § 308.301 [Reserved]

### § 308.302 Issuance of interim binder; terms and conditions.

Upon acceptance of an application, an interim binder in form as set forth in § 308.3 will be issued and there shall be deemed to be incorporated therein by reference all the terms, conditions, and warranties contained in the application for Second Seamen's war risk insurance (set forth in § 308.3) and the Second Seamen's War Risk Policy (1955) (set forth in § 308.306) to the same extent as if such application and policy were made a part of the binder. The binder fee (not refundable) shall be $75 per application for U.S.-flag vessels and $150 per application for foreign-flag vessels. All fees are payable in U.S. funds by check to the order of "Maritime Administration, Department of Transportation."

### § 308.303 Amounts insured under interim binder.

The amounts insured are the amounts specified in the Second Seamen's War Risk Policy (1955) or as

modified by shipping articles, collective bargaining agreements or other applicable employment agreements which are in effect as of the date of a casualty involving the subject vessel. Upon the attachment of this binder, the number of crew members and modified benefits payable as of that date shall be declared immediately to the Underwriting Agent that issued the binder. Any subsequent changes shall be likewise declared.

### § 308.304 Reporting casualties and filing claims.

All casualties occurring after insurance under a binder has attached shall be reported promptly to, and all claim documents filed with, the Maritime Administration, Attention: Director, Office of Subsidy and Insurance, Washington, DC 20590.

### § 308.305 [Reserved]

### § 308.306 Second Seamen's War Risk Policy, Form MA–242.

(a) The standard form of Second Seamen's War Risk Policy Form MA–242, may be obtained from the American War Risk Agency or MARAD.

(b) [Reserved]

## Subpart E—War Risk Builder's Risk Insurance

### § 308.400 Authority.

The Secretary of Transportation has delegated authority to the Maritime Administrator to perform the functions vested in the Secretary of Transportation by Title XII of the Merchant Marine Act, 1936, as amended. The Maritime Administrator, pursuant to a finding by the Secretary under section 1202(a) of the Act authorized, (46 App. U.S.C. 1982(a)) has authorized the issuance of war risk insurance on American vessels under construction in shipyards in the United States.

### § 308.401 Eligibility for insurance.

A vessel is eligible for insurance if it is an American vessel as defined in section 1201(a), Title XII of Merchant Marine Act, 1936, as amended, (46 App. U.S.C. 1281) being constructed in a shipyard within the United States.

### § 308.402 Insurance during vessel construction period.

(a) *Prelaunching period.* This period is from the date and time the first material destined for inclusion as part of the vessel becomes at risk at the shipyard of the builder to the date and time the vessel first becomes waterborne after launching.

(b) *Postlaunching period.* This period is from the date and time the vessel first becomes water-borne after launching to the date and time of delivery of the vessel by the builder.

(c) *Portions of periods.* A vessel may be insured for a portion of either period as cited in paragraph (a) or (b) of this section at the sole discretion of the Maritime Administrator.

### § 308.403 Insured amounts.

(a) *Prelaunching period.* The amount insured during this period will be the cost of material destined for inclusion as a part of the vessel at risk at the shipyard of the builder, plus the cost of labor, other direct charges, overhead, and profit not exceeding 10 percent, all as determined from the builder's records.

(b) *Postlaunching period.* The amount insured during this period will be: (1) An amount not in excess of the difference in amount between the total amount of war risk insurance obtainable from companies authorized to do an insurance business in a State of the United States and the contract price of the vessel plus the cost of the materials and equipment furnished by the owner and not included in such contract price, or (2) an amount not in excess of the contract price of the vessel plus the cost of materials and equipment furnished by the owner and not included in the contract price: Provided, That no war risk insurance is obtainable from companies authorized to do an insurance business in a State of the United States.

(c) *Maximum liability.* The amount of any claim for damage to or the total or constructive total loss of the vessel adjusted, compromised, settled, adjudged or paid shall not exceed the amount insured: Provided, That the amount payable hereunder shall not exceed the

maximum sum which the Maritime Administrator, as Underwriter, is authorized to pay under any applicable Acts of Congress: Provided, further, That where MARAD is an Excess Underwriter, the amount payable under this insurance for damage to or the total or constructive total loss of the vessel, after all sums due and payable under primary and excess insurance written by commercial Underwriters have been exhausted, shall be the balance, if any, of said claims.

### § 308.404 Application for insurance.

Application for insurance shall be made to the Maritime Administration, Attention: Director, Office of Subsidy and Insurance, Washington, DC 20590. The applications shall be signed by all parties to be named as assureds, unless they have filed with the Director, Office of Subsidy and Insurance, written designations of a broker or brokers to act for them, in which case the applications may be signed by such broker or brokers.

### § 308.405 Form of application.

Applications shall be submitted in duplicate and may be obtained from the American War Risk Agency or MARAD.

### § 308.406 Issuance of policies; terms and conditions.

Upon acceptance of an application, a policy in the form specified in § 308.409 will be issued with endorsements MA–283(A) and MA–283(D), or MA–283(B) and MA–283(D), or MA–283(C), and MA–283(D), as appropriate.

### § 308.407 Premiums and payment.

For the prelaunching period premium will be charged on the average value at risk during each calendar month or the daily pro rata part thereof for periods of less than one calendar month. For the postlaunching period premium will be charged on the amount insured for the full period. Premiums shall be due and payable within thirty days after receipt by the Assured of notice of the amount thereof and if not paid within that period the insurance shall become null and void and of no effect from the beginning of the period for which the premium charge is made unless the Maritime Administrator agrees otherwise. Payment shall be made to the Maritime Administration, Department of Transportation, Washington, DC 20590, by check payable to the order of "Maritime Administration, Department of Transportation."

### § 308.408 Right of Maritime Administrator to change rate of premium.

The Maritime Administrator, acting for the Secretary of Transportation, shall have the right to change the rate of premium at any time, and unless the revised rate of premium is accepted in writing by the Assured within fifteen days after receipt by the Assured of notice of the revised rate, the policy shall become null and void and of no effect as of midnight, Standard Time, at the location of the shipyard on the fifteenth day after receipt of said notice. Premium at the revised rate shall be payable for the fifteen-day period during which the insurance remained in force unless the Assured, within such period, dispatches notice to the Maritime Administration by telegraph of his refusal to accept such revised rate of premium, in which event premium at the revised rate shall be payable for that portion of the fifteen-day period prior to dispatch of such notice. Upon the dispatch of such notice of non-acceptance the insurance shall terminate.

### § 308.409 Standard form of War Risk Builder's Risk Insurance Policy, Form MA–283.

The standard form of War Risk Builder's Risk Insurance Policy, Form MA–283 may be obtained from the American War Risk Agency or MARAD.

### § 308.410 Reporting casualties and filing claims.

Casualties shall be reported promptly to, and all claims documents filed with MARAD, Attention, Director, Office of Subsidy and Insurance, Washington, DC 20590.

## Subpart F—War Risk Cargo Insurance

I—INTRODUCTION

### § 308.500 Authority.

The Secretary of Transportation has delegated authority to the Maritime Administrator to perform the functions vested in the Secretary by Title XII of the Merchant Marine Act, 1936, as amended, which authority includes the insurance set forth in this Subpart, as provided under section 1203(b) of the Act (46 App. U.S.C. 1283(b)). For the purposes of this Subpart F—War Risk Cargo Insurance, the terms "cargo" and "cargoes" as used herein shall include loaded or empty containers located aboard U.S.-flag and foreign-flag vessels insured under Title XII, Merchant Marine Act, 1936, as amended. Cargo war risk insurance will be written under either an open policy or a facultative policy in accordance with the provisions of this subpart.

### § 308.501 Cargoes on which coverage is available.

The Maritime Administrator will be prepared to provide marine insurance against loss or damage by the risks of war under approved clauses on shipments of cargoes coming within one or more of the following categories:

(a) Shipped or to be shipped on any American vessel, as defined in section 1201(a) of the Merchant Marine Act, 1936, as amended (46 App. U.S.C. 1281(a));

(b) Shipped or to be shipped on any foreign flag vessels owned by citizens of the United States;

(c) Owned by citizens or residents of the United States, its Territories or possessions;

(d) Imported to, or exported from, the United States, its Territories or possessions, under contracts of sale or purchase by the terms of which the risk of loss by war risks or the obligation to provide insurance against such risks is assumed by or falls upon a citizen or resident of the United States, its Territories or possessions;

(e) Sold or purchased by citizens or residents of the United States, its Territories or possessions, under contracts of sale or purchase by the terms of which the risk of loss by war risks or the obligation to provide insurance against such risks is assumed by or falls upon a citizen or resident of the United States, its Territories or possessions;

(f) Shipped between ports in the United States, or between ports in the United States and its Territories and possessions, or between ports in such Territories or possessions; and

(g) Shipped or to be shipped on any foreign flag vessels, whether or not owned by citizens of the United States, if such vessels are engaged in transportation in the water-borne commerce of the United States or in such other transportation by water or such other services as may be deemed by the Maritime Administrator to be in the interest of the national defense or the national economy of the United States, when so engaged.

### § 308.502 Additional insurance.

The assured may place increased value or additional insurance in other markets beyond the amount of insurance provided by the Maritime Administrator, but such insurance must be non-participating with the Maritime Administrator's coverage, and without benefit of salvage or right of contribution.

### § 308.503 Rate schedules.

Rate schedules published by the Maritime Administrator may be obtained from an underwriting agent. All rate schedules are subject to change by the Maritime Administrator at any time without notice. If no rate is published for a voyage on which war risk coverage is available, the Maritime Administrator will name a rate through an underwriting agent upon application.

### § 308.504 Definition of territories and possessions.

Whenever reference is made to the territories and possessions of the United States in this subpart or in any supplement thereto or any policy of insurance issued pursuant to the provisions thereof, said territories and possessions shall be deemed to include only the Virgin Islands of the United States, the Commonwealth of Puerto

Rico, American Samoa, Guam, Wake Island, Midway Islands, and the Panama Canal Zone.

II—OPEN POLICY WAR RISK CARGO INSURANCE

### § 308.505 General.

The Maritime Administrator is prepared to provide an open cargo war risk insurance policy covering any cargoes described in § 308.501. The policy will be in the standard form of War Risk Open Cargo Policy, Form MA–300, prescribed in § 308.517. All policies will be issued by underwriting agents appointed by the Maritime Administrator. All underwriting agents will be domestic insurance companies authorized to do a marine insurance business in a State of the United States.

### § 308.506 Application for an Open Cargo Policy.

Application for an Open Cargo Policy shall be made by filing Form MA–301, prescribed in § 308.521, with an underwriting agent of the Maritime Administration. The application shall state the applicant's name and address; the person or persons to whom loss shall be payable; the nature and geographic scope of the shipments to be covered under the policy which shall not be broader than the coverage authorized in § 308.501; the requested effective date, which shall not be earlier than the date of the completion of the requirements for the issuance of the policy; and the basis of valuation to be incorporated in the policy. An applicant may specify one basis of valuation for imports and another for exports, and he may specify different bases of valuation for different commodities or voyages, provided that each basis of valuation specified by the applicant shall define the value by the use of facts which existed prior to the date of the shipment and which are readily ascertainable by either party after the safe arrival or loss of the shipment.

### § 308.507 Security for payment of premiums.

Clause 21 of the policy requires the assured to maintain with the Maritime Administrator a collateral deposit fund or a surety bond, to secure the payment of the premiums, in an amount which shall at all times exceed the unpaid premiums on all risks which have attached under the policy. The minimum amount of the fund or of the surety bond shall be $1,000. Clause 21 also provides that, within seven (7) days from the time knowledge comes to the assured that the amount of the deposit or the surety bond is insufficient to meet the requirements of Clause 21, the assured shall deposit additional collateral or increase the surety bond in an amount not less than double the amount of such insufficiency, and for a sum which shall be a multiple of $500. If the assured fails to increase the deposit or the surety bond within the seven (7) day period, the policy automatically becomes void at the end of the seven (7) day period except as to risks which have attached prior to that date. The procedure for establishing a collateral deposit fund is prescribed in § 308.509, and the procedure for posting and maintaining a surety bond is prescribed in § 308.510. An application for the issuance of an open cargo policy shall be ineffective unless a collateral deposit fund is established and maintained, or a surety bond is posted and maintained, in accordance with the provisions of this section and §§ 308.509 and 308.510.

### § 308.508 Issuance of an Open Cargo Policy.

(a) *Time.* The underwriting agent will issue an Open Cargo Policy within (15) days after the completion by the applicant of the requirements set forth in §§ 308.506 and 308.507 unless the time for issuance is extended by the Maritime Administrator in writing. The underwriting agent may not make any Open Cargo Policy effective with respect to shipments attaching on a date earlier than the date when the application was completed, but he may make it effective on the date of the completion of the application or any date thereafter requested by the applicant.

(b) *Numbering.* Each Open Cargo Policy supplied to the underwriting agent by the Maritime Administrator shall be numbered by the Maritime Administration before it is supplied to the underwriting agent. No two numbers shall be the same. The underwriting

agent when issuing the policy shall add at the end of the policy number the agency number assigned to that underwriting agent, and where policies are issued by more than one office of an underwriting agent, the issuing office shall also be identified in the policy number. For example, policies issued by an office in New York will be designated by "NY" and policies issued in San Francisco will be designated by "SF" prefixed to the underwriting agent's agency number.

### § 308.509 Collateral deposit fund.

(a) *Requirements.* An assured electing to use a cash collateral deposit fund pursuant to § 308.507 shall comply with the provisions of this section and Clause 21 of the Open Cargo Policy, Form MA–300, prescribed in § 308.517.

(b) *Cash or Government bonds.* To establish a collateral deposit fund the applicant shall deposit with the underwriting agent a check payable to the order of the "Maritime Administration, Department of Transportation" for the amount of the fund, or United States Government bonds having a par value at the time of deposit of the amount of the fund, which shall be a multiple of $500 but not less than $1,000, together with a letter of transmittal executed by the applicant on Form MA–302, prescribed in § 308.522. Upon receipt of the deposit, the underwriting agent shall assign it a serial number and transmit it to the Maritime Administration, Attention: Director, Office of Financial Management, Washington, DC 20590. It is the responsibility of the assured to make sure that this deposit fund is sufficient at all times to cover the premiums payable on all risks which have attached under the policy, so as to prevent the termination of the insurance under the provisions of Clause 21.

(c) *Overdue premiums.* Pursuant to Clause 20, if the assured fails to pay any premium when it becomes due and payable, he thereby breaches the policy and it automatically ceases to insure any shipments which would otherwise have attached after the expiration of fifteen (15) days following the due date of the premium, unless within the fifteen (15) day period the premium has been paid and the assured has otherwise complied with the requirements of the policy, including the filing of the closing report required by Clause 19 and the payment of the reinstatement fee of $25 required by Clause 20. If the assured fails to pay the premium within the fifteen (15) day period, the Maritime Administrator may deduct from the assured's collateral deposit fund all amounts due.

(d) *Increase in amount of collateral as required by Clause 21.* If the assured fails to deposit additional collateral in the fund within seven (7) days from the time knowledge comes to the assured that the amount of collateral is insufficient to meet the requirements of Clause 21, the policy shall be void except as to risks which have attached prior to the expiration of the seven (7) day period.

(e) *Changes in amount of collateral.* The assured may increase or decrease the amount of the collateral deposit fund by amounts of not less than $500 or multiples thereof, provided that the amount of the fund shall not be less than the amount required by Clause 21, or the required minimum of $1,000, whichever is greater. The effect of any change in the amount of the collateral deposit shall be the sole responsibility of the assured, and the permission granted by this paragraph to change the amount of collateral in the fund shall in no manner relieve the assured of the responsibility imposed by Clause 21.

(f) *Increase of collateral.* To increase the amount of the collateral on deposit in the fund, the assured shall transmit to the underwriting agent on Form MA–302, prescribed in § 308.522, a check payable to the order of the "Maritime Administration, Department of Transportation" or United States Government bonds having a par value at the time of deposit of not less than the amount of the requested increase. The increase shall become effective upon the date of the receipt of the application and check or bonds by the underwriting agent, as shown on Form MA–302.

(g) *Decrease of collateral.* To decrease the collateral deposit fund, the assured shall file with the underwriting agent an application on Form MA–305, prescribed in § 308.525. The decrease shall

become effective upon the date of the receipt of the application by the underwriting agent as shown on Form MA–305.

(h) *Refund of collateral.* Whenever the assured becomes entitled to a refund of the collateral deposit, in whole or in part, by reason of a request for a partial return of such collateral, or the cancellation of the policy and the payment in full of all premiums then or thereafter due, or the waiver by the Maritime Administrator of the requirements of maintaining the collateral deposit fund because the assured is a department or agency of the United States or is acting on behalf of such a department or agency, or the substitution of a surety bond in the place and stead of the collateral deposit fund, as provided in §308.510(j), the Maritime Administrator will refund to the assured the amount of the collateral deposit to which the assured is entitled; provided, however, that the repayment of such collateral shall not be made by the Maritime Administrator until the assured has filed a closing report and paid in full all premiums with respect to all shipments which had attached at the time of the receipt by the underwriting agent of the application for the refund, Form MA–305, and a certificate executed in duplicate on Form MA–306, prescribed in §308.526, and, in the event of the substitution of a surety bond for the collateral deposit fund, the receipt by the underwriting agent of the surety bond properly executed, in accordance with §308.510.

**§308.510 Surety bond.**

(a) *Requirements.* An assured electing to post a surety bond pursuant to §308.507 shall comply with the provisions of this section and Clause 21 of the Open Cargo Policy, Form MA–300, prescribed in §308.517.

(b) *Amount of bond.* An applicant who wishes to post a surety bond shall deliver to the underwriting agent a surety bond on Form MA–308, prescribed in §308.528, executed by the assured as principal, and by the surety, in such amount as the assured determines to be necessary to comply with Clause 21. Such amount shall be a multiple of $500 but shall not be less than $1,000. Upon receipt of the surety bond, the underwriting agent shall assign a serial number to it and transmit it to the Maritime Administration, Attention: Director, Office of Financial Approvals, Washington, DC 20590. It shall be the responsibility of the assured to provide that the amount of the bond is sufficient at all times to cover the premium payable on all risks which have attached under the policy, so as to prevent the termination of the insurance under the provisions of Clause 21.

(c) *Surety.* The sufficiency of the surety executing the bond shall be subject to approval by the Maritime Administrator. The underwriting agent may accept on behalf of the Maritime Administrator a surety bond executed by a surety named on the United States Treasury Department's approved list of sureties whose bonds are acceptable to the United States Treasury Department to secure obligations due the United States, provided the bond is within the maximum amount for which the surety is so authorized to write bonds as shown by the approved list.

(d) *Overdue premiums.* Pursuant to Clause 20, if the assured fails to pay any premium when it becomes due and payable, he thereby breaches the policy and it automatically ceases to insure any shipments which would otherwise have attached after the expiration of fifteen (15) days following the due date of the premium, unless within the fifteen (15) day period the premium has been paid and the assured has otherwise complied with the requirements of the policy, including the filing of the closing report required by Clause 19 and the payment of the reinstatement fee of $25 required by Clause 20. If the assured fails to pay the premium within the fifteen (15) day period, all amounts due shall become a liability collectible under the surety bond and from the assured.

(e) *Increase in amount of bond as required by Clause 21.* If the assured fails to increase the amount of the surety bond within seven (7) days from the time knowledge comes to the assured that the amount of the bond is insufficient to meet the requirements of Clause 21, the policy shall be void except as to risks which have attached prior to the expiration of the seven (7) day period.

(f) *Changes in amount of bond.* The assured may increase or decrease the amount of the surety bond by amounts of not less than $500 or multiples thereof, provided that the amount of the bond shall not be less than the amount required by Clause 21, or the required minimum of $1,000, whichever is greater. The effect of any change in the amount of the bond shall be the sole responsibility of the assured, and the permission granted by this paragraph to change the amount of the bond shall in no manner relieve the assured of the responsibility imposed by Clause 21.

(g) *Increase in amount of bond.* To increase the surety bond the assured shall transmit to the underwriting agent, on Form MA–310, prescribed in § 308.530, an endorsement duly executed by the assured and the surety company on Form MA–311, prescribed in § 308.531. The increase shall become effective upon the date of the receipt of the endorsement by the underwriting agent as shown on Form MA–311.

(h) *Decrease in amount of bond.* To decrease the amount of the bond, the assured shall transmit to the underwriting agent, on Form MA–310, prescribed in § 308.530, an endorsement duly executed by the assured and the surety on Form MA–311, prescribed in § 308.531. The decrease shall become effective upon the date of the receipt of the endorsement by the underwriting agent as shown on Form MA–311, except as to shipments which on that date are known or reported to the assured to be in transit and which have attached under the policy and upon which premium has not been paid in full.

(i) *Termination of bond.* Whenever the assured becomes entitled to a termination of a surety bond by reason of the cancellation of the policy and the payment in full of all premiums then or thereafter due, or the waiver by the Maritime Administrator of the requirements of maintaining the surety bond by an assured which is a department or agency of the United States or is acting on behalf of such a department or agency, or the substitution of a collateral deposit fund in the place or stead of the surety bond, the underwriting agent shall execute a release on Form MA–312, prescribed in § 308.532. The release shall be made effective as of:

(1) The effective date of the cancellation of the policy when the bond is terminated for that reason, or

(2) The date of the Maritime Administrator's directive waiving the requirement of a surety bond when the bond is terminated for that reason, or

(3) The effective date of the establishment of a collateral deposit fund when the bond is terminated for that reason.

(j) *Substitution of bond for collateral deposit.* An assured may substitute a surety bond for a collateral deposit fund by delivering to the underwriting agent a surety bond on Form MA–309, prescribed in § 308.529, executed by the assured as principal, and by the surety, in such amount as the assured determines to be necessary to comply with Clause 21. Such amount shall be a multiple of $500, but shall not be less than $1,000. The collateral deposit fund will be refunded to the assured after the bond has been posted, in accordance with the provisions of § 308.509(h).

### § 308.511 Cancellation of Open Cargo Policy.

An assured may cancel an Open Cargo Policy by delivering to the underwriting agent, at least fifteen (15) days prior to the requested date of cancellation, an application for cancellation executed by the assured on Form MA–304, prescribed in § 308.524, together with the original policy. The policy shall be cancelled as of the effective date requested in the application, which, unless otherwise agreed by the Maritime Administrator in writing, shall not be a date earlier than fifteen (15) days following the date of the receipt of the application as acknowledged by the underwriting agent on Form MA–304, with respect to all risks that have not attached prior to said effective date. Such cancellation shall not relieve the assured of the obligation to file closing reports with respect to all risks which attached prior to the effective date of the cancellation and to pay all unpaid premiums. Within four (4) months of the effective date of cancellation, unless otherwise agreed

by the Maritime Administrator in writing, the assured must file a closing report in duplicate on Form MA–313, prescribed in § 308.533, of all shipments covered by the policy for which closing reports have not been previously filed. The assured shall mark this closing report "Final Closing Report on Cancellation of Policy", and file a certificate on Form MA–313–B, prescribed in § 308.535, executed by the assured in duplicate. Thereafter, when all unpaid premiums have been paid, the assured will become entitled to a refund of the collateral deposit, or cancellation of the surety bond in accordance with §§ 308.509 and 308.510. If the assured has lost or mislaid the original policy and is unable to produce it for cancellation, the assured shall execute a letter of indemnity and such other documents as may be required by the Maritime Administrator.

**§ 308.512 Declaration of shipments under Open Cargo Policy.**

(a) *Closing report.* (1) The assured shall file with the underwriting agent, not later than the twenty-fifth day of each month, a closing report for all inward shipments and a closing report for all outward shipments, and pay the premium and fees, for all shipments covered during the preceding calendar month, as required by Clause 19. Each closing report shall be filed in duplicate on Form MA–313, prescribed in § 308.533, supported by a certificate executed by the assured on Form MA–313–A, prescribed in § 308.534. If the assured has no shipments to report during any calendar month, the closing report, Form MA–313, shall, nevertheless, be filed with one or both of the following statements, depending upon their applicability, noted thereon certifying that:

(i) No inward shipment coming within the scope of this policy arrived at destination during the preceding calendar month, and that during the preceding calendar month no knowledge has come to the assured of an inward shipment covered under the terms of the policy which will not arrive by reason of loss, frustration or other similar cause,

(ii) No outward shipment coming within the scope of this policy was made during the preceding calendar month, and

(iii) Whenever a sea passage is made with respect to cargo covered under the policy by a barge or sailing vessel the assured shall note that fact upon the closing report, unless the Maritime Administrator otherwise agrees.

(2) An assured reporting for one calendar month shall not include therein a report of a shipment due to be reported in the report for the next succeeding calendar month. Thus, the report of January closing shipments filed in February does not include February closings.

(b) *Inward shipments.* The closing report covering inward shipments shall include:

(1) All such shipments which have arrived at the port of destination during the preceding calendar month, and

(2) All such shipments with respect to which inability to so arrive by reason of loss, frustration, or other similar causes has come to the knowledge of the assured during the preceding calendar month.

(c) *Outward shipments.* The closing report covering outward shipments shall include all such shipments which attached under the policy during the preceding calendar month.

(d) *Definition of inward and outward shipments.* A shipment will be classified as an inward shipment or as an outward shipment by reference to the geographical location of the assured with respect to the movement of the shipment. The address of the assured as stated in the application filed by him for the policy shall be deemed to be the assured's geographical location for the purpose of determining whether the shipment is inward or outward. To illustrate, if an assured has stated in his application that his address is in Hawaii, the assured's shipments of goods from the United States to Hawaii would be classified as inward, and his shipments from Hawaii to the United States would be classified as outward. Any shipments that cannot be classified as inward or outward under this definition shall be treated as inward shipments for the purposes of the declaration.

(e) *Supplemental closing report.* If an assured files a closing report and thereafter discovers that one or more additional shipments should have been included in the report, then, even though the assured has executed the certificate on Form MA–313–A, prescribed in § 308.534, or Form MA–313–B, prescribed in § 308.535, in connection with the closing report, the assured must nevertheless amend the closing report by filing a supplemental closing report supported by an appropriate certificate. The supplemental closing report must be accompanied by a statement in writing signed by the assured giving the reasons for the omission of such shipments from the original closing report. If the Maritime Administrator finds that the failure to file the complete closing report was either inadvertent or unintentional or arose by reason of causes beyond the control of the assured, the otherwise automatic termination of the policy by reason of a breach of the warranty embodied in Clause 20 shall be avoided pursuant to the provisions of Clause 23.

### § 308.513 Payment of premiums and fees.

The assured shall pay the premium, when his closing report is filed, for all shipments shown on his closing report for the preceding month, at the rates prescribed by the Maritime Administrator and in effect on the date of the ocean bill of lading, or if an ocean bill of lading was not issued, on the date of the equivalent shipping document, or if no ocean bill of lading or equivalent shipping document was issued, or if such documents were undated, on the date the goods were laden on the overseas vessel, as required by Clause 19. All payments of premium or fees must be made by check or money order payable to the order of the "Maritime Administration, Department of Transportation."

### § 308.514 Return premium.

No premium will be returned to the assured with respect to a shipment of goods that attached under the policy except where there was a declaration of value at variance with Clause 8, or an error in the application of a rate or in the computation of a premium, or the insured goods were short-shipped. An application for the return of a premium shall be made on Form MA–307, prescribed in § 308.527, filed in duplicate with the Underwriting Agent who will transmit it to the Maritime Administrator for payment.

### § 308.515 Payment in event of loss.

All claims for losses shall be filed by the assured with the Underwriting Agent who issued the policy. Such claims must be supported by the customary documents required in connection with war risk insurance claims, together with appropriate declarations as required by Clause 9, and such further data as may now or hereafter be required by the Maritime Administrator.

### § 308.516 Failure to comply with Clause 21.

(a) If the assured willfully fails to maintain a collateral deposit fund or a surety bond in an amount sufficient to meet the requirements of Clause 21, the policy becomes void from the date the fund or bond was first insufficient, but, if the assured's failure was inadvertent, the policy may be reinstated when the assured complies with Clause 21, and shows to the satisfaction of the Maritime Administrator that his failure was inadvertent and not willful. If the failure was in fact inadvertent, the assured shall file a declaration on Form MA–314, prescribed in § 308.536, executed in duplicate, with the Underwriting Agent within seven (7) days from the time knowledge comes to the assured of the insufficiency of the collateral deposit fund or surety bond unless the time for filing such declaration is extended by permission of the Maritime Administrator. If the space provided in the declaration, Form MA–314, for an explanation of the circumstances whereby the assured first had knowledge that the collateral was not sufficient, the assured shall attach to the declaration a detailed statement and include the same by reference in the declaration.

(b) If any policy becomes void by reason of the failure of the assured to deposit additional collateral or increase the amount of its surety bond under

the provisions of Clause 21, the Maritime Administrator reserves the right to refuse to issue another policy to such assured for a period of 90 days.

### § 308.517 Open Cargo Policy, Form MA–300.

The standard form of War Risk Open Cargo, Form MA–300, may be obtained from the American War Risk Agency or MARAD.

### § 308.518 Standard optional endorsement No. 1, Form MA–300–A.

Standard Optional Endorsement No. 1, which may be obtained from the American War Risk Agency or MARAD, limits the amount payable for the loss of goods to the actual bona fide pecuniary loss to the Assured, exclusive of any allowance for anticipated or accrued profit arising out of the insured venture. An Assured may elect to have his Open Cargo Policy endorsed with Standard Optional Endorsement No. 1 applicable on all shipments, or on all outward shipments, or on all inward shipments, or on named commodities except goods sold by the Assured prior to loading on board the overseas vessel and shipped for the account and at the risk of third persons other than a branch subsidiary or affiliate of the Assured. When an Assured has elected to have Standard Optional Endorsement No. 1 made applicable to certain named commodities he may not change to a different basis of valuation for those commodities until after he has given ninety (90) days written notice to the Maritime Administrator through the Underwriting Agent of his election to make the change. Application for Standard Optional Endorsement No. 1 may be made to the Underwriting Agent which is authorized to issue the endorsement without prior approval of the Maritime Administrator.

### § 308.519 Standard optional endorsement No. 2, Form MA–300–B.

Standard Optional Endorsement No. 2, which may be obtained from the American War Risk Agency or MARAD, amends the policy to cover shipments made to the Assured or shipped by the Assured as agent for the account and risk of a principal. Application for Standard Optional Endorsement No. 2 may be made to the Underwriting Agent, which is authorized to issue the endorsement without prior approval of the Maritime Administrator.

### § 308.520 Standard optional endorsement No. 3, Form MA–300–C.

Standard Optional Endorsement No. 3, which may be obtained from the American War Risk Agency or MARAD, amends the policy to include shipments of diamonds for industrial purposes, or rubies or sapphires, natural or synthetic, used for instruments or watch jewels imported to the Continental United States (excluding Alaska). Application for Standard Optional Endorsement No. 3 may be made to the Underwriting Agent, which shall transmit it to the Maritime Administrator for approval or disapproval of the issuance of the endorsement.

### § 308.521 Application for Open Cargo Policy, Form MA–301.

The standard form of application for a War Risk Open Cargo Policy may be obtained from the American War Risk Agency or MARAD.

### § 308.522 Collateral deposit fund, letter of transmittal, Form MA–302.

The standard form of letter of transmittal for use in establishing a collateral deposit fund, may be obtained from the American War Risk Agency or MARAD.

### § 308.523 Application for revision of Open Cargo Policy, Form MA–303.

An application for the revision of an Open Cargo Policy shall be filed in duplicate with the Underwriting Agent on a form which may be obtained from the American War Risk Agency or MARAD.

### § 308.524 Application for cancellation of Open Cargo Policy, Form MA–304.

The standard form of application for cancellation of an Open Cargo Policy Form MA–304 may be obtained from the American War Risk Agency or MARAD.

### § 308.525 Application for decrease in amount of cash collateral fund, Form MA–305.

Application for decrease in the amount of the cash collateral deposit fund shall be made on Form MA–305, which may be obtained from the American War Risk Agency or MARAD.

### § 308.526 Certificate for repayment of decrease of collateral deposit fund, Form MA–306.

The standard form of certificate for repayment of the amount of the decrease of the collateral deposit fund, Form MA–306, may be obtained from the American War Risk Agency or MARAD.

### § 308.527 Application for return premium, Form MA–307.

An application for the return of premium, which may be obtained from the American War Risk Agency or MARAD, shall be filed in duplicate with the Underwriting Agent on Form MA–307.

### § 308.528 Surety Bond A, Form MA–308.

The Standard Form of Surety Bond A, Form MA–308, which may be obtained from the American War Risk Agency or MARAD, shall be used by an Assured who elects to post a surety bond as security for payment of the premiums pursuant to Clause 21 of the policy:

### § 308.529 Surety Bond B, Form MA–309.

An Assured who elects to substitute a surety bond for a collateral deposit fund shall submit Form MA–309, which may be obtained form the American War Risk Agency or MARAD.

### § 308.530 Letter requesting increase or decrease in amount of surety bond, Form MA–310.

An endorsement increasing or decreasing the amount of the surety bond, Form MA–310, shall be transmitted to the underwriting agent and may be obtained from the American War Risk Agency or MARAD.

### § 308.531 Endorsement of surety bond increasing or decreasing amount of coverage, Form MA–311.

The Standard Form of Endorsement which shall be used in increasing or decreasing the amount of a surety bond, Form MA–311, may be obtained from the American War Risk Agency or MARAD.

### § 308.532 Release of surety bond, Form MA–312.

The Standard Form of Release of Surety bond, Form MA–312, may be obtained from the American War Risk Agency or MARAD.

### § 308.533 Closing report, Form MA–313.

This form, which may be obtained from the American War Risk Agency or MARAD, shall be filed in duplicate with the Underwriting Agent not later than the 25th day of each month.

### § 308.534 Certificate to be attached to closing report, Form MA–313–A.

The standard form of Certificate to be attached to the closing report, Form MA–313–A, may be obtained from the American War Risk Agency or MARAD and shall be filed each month.

### § 308.535 Certificate to be attached to final closing report, Form MA–313–B.

The Standard Form of Certificate, Form MA–313–B, shall be attached to the final closing report after cancellation of the policy, and may be obtained from the American War Risk Agency or MARAD.

### § 308.536 Declaration where failure to comply with Clause 21 was inadvertent, Form MA–314.

An Assured that fails inadvertently to maintain a collateral deposit fund or surety bond in an amount sufficient to meet the requirements of Clause 21 of the Policy shall file this Declaration, Form MA–314, which may be obtained from the American War Risk Agency or MARAD.

III—FACULTATIVE WAR RISK CARGO INSURANCE

**§ 308.538 General.**

The Maritime Administrator is prepared to provide facultative war risk insurance policies covering any cargoes described in § 308.501 which are designated by an applicant prior to the attachment of risks, if the applicant does not have an Open Cargo Policy issued by the Maritime Administrator, or if he has a shipment which is not covered by his Open Cargo Policy. However, a person with regular shipments is urged to avail himself of the advantages of the automatic coverage of an Open Cargo Policy. The Maritime Administrator reserves the right to decline to quote rates or bind insurance on shipments of cargo that could be covered by an Open Cargo Policy unless the applicant can show to the satisfaction of the Maritime Administrator that the risk is not one of a series of similar risks forming part of a continual flow of business for the applicant. The policy will be in the standard form of War Risk Facultative Cargo Policy, Form MA–316, prescribed in § 308.545. All policies shall be issued by Underwriting Agents appointed by the Maritime Administrator. All Underwriting Agents shall be domestic insurance companies authorized to do a marine insurance business in a State of the United States.

**§ 308.539 Application.**

(a) *Preliminary request.* Application for a Facultative Cargo Policy shall be made by filing a preliminary request in writing (including telegram) with an Underwriting Agent of the Maritime Administration, setting forth the following information:

(1) The name and address of the applicant;

(2) The amount of insurance requested;

(3) The commodity and quantity to be insured;

(4) The voyage to be covered;

(5) The name of the vessel upon which the cargo will be shipped, if known, the name of the steamship line, if known, and the date of shipment, if the applicant is submitting the request to bind war risk in writing; for security reasons, if the applicant is submitting the order to bind war risk insurance by telefax, neither the name of the vessel nor the name of the steamship line nor the anticipated date of sailing, should be mentioned. Mentioning such information in a telefax may result in a denial of insurance to the applicant. Any envelope transmitting a letter containing such information shall be marked "confidential."

(b) *Binder.* Before the insurance can be bound, the applicant shall provide the Underwriting Agent with a properly prepared binder on Form MA–315 prescribed in § 308.544. The binder must be submitted in duplicate, accompanied by check or Money Order payable to the order of the Maritime Administration, Department of Transportation" for the full amount of the premium computed on the amount to be insured at the rate set by the Maritime Administrator. Any application for facultative cargo war risk insurance received by an Underwriting Agent later than 4 p.m. (Local War Time) shall be considered the next day's business.

(c) *Optional loss limits clause.* Clause 9 of the standard form of facultative cargo policy, Form MA–316, prescribed in § 308.545, limits the amount payable for loss to the fair market value at the place and approximate time of the attachment of risk, plus the cost of marine insurance, transportation and expenses incident thereto, and war risk insurance with respect to the lost or damaged goods, or if it is impossible to determine the fair market value at place and time of attachment of risk, the fair market value at the designated port of arrival on the date of the attachment of the risk, plus the cost of marine insurance, transportation and expenses incidental thereto, and war risk insurance with respect to the lost or damaged goods, or if the goods had been purchased prior to loading, the actual amount paid or payable to the seller for the goods less all discounts, plus the cost of marine insurance, transportation and expenses incidental thereto, and war risk insurance with respect to the lost or damaged goods. In lieu of these loss limits, the Assured by so specifying in his application, and the binder may have attached to the policy when issued Standard Optional

Endorsement No. 1–A, Form MA–316, prescribed in § 308.546, which limits the amount payable for loss to the actual bona fide pecuniary loss to the Assured, exclusive of any allowance for anticipated or accrued profits arising out of the insured venture.

### § 308.540 Premiums.

(a) *Rates.* Rate Schedules for war risk facultative cargo insurance will be published by the Maritime Administrator from time to time, and may be obtained from an Underwriting Agent. All Rate Schedules are subject to change by the Maritime Administrator without notice. If no rate is published for a voyage on which war risk facultative cargo insurance is available, the Maritime Administrator will name a rate through an Underwriting Agent upon application. Whenever an applicant for war risk facultative cargo insurance receives a definite rate quotation and desires to bind insurance at the quoted rate, an order to bind the insurance in accordance with the procedure set forth in this subpart should be submitted within two business days following the day of quotation accompanied by check or Money Order payable to the order of "Maritime Administration, Department of Transportation" for the full amount of the premium thereon computed on the amount to be insured at the rate set by the Maritime Administrator, or the quotation will expire.

(b) *Return premium.* Where goods are short-shipped, the amount of insurance may be reduced by an amount computed by applying to the original amount of insurance the proportion which the quantity of merchandise short-shipped (i.e., bales, barrels, tons, and other designations of quantity) bears to the total quantity of merchandise originally declared for insurance. Where more than one class of merchandise is insured under one policy (e.g., fuel, oil and gasoline) the reduced amount of insurance must be computed separately on each item. Where the amount of insurance is reduced, the Maritime Administrator will give consideration to requests for proportionate returns of premium. An application for the return of a premium must be submitted to the Underwriting Agent in quadruplicate on Form MA–317, prescribed in § 308.547.

### § 308.541 Issuance.

(a) *Binder.* The Underwriting Agent is authorized to issue a facultative policy in Form MA–316, prescribed in § 308.545, when there has been presented to him a properly prepared binder on Form MA–315, prescribed in § 308.544, together with the payment of the premium as required, and such policy shall be issued as soon as possible after the binder form has been presented to the Underwriting Agent. Prior to the issuance of the policy, the Underwriting Agent is authorized to accept the risk on behalf of the Maritime Administrator by signing the binder. The Maritime Administrator will provide each Underwriting Agent with a supply of facultative policies which shall not be valid until countersigned by the Underwriting Agent. The Underwriting Agent shall keep a permanent record of all such policies and the Assured to whom the policy is issued.

(b) *Numbering.* Each Facultative Cargo Policy supplied to the Underwriting Agent by the Maritime Administrator shall be numbered by the Maritime Administration before it is supplied to the Underwriting Agent. No two numbers shall be the same. The Underwriting Agent when issuing the policy shall add at the end of the Policy number the agency number assigned to that Underwriting Agent, and where policies are issued by more than one office of an Underwriting Agent the issuing office shall also be identified in the policy number. For example, the policies issued by an office in New York will be designated "NY" and policies issued in San Francisco will be designated by "SF" prefixed to the Underwriting Agent's agency number.

### § 308.542 Warranty re thirty-day shipments.

If, after an effective binding of war risk insurance on a shipment of cargo, the assured believes that it will be impossible to comply with the warranty requiring the goods to be shipped and in transit within thirty days from the effective date of binding, such an assured may apply to the Maritime Administrator, through the Underwriting

Agent, to modify the warranty. If the Maritime Administrator is satisfied that an extension of time within which the goods are warranted to be shipped and in transit should be granted, he will do so, but additional premium may be charged in the discretion of the Maritime Administrator.

### § 308.543 Cancellation.

Facultative war risk insurance is not subject to cancellation by the Assured unless the goods are not shipped within thirty days following the effective date of binding, and then only if the policy is returned for cancellation.

### § 308.544 Facultative binder, Form MA–315.

The standard form of War Risk Facultative Cargo Binder, which may be obtained from the American War Risk Agency of MARAD, shall be completed by the applicant and submitted, in duplicate, to an Underwriting Agent before the insurance can be bound.

### § 308.545 Facultative cargo policy, Form MA–316.

The standard form of War Risk Facultative Cargo Policy, Form MA–316, may be obtained from the American War Risk Agency or MARAD.

### § 308.546 Standard optional endorsement No. 1–A, Form MA–316–A.

Standard Optional Endorsement No. 1–A limits the amount payable for the loss of goods to the actual bona fide pecuniary loss to the Assured, exclusive of any allowance for anticipated or accrued profit arising out of the insured venture. (Similar provisions for Open Cargo Policies are contained in Standard Optional Endorsement No. 1, Form MA–300–A, prescribed in § 308.518.) Application for Standard Optional Endorsement No. 1–A shall be made to the Underwriting Agent at the time application is made for the policy. The Underwriting Agent is authorized to issue the endorsement without prior approval of the Maritime Administrator. This form may be obtained from the American War Risk Agency or MARAD.

### § 308.547 Application for return premium, Form MA–317.

An application for the return of premium must be filed in duplicate with the Underwriting Agent on Form MA–317, which may be obtained from the American War Risk Agency or MARAD.

## IV—GENERAL

### § 308.548 Standard form of underwriting agency agreement for cargo, Form MA–318.

This form, which may be obtained from the American War Risk Agency or MARAD, is the standard form of underwriting agency agreement applicable with respect to agreements executed by the Maritime Administrator and domestic insurance companies authorized to do a marine insurance business in any State of the United States, appointing such companies as Underwriting Agents to issue war risk cargo policies in accordance with the provision of the agreement and this subpart.

### § 308.549 Application for appointment of Cargo Underwriting Agent, Form MA–319.

Any domestic insurance company authorized to do a marine insurance business in any State of the United States may apply for appointment as a Cargo Underwriting Agent by submitting to the Maritime Administrator a letter and Form MA–399, which may be obtained from the American War Risk Agency or MARAD.

### § 308.550 Certificate, Form MA–320.

Wherever any provision of this subpart, or any amendment thereto, requires the Assured to make a declaration or certification under the penalties of perjury, and the form of the declaration or certificate is not prescribed, the Assured may execute a certificate on Form MA–320–A for an individual, on Form MA–320–B for a partnership, or on Form MA–320–C for a corporation, which forms may be obtained from the American War Risk Agency or MARAD.

### § 308.551 War risk insurance clearing agency agreement for cargo, Form MA–321.

The standard form of clearing agency agreement, Form MA–321, shall be executed by the Maritime Administrator and domestic insurance companies, or groups of domestic insurance companies authorized to do a marine insurance business in any State of the United States, appointing such companies or groups of companies as clearing agents, which form may be obtained from the American War Risk Agency or MARAD.

### § 308.552 Effective date.

This subpart shall be effective as and when the Maritime Administrator finds that war risk cargo insurance adequate for the needs of the waterborne commerce of the United States cannot be obtained on reasonable terms and conditions from companies authorized to do an insurance business in a State of the United States.

## Subpart G—Records Retention

### § 308.600 Records retention requirement.

The records specified in §§ 308.8, 308.517, and 308.548 of this part shall be retained until a release is granted by the MARAD, at which time MARAD will take custody of the records.

# PART 309—VALUES FOR WAR RISK INSURANCE

Sec.
309.1 Procedure.
309.2 Definitions.
309.3 Stated valuation.
309.4 Maximum amount insured.
309.5 Condition of vessel.
309.6 Adjustments for condition, equipment, and other considerations.
309.7 Modifications.
309.8 Vessel data forms.
309.101 Amendment of interim binders.

STORES AND SUPPLIES

309.201 Purpose.
309.202 Definitions.
309.203 Value at time of loss.
309.204 Proof of loss.

AUTHORITY: Secs. 204, 1209, Merchant Marine Act, 1936, as amended (46 U.S.C. 1114, 1289); Reorganization Plans No. 21 of 1950 (64 Stat. 1273), No. 7 of 1961 (75 Stat. 840) as amended by Pub. L. 91–469 (84 Stat. 1036); Department of Commerce Organization Order 10–8 (38 FR 19707, July 23, 1973); Maritime Administrative Order 440–3 (December 6, 1973).

SOURCE: 39 FR 30487, Aug. 23, 1974, unless otherwise noted.

### § 309.1 Procedure.

The Ship Valuation Committee, Maritime Administration, shall publish bianually in the notice section of the FEDERAL REGISTER a general notice which shall set forth the stated valuations of individual vessels upon which interim binders for war risk hull insurance have been issued. Such values shall be effective with respect to a six-month period commencing on January 1 and ending on June 30, or a six-month period commencing on July 1 and ending on December 31 of each calendar year; *Provided, however,* That if there is a substantial change in market values during the effective period of a state valuation, the Maritime Administration reserves the right to revise such valuations at any time during such period.

### § 309.2 Definitions.

(a) *Ship Valuation Committee* means the Ship Valuation Committee referred to in Maritime Administrative Order 440–3.

(b) *The date a vessel is built* is the date the vessel is delivered by the shipbuilder.

(c) *The deadweight tonnage* of a vessel means her deadweight capacity established in accordance with normal Summer Freeboard as assigned pursuant to the International Load Line Convention, 1966, and shall be her capacity (in tons of 2,240 pounds) for cargo, fuel, fresh water, spare parts, and stores, but exclusive of permanent ballast.

(d) *The speed of a vessel* means the speed determined in accordance with the formulae provided in part 246 of this chapter.

(e) *A passenger vessel* is a vessel which carries more than twelve passengers.

### § 309.3 Stated valuation.

A stated valuation represents just compensation for the vessel to which it applies computed by the Ship Valuation Committee in accordance with

sections 902(a) and 1209(a)(2) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1242(a), 1289(a)(2)). The stated valuation of a vessel does not include vessel stores and supplies, which consist of (a) consumable stores, (b) subsistence stores, (c) slop chest, (d) bar stock, and (e) fuel, as defined in Maritime Administration Inventory Book Forms MA–4736, A through K, which will be valued separately.

### § 309.4 Maximum amount insured.

A stated valuation is the maximum amount for which the Maritime Administration will provide war risk hull insurance for damage to or actual or constructive total loss of the vessel to which such valuation applies and for which claims for damage to or actual or constructive total loss of such insured vessel may be adjusted, compromised, settled, adjudged, or paid by the Maritime Administration with respect to insurance attaching during the effective period of such valuation under the standard forms of war risk hull insurance interim binder or policy prescribed by §§ 308.106 and 308.107 of this chapter.

### § 309.5 Condition of vessel.

If the true condition of a vessel is not known, the Ship Valuation Committee, in determining the stated valuation of the vessel, may assume that it is in a condition that would entitle it to the highest classification of the American Bureau of Shipping, or the equivalent if the vessel is a foreign-flag vessel, with all required certificates, including but not limited to, marine inspection certificates of the United States Coast Guard, the United States Public Health Service, and the Federal Communications Commission, with all outstanding requirements and recommendations necessary for retention of class accomplished, without regard to any grace period; and, so far as due diligence can make her so, the vessel is tight, staunch, strong, and well and sufficiently tacked, appareled, furnished, and equipped, and in every respect seaworthy and in good running condition and repair, with clean swept holds and in all respects fit for service. The stated valuation of a vessel in substandard condition is subject to downward adjustment as provided in § 309.6(a).

### § 309.6 Adjustments for condition, equipment, and other considerations.

(a) *Adjustment for a vessel in substandard condition.* If the Maritime Administration determines that a vessel is in substandard condition from that assumed by the Committee as provided in § 309.5, there shall be subtracted from the stated valuation of such vessel an amount estimated by the Maritime Administration as the cost of putting the vessel in the condition assumed by the Committee when determining its stated valuation.

(b) *Special equipment.* If the depreciated reproduction cost less construction subsidy, if any, of any special equipment of material utility in the handling of cargo or utilization of a vessel, not otherwise taken into account in determining the stated valuation of such vessel, is in excess of $50,000, an amount estimated by the Maritime Administration as the fair and reasonable value of such equipment shall be added to the stated valuation of such vessel.

(c) *Government installations.* A stated valuation determined pursuant to this part shall not include any allowance for any special installations or equipment to the extent that their cost was borne by the United States.

### § 309.7 Modifications.

The Maritime Administration reserves the right to exempt any vessel from the scope of this part, or to amend, modify, or terminate the provisions hereof.

### § 309.8 Vessel data forms.

(a) *To accompany application for insurance.* Each application for war risk insurance, submitted in accordance with § 308.3 of this chapter, shall be accompanied by a completed Form MA–828, Vessel Data. Copies of this form may be obtained from either the American War Risk Agency, 14 Wall Street, New York, N.Y. 10005, or the Director, Office of Marine Insurance (MAR–540) Maritime Administration 400 Seventh Street SW., Washington, DC 20590.

(b) *Modification to vessels.* Revised vessel data shall be submitted on the appropriate form prescribed in paragraph (a) of this section whenever a vessel undergoes a physical change which increases or decreases its value by five percent or more.

(Approved by the Office of Management and Budget under control number 2133–0011)

[39 FR 30487, Aug. 23, 1974, as amended at 47 FR 25330, June 14, 1982; 50 FR 50167, Dec. 9, 1985]

### § 309.101 Amendment of interim binders.

The interim binder for a vessel whose stated valuation is established pursuant to this part shall be deemed to have been amended on the first day of the effective period of such valuation, as provided in the notice publishing such valuation, by inserting in the space provided therefor, or in substitution for any value appearing in such space, the stated valuation of the vessel set forth in such notice. A stated valuation shall apply with respect to insurance attaching during the effective period of such valuation; *Provided, however,* That if there is a substantial change in market values during such period, the Maritime Administration reserves the right to revise the valuations provided for therein at any time during said period; *And provided further,* That the assured shall have the right within 60 days after the date of publication of a stated valuation or within 60 days after the attachment of the insurance under the interim binder to which such valuation applies, whichever is later, to reject such valuation and proceed as authorized by section 1209(a)(2), Merchant Marine Act, 1936, as amended (46 U.S.C. 1289(a)(2)).

## STORES AND SUPPLIES

AUTHORITY: Sec. 204, 49 Stat. 1987, as amended, sec. 1209, 64 Stat. 775, as amended, 70 Stat. 984; 46 U.S.C. 1114, 1289.

SOURCE: Sections 309.201 through 309.204 contained in G.O. 100, 29 FR 2944, Mar. 4, 1964; 29 FR 3706, Mar. 25, 1964, unless otherwise noted.

### § 309.201 Purpose.

It is the purpose of §§ 309.201 through 309.204 to prescribe the method for determining the values of stores and supplies on board a vessel when lost, for which claims for loss will be paid, and to prescribe the procedure for payment of claims for such loss, when stores and supplies are covered under a disbursements clause of a War Risk Hull Insurance Binder or a War Risk Hull Insurance Policy issued by the United States on forms prescribed by §§ 308.106 and 308.107 of this chapter, or when stores and supplies are covered by a War Risk Disbursements Policy issued by the United States pursuant to section 1203(c) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1283(c)). The vessel values established by §§ 309.1 through 309.8 (General Order 82) do not include any allowance for the loss of stores and supplies, as distinguished from equipment and spare parts which are included in such vessel values.

### § 309.202 Definitions.

Stores and supplies are those articles and commodities used and consumed in the day-to-day operation of a vessel by the operation and maintenance of machinery and equipment; the maintenance of clean and sanitary conditions; the feeding of passengers, officers, and crew; and stocked for the use and convenience of passengers, officers, and crew. Vessel stores and supplies include (a) consumable stores, (b) subsistence stores, (c) slop chest, (d) bar stock, and (e) fuel, as defined in Maritime Administration Inventory Books, Forms MA–4736, A through K.

### § 309.203 Value at time of loss.

The value of unused stores and supplies on board a vessel at the time of loss, and for which claims for loss will be paid equals:

(a) The value of such stores and supplies on board at the completion of the previous voyage, plus

(b) The value of stores and supplies purchased and placed on board the vessel before the commencement of the voyage during which the loss occurred, plus

(c) The value of stores and supplies purchased and placed on board the vessel after the commencement of such voyage, less

(d) That portion of the sum of paragraphs (a), (b), and (c) of this section which was sold, transferred, used or consumed to, but not including, the date of the loss.

### § 309.204 Proof of loss.

Claims for reimbursement for total loss of stores and supplies may be submitted by the owner to the Chief, Division of Insurance, Maritime Administration, Washington, DC 20590, based on one of two alternative methods of proof, as provided in paragraphs (a) and (b) of this section. Owners may use either method for each category of stores and supplies.

(a) *Formula.* In cases where the owner and the Chief, Division of Insurance, Maritime Administration, have agreed, in advance of the loss, upon amounts representing, or the method for determining, the average daily consumption costs of stores and supplies for the owner's vessel, claims for total loss of such stores and supplies may be submitted by the owner on Affidavit in Proof of Claim for the loss of stores and supplies, Exhibit A. In such cases, the value of the consumable stores at time of loss is determined as follows:

(1) The value of consumable stores on board at the time the vessel was ready to sail, determined by multiplying the number of days for which the vessel is stored by the average daily consumption cost in dollars, plus

(2) The cost of consumable stores, if any, purchased in foreign ports for the homeward voyage, less

(3) The average daily consumption cost times the number of days from the date the vessel was ready to sail to, but not including, the date of loss, plus the actual amount of consumable stores transferred or sold. The values of slop chest stores, bar stock and fuel, at the time of loss are determined in the same manner by using the applicable daily consumption costs for such stores. The value of subsistence stores at the time of loss is determined as follows:

(i) The value of subsistence stores on board at the time the vessel was ready to sail, determined by multiplying the agreed cost for one man per day by the number of crew signed on and the number of passengers, if any, and multiplying that product by the number of days for which the vessel is stored, plus

(ii) The cost of subsistence stores, if any, purchased in foreign ports for the homeward voyage, less

(iii) The number of crew signed on and the average number of passengers, if any, times the agreed cost of one man per day times the number of days from the date the vessel was ready to sail to, but not including, the date of loss, plus the actual amount of subsistence stores transferred or sold.

(b) *Verified costs.* In cases where the owner and the Chief, Division of Insurance, Maritime Administration, have not agreed in advance of the loss upon amounts representing, or the method for determining, the average daily consumption costs of Stores and Supplies for the owner's vessel, claims for total loss of such Stores and Supplies must be submitted by the owner on Affidavit in Proof of Claims for the Loss of Stores and Supplies, Exhibit B. In such cases, the value of the consumable stores will be determined as follows:

(1) The value of consumable stores on board the vessel at the time the vessel was ready to sail, determined by certified inventories of the owner of amounts on board the vessel at the termination of the preceding voyage or date of last inventory, less actual consumption to date of sailing, plus a certified statement by the owner of actual additional purchases made from date of termination of the preceding voyage or date or last inventory to date vessel was lost, subject to audit by the Maritime Administration, less

(2) The average daily consumption cost determined by dividing the amount determined as in paragraph (b)(1) of this section by the number of days for which the vessel was stored, times the number of days from the date the vessel was ready to sail to, but not including, the date of loss, plus actual amount of consumable stores transferred or sold.

The values of subsistence stores, slop chest, bar stock, and fuel, at the time of loss are determined in the same manner, supported by certified inventories of the owner and invoices.

EXHIBIT A

AFFIDAVIT IN PROOF OF CLAIM FOR THE LOSS OF UNUSED STORES AND SUPPLIES ON BOARD THE SS_____

STATE OF

*ss:*

COUNTY OF

I am the _____ of _____, the Owner of the SS _____, which was lost as a result of enemy action on or about the _____ day of _____, _____. I make this affidavit in support of the above-named Owner's claim for the loss of the actual value of the said vessel's unused Stores and Supplies. The statements herein contained are based upon the personal knowledge of deponent or upon the books of records of the Owner or its agent which deponent believes are true and accurate.

(A) "Stores and Supplies", for loss of which claim is being made, are limited to consumable and subsistence stores as defined in Maritime Administration Inventory Manual, Vessel Inventories, Part I, and do not include radio supplies, expendable equipment, scrap, junk and spare parts.[1]

(B) It has been the consistent accounting practice of the Owner to group together Consumable Stores as defined in the Maritime Administration Inventory Manual, Vessel Inventories, Part I, and Expendable Equipment, but the amount herein stated to be the value of consumable stores for the purpose of making this claim does not exceed _____[2] percent of the aggregate of such consumable stores and expendable equipment.[1] I am familiar with the insurance carried on the Stores and Supplies on the SS _____; and, from the effective date of War Risk Insurance Binder No_____ Policy No_____ issued by the United States of America, which covers the total loss of Stores and Supplies in the amount of $_____, to the date of such vessel's loss on _____, there was no war risk insurance on such Stores and Supplies other than that provided by said Binder or Policy.

The period for which the vessel was stored with Stores and Supplies for use on the voyage on which she was lost, beginning with the last day of storing, was _____ days for Consumable Stores, _____ days for Subsistence Stores, _____ days for Slop Chest, _____ days for Bar Stock and _____ days for Fuel. The number of days from the last day of storing to, but not including, the date on which the vessel was lost, was _____ days for Consumable Stores, _____ days for Subsistence Stores, _____ days for Slop Chest, _____ days for Bar Stock and _____ days for Fuel.

I. Consumable (Excluding Subsistence) Stores:[3]

(A) The average daily consumption cost of Consumable Stores for this vessel for the year prior to the voyage on which she was lost was[4] $_____.

(B) The figure required for (A) is not readily available, and the average daily cost of Consumable Stores for this vessel for the last calendar year set up on the Owner's books was[4] $_____.

The amount of Consumable Stores on board at the time this vessel was ready to sail (the number of days for which the vessel was stored times the average daily consumption cost, as above) was $_____.

To this amount is added the actual cost of Consumable Stores purchased in Foreign Ports for the homeward voyage (as per statement attached)[5] $_____, making the total amount on board at date of sailing $_____.

The average daily consumption cost, as above, times the number of days from the date the vessel was ready to sail to, but not including, the date of loss, as above, is $_____.

To this amount is added the actual amount of Consumable Stores transferred or sold (as per statement attached) $_____, making $_____, which, subtracted from the amount of Consumable Stores on board at date of sailing, as above, is $_____, which sum is claimed to be the actual value of the vessel's unused Consumable Stores at the time of the loss, according to the best of deponent's knowledge, information and belief.

II. Subsistence Stores:

The amount of Subsistence Stores on board, that is the number of the crew signed on ( ) and the average number of passengers, if any ( ), times the number of days for which the vessel was stored as above ( ), times the applicable factor[6] of cost for one man per day ( ) was $_____.

To this amount is added the actual cost of Subsistence Stores purchased in Foreign Ports for the homeward voyage (as per statement attached)[5] $_____, making the amount on board on date of sailing $_____.

The amount of Subsistence Stores consumed, that is the number of crew signed on ( ) and the average number of passengers, if

[1] Strike out either paragraph (A) or (B).

[2] Insert percentage agreed upon with Chief, Division of Insurance, Maritime Administration.

[3] If the figure needed to fill the blank in paragraph (A) or (B) is not available, the formula cannot be used; the Owner must submit actual inventories and a record of purchases on Affidavit Exhibit B.

[4] Strike out paragraph (A) or (B).

[5] Strike out this sentence if vessel was lost on outward leg of voyage.

[6] The factor of cost per man per day, as prescribed by the Maritime Administration for voyages beginning in 19 , is $_____.

any ( ) times the number of days between the last day of storing the vessel and the date on which the vessel was lost ( ) times the applicable factor[6] of cost for one man per day was $_____.

To this amount is added the actual amount of Subsistence Stores transferred or sold (as per statement attached), $_____, making $_____, which, subtracted from the amount of Subsistence Stores on board at date of sailing, as above, is $_____, which sum is claimed to be the actual value of the unused Subsistence Stores at the time of the loss, according to the best of deponent's knowledge, information and belief.

III. Slop Chest:[7]

(A) The average daily consumption cost of Slop Chest Stores for this vessel for the year prior to the voyage on which she was lost was[8] $_____.

(B) The figure required for (A) is not readily available, and the average daily cost of Slop Chest Stores for this vessel for the last calendar year set up on the Owner's books was[8] $_____.

The amount of Slop Chest Stores on board at the time this vessel was ready to sail (the number of days for which the vessel was stored times the average daily consumption cost, as above) was $_____.

To this amount is added the actual cost of Slop Chest Stores purchased in Foreign Ports for the homeward voyage (as per statement attached)[5] $_____, making the total amount on hand at date of sailing $_____.

The average daily consumption cost, as above times the number of days from the date the vessel was ready to sail to, but not including, the date of loss, as above, is $_____.

To this is added the actual amount of Slop Chest Stores transferred or sold (as per statement attached) $_____, making $_____, which, subtracted from the amount of Slop Chest Stores on board at date of sailing, as above, is $_____, which sum is claimed to be the actual value of the vessel's unsold Slop Chest Stores at the time of the loss according to the best of deponent's knowledge, information and belief.

IV. Bar Stock:[9]

(A) The average daily consumption cost of Bar Stock for this vessel for the year prior to the voyage on which she was lost was[10] $_____.

(B) The figure required for (A) is not readily available, and the average daily cost of Bar Stock for this vessel for the last calendar year set up on the Owner's books was[10] $_____.

The amount of Bar Stock on board at the time this vessel was ready to sail (the number of days for which the vessel was stored times the average daily consumption cost, as above) was $_____.

To this amount is added the actual cost of Bar Stock purchased in Foreign Ports for the homeward voyage (as per statement attached)[5] $_____, making the total amount on hand at date of sailing $_____.

The average daily consumption cost, as above, times the number of days from the date the vessel was ready to sail to, but not including, the date of loss, as above, is $_____.

To this amount is added the actual amount of Bar Stock transferred or sold (as per statement attached) $_____, making $_____, which, subtracted from the amount of Bar Stock on board at the time of sailing, as above, is $_____, which sum is claimed to be the actual value of the vessel's unused Bar Stock at the time of the loss according to the best of deponent's knowledge, information and belief.

V. Fuel:[11]

(A) The average daily consumption cost of Fuel for this vessel for the year prior to the voyage on which she was lost was[11] $_____.

(B) The figure required for (A) is not readily available, and the average daily cost of Fuel for this vessel for the last calendar year set up on the Owner's books was[12] $_____.

The amount of Fuel on board at the time this vessel was ready to sail (the number of days for which the vessel was stored times the average daily consumption cost, as above) was $_____.

To this amount is added the actual cost of Fuel purchased in Foreign Ports for homeward voyage (as per statement attached)[5] $_____, making the total amount on hand at date of sailing $_____.

The average daily consumption cost, as above, times the number of days from the date the vessel was ready to sail to, but not including, the date of loss, as above, is $_____.

To this amount is added the actual amount of Fuel transferred or sold (as per statement attached) $_____, making $_____, which,

[7] If the figure needed to fill the blank in paragraph (A) or (B) is not available, the formula cannot be used; the Owner must submit actual inventories and a record of purchases on Affidavit Exhibit B.

[8] Strike out paragraph (A) or (B).

[9] If the figure needed to fill the blank in paragraph (A) or (B) is not available, the formula cannot be used; the Owner must submit actual inventories and a record of purchases on Affidavit Exhibit B.

[10] Strike out paragraph (A) or (B).

[11] If the figure needed to fill the blank in paragraph (A) or (B) is not available, the formula cannot be used; the Owner must submit actual inventories and a record of purchases on Affidavit Exhibit B.

[12] Strike out paragraph (A) or (B).

subtracted from the amount of Fuel on board at the time of sailing, as above, is $_____, which sum is claimed to be the actual value of the vessel's unused Fuel at the time of the loss according to the best of deponent's knowledge, information and belief.

| | |
|---|---|
| Unused Consumable Stores, other than— | |
| Subsistence Stores | $_____ |
| Subsistence Stores | _____ |
| Slop Chest | _____ |
| Bar Stock | _____ |
| Fuel | _____ |
| Total | $_____ |

By: _____

Sworn to before me this _____ day of _____, 19____.

*Notary Public*

EXHIBIT B

AFFIDAVIT IN PROOF OF CLAIM FOR THE LOSS OF UNUSED STORES AND SUPPLIES ON BOARD THE SS_____

STATE OF

*ss:*

COUNTY OF

I am the _____ of _____, the Owner of the SS _____, which was lost as a result of enemy action on or about the _____ day of _____, _____. I make this affidavit in support of the above-named Owner's claim for the loss of the actual value of the said vessel's unused Stores and Supplies. The statements herein contained are based upon the personal knowledge of deponent or upon the books of records of the Owner or its agent which deponent believes are true and accurate.

"Stores and Supplies", for loss of which claim is being made, are limited to consumable and subsistence stores as defined in Maritime Administration Inventory Manual, Vessel Inventories, Part I, and do not include radio supplies, expendable equipment, scrap, junk and spare parts.

I am familiar with the insurance carried on the Stores and Supplies, on the SS _____; and, from the effective date of War Risk Insurance Binder No. _____ Policy No. _____ issued by the United States of America, which covers the total loss of Stores and Supplies in the amount of $_____, to the date of such vessel's loss on _____, there was no war risk insurance on such Stores and Supplies other than that provided by said Binder or Policy.

The period for which the vessel was stored with Stores and Supplies for use on the voyage on which she was lost, beginning with the last day of storing, was _____ days for Consumable Stores, _____ days for Subsistence Stores, _____ days for Slop Chest, _____ days for Bar Stock and _____ days for Fuel. The number of days from the last day of storing to, but not including, the date on which the vessel was lost, was _____ days for Consumable Stores, _____ days for Subsistence Stores, _____ days for Slop Chest, _____ days for Bar Stock and _____ days for Fuel.

I. Consumable (excluding Subsistence) Stores:

(1) The value of Consumable Stores on board the vessel at the time the vessel was ready to sail, as shown by the attached certified inventory of amounts on board the vessel at the termination of the preceding voyage or date of last inventory on _____, less actual consumption to date of sailing, amounting to $_____, plus the actual additional purchases made for the voyage on which the vessel was lost, as shown by the attached invoices, amounting to $_____, was $_____.

(2) The average daily consumption factor of $_____ (determined by dividing the amount determined as in (1) by the number of days for which the vessel was stored) times the number of days from the date the vessel was ready to sail to, but not including, the date of loss (  ) is $_____.

To this amount is added the actual amount of Consumable Stores transferred or sold (as per statement attached) $_____, making $_____, which, subtracted from the amount of Consumable Stores on board at the time the vessel was ready to sail, as shown in (1) above, is $_____, which sum is claimed to be the actual value of the vessel's unused Consumable Stores at the time of the loss according to the best of deponent's knowledge, information and belief.

II. Subsistence Stores:

(1) The value of Subsistence Stores on board the vessel at the time the vessel was ready to sail, as shown by the attached certified inventory of amounts on board the vessel at the termination of the preceding voyage or date of last inventory on _____ less actual consumption to date of sailing, amounting to $_____, plus the actual additional purchases made for the voyage on which the vessel was lost, as shown by the attached invoices, amounting to $_____, was $_____.

(2) The average daily consumption factor of $_____ (as determined by dividing the amount determined as in (1) by the number of days for which the vessel was stored) times the number of days from the date the vessel was ready to sail to, but not including, the date of loss (  ) is $_____.

To this amount is added to the actual amount of Subsistence Stores transferred or sold (as per statement attached) $_____, making $_____, which, subtracted from the amount of Subsistence Stores on board at the time the vessel was ready to sail, as shown in (1) above, is $_____, which sum is claimed to be the actual value of the vessel's unused Subsistence Stores at the time of the

loss according to the best of deponent's knowledge, information and belief.

III. Slop Chest Stores:

(1) The value of Slop Chest Stores on board the vessel at the time the vessel was ready to sail, as shown by the attached certified inventory of amounts on board the vessel at the termination of the preceding voyage or date of last inventory on _____ less actual consumption to date of sailing, amounting to $_____, plus the actual additional purchases made for the voyage on which the vessel was lost, as shown by the attached invoices, amounting to $_____, was $_____.

(2) The average daily consumption factor of $_____ (determined by dividing the amount determined as in (1) by the number of days for which the vessel was stored) times the number of days from the date the vessel was ready to sail to, but not including, the date of loss (  ) is $_____.

To this amount is added the actual amount of Slop Chest Stores transferred or sold (as per statement attached) $_____, making $_____, which, subtracted from the amount of Slop Chest Stores on board at the time the vessel was ready to sail, as shown in (1) above, is $_____, which sum is claimed to be the actual value of the vessel's unused Slop Chest Stores at the time of the loss according to the best of deponent's knowledge, information and belief.

IV. Bar Stock:

(1) The value of Bar Stock on board the vessel at the time the vessel was ready to sail, as shown by the attached certified inventory of amounts on board the vessel at the termination of the preceding voyage or date of last inventory on _____ less actual consumption to date of sailing, amounting to $_____, plus the actual additional purchases made for the voyage on which the vessel was lost, as shown by the attached invoices, amounting to $_____, was $_____.

(2) The average daily consumption factor of $_____ (determined by dividing the amount determined as in (1) by the number of days for which the vessel was stored) times the number of days from the date the vessel was ready to sail to, but not including, the date of loss (  ) is $_____.

To this amount is added the actual amount of Bar Stock transferred or sold (as per statement attached) $_____, making $_____, which, subtracted from the amount of Bar Stock on board at the time the vessel was ready to sail, as shown in (1) above, is $_____, which sum is claimed to be the actual value of the vessel's unused Bar Stock at the time of the loss according to the best of deponent's knowledge, information and belief.

V. Fuel:

(1) The value of Fuel on board the vessel at the time the vessel was ready to sail, as shown by the attached certified inventory of amounts on board the vessel at the termination of the preceding voyage or date of last inventory on _____ less actual consumption to date of sailing, amounting to $_____, plus the actual additional purchase made for the voyage on which the vessel was lost, as shown by the attached invoices, amounting to $_____, was $_____.

(2) The average daily consumptions factor of $_____ (determined by dividing the amount determined as in (1) by the number of days for which the vessel was stored) times the number of days from the date the vessel was ready to sail to, but not including, the date of loss (  ) is $_____.

To this amount is added the actual amount of Fuel transferred or sold (as per statement attached) $_____, making $_____, which, subtracted from the amount of Fuel on board at the time the vessel was ready to sail, as shown in (1) above, is $_____, which sum is claimed to be the actual value of the vessel's unused Fuel at the time of the loss according to the best of deponent's knowledge, information and belief.

Claim is hereby made for:

Unused Consumable Stores, other than—

| | |
|---|---|
| Subsistence Stores | $_____ |
| Subsistence Stores | $_____ |
| Slop Chest | $_____ |
| Bar Stock | $_____ |
| Fuel | $_____ |
| Total | $_____ |

By:_____

Sworn to before me this _____ day of _____, 19____.

*Notary Public*

# SUBCHAPTER H—TRAINING

## PART 310—MERCHANT MARINE TRAINING

### Subpart A—Regulations and Minimum Standards for State, Territorial or Regional Maritime Academies and Colleges


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AUTHORITY: 46 App. U.S.C. 1295; 49 CFR 1.66.

SOURCE: 46 FR 37694, July 22, 1981, unless otherwise noted.

## Subpart A—Regulations and Minimum Standards for State, Territorial or Regional Maritime Academies and Colleges

### § 310.1 Definitions.

For purposes of this subpart A:

(a) *The 1958 Act* means the Maritime Academy Act of 1958, Pub. L. 85–672.

(b) *Act* means the Maritime Education and Training Act of 1980, Pub. L. 96–453, as amended.

(c) *Administration* means the Maritime Administration, United States Department of Transportation.

(d) *Agreement* means an agreement between a State, or Territorial or Regional maritime academy or college and the Maritime Administrator, Department of Transportation as authorized by the 1958 Act or the Act and set forth in § 310.13 of this part.

(e) *Secretary* means Secretary of Transportation.

(f) *Maritime Administrator* means the Maritime Administrator, Department of Transportation.

(g) *Cadet* means cadet enrolled in the United States Maritime Service and in good standing at a State or Territorial or Regional maritime academy or college meeting the requirements of the 1958 Act.

(h) *Commanding Officer* means the Commanding Officer of a training ship furnished by the Administration.

(i) *Cost of Education Provided* means the financial costs incurred by the Federal Government in providing student incentive payments for students at the State maritime academies.

(j) *Deputy* means the Deputy Maritime Administrator, Department of Transportation.

(k) *Maritime Service* means the United States Maritime Service.

(l) *Midshipman* means a student in good standing at a State maritime academy or college who has accepted midshipman status in the United States Naval Reserve (including the Merchant Marine Reserve, United States Naval Reserve) under the Act.

(m) *Officers* means all officers and faculty employed by a State maritime academy or college.

(n) *Region Director* means the Director of the Administration's region office in which a School is located or in which a training ship is located.

(o) *School* means State or Territorial or regional maritime academy or college meeting the requirements of the Act.

(p) *Superintendent* means the superintendent or president of a School.

(q) *Supervisor* means the employee of the Administration designated to supervise the Federal Government's interest in a School under the provisions of the Act, an agreement, and this subpart.

(r) *Training Ship* means a vessel used for training by a school and furnished by the Administration to a State or Territory, and includes the ship itself and all its equipment, apparel, appliances, machinery boilers, spare and replacement parts and other property contained in it.

[46 FR 37694, July 22, 1981, as amended at 69 FR 31901, June 8, 2004]

### §310.2 Federal assistance.

(a) The Maritime Administrator may enter into agreements with the present or later established schools (not more than one such school in each State or Territory) meeting the requirements of the Act to make annual payments, for not in excess of four (4) years in the case of each such agreement, to be used for the maintenance and support of such Schools. The amount of each such annual payment shall be not less than the amount furnished to such School for its maintenance and support by the State or Territory in which such academy is located or, in the case of a Regional maritime academy an amount equal to the amount furnished to such academy for its maintenance and support by all States or Territories, r both, cooperating to support such School, but shall not exceed $100,000. However, the amount shall not exceed $25,000, if such academy does not meet the requirements of subsection 1304(f)(2) of the Act.

(b) Pursuant to the provisions of section 1304(c) of the Act, The Maritime Administrator, may furnish to any State or Territory of the United States for use as a Training Ship by a school any suitable vessel that is under his or her jurisdiction, obtain such vessel from any department or agency of the United States, or may construct and furnish a suitable vessel, if such vessel is not available.

(c) The Maritime Administrator may pay to any School the amount of the costs of all fuel consumed by a Training Ship furnished under the provisions of section 1304(c)(1) of the Act while such vessel is being used for training purposes by such a School, if such funds have been appropriated and are available for that purpose.

(d) As a condition to receiving any payments or the use of any Training Ship under the provisions of the Act, the school shall comply with the requirements of the Act and this subpart and shall agree in writing to conform to such requirements.

(e) As a further condition to receiving any payments or the use of any Training Ship, a School shall agree that, with respect to the training program for merchant marine officers, consistent with provisions of the Act, the 1958 Act, and the Agreement, it will comply with the following provisions of law and implementing regulations duly promulgated thereunder, to the extent applicable, including, but not limited to: Title VI, Civil Rights Act, 1964 (42 U.S.C. 2000d); the Age Discrimination Act of 1975 (42 U.S.C. 6101); the Vocational Rehabilitation Act—section 504 (29 U.S.C. 794); and 15 CFR Part 8. Each school shall give assurances that it will take any and all measures necessary to effectuate compliance.

### §310.3 Schools and courses.

(a) *Schools with Federal aid.* The following schools are presently operating with Federal aid under the 1958 Act or the Act:

California Maritime Academy
Maine Maritime Academy
Massachusetts Maritime Academy
State University of New York Maritime College
Texas Maritime College of the Texas A&M University at Galveston
The Great Lakes Maritime Academy

(b) *General rules for operation of a School.* (1) The Schools shall maintain

adequate berthing, messing and classroom instruction facilities ashore, or have plans to establish same at the earliest possible time, unless prevented from doing so by conditions beyond the control of the School. During a period a school is implementing an approved plan, Cadets may be housed and instructed on a Training Ship. However, the approved plan may include the ongoing use of the Training Ship as an instructional and laboratory facility and for the berthing of entering class cadets for a period not to exceed six months for purposes of shipboard indoctrination.

(2) The School shall arrange for the Cadet or Midshipman to take the United States Coast Guard original licensing examination prior to the date of graduation.

(3) As a condition to receiving payments of any amount allowable by the 1958 Act and the Act in excess of $25,000 for any year, a School shall agree to admit student residents of other States to the extent of at least ten percent (10%) of each entering class, if such out-of-State students apply for admission and are otherwise qualified for such admission. The calculation of residents of other States shall exclude residents of foreign countries, but shall include residents of Territories and possessions of the United States (including the Commonwealth of Puerto Rico).

(4) Upon the request of the Administration a school shall furnish such reports and estimates as may be required in the preparation of Federal Budget estimates.

(5) State authorities shall prescribe and administer rules and regulations for the internal organization and administration of each School.

(6) The Administration shall have the right to inspect shore base facilities at all reasonable times.

(7) Records pertaining to a School, its officers, crew, Cadets, the Training Ship, and shore base, shall be maintained by each School and shall be available to the Supervisor upon request. A detailed record of applications for admissions, enrollments, reenrollments, absences with or without leave, hospitalizations, determinations of students not in good standing, disenrollments, graduations, and other data concerning cadets and Midshipmen shall be kept by each school for the period of enrollment plus one year. Copies of these records shall be furnished to the Supervisor upon request.

(8) The Administration may include in any pamphlets, brochures or other public information materials an adequate description of each School giving the reader knowledge of the existence of the School, its purposes and where to obtain application forms and further information.

(c) *Curriculum.* (1) The minimum period of training shall be three (3) years. For the Cadets and Midshipmen at the schools located in California, Maine, Massachusetts, New York and Texas at least six (6) months of the total time must be aboard a Training Ship in cruise status. A maximum of two (2) months of training time aboard commercial vessels of not less than 2,500 horsepower may be substituted for two (2) months of the specified cruise time. For the cadets at the Great Lakes Maritime Academy, six (6) months of the time shall be aboard Great Lakes commercial vessels and an additional three (3) months shall be aboard either a Training Ship in a cruise status or Great Lakes commercial vessels while underway. Cadets in training status aboard commercial vessels shall sign on board as cadets and shall pursue their training within the framework of formal sea projects prepared and monitored by their respective Schools.

(2) State authorities shall prescribe and be responsible for the courses of instruction and general system of training and the addition of such reasonable maritime courses as may be prescribed by Federal authorities, subject to approval by the Maritime Administrator. The curriculum as a composite shall, as a minimum, meet the requirements set out in the Federal Curriculum Standards for Merchant Marine Officers Training Program.

(3) Copies of the Federal Curriculum Standards for Merchant Marine Officers Training Program at the State maritime academies may be obtained

from the Maritime Administration, Office of Policy and Plans, 400 Seventh Street, SW, Washington, DC 20590.

(Sec. 204(b), Merchant Marine Act, 1936, as amended (46 U.S.C. 1114(b)); Pub. L. 97–31 (August 6, 1981); 49 CFR 1.66 (46 FR 47458, Sept. 28, 1981))

[46 FR 37694, July 22, 1981, as amended at 49 FR 13365, Apr. 4, 1984; 69 FR 31901, June 8, 2004]

### §310.4 Training Ship.

The Administration may furnish a Training Ship, if such is available, to any School. Training Ships which may be designated for use by a School will be delivered to the School at a location determined by the Administration, in condition found to be in class by the American Bureau of Shipping and certificated by the U.S. Coast Guard. If a Training Ship is not available, adequate cruising facilities shall be the responsibility of the State and its School. The furnishing of a Training Ship shall be subject to the following terms and conditions:

(a) *General provisions.* (1) The State, acting through the School shall exercise reasonable care to safeguard the interests of the Administration and avoid (i) injury to any person aboard the Training Ship, and (ii) loss and damage of every nature with respect to the Training Ship. Also, the school shall have reasonable layup procedures during noncruise status of the Training Ship.

(2) Excerpts from log books and reports shall be submitted as directed by the Supervisor.

(3) Initial telegraphic or telephonic reports shall be made promptly to the Supervisor and the appropriate Region Director in the event of an accident causing (i) serious injury to any person, or to the Training Ship, or (ii) damage inflicted by the Training Ship upon any other ship or other property. Such reports shall be followed by complete written details of the occurrence.

(4) The Supervisor shall determine whether or not the berth of the Training Ship at the base in its home port is suitable from the standpoint of safe mooring. When the Training Ship is not on cruise, the Commanding Officer or Superintendent shall keep the Supervisor informed of the location of the Training Ship and any contemplated change of berth.

(5) The following notice shall be posted conspicuously aboard each Training Ship furnished to a State for use by a School:

This training ship is the property of the United States of America. It is furnished to the State of _____ by the Department of Transportation, Maritime Administration, for the purpose of training young men and women to become officers in the merchant marine of the United States. Neither the State, the Commanding Officer, nor any other person has any right, power or authority to create, incur or permit to be imposed upon this vessel, any lien whatever.

(6) No changes requiring U.S. Coast Guard approval shall be made to the Training Ship without the written approval of the Administration.

(7) In the event of the termination of the use of a Training Ship by the State or by the Maritime Administrator, the State shall return to the State base port, the Training Ship and all property whatsoever owned by the Administration. Title to all additions, replacements, and renewals made by the State shall vest in the Administration without charge.

(b) *Termination of use.* The Maritime Administrator may terminate the use of a Training Ship upon such reasonable notice to the State as the circumstances may permit in the judgment of the Maritime Administrator. If use of the Training Ship is terminated by the Maritime Administrator, the Maritime Administrator may:

(1) Substitute another Training Ship;

(2) Require the sharing of a Training Ship by two or more Schools; or

(3) Cooperate with the School in arranging for training time aboard commercial vessels for its Cadets and Midshipmen.

(c) *Property aboard the Training Ship.* The State shall have the complete use of a Training Ship as defined, subject to the following terms and conditions:

(1) All property, or its equivalent furnished by the Administration, shall be returned to the Administration when use of the Training Ship is terminated. The only exceptions are: spare and replacement parts consumed; and losses

due to ordinary wear and tear, unavoidable accident and perils of the sea. All other property otherwise lost or destroyed shall be replaced at the expense of the State.

(2) Administration property shall not be permanently removed from the Training Ship to the shore base without the prior written approval of the Supervisor.

(3) The administration shall take inventories of State and Federal property aboard the Training Ship at such times as it deems necessary. The school, at its expense, shall furnish such assistance as may be necessary in taking such inventories.

(d) *Condition Surveys.* Before a Training Ship is released to a School and manned by officers under State control, a condition survey shall be made by duly authorized representatives of the School and the Administration. If the Training Ship is found in order, the School representative shall sign a receipt for the Training Ship. Subsequently, after due notice to the State authorities, a condition survey may be made of the Training Ship whenever deemed advisable by the Administration, and, in any event, upon redelivery of the Training Ship by the State to the Administration.

(e) *Maintenance and repairs*—(1) *Administration payment.* A Training Ship shall be maintained in good repair by the Secretary as provided by the 1958 Act and the Act. Expenses for repairs, changes and alterations, repairs to equipage and replacements of equipage in accordance with the Administration's approved allowance lists for the Training Ship (i.e. authorized under the Act and to the extent that funds are available), shall be borne by the Administration under the following terms and conditions:

(i) When it is necessary to repair or drydock the Training Ship because of damage (except in an emergency, when on foreign cruise), the Commanding Officer or Superintendent shall notify the Supervisor and appropriate Region Director by telephone or telegraph in order to enable a representative of the Region Director, if available, to be present, when the survey of the damage is made.

(ii) Repairs which need not be carried out during the annual overhaul period shall be made by the Cadets or Midshipmen, if possible, under the supervision of the officers. When repair material is required for this purpose, the Commanding Officer or Superintendent shall forward to the Supervisor a list of such material and estimated costs, and a description of the repairs to be carried out by the Cadets or Midshipmen. The Supervisor shall promptly advise the Commanding Officer or Superintendent whether or not such work comes under the heading of repairs, and if procurement of the material is authorized.

(iii) Requisitions covering repairs, renewals, and betterments shall be prepared in quintuplicate by the heads of departments of the Training Ship and submitted by the Commanding Officer or Superintendent to the Supervisor at least forty-five (45) days before the date of the annual overhaul, with one copy to the Region Director.

(iv) The State is authorized to expend not to exceed $5,000 for emergency repairs which become necessary while the Training Ship is on foreign cruise. The Administration shall reimburse the State upon submission of vouchers to, and approval by, the Maritime Administrator. To obtain reimbursement for emergency repairs estimated to cost in excess of $5,000, authorization must be obtained by the State from the Supervisor prior to undertaking such repairs. The Commanding Officer shall be responsible for all necessary filings with the United States Customs Service to avoid duties upon all emergency repairs performed outside the United States. If penalties are imposed, for non-filing or improper filing, they shall be solely the responsibility of the State.

(2) *State payment.* Except as otherwise provided in this section, the State shall, at its own expense, accomplish the following:

(i) Undertake usual preventive maintenance of the Training Ship, adhere to minimum levels of preventive maintenance as prescribed by the Administration, and keep the Training Ship clean and painted, above the waterline according to good maritime practices.

(ii) Cause the Training Ship to be fumigated if required by the Administration and forward to the Supervisor a copy of the fumigation certificate.

(iii) Pay for all consumable stores, freshwater and costs incidental to the operation of the Training Ship.

(iv) Pay for fuel of the training ship except that the Administration may assist in paying the cost of fuel consumed on the Training Ship while being used for training purposes if funds are appropriated and available for such purposes.

(f) *Cruises.* The school shall submit the cruise itinerary of the Training Ship including a listing of foreign ports to be visited, for approval of the Supervisor at least sixty (60) days in advance of the date such cruise is scheduled to begin. The Supervisor shall arrange with the Department of State for clearance of the Training Ship to visit foreign ports.

(g) *Hospitalization.* The School shall be responsible for all medical treatment and hospitalization of all persons aboard the Training Ship at all times, including officers and Cadets and Midshipmen. If available, facilities of the United States Public Health Service should be utilized.

(h) *Repatriation and return to home port.* The School shall be responsible for the return to the home port of the Training Ship of all persons, including officers and Cadets and Midshipmen, who originally embarked on a training cruise from a Continental United States port and who are left behind, after the departure of the Training Ship from any port, foreign or domestic, or are to be brought home from the ship at any time or for any reason. The School shall be solely responsible for all expenses of repatriation and return to home port.

### §310.5 Personnel.

(a) *Selection and appointment of Superintendent and faculty by State authorities.* (1) The State shall select and appoint the Superintendent of a School in accordance with qualifications established by appropriate State authorities. The State shall notify the Maritime Administrator whenever a new Superintendent is appointed and furnished with appropriate background information on the appointee for informational purposes.

(2) The State shall appoint faculty members in disciplines other than engineering and navigation on the basis of the same criteria used in the employment of such personnel in State-supported colleges and universities throughout the State. Faculty members in navigation and engineering courses, including steam and diesel, shall meet appropriate academic and practical experience standards adopted by the school and approved by the Administration.

(b) *Personnel for Training Ships*—(1) *Commanding Officer.* The Commanding Officer shall hold a valid Master's Ocean, Unlimited Tonnage license including Radar Observer endorsement issued by the United States Coast Guard and shall have served at least two (2) years as Master, Chief Officer, Commanding Officer, or Executive Officer either (i) on oceangoing vessels under the authority of said Master's Ocean, Unlimited Tonnage license, or (ii) in the case of sea service as a member of the Uniformed Services of the United States, on ships accepted by the United States Coast Guard as equivalent for qualifying service for issue of a Master's Ocean, Unlimited Tonnage license.

(2) *Chief Engineer.* The Chief Engineer must hold a valid Chief Engineer's (Steam) Ocean, Unlimited Horsepower license, issued by the United States Coast Guard and have served as Chief Engineer of an oceangoing steamship of comparable horsepower to that of the particular Training Ship.

(3) *Watch Officers.* Both Deck and Engineer Watch Officers in charge of a watch, underway, shall hold valid Ocean, Unlimited Tonnage licenses, issued by the United States Coast Guard, in their particular field.

(4) *Radio Officers.* During each training cruise the Training Ship shall have assigned one or more radio officers holding a valid license issued by the United States Coast Guard, in accordance with its regulations.

(5) *Licensed Engineer.* When a Training Ship boiler is in operation, there shall be a Licensed Engineer qualified to stand the watch aboard at all times.

(c) *Insignia for officers and other School personnel.* The State may furnish insignia for officers and other school personnel, other than officers of the United States Navy, United States Naval Reserve, United States Maritime Service and United States Coast Guard.

(Approved by the Office of Management and Budget under control number 2133–0010)

(Sec. 204(b), Merchant Marine Act, 1936, as amended (46 U.S.C. 1114(b)); Pub. L. 97–31 (August 6, 1981); 49 CFR 1.66 (46 FR 47458, Sept. 28, 1981))

[46 FR 37694 July 22, 1981, as amended at 47 FR 25530, June 14, 1982; 49 FR 13365, Apr. 4, 1984]

### § 310.6 Entrance requirements.

(a) *Enrollment prior to April 1, 1982.* A candidate for admission to a school who wishes to be considered for Federal student subsistence payments shall:

(1) Be a citizen of the United States.

(2) Be obligated to (i) complete the Naval Science curriculum (ii) take all necessary and positive steps to obtain a commission as ensign in the United States Naval Reserve, (iii) apply before graduation for such commission, and (iv) accept such commission if offered. A breach of this agreement will result in termination of cadet status and of Federal student subsistence payments, and may lead to legal action for recovery of all past such payments. The requirements of this paragraph shall not apply at The Great Lakes Maritime Academy.

(3) Be obligated to sit for the appropriate licensing examination of the United States Coast Guard. A breach of this agreement will result in termination of cadet status and of Federal student subsistence payments, and may lead to legal action for recovery of all past such payments.

(4) Meet the physical standards specified by the United States Coast Guard for original licensing as a merchant marine officer. The written certification of the Superintendent of the school, based on a physical examination by a doctor, the results of which are on record at the school, that a candidate meets these requirements, will be acceptable to the Administration.

(5) Possess a secondary school education or equivalent, satisfactory for admission as an undergraduate, to colleges or universities under control of the State in which the school is located.

(6) Meet requirements established by the school in regard to such criteria as the individual's secondary school grades, rank in graduating class, aptitude, achievement, and qualities of leadership.

(b) *Enrollment on or after April 1, 1982.* A candidate for admission to a school who wishes to be considered for the Federal student incentive payments shall:

(1) Meet the requirements of paragraphs (a) (1), (4), (5), and (6) of this section.

(2) Be at least seventeen (17) years of age and not have passed the twenty-fifth (25th) birthday on the day of enrollment at a School.

(3) Apply for, be offered, and have accepted midshipman status in the United States Naval Reserve (including the Merchant Marine Reserve, United States Naval Reserve) and simultaneously have applied and been accepted for Enlisted Reserve status.

(4) Be obligated to complete the naval science curriculum.

[46 FR 37694, July 22, 1981, as amended at 48 FR 24080, May 31, 1983]

### § 310.7 Federal student subsistence allowances and student incentive payments.

(a) *Subsistence allowances*—(1) *Selection and allocation.* In accordance with the Administration's established freshmen subsidy allocation for each School, the school shall select the individuals in its new entering class who will be enrolled in the United States Maritime Service as cadets and start to receive Federal student subsistence payments for uniforms, textbooks and subsistence as provided in the 1958 Act. The freshman subsidy allocations for each school are as follows: California Maritime Academy 99; Maine Maritime Academy 135; Massachusetts Maritime Academy 69; State University of New York Maritime College 200; Great Lakes Maritime Academy 45; and the

Texas Maritime College 32. Each student who meets the entrance requirements in §310.6(a) and applies for enrollment in the United States Maritime Service shall be entitled to consideration for a student subsistence payment at a rate and under the conditions in the 1958 Act. The list identifying the selected students shall be forwarded to the Administration on or before October 31, 1981. The Federal student subsistence payments will be paid to the School while a cadet is in attendance but not in excess of four (4) academic years for any one student.

(2) *Resignation or disenrollment.* There will be no substitution for students removed or dropped from the list of those originally receiving Federal student subsistence payments. Subsidized students who resign or are disenrolled from a school shall not, on subsequent reenrollment, be in a position to reclaim their subsidy status.

(3) *Selection criteria; rate of payment.* The selection of the students to receive such payments shall be made by the School in accordance with criteria established by the School, with the prior approval of the Administration. The rate of Federal student subsistence payments will be determined by the Administration according to the 1958 Act or the Act.

(4) *ROTC enrollment.* Subsidized cadets who make a commitment to an Armed Force Reserve Officer Training Corps will be removed from the Administration subsidy rolls effective on the date they receive funds from a U.S. military service. Should they leave the program for any reason they may not reclaim the Administration subsidy as a cadet.

(5) *Payment procedure.* The Administration shall make the Federal student subsistence payments no more frequently than monthly, directly to the School upon the presentation of a statement containing the names of each Cadet selected by the Academy (within the quotas furnished pursuant to paragraph (a) of this section) to be enrolled in the Maritime Service and to receive the Federal student subsistence payments. For newly selected Cadets in a new entering class, the statement supporting the first voucher for payment shall certify that the cadets have met the entrance requirements in §310.6.

(6) *Certification procedure.* All vouchers submitted for payment shall contain a certification by the Superintendent that the payment will be used to assist in defraying the cost of the uniforms, textbooks, and subsistence of each Cadet on the basis of the amount to which the cadet is entitled, as reflected by the attached Daily Attendance Report. No cadet shall receive a federal student subsistence payment for any time during which he or she is absent without leave or for absence due to a condition not in line of duty, or when determined by the School to be not in good standing.

(7) *Insufficient appropriations.* If it appears that the amount appropriated by Congress under the Act shall not be sufficient to make payments at the maximum rate, not in excess of $1,200 per academic year per cadet, the Maritime Administrator, after consultation with the Schools, may determine the exact rate to be paid at each School for the remainder of the fiscal year.

(b) *Federal student incentive payments*—(1) *General provisions.* In accordance with the Administration's established subsidy quotas for classes entering after April 1982, each school shall identify to the Administration, no later than February 1 annually, those students who have been selected to receive the student incentive payment authorized by the Act. The students so identified must meet the requirements of §310.6(b). The Administration shall provide the school with the necessary service obligation contracts. The contracts will be signed by the designated students and returned by the School to the Supervisor and shall become effective when signed by the Supervisor or his or her designee. A copy shall be returned to the School for transmittal to the student. Payments will be issued to midshipmen in amounts equaling $4000 for each academic year of attendance whom execute the service obligation contracts providing for such payment amount. Payments shall commence to accrue on the day each such midshipman begins his or her first term of work at the School. Such payments shall be made quarterly to the midshipman until the completion of his or

her course of instruction but in no event for more than four (4) academic years. The School shall submit a quarterly certified Daily Attendance Report listing the names of all designated midshipmen who are entitled to student incentive payments. Midshipmen who do not take all necessary steps to maintain their midshipman status, who lose their midshipman status due to action by the U.S. Navy, or who make the commitment identified in paragraph (a)(4) of this section will have their student incentive payment terminated.

(2) *Temporary reallocation of Federal student incentive payments.* If a School does not have a sufficient number of eligible freshmen to utilize all of its alloted payments, then the unused subsidies may be reallocated on a need basis to academies with eligible students. In the next academic year, each School's subsidy quota for entering students will revert to its original level.

(3) *Form of the service obligation contract.* The service obligation contract shall obligate the midshipman to—

(i) Use the student incentive payment to defray the cost of uniforms, books and subsistence;

(ii) Complete the course of instruction at the School;

(iii) Take the examination for a license as an officer in the merchant marine of the United States on or before the date of graduation from a School and fulfill the requirements for such license not later than three (3) months after such graduation;

(iv) Maintain a valid license as an officer in the merchant marine of the United States for at least six (6) years following the date of graduation from a School, accompanied by the appropriate national and international endorsements and certification required by the United States Coast Guard for service aboard vessels on domestic and international voyages ("appropriate" means the same endorsements and certifications held at the date of graduation, or the equivalent);

(v) Apply for an appointment as, and accept if tendered, and serve as a commissioned officer in the United States Naval Reserve (including the Merchant Marine Reserve, United States Naval Reserve), the United States Coast Guard Reserve, or any other Reserve unit of an armed force of the United States for at least six (6) years following the date of graduation from a school; and

(vi) Serve in the foreign or domestic commerce or both, and the national defense of the United States for at least three (3) years following graduation from a School—

(A) As a merchant marine officer serving on vessels documented under the laws of the United States or on vessels owned and operated by the United States or by any State or Territory of the United States;

(B) As an employee in a United States maritime-related industry, profession, or marine science (as determined by the Maritime Administrator), if the Maritime Administrator determines that service under paragraph (b)(3)(vi)(A) of this section is not available to such individual;

(C) As a commissioned officer on active duty in an armed force of the United States or in the National Oceanic and Atmospheric Administration or in other maritime-related employment with the Federal Government which serves the national security interests of the United States, as determined to be satisfactory by the Maritime Administrator; or

(D) By combining the services specified in paragraphs (b)(3)(vi)(A), (b)(3)(vi)(B) and (b)(3)(vi)(C) of this section; and

(E) Such employment in the Federal Government must be both significantly maritime-related and serve the national security interests of the United States. "Significantly" is equated to a material or essential portion of an individual's responsibilities. It does not mean a "majority" of such individual's responsibilities, but means more than just an incidental part.

(4) *Marine-related employment.* (i) graduates who intend to claim employment in a United States maritime-related industry, profession of marine science as meeting all or part of the service obligation under paragraph (b)(3)(vi) of this section, shall submit evidence to the Supervisor that they have conscientiously sought employment as a merchant marine officer, and

that such employment is not available. Such evidence and other information available, shall be considered in any finding. In view of current and projected employment opportunities, afloat, the Maritime Administrator will grant the shoreside employment option infrequently and only on the basis of comprehensive evidence.

(ii) The Maritime Administrator may consider the positions of operational, management and administrative responsibility in the following marine-related categories under the provisions of paragraph (b)(3)(vi) of this section: Civilian employment in Federal and State agencies related to maritime affairs, steamship companies, stevedoring companies, vessel chartering and operations, cargo terminal operations, naval architecture, shipbuilding and repair, municipal and state port authorities, port development, marine engineering, and tug and barge companies. The above list is not all inclusive and is only intended to serve as a general guide.

(5) *Afloat employment year.* For purposes of the service obligation, a satisfactory year of afloat employment shall be the lesser of—

(i) 150 days; or

(ii) The number of days employed afloat that is at least equal to the median number of days of seafaring employment under articles achieved by deck or engine officers in the most recent calendar year for which statistics are available.

(6) *Reporting requirement.* (i) The schools must promptly submit copies of all resignation forms (containing the name, reason, address and telephone number) of juniors and seniors to the Supervisor, to be used for monitoring and enforcement purposes. Each graduate must submit an annual Service Obligation Compliance Report form (MA–930) to the Maritime Administration (Supervisor) between January 1 and March 1 following his or her graduation. After the initial report is submitted, each graduate must continue to submit annual reports during the same time frame between January 1 and March 1 for six (6) consecutive years thereafter, or until all components of the service obligation are fulfilled, whichever is latest. Each graduate will file a minimum of seven (7) reports in order to give information on all six (6) years of the armed forces reserve and merchant marine officer license service obligations. Graduates are encouraged to submit their Service Obligation Compliance Report forms (MA–930) to MARAD using the web-based Internet system at *https://mscs.marad.dot.gov*. Reports may also be mailed to: Compliance Specialist, Office of Policy and Plans, Maritime Administration, Department of Transportation, 400 7th St., SW., Room 7123, Washington, DC 20590. In case a deferment has been granted to engage in a maritime-related graduate course of study, annual reports must be submitted during the extension period resulting from such deferments. Examples of the reporting requirements are as follows.

*Example 1:* Midshipman graduates on June 30, 2004. His or her first reporting date is between January 1, 2005 and March 1, 2005 and each following period between January 1 and March 1 for six (6) consecutive years thereafter (or until all components of the service obligation are fulfilled, whichever is latest) for a minimum of seven (7) reports.

*Example 2:* Midshipman has a deferred graduation on November 30, 2004. His or her first reporting date is between January 1, 2005 and March 1, 2005 and each following period between January 1 and March 1 for six (6) consecutive years thereafter (or until all components of the service obligation are fulfilled, whichever is latest) for a minimum of seven (7) reports.

*Example 3:* Midshipman has a deferment following graduation on June 30, 2004, to attend graduate school for two (2) years. His or her first reporting date is between January 1, 2005 and March 1, 2005 and during the same time frame between January 1 and March 1 for two (2) years during graduate school, and then during the same January 1 to March 1 time frame for six (6) consecutive years thereafter (or until all components of the service obligation are fulfilled, whichever is latest) for a total of nine (9) reports.

(ii) The Maritime Administration will provide reporting forms. However, non-receipt of such forms will not exempt a graduate from submitting information as required by this paragraph. The reporting form has been approved by the Office of Management and Budget (2133–0509).

(7) *Breach of contract*—(i) *Breach before graduation.* (A) If the Maritime Administrator determines that any individual who has accepted Federal student incentive payments for a minimum of two (2) academic years has failed to fulfill any part of the contract set forth in § 310.7(b)(3), such individual may be ordered by the Secretary of Defense to active duty in one of the Armed Forces of the United States to serve a period of time not to exceed two (2) years. In cases of hardship as determined by the Maritime Administrator, the Maritime Administrator may waive this provision in whole or in part.

(B) If the Secretary of Defense is unable or unwilling to order an individual to active duty under paragraph (b)(7)(i)(A) of this section, or if the Maritime Administrator determines that reimbursement of the cost of education provided would better serve the interests of the United States, the Maritime Administrator may recover from the individual the amount of student incentive payments, plus interest and attorney's fees.

(C) The Maritime Administrator is authorized to reduce the amount to be recovered under paragraph (b)(7)(i)(B) of this section from such individual to reflect partial performance of service obligations and such other factors as the Maritime Administrator determines merit such reduction.

(D) For purposes of paragraph (b)(7)(i)(A) of this section, an "academic year" is defined as the completion by a student of the required number of semesters, trimesters, or quarters, as applicable, whether at school or at sea, which comprise a complete course of study for an academic year. Thus, liability under paragraph (b)(7)(i)(A) of this section begins for students at the beginning of their third (3rd) academic year, whether at school or at sea.

(ii) *Breach after graduation.* (A) If the Maritime Administrator determines that an individual has failed to fulfill any part of the service obligations (described in § 310.7(b)(3)), such individual may be ordered to active duty to serve a period of time not less than two (2) years and not more than the unexpired portion of the service obligation contract relating to service in the foreign or domestic commerce or the national defense, as determined by the Maritime Administrator. The Maritime Administrator, in consultation with the Secretary of Defense, shall determine in which service the individual shall be ordered to active duty to serve such period of time. In cases of hardship, as determined by the Maritime Administrator, the Maritime Administrator may waive this provision in whole or in part.

(B) If the Secretary of Defense is unable or unwilling to order an individual to active duty under paragraph (b)(7)(ii)(A) of this section or if the Maritime Administrator determines that reimbursement of the Cost of Education Provided would better serve the interests of the United States, the Maritime Administrator may recover from the individual the Cost of Education Provided, plus interest and attorney's fees.

(C) The Maritime Administrator may reduce the amount to be recovered under paragraph (b)(7)(ii)(B) of this section from such individual to reflect partial performance of service obligations and such other factors as the Maritime Administrator determines merit such reduction.

(8) *Waivers.* Waivers may be granted in cases where there would be undue hardship or impossibility of performance of the provisions of the contract due to accident, illness or other justifiable reason. Applications for waiver will be submitted to the Supervisor.

(9) *Deferments.* In exceptional cases the Administration may grant a deferment of all or part of the service commitment under paragraphs (b)(3)(ii) through (vi) of this section for a period not to exceed two years, only for graduates considered to have superior academic and conduct records while at the school, for the purpose of their entry after graduation into a marine-or maritime-related graduate course of study at an accredited graduate school. However, the Secretary of the department in which the United States Coast Guard is operating and the Secretary of Commerce, with respect to the National Oceanic and Atmospheric Administration, which has jurisdiction over such service shall approve any

deferment of service as a commissioned officer. Applications for such deferment shall be made through the Superintendent of Midshipman's school, who shall forward each application together with the Superintendent's recommendation for approval or disapproval and an evaluation of the applicant's academic and conduct records, to the Supervisor for appropriate action.

(10) *Determination of compliance with service obligation contract; deferment; waiver; and appeal procedures.* (i) An official of the Administration designated by the Supervisor shall:

(A) Render determinations of whether a student or graduate has breached his or her service agreement;

(B) Grant or deny a deferment of the service obligation under paragraph (b)(9) of this section, except obligations otherwise a part of the graduate Reserve officer status;

(C) Grant or deny a waiver of the requirements of the service agreement in hardship cases.

(ii)(A) If a student or graduate disagrees with the decision of the designated official, the student or graduate may appeal that decision to the Maritime Administrator. The appeal must set forth all the legal and factual grounds on which the student or graduate bases the appeal. Any grounds not set forth in the appeal are waived.

(B) Appeals must be filed with the Maritime Administrator within 30 calendar days of the date of receipt by such student or graduate of the written decision of the designated official. Appeals must be filed at the Office of the Secretary, Maritime Administration, Room 7210, 400 7th St., SW., Washington, DC 20590. Each decision will include a notice of appeal rights.

(C) A decision is deemed to be received by a student or graduate five (5) working days after the date it is mailed by first class mail, postage prepaid, to the address for such student or graduate listed with the Office of Policy and Plans. It is the responsibility of such student or graduate to ensure that their current mailing address is on file with the Office of Policy and Plans, 400 7th St., SW., Washington, DC 20590.

(D) If the appeal is sent by conventional mail (through the United States Postal Service), the date of filing is determined by the postmark date. If no legible postmark date appears on the mailing, the appeal is deemed to be filed five (5) working days before the date of its receipt in the Office of the Secretary. If delivered by other than the United States Postal Service, an appeal is filed with the Maritime Administrator on the date it is physically delivered to the Office of the Secretary at the address referenced in paragraph (b)(10)(ii)(B) of this section. The date of filing by commercial delivery (not United States Postal Service) is the date it is received at the address for the Office of the Secretary set forth in paragraph (b)(10)(ii)(B) of this section. Appeals may not be submitted by facsimile or by electronic mail. Requests for extension of the time to file an appeal may be submitted by facsimile or electronic mail to the Office of the Secretary. Requests for extension of time do not stop or toll the running of the time for filing an appeal. Appeals may only be filed after the deadline if the Maritime Administrator or his designee, in their sole discretion, grants an extension.

(E) In computing the number of days, the first day counted is the day after the event from which the time period begins to run. If the date that ordinarily would be the last day for filing falls on a Saturday, Sunday, or Federal holiday, the filing period will include the first workday after that date.

*Example to paragraph (b)(10)(ii)(E):* If a graduate receives a decision on July 1, the 30-day period for filing an appeal starts to run on July 2. The appeal would ordinarily be timely only if postmarked on or physically delivered by July 31. If July 31 is a Saturday, however, the last day for obtaining a postmark by mailing or physical delivery would be Monday, August 2.

(iii) The Maritime Administrator will issue a written decision for each timely appeal. This decision constitutes final agency action.

(iv) If a student or graduate fails to appeal within the time set forth in paragraph (b)(10)(ii) of this section, the decision of the designated official will be final and constitute final agency action.

(11) *Remedies.* To aid in the recovery of the cost of education under this section, the Maritime Administrator may request the Attorney General to begin court proceedings, and the Maritime Administrator may make use of the Federal debt collection procedure in chapter 176 of title 28, United States Code, or other applicable administrative remedies.

[46 FR 37694, July 22, 1981, as amended at 48 FR 24080, May 31, 1983; 49 FR 13365, Apr. 4, 1984; 65 FR 39558, June 27, 2000; 66 FR 36176, July 11, 2001; 69 FR 31901, June 8, 2004; 69 FR 61606, Oct. 20, 2004; 70 FR 28833, May 19, 2005]

### § 310.8 Leave.

(a) *Enrolled before April 1, 1982.* Limitations on cadet leave, without loss of Federal student subsistence, with the specific limits to be set at the discretion of the Superintendent on an academic year basis, are:

(1) If hospitalized, sick at home, or confined in the sick bay, leave shall not exceed four (4) months.

(2) For an emergency due to the serious illness, injury or death of a very near relative, leave shall not exceed seven (7) days.

(3) Annual leave shall not exceed thirty (30) days.

(4) Christmas and Easter leave shall not exceed a total of twelve (12) days, and leave may be granted for all legal holidays—Federal and state. This leave is in addition to that granted in paragraph (a)(3) of this section.

(5) Leave in addition to that provided in paragraphs (a) (3) and (4) of this section may be granted only if approved in advance by the Supervisor, upon direct request by the Superintendent.

(b) *Enrolled on or after April 1, 1982.* Midshipmen will be granted leave without loss of incentive payments as follows:

(1) Medical leave, as authorized by the school, not to exceed four (4) months.

(2) Christmas and Easter leave and all legal holidays—Federal and state—as authorized by the school. This leave is in addition to that granted in paragraph (b)(3) of this section.

(3) Excused absences, as authorized by the school, not to exceed thirty (30) days per academic year. All unauthorized leave and all excused absences in excess of thirty (30) days will result in loss of incentive payments. Midshipmen receiving student incentive payments may be granted leaves of absence without pay, as approved by the Superintendent, for periods not to exceed one (1) academic year at a time. Midshipmen in a pay status will only be granted a leave of absence if they continue to meet all requirements for graduation in this part, including age requirements.

[48 FR 24081, May 31, 1983]

### § 310.9 Medical attention and injury claims.

(a) *Medical attention and hospitalization.* The school shall be responsible for arranging that a medical officer shall be attached or on call to the school. During the cruise, the School shall assign a medical officer to the Training Ship.

(b) *Compensation claims of Cadets or Midshipmen.* Compensation claims for personal injuries or death sustained by a federally-assisted cadet or midshipman in the performance of official duty shall be forwarded to the Supervisor for transmission to the Office of Workers' Compensation Programs. The Supervisor shall furnish necessary forms.

(c) *Medical care and compensation for Officers and other personnel.* Officers and other personnel of the School, and of the Training Ship may avail themselves of any medical facilities furnished by the State or Federal Government for which they qualify. See, for example, 42 CFR part 32. Such persons who are not Federal employees shall look to the State alone for pay, allowances, compensation and other benefits during injury or illness.

[46 FR 37694, July 22, 1981, as amended at 48 FR 24081, May 31, 1983]

### § 310.10 Discipline and dismissal.

(a) Each School shall establish and publish rules and regulations governing Cadet and Midshipman discipline and providing for a demerit system for infractions of these rules and regulations. Serious or excessive violations of the rules and regulations by a Cadet or Midshipman may be considered as evidence of inaptitude for the demanding

career of a merchant marine officer and warrant dismissal by the school.

(b) Each Cadet or Midshipman shall, upon admission to the School, be furnished a copy of the School's rules and regulations.

(c) Any Cadet or Midshipman placed on probation for failure to meet the conduct requirements of the school may, at the discretion of the Superintendent, be listed as not in good standing for any period not to exceed six (6) months for the purpose of § 310.7(a)(5).

### § 310.11 Cadet uniforms.

Cadet uniforms shall be supplied at the school in accordance with the uniform regulations of the School. Those regulations shall prescribe a distinctive insignia or device approved by the Maritime Administrator.

### § 310.12 Scope and effect.

(a) If any provisions of this subpart conflict with laws and regulations of the State, the appropriate State authorities shall notify the Maritime Administrator in writing of such conflict and pertinent circumstances. The Maritime Administrator, as a matter of discretion, shall take, or not take, any action determined appropriate under the 1958 Act or the Act.

(b) The Maritime Administrator may, after consultation with the Superintendents of the schools issue binding executive instructions supplementing this subpart.

### § 310.12–1 Form of Agreement.

The form of agreement between the Maritime Administrator and schools for annual maintenance and support payments, Federal student subsistence and incentive payments and fuel assistance under the 1958 Act and the Act may be obtained from the Office of Policy and Plans, Maritime Administration, 400 7th St., SW., Washington, DC 20590.

[70 FR 28833, May 19, 2005]

## Subpart B [Reserved]

## Subpart C—Admission and Training of Midshipmen at the United States Merchant Marine Academy

AUTHORITY: Secs. 204(b) and 1301–1308, Merchant Marine Act, 1936, as amended, (46 U.S.C. 1114(b) and 1295–1295g); 49 CFR 1.66 (46 FR 47458, September 28, 1981).

SOURCE: 47 FR 21812, May 20, 1982, unless otherwise noted.

### § 310.50 Purpose.

The regulations in this subpart govern the nomination, admission and appointment of midshipmen to the United States Merchant Marine Academy,

### § 310.51 Definitions.

(a) *Academy* means the United States Merchant Marine Academy.

(b) *Act* means the Maritime Education and Training Act of 1980, Pub. L. 96–453, 94 Stat. 1997, as subsequently amended, 46 App. U.S.C. 1295–1295g.

(c) *Administration* means the Maritime Administration, Department of Transportation.

(d) *Administrator* means the Administrator of the Maritime Administration.

(e) *Citizen* means an individual who, by birth or naturalization, owes national allegiance to the United States, but the term excludes United States nationals.

(f) *Cost of Education Provided* means the financial costs incurred by the Federal Government for providing training or financial assistance to students at the United States Merchant Marine Academy, including direct financial assistance, room, board, classroom academics, and other training activities.

(g) *Foreign student* means an individual who owes national allegiance to a country or political entity other than the United States, and the term includes United States nationals.

(h) *NOAA* means the National Oceanic and Atmospheric Administration.

(i) *USNR* means the United States Naval Reserve.

[47 FR 21812, May 20, 1982, as amended at 69 FR 31902, June 8, 2004]

### § 310.52 General.

(a) Midshipmen are appointed to the Academy for training to prepare them to become officers in the U.S. merchant marine. The Academy, located at Kings Point, New York, is maintained by the Government as a part of the Administration. After successful completion of the 4-year course of study, a graduate of the Academy shall receive a Bachelor of Science degree and a merchant marine license as either a third officer or third assistant engineer (or both licenses upon completion of a special curriculum and passing the respective license examinations) issued by the U.S. Coast Guard. If qualified, a graduate may be commissioned as an officer in a reserve component of an armed force of the United States.

(b) Midshipmen entering the Academy after April 1, 1982, are required by the Act to sign an agreement committing them to service obligations following the date of graduation. The terms of the service obligation contract are set forth in § 310.58 of this subpart.

### § 310.53 Nominations and vacancies.

(a) *Nominating officials.* (1) Each Senator and Member of the House of Representatives (including delegates from Guam, the Virgin Islands and the District of Columbia and the Resident Commissioner from Puerto Rico), the Panama Canal Commission, the Governor of the Northern Mariana Islands, and the Delegate to the House of Representatives from American Samoa may nominate ten (1) candidates to compete for admission to the Academy.

(2) In accordance with the Act (46 U.S.C. 1295b (b)(1)), nominating officials may only nominate candidates who are residents of the State or other geographic area which the particular nominating official represents, as follows:

| The candidate must be a resident of— | To be nominated by— |
|---|---|
| The State | A Member of the U.S. Senate representing that State. |
| The State | A Member of the U.S. House of Representatives whose Congressional District is located in that State. |
| Guam | The Delegate to the U.S. House of Representatives representing Guam. |
| Virgin Islands | The Delegate to the U.S. House of Representatives representing the Virgin Islands. |
| District of Columbia | The Delegate to the U.S. House of Representatives representing the District of Columbia. |
| Commonwealth of Puerto Rico. | The Resident Commissioner to the United States from Puerto Rico. |
| American Samoa | The Delegate to the House of Representatives representing American Samoa. |
| Any area or installation located in the Republic of Panama which is made available to the United States pursuant to the (i) the Panama Canal Treaty of 1977, (ii) the agreements relating to and implementing the Treaty signed September 7, 1977, and (iii) the Agreement between the United States of America and the Republic of Panama Concerning Air Traffic Control and Related Services, concluded January 8, 1979; *Provided,* That no residence in the Republic of Panama is required if nomination is due to his or her parent's employment in the Panama Canal or in the Republic of Panama by the United States Government or the Panama Canal Commission. | Panama Canal Commission. |
| Northern Mariana Islands | Governor of the Northern Mariana Islands. |
| Trust Territory of the Pacific Islands. | Secretary of the Interior. |

(3) Individuals must be residents of the Trust Territory of the Pacific Islands to qualify for designation by the Secretary of the Interior.

(4) Nominating officials may select nominees, and the Secretary of the Interior may select designees, by any method they wish, including a screening examination.

(5) Candidates from nations other the United States must be nominated by an official of their home government and have their applications approved by the United States Government official specified in § 310.66 (a), or (c) or (d).

(b) *Vacancies.* (1) The number of vacancies in each entering class allocated to each State is in proportion to the representation in Congress from that State.

(2) In each entering class, two vacancies shall be allocated each year for individuals nominated by the Panama Canal Commission; one vacancy each to nominees from Puerto Rico, Guam, Virgin Islands, Northern Marian Islands and American Samoa; and four vacancies to nominees from the District of Columbia.

(3) Not to exceed four (4) individuals at any one time may be admitted from the Trust Territory of the Pacific Islands and twelve (12) individuals from nations located in the Western Hemisphere, other than the United States, but not more than two (2) individuals from any one of such nations shall receive training at the same time.

(4) The Administrator may permit, upon approval of the Secretary of State, not more than thirty (30) individuals at one time from nations other than the United States to receive instruction at the Academy, subject to the condition that the foreign nations reimburse the Administrator for the cost of such training.

(5) The distribution of each entering class by State is:

Alabama ....4
Alaska ....1
Arizona ....3
Arkansas ....2
California ....19
Colorado ....4
Connecticut ....4
Delaware ....1
Florida ....10
Georgia ....5
Hawaii ....2
Idaho ....2
Illinois ....9
Indiana ....3
Iowa ....4
Kansas ....3
Kentucky ....2
Louisiana ....4
Maine ....2
Maryland ....5
Massachusetts ....5
Michigan ....7
Minnesota ....3
Mississippi ....3
Missouri ....3
Montana ....2
Nebraska ....2
Nevada ....2
New Hampshire ....2
New Jersey ....6
New Mexico ....2
New York ....15
North Carolina ....6
North Dakota ....1
Ohio ....8
Oklahoma ....2
Oregon ....3
Pennsylvania ....10
Rhode Island ....2
South Carolina ....4
South Dakota ....1
Tennessee ....4
Texas ....13
Utah ....2
Vermont ....1
Virginia ....5
Washington ....5
West Virginia ....2
Wisconsin ....4
Wyoming ....1

(6) The distribution of each entering class otherwise provided under the Act is:

Northern Mariana Islands ....1.
Puerto Rico ....1.
District of Columbia ....4.
Republic of Panama ....2.
Guam ....1.
American Samoa ....1.
Virgin Islands ....1.
Administrator ....Not to exceed 40.

(7) The distribution of students provided for under the Act without reference to entering class is:

| | Not to exceed at any one time |
|---|---|
| Trust Territory of the Pacific Islands | 4 |
| Western Hemisphere nations (other than U.S.) | 12 |
| Foreign nations | 30 |

(c) *Request for nomination.* A person interested in admission to the Academy who feels that he or she meets the requirements in this subpart should request a nomination from his or her Senator or Representative or other appropriate nominating official listed in paragraph (a) of this section.

(d) *Date for nominations.* The nominating official will send a nomination form for each nominee to the Admissions Office, U.S. Merchant Marine Academy, Kings Point, Long Island, New York 11024, normally between August 1 and December 31 of the school year preceding that in which admission to the Academy is desired.

(e) *Appointments.* (1) The Administrator shall make appointments to fill the vacancies allocated pursuant to paragraph (b) of this section from among qualified nominees, in order of merit, from each geographical area.

The order of merit shall be established according to the procedure as specified in § 310.57(b). Such appointments first shall be made from among residents of each geographic area listed in paragraph (b) of this section. Thereafter, appointments shall be made from among residents of each geographic area listed in paragraph (b) of this section. Thereafter appointments shall be made from among remaining qualified nominees (national alternates) in order of merit regardless of the area of residence.

(2) The Administrator may appoint, without competition, not more than forty (40) qualified citizens who possess qualities deemed to be of special value to the Academy. In making these appointments, the Administrator shall give special consideration to achieving a national demographic balance and to recognizing individuals with qualities deemed to be of special value to the Academy.

[47 FR 21812, May 20, 1982, as amended at 51 FR 17741, May 15, 1986; 60 FR 44438, Aug. 28, 1995]

### § 310.54 General requirements for eligibility.

(a) *Citizenship.* All candidates shall be citizens of the United States except: (1) Nominees from foreign nations; (2) nominees from the Northern Mariana Islands; (3) designees from the Trust Territory of the Pacific Islands; and (4) nominees from American Samoa, who may be American nationals. No person who is not a citizen shall be entitled to any office or position in the U.S. merchant marine by reason of his or her graduation from the Academy, until such person shall have become a citizen.

(b) *Age.* On July 1 of the year of admission to the Academy, a candidate shall be not less than seventeen (17) years of age and shall not have passed his or her twenty-fifth (25) birthday.

(c) *Character.* A candidate shall be of good moral character. The Administrator may reject the nomination of any candidate whose character is incompatible with the Academy's standards. No person who has been dismissed or compelled to resign from the U.S. Military Academy, the U.S. Naval Academy, the U.S. Air Force Academy, the U.S. Coast Guard Academy, the Academy or a State maritime academy for improper conduct shall be eligible for appointment as a midshipman at the Academy. No person whose last discharge from any armed force was under conditions other than honorable or who has had a merchant mariner document removed or suspended for cause shall be eligible for appointment as a midshipman.

(d) *Investigation.* To be eligible for appointment, all candidates who are United States citizens shall be completely loyal to the United States and shall meet the requirements established by the Department of the Navy for designation as Midshipman, USNR (including the Merchant Marine Reserve, USNR). Candidates for appointment shall execute documents approved by the Administrator for the purpose of a security and suitability investigation. Appointment as a Midshipman, USNR (including the Merchant Marine Reserve, USNR) shall be a condition of admission for an individual who is a citizen. A candidate who is conditionally appointed to the Academy pending completion of a Navy security and suitability investigation shall be subject to immediate separation should the candidate, as a result of the investigation, fail to meet the requirements established for appointment as Midshipman, USNR.

(e) *Waivers.* There shall be no waivers of general eligibility requirements.

(Sec. 204(b), Merchant Marine Act, 1936, as amended (46 U.S.C. 1114(b)); Pub. L. 97–31 (August 6, 1981); 49 CFR 1.66)

[47 FR 21812, May 20, 1982, as amended at 49 FR 45858, Nov. 21, 1984]

### § 310.55 Scholastic requirements.

(a) *Academic requirements*—(1) *Credits.* Applicants shall have satisfactorily completed their high school education at an accredited secondary school, or equivalent, and shall present at least 15 units of credit for subjects acceptable to the Academy, comprised of:

(i) 7 required units, as follows:

(A) 3 units of Mathematics (from algebra, geometry and trigonometry);

(B) 3 units of English; and

(C) 1 unit of Physics or Chemistry.

(ii) 8 other units, preferably chosen from the following fields:

(A) Additional mathematics and science;

(B) Foreign language;

(C) Economics; and,

(D) Social science.

(2) *Evidence of academic work.* Before approval of an application, each applicant shall submit evidence showing completion of high school education, or showing that such education will be completed no later than June 30 of the year in which admission is sought.

(b) *Scholastic examinations*—(1) *Required entrance examinations.* Applicants shall qualify in either the College Board's Scholastic Aptitude Tests (SAT) or the American College Testing Program (ACT) examinations, administered nationally on scheduled dates at convenient testing centers. A candidate electing to use the College Board shall take both the mathematics and the verbal section of the SAT. A candidate electing to use the ACT, shall take all the tests, namely, English, Mathematics, Social Sciences and Natural Sciences. Minimum qualifying scores on the entrance examinations will be determined by the Superintendent of the Academy for each entering class prior to any offers of appointment for the particular class. Any score below the minimum on any one section of an examination shall make the nominee ineligible for admission. All examination costs shall be borne by the applicant. Nominees shall take all the required examinations by the February testing date in the year for which they seek appointment, unless the Academy's Admissions Office grants special authorization to take later examinations.

(2) *Forwarding test results.* Candidates shall be responsible for requesting the testing services to submit their scores directly to the Academy.

(3) *Test information.* Information on the entrance examinations may be obtained from—

The candidate's high school guidance office; or,

College Board, P.O. Box 592, Princeton, N.J. 08540; or,

College Board, P.O. Box 1025, Berkeley, CA. 94701; or,

American College Testing Program, P.O. Box 168, Iowa City, IA 52240.

(c) *Prior Scholastic Record.* Applicants shall demonstrate scholastic achievement by having attained a relatively high standing in relation to their fellow students and by having shown proficiency in mathematics and science courses. With respect to applicants who completed high school at least one year before applying for admission to the Academy, consideration will be given to satisfactory college level study or any special study undertaken to strengthen their academic backgrounds, particularly in respect to determining whether such supplementary academic activity offsets any deficiency in high school scholastic records.

(d) *Waivers.* No waivers of scholastic requirements will be granted.

### § 310.56 Physical requirements.

(a) *Physical standards.* (1) A candidate shall meet the physical requirements prescribed by the Department of the Navy for appointment as Midshipman, USNR (including the Merchant Marine Reserve, USNR) and the requirements prescribed by the U.S. Coast Guard for original licensing as a third mate and third assistant engineer. All candidates shall have color perception and refractive error within the limits prescribed by the Department of the Navy or by the U.S. Coast Guard, whichever are higher.

(2) The requirement to meet these standards is a continuing one and shall apply through graduation from the Academy. Failure to meet the standards while attending the Academy is grounds for, and may lead to disenrollment. Individuals who have completed at least two years of study and, as a result of an accident, illness or other cause (during official duty), fail to meet this requirement may be permitted to remain at the Academy at the discretion of, and under conditions set by, the Administrator. Those individuals permitted to remain through graduation will agree to fulfill aspects of the service obligation which they are capable of, as deemed appropriate by the Administrator.

(b) *Qualifying physical examinations.* All candidates for the Academy shall have a physical and dental examination conducted by a service academy

examining facility designated by the Service Academies Central Medical Review Board. The required physical examination shall occur within 1 year preceding the date of admission to the Academy. Although there is no charge for such examination, all expenses (including travel, meals and hotel accommodations) incurred in obtaining such examination shall be borne by the applicant. Candidates may be subject to reexamination upon reporting to the Academy and at any time while attending the Academy.

(c) *Physical reexamination.* A candidate who is rejected for failure to meet the physical requirements may request either a reevaluation of the examination results or a reexamination. A midshipman failing to meet the physical requirements while attending the Academy is entitled to make the same request.

(d) *Waivers.* Some medical requirements may be waived for enrolled students and applicants to the USMMA who require such a medical waiver to qualify for admission and/or retention. Since commissioning in the United States Navy, or any other branch of the Armed Forces, is a requirement for graduation, no waivers will be granted for medical conditions which would prevent commissioning in at least a restricted status in the U.S. Navy Reserve. Individuals interested in waiver consideration may request a waiver by writing to the Superintendent, USMMA. The granting of medical waivers will be based on U.S. Navy guidelines and regulations for waiver consideration for admission to the U.S. Naval Academy and the physical requirements consistent with commissioning as a reserve officer in the U.S. Navy in a restricted line program. Individuals requesting medical waivers must be able to meet all other admission requirements, including the physical examination requirement for an original U.S. Coast Guard merchant marine license as a third mate and/or third assistant engineer. The decision of the Superintendent on any requested waiver is administratively final.

[47 FR 21812, May 20, 1982, as amended at 55 FR 46952, Nov. 8, 1990]

## § 310.57 Application and selection of midshipmen.

(a) *Application.* All candidates shall submit an application for admission to the Academy's Admissions Office. Prospective candidates also should submit an application, but are not considered official candidates until their nominations are received. Candidates shall submit with their applications an official transcript and personality record from the candidate's high school and, if applicable, such records from any school attended after high school graduation. Application forms are available upon request by writing to the Admissions Office at the Academy. MARAD will accept electronic options (such as facsimile and Internet) for transmission of only Part I of required information to MARAD, if practicable.

(b) *Selection of Midshipmen.* Selection of midshipmen for appointment to fill vacancies allotted to the various States and other locations, as specified in § 310.53(b) (1) and (2) of this subpart, shall be in order of merit. The order of merit shall be determined on the scores of the required entrance examinations, on assessment of the academic background of the individual and on such other factors as are considered by the Academy to be effective indicators of motivation and the probability of successful completion of training at the Academy. No preference shall be granted in selecting individuals for appointment because one or more members of their immediate families are alumni of the Academy.

(c) *Notification of selection.* Results of the selection process will be made known about May 1 each year. The Academy shall advise each candidate and his or her nominating official of his or her status as a principal candidate, as an alternate candidate or as an unqualified candidate. Alternates will replace principal candidates who decline appointment or fail to meet the physical requirements or the security and suitability investigation.

(d) *Service obligation agreement.* Each candidate selected for appointment to the Academy after April 1, 1982, who is a citizen of the United States, shall sign a service obligation contract as a condition of admission. The contract is prescribed in § 310.58 of this subpart.

(e) *Reporting to the Academy.* Candidates who accept offers of appointment shall, pursuant to instructions issued by the Academy, report to the Academy on a specified date in mid-July for orientation and induction.

(f) *Oath.* Each midshipman who is a citizen of the United States shall take the following oath of office at the Academy:

"I, _____, having been appointed a midshipman to the U.S. Merchant Marine Academy, accept appointment and do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will comply with all the regulations of the U.S. Merchant Marine Academy; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God."

(g) *Birth Certificate.* Each candidate shall present a certificate of birth authenticated by an authorized official.

[47 FR 21812, May 20, 1982, as amended at 68 FR 62538, Nov. 5, 2003; 69 FR 61451, Oct. 19, 2004]

### § 310.58 Service obligation for students executing or reexecuting contracts.

(a) The service obligation contract shall obligate each midshipman who is a citizen and who executes or reexecutes a service obligation contract to:

(1) Complete the course of instruction at the Academy;

(2) Fulfill the requirements for a license as an officer in the merchant marine of the United States on or before the date of graduation from the Academy;

(3) Maintain a license as an officer in the merchant marine of the United States for at least six (6) years following the date of graduation from the Academy accompanied by the appropriate national and international endorsements and certifications as required by the United States Coast Guard for service aboard vessels on both domestic and international voyages ("appropriate" means the same endorsements and certifications held at the date of graduation, or the equivalent);

(4) Apply for an appointment as, accept any tendered appointment as and serve as a commissioned officer in the USNR (including the Merchant Marine Reserve, USNR), the United States Coast Guard Reserve, or any other Reserve component of an armed force of the United States for at least six (6) years following the date of graduation from the Academy;

(5) Serve in the foreign or domestic commerce and the national defense of the United States for at least five (5) years following the date of graduation from the Academy:

(i) As a merchant marine officer serving on vessels documented under the laws of the United States or on vessels owned and operated by the United States or by any State or territory of the United States;

(ii) As an employee in a United States maritime-related industry, profession or marine science (as determined by the Maritime Administrator), if the Maritime Administrator determines that service under paragraph (a)(5)(i) of this section is not available;

(iii) As a commissioned officer on active duty in an armed force of the United States or in the National Oceanic and Atmospheric Administration; or

(iv) Other maritime-related employment with the Federal Government which serves the national security interests of the United States, as determined by the Maritime Administrator; or

(v) By combining the services specified in paragraphs (a)(5)(i), (ii), (iii) and (iv) of this section; and,

(vi) Such employment in the Federal Government that satisfies paragraph (a)(5)(iv) of this section must be both significantly maritime-related and serve the national security interests of the United States. "Significantly" is equated to a material or essential portion of an individual's responsibilities. It does not mean a "majority" of such individual's responsibilities, but means more than just an incidental part; and

(6) Submit periodic reports to the Administration to establish compliance with all the terms of the contract.

(b) *Service as a merchant marine officer.* For purposes of the service obligation set forth in paragraph (a)(5)(i) of this section, a satisfactory year of service on vessels in the United States

merchant marine as a merchant marine officer shall be the lesser of—

(1) 150 days; or

(2) The number of days that is at least equal to the median number of days of seafaring employment under articles achieved by deck or engine officers in the most recent calendar year for which statistics are available.

(c) *Marine-related employment.* (1) Graduates who do not meet the sea service requirement in paragraph (b) of this section and who claim employment in a United States maritime-related industry, profession or marine science as meeting all or part of the service obligation under paragraph (a)(5) of this section and the serve obligation contract shall submit evidence to the Administration that they have conscientiously sought employment as a merchant marine officer, and that such employment is not available. Such evidence submitted, and other information available to the Administration, shall be considered in any finding. In view of current and projected employment opportunities afloat, the Administrator will grant the shoreside employment option infrequently and only on the basis of comprehensive evidence.

(2) The Administrator may consider positions of operational, management or administrative responsibility, including, but not limited to, the following marine-related categories, to be under the provisions of § 310.58(a)(5)(ii) of this subpart and the service obligation contract: Civilian employment in Federal and State agencies related to maritime affairs; steamship companies; stevedoring companies; vessel chartering and operations; cargo terminal operations; naval architecture; shipbuilding and repair; municipal and State port authorities; and port development, marine engineering, and tug and barge companies.

(d) *Reporting requirements.* (1) Each graduate must submit an annual Service Obligation Compliance Report form (MA–930) to the Maritime Administration between January 1 and March 1 following his or her graduation. After the initial report is submitted, each graduate must continue to submit annual reports during the same time frame between January 1 and March 1 for six (6) consecutive years thereafter, or until all components of the service obligation are fulfilled, whichever is latest. Each graduate will file a minimum of seven (7) reports in order to give information on all six (6) years of the service obligation. Graduates are encouraged to submit their Service Obligation Compliance Report forms (MA–930) to MARAD using the web-based Internet system at *https://mscs.marad.dot.gov*. Reports may also be mailed to: Compliance Specialist, Office of Policy and Plans, Maritime Administration, Department of Transportation, 400 7th St., SW., Room 7123, Washington, DC 20590.

(i) Example 1: Midshipman graduates on June 30, 2004. His or her first reporting date is between January 1, 2005 and March 1, 2005 and thereafter between January 1 and March 1 for six (6) consecutive years (or until all components of the service obligation are fulfilled, whichever is latest) for a minimum of seven (7) reports.

(ii) Example 2: Midshipman has a deferred graduation on November 30, 2004. His or her first reporting period is between January 1, 2005 and March 1, 2005 and thereafter between January 1 and March 1 for six (6) consecutive years (or until all components of the service obligation are fulfilled, whichever is latest) for a minimum of seven (7) reports.

(iii) Example 3: Midshipman graduated in June 2003 and has already begun his or her service obligation reporting. His or her reports are now due between January 1 and March 1 of each reporting year.

(2) The Maritime Administration will provide reporting forms upon request. However, non-receipt of such forms will not exempt a graduate from submitting service obligation information as required by this paragraph. Graduates are encouraged to submit their Service Obligation Compliance Report forms (MA–930) electronically at *https://mscs.marad.dot.gov*. The reporting form has been approved by the Office of Management and Budget (2133–0509).

(e) *Breach of contract.* (1) Breach before graduation: (i) If the Maritime Administrator determines that an individual who has attended the Academy for not less than two (2) academic

years has failed to complete the course of instruction at the Academy, such individual may be ordered by the Secretary of Defense to active duty in one of the Armed Forces of the United States to serve for a period of time not to exceed two (2) years. In cases of hardship, as determined by the Maritime Administrator, the Maritime Administrator may waive this provision in whole or in part.

(ii) If the Secretary of Defense is unable or unwilling to order an individual to active duty under the previous paragraph, or if the Maritime Administrator determines that reimbursement of the Cost of Education Provided by the Federal Government would better serve the interests of the United States, the Maritime Administrator may recover from the individual the Cost of Education Provided by the Federal Government.

(iii) For purposes of paragraph (e)(1)(i) of this section, an "academic year" is defined as the completion by a student of a total of three (3) trimesters, whether at the Academy or at sea. Thus, liability under paragraph (e)(1)(i) of this section begins for students when they begin their seventh (7th) trimester, whether at the Academy or at sea.

(2) Breach after graduation: (i) If the Maritime Administrator determines that an individual has failed to fulfill any part of the service obligation contract (described in § 310.58(a)), such individual may be ordered to active duty to serve a period of time not less than three (3) years and not more than the unexpired portion of the service obligation contract relating to service in the foreign or domestic commerce or the national defense, as determined by the Maritime Administrator. The Maritime Administrator, in consultation with the Secretary of Defense, shall determine in which service the individual shall be ordered to active duty to serve such period of time. In cases of hardship, as determined by the Maritime Administrator, the Maritime Administrator may waive this provision in whole or in part.

(ii) If the Secretary of Defense is unable or unwilling to order an individual to active duty under paragraph (e)(2)(i) of this section or if the Maritime Administrator determines that reimbursement of the Cost of Education Provided would better serve the interests of the United States, the Maritime Administrator may recover from the individual the Cost of Education Provided.

(iii) The Maritime Administrator may reduce the amount to be recovered from such individual to reflect partial performance of service obligations and such other factors as the Maritime Administrator determines merit such reduction.

(f) *Waivers.* The Maritime Administrator shall have the discretion to grant waivers of all or a portion of the service obligation contract in cases where there would be undue hardship or impossibility of performance due to accident, illness or other justifiable reason. Applications for waivers shall be submitted in writing to the Academies Program Officer, Office of Policy and Plans, Maritime Administration, 400 7th St., SW., Washington, DC 20590.

(g) *Deferments.* In exceptional cases, the Administration may grant a deferment of all or part of the agreement under paragraph (a)(5) of this section and the service obligation contract, for a period not to exceed 2 years, only for graduates considered to have superior academic and conduct records while at the Academy and only for the purpose of entering a marine or maritime-related graduate course of study approved by the Administrator or for the purpose of pursuing studies as recipients of scholarships or fellowships of national significance; *Provided,* that any deferment of service as a commissioned officer under paragraph (a)(5)(iii) of this section and the service obligation contract shall be subject to the sole approval of the Secretary of the department which has jurisdiction over such service (including the Secretary of the department in which the U.S. Coast Guard is operating and the Secretary of Commerce with respect to NOAA). A graduate shall make application for such deferment through the Superintendent of the Academy, who shall forward each application, together with the Superintendent's recommendation for approval or disapproval and an evaluation of the applicant's academic and conduct

records, to the Academies Program Officer, Maritime Administration, Office of Policy and Plans, NASSIF Building, 400 7th St., SW., Washington, DC 20590 for appropriate action.

(h) *Determination of compliance with service obligation contract; deferment; waiver; and appeal procedures.* (1) A designated official of the Administration shall:

(i) Determine whether a student or graduate has breached his or her service obligation contract;

(ii) Grant or deny a deferment of the service obligation, except for obligations otherwise a part of the graduate's commissioned officer status; and,

(iii) Grant or deny a waiver of the requirements of the service obligation contract in cases of undue hardship or impossibility of performance due to accident, illness or other justifiable reason.

(2)(i) If a student or graduate disagrees with the decision of the designated official, the student or graduate may appeal that decision to the Maritime Administrator. The appeal will set forth all the legal and factual grounds on which the student or graduate bases the appeal. Any grounds not set forth in the appeal are waived.

(ii) Appeals must be filed with the Maritime Administrator within thirty (30) calendar days of the date of receipt by such student or graduate of the written decision of the designated official. Appeals must be filed at the Office of the Maritime Administrator, Maritime Administration, Room 7210, 400 7th St., SW., Washington, DC 20590. Each decision will include a notice of appeal rights.

(iii) A decision is deemed to be received by a student or graduate five (5) working days after the date it is mailed by first class mail, postage prepaid, to the address for such student or graduate listed with the Office of Policy and Plans. It is the responsibility of such student or graduate to ensure that their current mailing address is on file with the Office of Policy and Plans, Maritime Administration, 400 7th St., SW., Washington, DC 20590. Students and graduates can determine the current address on file with the Office of Policy and Plans by logging into the service obligation contract compliance Web site at *http://mscs.marad.dot.gov*. Changes in the address listed can be made through the Internet.

(3) The Maritime Administrator will issue a written decision for each timely appeal. This decision constitutes final agency action.

(4) If a student or graduate fails to appeal within the time set forth in paragraph (h)(2) of this section, the decision of the designated official will be final and constitute final agency action.

(i) *Remedies.* To aid in the recovery of the Cost of Education Provided the Maritime Administrator may request the Attorney General to begin court proceedings, and the Maritime Administrator also may make use of the Federal debt collection procedures in chapter 176 of title 28, United States Code, and other applicable administrative remedies.

[47 FR 21812, May 20, 1982, as amended at 60 FR 44438, Aug. 28, 1995; 65 FR 39558, June 27, 2000; 66 FR 36177, July 11, 2001; 69 FR 9759, Mar. 2, 2004; 69 FR 29081, May 20, 2004; 69 FR 31903, June 8, 2004; 69 FR 61454, Oct. 19, 2004; 70 FR 28833, May 19, 2005]

### § 310.59 Courses of instruction.

(a) *At Academy.* Three major curriculums are offered: Nautical Science, for the preparation of deck officers; Marine Engineering, for the preparation of engineering officers; and the Dual License Program, a combined course which leads to licenses in both specialties. All midshipmen who are citizens shall take naval science courses prescribed by the Department of the Navy. All curriculums include general education courses and electives.

(b) *Sea year.* Midshipmen spend one-half of their sophomore (third class) year and one-half of their junior (second class) year training at sea aboard one or more merchant vessels. In addition to practical shipboard assignments, midshipmen are required to complete written study assignments incorporating material from the major segments of the Academy curriculums.

### § 310.60 Training on subsidized vessels.

All operators of subsidized merchant vessels, in accordance with contractual

arrangements, are required to employ for training at least two midshipmen, as assigned by the Superintendent of the Academy, which employment shall be in accordance with the following provisions.

(a) *Work assignments.* All practical work assignments for midshipmen shall be in accordance with courses prescribed by the Superintendent of the Academy.

(b) *Working hours.* In order to permit midshipmen to complete their academic assignments, vessel employers shall not require midshipmen to work more than 8 hours each day. Midshipmen shall devote at least 3 hours of their own time each day to study.

(c) *Pay.* Midshipmen shall receive pay while employed aboard merchant vessels directly from the steamship company employers at the same rate received by cadets and midshipmen at the other Federal academies. A change in the rate of pay for midshipmen at the Academy shall occur after a change in the rate of pay for cadets/midshipmen at the other Federal academies and shall be effective either on June 15th or on December 15th of the same calendar year, whichever occurs first. While aboard ship, they shall be berthed in single-occupancy rooms or in rooms with other midshipmen in that part of the vessel designated for licensed officers (or in first-class passenger quarters) and shall mess with the licensed officers. The steamship company employers shall also pay the midshipmen such subsistence and room allowance in port, transportation allowances, and other bonuses or allowances as are paid to the licensed officers of the vessel in which the midshipmen are employed.

(d) *Berthing and messing.* While aboard ship, midshipmen shall be berthed in single-occupancy rooms or in rooms with other midshipmen in that part of the vessel designated for licensed officers (or in first-class passenger quarters) and shall mess with the licensed officers.

(Secs. 204(b) and 1301–1308, Merchant Marine Act, 1936, as amended, (46 U.S.C. 1114(b); and 1295 through 1295g); Pub. L. 96–453; Pub. L. 97–31; 49 CFR 1.66 (46 FR 47458, Sept. 28, 1981); EO 12387 (47 FR 44981, Oct. 13, 1982)

[47 FR 21812, May 20, 1982, as amended at 52 FR 21534, June 8, 1987]

### § 310.61 Training on other vessels and by other facilities or agencies.

The Administrator may arrange for training of midshipmen on Government-owned vessels, in cooperation with other governmental and private agencies, and on other vessels documented under the laws of the United States if the owner of such vessel cooperates in such use. Midshipmen may be assigned for training in shipyards, plants, and industrial and educational organizations for instructional purposes only.

### § 310.62 Allowances and expenses; required deposit.

(a) *Items furnished.* Each midshipman shall receive: Free tuition, quarters and subsistence; limited medical and dental care; and certain travel expenses, in accordance with chapter 5, part A, of the Joint Travel Regulations For Members Of Uniform Services, Vol. 1 (U.S. Department of Defense publication, Serial No. 0516–LP–255–0265), while traveling under official Academy orders.

(b) *Required Deposit.* Prior to admission to the Academy, each midshipman shall make a specified deposit, as established by Academy regulations, to help defray the cost of items and services generally of a personal nature which are not provided by the Academy. Additional deposits, as prescribed in Academy regulations, are required to be made in subsequent years. Failure to make any required deposit will result in denial of admission, suspension or disenrollment.

### § 310.63 Uniforms and textbooks.

The Academy shall supply midshipmen uniforms and textbooks in accordance with Academy regulations.

**§ 310.64 Privileges.**

(a) Midshipmen may be granted a leave of absence of approximately four (4) weeks after completing each of the first, second and third years of training.

(b) Classes and exercises are suspended on New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day and such other days as may be designated by the President as holidays for Federal employees.

(c) Midshipmen may be granted approximately 2 weeks leave during the period which includes Christmas Day and New Year's Day.

(d) Liberty and other privileges are granted to midshipmen meriting them under Academy regulations.

(e) Relatives and friends of midshipmen may visit at the Academy during such ours as the Superintendent may prescribe.

(f) There shall be a Ship's Service Store maintained as a non-appropriated fund activity at the Academy primarily to serve the needs of the midshipmen.

**§ 310.65 Graduation.**

(a) *Classes enrolled prior to April 1, 1982.* (1) A midshipman will be graduated from the Academy upon the successful attainment of the following requirements:

(i) Completion of the required course of study;

(ii) Fulfillment of the requirements for a license as an officer in the merchant marine of the United States;

(iii) Filing for a commission in the USNR (including the Merchant Marine Reserve, USNR); and

(iv) Compliance with the prescribed midshipman disciplinary and honor systems.

(2) Graduates receive the degree of Bachelor of Science and a U.S. Coast Guard license either as third officer or third assistant engineer or both. They also may be granted commissions as Ensign, USNR (including the Merchant Marine Reserve, USNR) by the Department of the Navy.

(3) In return for the education received at Government expense, each applicant shall sign an agreement to serve in one of the following categories immediately after graduation:

(i) Sail on his or her license at sea for not less than six (6) months each year for three (3) consecutive years; or

(ii) Sail on his or her license at sea for not less than four (4) months each year for four (4) consecutive years; or

(iii) Apply for and serve on active duty for training on board a U.S. Navy ship for a minimum period of thirty (30) consecutive days each year for a period of three (3) consecutive years, and be either employed ashore for the balance of each year in some phase of the maritime industry or engaged in full-time graduate studies related to the maritime field; or

(iv) Apply for and serve on full-time active duty as a commissioned officer in a uniformed service of the United States for a period of 3 consecutive years.

(b) *Classes enrolled after April 1, 1982.* (1) A midshipman will be graduated from the Academy upon the successful attainment of the following requirements:

(i) Completion of the required course of study;

(ii) Fulfillment of the requirements for a license as an officer in the merchant marine of the United States;

(iii) Application for an appointment, and acceptance if tendered of an appointment, as a commissioned officer in the USNR (including the Merchant Marine Reserve, USNR), the U.S. Coast Guard Reserve, or any other Reserve component of an armed force of the United States; and,

(iv) Compliance with the prescribed midshipman disciplinary and honor systems.

(2) Graduates receive the degree of Bachelor of Science and a U.S. Coast Guard license either as third officer or third assistant engineer or both. They also may be commissioned as a reserve officer in an armed force as described in paragraph (b)(1) of this section.

(3) The service obligation incurred by graduates is prescribed in § 310.58 of this subpart.

**§ 310.66 Foreign students.**

(a) *Appointments from the Trust Territory of the Pacific Islands.* The Administrator may permit, upon designation

by the Secretary of the Interior, individuals from the Trust Territory of the Pacific Islands to receive instruction at the Academy. Not more than 4 such individuals may receive instruction at any one time. Residents of the Trust Territory of the Pacific Islands are neither citizens nor nationals of the United States.

(b) *Appointments from the Northern Mariana Islands.* The Governor of the Northern Mariana Islands may nominate individuals for one position each year allocated to residents of the Northern Mariana Islands. Such residents are neither citizens nor nationals of the United States.

(c) *Appointments from nations located in the Western Hemisphere.* The President may designate individuals from nations located in the Western Hemisphere, other than the United States, to receive instruction at the Academy. Not more than 12 individuals may receive instruction under this paragraph at any one time, and not more than 2 individuals receiving instruction under this paragraph at any one time may be from the same nation. The Secretary may allow, upon approval of the Secretary of State, additional individuals from the Republic of Panama to receive instruction at the Academy on a reimbursable basis.

(d) *Appointments from nations other than the United States.* In addition to the appointments under paragraphs (a), (b) and (c) of this section, the Administrator, with the approval of the Secretary of State, may permit individuals from any nations other than the United States to receive instruction at the Academy. Not more than 30 such individuals may receive instruction at any one time.

(e) *Candidate Sponsors.* A representative of the Administration or a diplomatic representative of the United States in the candidate's country of residence will be designated as the Candidate's Sponsor. It will be the responsibility of the Candidate's Sponsor to act as liaison with the appropriate officials of the candidate's country of residence and to coordinate all activities, including funding arrangements, entrance examinations, medical examinations, country clearances, travel papers, transportation to the Academy, obtaining the necessary designation by the Department of the Interior in the case of candidates from the Trust Territory of Pacific Islands under paragraph (a) of this section, the nomination of the Governor of the Northern Mariana Islands under paragraph (b) of this section, the nomination of a designee of the President in the case of candidates from nations located in the Western Hemisphere under paragraph (c) of this section, and the approval of the Department of State in the case of candidates from nations other than the United States under paragraph (d) of this section. In addition, the Candidate's Sponsor shall furnish to the Admissions Office of the Academy a report as to the candidate's proficiency in the use of idiomatic English.

(f) *Admissions Procedure*—(1) *Applications.* Applications for enrollment of foreign students shall be processed through the appropriate diplomatic channels of the applicant's country and the appropriate offices in the United States Departments of State or of the Interior, whichever is applicable. Applications shall reach the appropriate office of the United States Government by January 1 of the year in which admission is sought. After endorsement by the authorized official of the United States Government, the application will be forwarded promptly to the Academy's Admissions Office.

(2) *Qualifications.* Each candidate shall:

(i) Be a bona fide citizen of the country transmitting the application and meet the requirements as to age and character set forth in §310.54 of this subpart;

(ii) Possess the physical qualifications, specified in §310.56 of this subpart, and undergo a physical examination as arranged by the Academy's Admissions Office;

(iii) Be proficient in reading, writing and speaking idiomatic English; and,

(iv) Satisfy the following scholastic requirements:

(A) Meet the minimum qualifying scores on the entrance examinations as specified in §310.55 of this subpart. When available, special foreign language College Board examinations may be substituted for the College Board or

American College Testing Program examinations. Detailed certificates covering schoolwork of foreign students are required. Transcripts shall be submitted in the English language.

(B) Submit a certificate from his or her Government that he or she is conversant with the literature of his or her native country and that he or she has completed a course in the literature of his or her native language generally equivalent to two (2) years of secondary schoolwork in literature in the United States. In lieu of this certificate, a candidate may produce evidence of having acquired the units for literature from accredited United States schools.

(g) *Cost of instruction.* Students admitted to the Academy pursuant to paragraphs (a), (b) and (c) of this section shall be subject only to the same fees as are paid by citizen midshipmen. The cost of instruction (including the same allowances as received by midshipmen at the Academy appointed from the United States) for students admitted to the Academy under paragraph (d) of this section must be reimbursed to the Administrator by the nation from which the student comes. Such reimbursement shall be the incremental cost of providing the instruction to each of such foreign students (including the cost of allowances). The amount of reimbursement shall be established by the Academy separately for each entering class and each upper class prior to January 1 of the year in which the academic year begins and will be payable annually in advance of commencement of the academic year. Instructions as to payment procedures will be provided with the statement of the amount to be reimbursed. Students admitted to the Academy pursuant to paragraph (d) of this section shall pay the same fees paid by citizen midshipmen.

(h) *Uniforms, textbooks and allowances.* The Academy shall provide to foreign students receiving instruction at the Academy all required uniforms and textbooks and allowances for transportation as are provided to citizen midshipmen.

(i) *Rules and regulations.* Subject to such exceptions as shall be jointly agreed to by the Administrator and the Secretary of the Interior with respect to individuals from the Trust Territory of the Pacific Islands, foreign students, including students from the Northern Mariana Islands, receiving instruction at the Academy shall be subject to the same rules and regulations governing admission, attendance, discipline, resignation, discharge, dismissal and graduation as citizen midshipmen; but such persons shall not be entitled to hold any license authorizing service on any merchant vessel of the United States solely by reason of graduation from the Academy.

(j) *Oath.* In lieu of the oath of allegiance to the United States, a substitute oath shall be required of students who are not citizens of the United States, as follows:

"I, _____, a citizen of _____, aged __ years and __ months, having been appointed to receive instruction at the U.S. Merchant Marine Academy, do solemnly swear (or affirm) to comply with all regulations of the U.S. Merchant Marine Academy and to give my utmost efforts to accomplish satisfactorily the required curriculum with the full knowledge that I shall be disenrolled from the U.S. Merchant Marine Academy if deficient in conduct, health or studies."

[47 FR 21812, May 20, 1982, as amended at 60 FR 44439, Aug. 28, 1995]

### § 310.67 Academy regulations.

The Superintendent of the Academy is delegated authority to issue all regulations necessary for the accomplishment of the Academy's mission.

# SUBCHAPTER I-A—NATIONAL SHIPPING AUTHORITY

## PART 315—AGENCY AGREEMENTS AND APPPOINTMENT OF AGENTS

Sec.
315.1 Purpose.
315.3 Definitions.
315.5 Appointment of agents.
315.6 Transferred vessels and contracts.
315.7 Administration of agency agreements.
315.9 Duties of agents.
315.11 Vessel deactivation procedures.

AUTHORITY: 50 U.S. C. App. 1744; 49 CFR 1.66.

SOURCE: 58 FR 44285, Aug. 20, 1993, unless otherwise noted.

### § 315.1 Purpose.

This part summarizes the procedures governing the award and administration of Agency Agreements in the form of Service Agreements and Ship Manager Contracts entered into between the United States of America, acting by and through the Director, National Shipping Authority (NSA) of the Maritime Administration (MARAD), Department of Transportation, and Agents which will manage or otherwise conduct the business of one or more vessels owned, controlled or time-chartered by the United States, which vessel(s) may be assigned to Agents from time to time pursuant to the specific provisions of a Service Agreement or Ship Manager Contract.

### § 315.3 Definitions.

(a) *Agent* includes a General Agent, Berth Agent and Ship Manager, designated as such under a standard form of Service Agreement or Ship Manager Contract to manage and conduct the business of vessels of which the United States is owner, owner *pro hac vice* or time charterer.

(b) *Citizen of the United States* means a person (including receivers, trustees and successors or assignees of such Persons as provided in 46 App. U.S.C. 803), including any Person (stockholder, partner or other entity) who has a controlling interest in such person, any person whose stock or equity is being relied upon to establish the requisite U. S. citizen ownership, and any parent corporation, partnership or other entity of such Person at all tiers of ownership, who, in both form and substance at each tier of ownership, satisfies the following requirements—

(1) An individual who is a Citizen of the United States, by birth, naturalization or as otherwise authorized by law;

(2) A corporation organized under the laws of the United States or of a State, the controlling interest of which is owned by and vested in Citizens of the United States and whose chief executive officer, by whatever title, chairman of the board of directors and all officers authorized to act in the absence or disability of such persons are Citizens of the United States, and no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens;

(3) A partnership organized under the laws of the United States or of a State, if all general partners are Citizens of the United States and a controlling interest in the partnership is owned by Citizens of the United States;

(4) An association organized under the laws of the United States or of a State, whose chief executive officer, by whatever title, chairman of the board of directors (or equivalent committee or body) and all officers authorized to act in their absence or disability are Citizens of the United States, no more than a minority of the number of its directors, or equivalent, necessary to constitute a quorum are noncitizens, and a controlling interest in which is vested in Citizens of the United States;

(5) A joint venture, if it is not determined by the Maritime Administrator to be in effect an association or partnership, which is organized under the laws of the United States or of a State, if each conventurer is a Citizen of the United States. If a joint venture is in effect an association, it will be treated as is an association under paragraph (b)(4) of this section, or, if it is in effect a partnership, will be treated as is a partnership under paragraph (b)(3) of this section.

(c) *Director, National Shipping Authority, or Director* means the Maritime Administrator. It also means the Associate Administrator for Shipbuilding

and Ship Operations, or the Associate Administrator for Marketing, respectively, when the NSA is operating under authority delegated by the Maritime Administrator.

(d) *NDRF* means a National Defense Reserve Fleet site.

(e) *United States* means the States of the United States, Guam, Puerto Rico, the Virgin Islands, American Samoa, the District of Columbia, the Commonwealth of the northern Mariana Islands and any other territory or possession of the United States.

[58 FR 44285, Aug. 20, 1993, as amended at 69 FR 34310, June 21, 2004]

### § 315.5 Appointment of agents.

(a) *Eligibility*. The Director shall restrict the appointment as Agent to qualified applicants. Each applicant shall establish that eligibility according to procedures that may be obtained from MARAD and shall:

(1) Be a Citizen of the United States, as defined in § 315.3(b) of this part;

(2) Demonstrate the necessary ability, experience and resources as an operator of vessels or ports, or shoreside husbander of vessels; and

(3) Continue to meet all such requirements throughout the term of the appointment.

(b) *Procedures*. Information about procedures for appointment as General Agent, Berth Agent or Ship Manager may be obtained from, and inquiries and other written communications shall be submitted to, the Maritime Administration, Attn: Office of Acquisition, MAR–383, Department of Transportation, 400 Seventh Street SW., Washington, DC 20590, tel. (202)366–1943. Inquiries should be made during normal business hours.

(c) *Approval*. After final approval of an Agent by MARAD, the contracting office shall transmit the Service Agreement or Ship Manager contract to the Agent for execution and return to MARAD.

(d) *Agreements*. The standard text of the Service Agreement and Ship Manager Contract may be obtained from the Office of Acquisition at the address appearing in paragraph (b) of this section, by mail or in person during normal business hours.

### § 315.6 Transferred vessels and contracts.

The requirements of § 315.5(a)(1) shall not apply to a contractor managing vessels owned by the United States under a contract or contracts previously awarded by another Federal agency if the contract, and the vessels managed under such contract, are subsequently transferred to the Maritime Administration, provided the period of performance of the transferred contract does not exceed the period of performance of the original contract, including options.

[73 FR 49358, Aug. 21, 2008]

### § 315.7 Administration of agency agreements.

(a) *Amendments*. The MARAD contracting office shall prepare modifications to all Service Agreements and Ship Manager Contracts that are required due to changes in the Federal Acquisition Regulation or Transportation Acquisition Regulation, or changes in MARAD policy or procedure.

(b) *Annual review of General Agent representations and certifications*. The contracting office shall require that each General Agent certify annually that all representations and certifications incorporated in a Service Agreement are current, complete and accurate, or provide new representations and certifications.

### § 315.9 Duties of agents.

The Agent shall perform all duties prescribed in the Service Agreement or Ship Manager Contract and shall be guided by such directions, orders or regulations as may be issued by MARAD.

### § 315.11 Vessel deactivation procedures.

When an Agent is responsible as vessel operator to decommission and deliver a vessel to the NDRF, that Agent shall observe all the procedures and requirements prescribed by MARAD contained in instructions which may be obtained from the MARAD Division of Reserve Fleet (MAR–743) at the address specified in § 315.5(b) of this part. Tel. (202) 366–5752.

# PART 317—BONDING OF SHIP'S PERSONNEL

Sec.
1. What this order does.
2. Amount of bond.
3. Premiums.
4. Posting of bond.
5. Measures to protect ship's payrolls.
6. Surety and form of bond.

AUTHORITY: Sec. 204, 49 Stat. 1987, as amended; 46 U.S.C. 1114.

SOURCE: AGE–3, 16 FR 6751, July 12, 1951, unless otherwise noted. Redesignated at 45 FR 44587, July 1, 1980.

## Section 1 What this order does.

This order requires that General Agents, appointed under Service Agreement "G.A.A., 3/19/51" shall not advance or entrust any monies or slop chest property of the United States to a master, purser or any other member of the ship's personnel unless such person is under a bond indemnifying the United States against loss of such monies or property caused solely or in part by the dishonesty or lack of care of any such person in the performance of the duties of any petition covered by the bond.

## Sec. 2 Amount of bond.

The amount of the bond must be governed by the amount of monies advanced or value of slop chest property entrusted, and shall, at all times, not be less than the value of slop chest property entrusted plus advances of monies for which a satisfactory accounting has not been made.

## Sec. 3 Premiums.

The bonds provided for shall be furnished without cost to the National Shipping Authority, but the cost of the premiums of such bonds shall be included in the overhead expense of the General Agent.

## Sec. 4 Posting of bond.

The General Agent shall retain an executed copy of each such bond in its principal office for examination by the National Shipping Authority at any time.

[Amdt. 1, 16 FR 9527, Sept. 19, 1951. Redesignated at 45 FR 44587, July 1, 1980]

## Sec. 5 Measures to protect ship's payrolls.

(a) General Agents are not required to consider the amount of the payroll delivered to the Master at the conclusion of a voyage in determining the amount of bond required for any one person filling a bonded position hereunder. However, the person paying off the crew should be either the Master, or purser, or some other member of the ship's personnel acting for the Master who has been bonded pursuant to this order. If, however, the person paying off is a shoreside employee of the General Agent, such employee shall be bonded under the General Agents' general fidelity bond.

(b) The principal risk involved where payrolls are delivered to a vessel at the conclusion of a voyage is loss through hold-up. Therefore, reasonable protection shall be taken by all General Agents where payrolls are delivered to a vessel or elsewhere. Because the circumstances of each case will vary, the General Agents shall use their best judgment in determining whether armored car service, armed guards or similar types of protection should be employed (in other words, the General Agents should follow their usual practices). The cost of these services may be included in vessel operating expenses.

(c) General Agents are not required to purchase hold-up insurance, since subject to the terms, conditions and limitations of Service Agreement "G.A.A., 3/19/51" losses resulting from this exposure are assumed by the National Shipping Authority.

## Sec. 6 Surety and form of bond.

Each bond provided for by this order shall be duly executed by an authorized surety appearing on the current approved list of companies acceptable as sureties on Federal bonds published by the U.S. Treasury Department. The form of bond required by the National Shipping Authority to be used by the General Agents shall be as follows:

DEPARTMENT OF TRANSPORTATION

MARITIME ADMINISTRATION, NATIONAL SHIPPING AUTHORITY

*Position Fidelity Schedule Bond*

In consideration of the annual premium _____ (hereafter called the "Surety") hereby agrees to pay to _____ or its successors (hereafter called the "Agent") or the United States of America, (hereafter called the "United States"), represented by the Director, National Shipping Authority of the Maritime Administration, Department of Transportation (hereafter called the "Director"), as their interests may appear, the amount of any pecuniary loss of money or slop chest property caused, solely or in part, by reason of the dishonesty or lack of care of any person in the performance of the duties of any position, now or hereafter listed in the Schedule of Positions and Amounts forming part hereof (hereafter called the "Schedule"), on any and all vessels from time to time allocated to the Agent by the Director.

This bond is executed and accepted subject to the following agreements, limitations and conditions:

*First.* Liability under this bond begins with the _____ day of _____, 19___ in respect of each person then filling any position named in the Schedule on any and all vessels then allocated to the Agent by the Director. As to any position or positions bearing the same designation as that of any position or positions named in the Schedule on any vessel or vessels thereafter allocated to the Agent by the Director, liability under this bond shall automatically begin as soon as such position or positions are filled, provided the Director or the Agent shall within ninety (90) days of the date such position or positions are filled notify the Surety in writing of the date such position or positions are filled. As between the Agent and the Director, it shall be the responsibility of the Agent to give the notice to the Surety as provided herein. Without affecting its liability hereunder, the Surety agrees that neither the Agent nor the Director need furnish the names of vessels on which positions are bonded hereunder at any time during the effective period of this bond.

*Second.* If the Agent or the Director shall request the Surety to increase or decrease the amount of coverage applicable to any position named in the Schedule, the Surety shall make such change by written acceptance showing the increase or decrease in the amount of coverage and the effective date thereof, which effective date shall not be prior to the date of such request; provided, however, that if the Director shall within ninety (90) days after receipt of notice of a decrease resulting from a request by the Agent, advise the Surety that it does not consent to such decrease, such decrease shall become inoperative and coverage shall continue in the amount applicable prior to such decrease as if such decrease had never been made.

*Third.* If the Surety knows or has reason to believe that any person filling any position named in the Schedule has caused any loss of money or property entrusted to him by reason of his dishonesty or lack of care in the performance of the duties of such position, the Surety may terminate the coverage of this bond as to such person by giving notice in writing to the Agent and the Director at least thirty (30) days prior to the completion, in a continental United States port, of the then current voyage of the vessel on which such person is filling a position, in which case the coverage of this bond as to such person shall terminate when the crew is paid off upon such completion of the voyage. The Agent may cancel the coverage of this bond (a) as an entirety or (b) as to any position named in the Schedule by giving the Surety fifteen (15) days' written notice accompanied by written approval of the Director to such cancellation. The Director may cancel the coverage of this bond (a) as an entirety or (b) as to any position named in the Schedule upon fifteen (15) days' written notice to the Surety. In the event of any such cancellation the Surety shall refund to the Agent any unearned premiums computed pro rata.

*Fourth.* After discovery and report to the Agent or the Director of any loss hereunder, the Agent or the Director shall give the Surety written notice thereof, and within ninety (90) days after such written notice to the Surety shall file with the Surety affirmative proof of loss itemized and sworn to on forms furnished by the Surety. Prior discovery and report to the Agent of such loss shall not affect the right of the Director to notify the Surety of such loss and to file proof of loss. As between the Agent and the Director, it shall be the responsibility of the Agent to give the notice and to file the proof of loss with the Surety as provided herein. "Discovery and report" as used herein is defined in paragraph Tenth hereof.

*Fifth.* Any suit to recover on account of any loss hereunder shall be brought before the expiration of five years from the report to the Agent or the Director of the act causing such loss.

*Sixth.* The Agent will declare at the original effective date of this bond, and at each subsequent premium anniversary date, the total number of persons then filling each position named in the Schedule, and the annual premium will be computed for the ensuing year on the basis of the aggregate coverage represented by such declaration. Upon such premium anniversary date there will be a computation of additional premium or refund of premium in proportion to the change in the coverage each year.

*Seventh.* Settlement of any claim hereunder shall be made by check payable to the Agent unless otherwise instructed by the Director, but no settlement of any claim hereunder may be made for an amount less than the full amount of the loss for which the claim is made without the written consent of the Director thereto.

*Eighth.* The Surety shall not be entitled to any reimbursement, salvage or recovery,—except from insurance, reinsurance, collateral or indemnity taken by the Surety for its own benefit,—on account of any loss hereunder until the Agent or the Director, as their interests may appear, is reimbursed in full.

*Ninth.* No modification or change of any nature of the provisions of this bond shall take effect unless the Director shall have given his written consent thereto, except that the Agent may increase the coverage hereunder in accordance with the provisions of paragraph First hereof without such consent of the Director.

*Tenth.* (a) Any action, approval or consent which by the provisions of this bond is required to be taken or signed by the Director shall be effective if taken or signed by the Director or by his authorized representative, and wherever and whenever herein any right, power, or authority is granted or given to the Director, such right, power, or authority may be exercised in all cases by his authorized representative, and the act or acts of such authorized representative, when taken shall constitute the act of the Director hereunder.

(b) "Discovery and report" by the Agent as used herein shall be deemed to mean discovery by any person and the report of such discovery to an executive officer or head of a department or division concerned with such discovery and report of the Agent at the Agent's principal place of business within the continental United States. "Discovery and report" by the Director shall be deemed to mean discovery by any person and the report of such discovery to an executive officer or head of a division or section concerned with such discovery and report at the Director's headquarters.

(c) Notices, approvals and requests required by the provisions hereof shall be sent to the Surety addressed to it at its home office at.

(d) Notices, acceptances and requests required to be sent to the Agent shall be sent to The Agent, _____ (Name and head office address).

(e) Notices and requests to be sent to the Director shall be addressed to the Director, National Shipping Authority of the Maritime Administration, Department of Transportation, at the Director's headquarters.

Signed, sealed and dated this _____ day of _____, 19____.

[corporate seal] _____
(Surety)

Attest or witness:

_____ By _____
_____ By _____

SCHEDULE OF POSITIONS AND AMOUNTS

The positions set forth hereinafter in this Schedule are all located on board the vessel or vessels allocated by the Director from time to time to the Agent named herein

| Item No. | Description position | Number persons filling position | Amount coverage on each | Aggregate coverage | Premium |
|---|---|---|---|---|---|

[AGE–3, 16 FR 6751, July 12, 1951, as amended by Amdt. 1, 16 FR 9527, Sept. 19, 1951. Redesignated at 45 FR 44587, July 1, 1980]

# PART 324—PROCEDURAL RULES FOR FINANCIAL TRANSACTIONS UNDER AGENCY AGREEMENTS

ACCOUNTS

Sec.

1. Books of account.
2. Bank account.

ACCOUNTING FOR REVENUES

3. Accounting for revenues.

FUNDING OF OPERATIONS

4. Funding of operations.

DISBURSEMENTS

5. Disbursements at principal office of agent.
6. Disbursements at other domestic ports.
7. Disbursements at foreign ports.

DOCUMENTS

8. Disbursement documents.
9. Maintenance of documents.
10. Lost documents.

REPORTS AND AUDIT

11. Reports to the owner.
12. Audit.

AUTHORITY: Sec. 204, 49 Stat. 1987, as amended; 46 U.S.C. 1114.

SOURCE: FIS–1, 16 FR 2885, Apr. 3, 1951, unless otherwise noted. Redesignated at 45 FR 44587, July 1, 1980.

## ACCOUNTS

### Section 1 Books of account.

A separate set of books of account shall be opened for the purpose of recording the various transactions in connection with the said agency agreement. The books of original entry and ledgers may be similar in design to those heretofore employed by the agent unless it develops that they are inadequate, in which event the deficiency shall be remedied promptly. The accounts required in operations under this agency agreement, however, shall conform to the chart in the uniform system prescribed by the Maritime Administration in General Order No. 22, Revised (46 CFR part 282) and recordings in the accounts shall be in accordance with the descriptions thereof contained in the said uniform system.

### Sec. 2 Bank account.

A separate joint bank account will be maintained in a depository or depositories designated by the agent and approved by the National Shipping Authority (referred to in this order as the owner), into which all collections under the agency agreement will be deposited and from which disbursements in connection with the activities, maintenance and business of the vessels thereunder will be made. Upon designation by the agent and approval by the owner of the depository or depositories, the owner will issue an order for the establishment of the joint bank account. The order will set forth the conditions governing the establishment and maintenance of the account and the making of deposits therein and withdrawals therefrom. A signed copy of the order of the owner will be furnished the agent and the agent promptly shall adopt, through its Board of Directors, a resolution satisfactory in form and substance to the owner, authorizing the establishment and maintenance of the account in conformity with the action of the owner. A signed copy of the order of the owner and a certified copy of the resolution of the agent will be furnished by the owner to the depository for its guidance in maintaining the fund and honoring instruments of withdrawal. The order will provide, among other things, that:

(a) Withdrawals from this bank account may be made by the agent without the countersignature of the owner for disbursements in connection with the activities, maintenance and business of the vessels assigned under agency agreements, except disbursements involving payments to the agent directly, or to any other persons specifically designated by the Director, National Shipping Authority, in which instances the countersignature of a designated representative of the owner will be required, (b) withdrawals may be made from the account by the owner without the countersignature of the agent whenever and to the extent the owner shall determine that the balance in the account in excess of current operating requirements warrants such action, (c) the bank shall have no rights against the joint account on account of indebtedness of the agent either by way of set-off or otherwise, (d) the bank may receive for deposit in the joint account any funds tendered to it by any person with instructions that the same be deposited in the said account, and the bank shall have no responsibility to inquire as to the source of such funds, and (e) the bank shall disburse funds from the joint account in accordance with checks, drafts, or other orders for the payment of money, drawn as provided in the order, without making any inquiry as to the purpose

or use to which such withdrawals are to be put.

ACCOUNTING FOR REVENUES

**Sec. 3 Accounting for revenues.**

(a) *General.* (1) The Agent shall be responsible for the prompt collection of all vessel operating revenue, shall issue such instructions as may be necessary to its branch houses or sub-agents, and shall take such other steps as may be necessary to insure prompt remittance to it of vessel operating revenue collected outside its principal office.

(2) Freight revenue collected, less refunds made therefrom, shall be remitted to the owner promptly subsequent to the close of each month. Disbursements except for refunds shall not be made from freight revenue collections unless specifically authorized by the owner.

(3) Passenger revenue collections shall be accounted for in accordance with procedures to be described.

(4) The agent shall in all cases perform his audit and review functions promptly and shall be in a position to supply complete documentation for a current audit by representatives of the owner.

(b) *Revenue documents*—(1) *Freight revenue.* The agent shall require its domestic and foreign branch houses, sub-agents, or other representatives, to prepare and submit revenue documents (manifests, bills of lading, out turn weight certificates, correction notices, etc.) to it. The manifest, in addition to showing the name of shipper, consignee, weight or measurement, freight rate and basis (whether the freight rate applies on measurement or weight basis), and amount of freight, shall show also advance charges, prepaid beyond charges, etc. A recapitulation sheet shall be made of the totals shown on the individual manifest sheets for each port. The aggregate totals of weight and measurement freight shall be converted to freight payable tons of bulk, general, heavy lifts, and commodities subject to special stevedoring rates if freight carried is subject to an over-all stevedoring agreement.

(2) *Passenger revenue.* Agents to whom combination passenger and freight vessels have been assigned under agency agreements and who heretofore have established a passenger accounting procedure, may continue to follow such procedure under the agency operations, unless such procedure is found to be inadequate by the owner.

(3) *Certifications of revenue documents.* The following certifications will be signed by branch houses or sub-agents:

(i) *Freight manifests.* Certified to be a true and correct reflection of cargo loaded and rates charged.

By: *Branch house or sub-agent*

*Name* *Title*

(ii) *Passenger manifests.* Certified to be a true and correct reflection of passengers carried and rates charged.

By: *Branch house or sub-agent*

*Name* *Title*

(4) *Definition of manifest.* The term *manifest* as used in this order, shall be interpreted to include appropriate equivalent documents as customarily used.

FUNDING OF OPERATIONS

**Sec. 4 Funding of operations.**

Cash advances will be made by the owner in such amounts and at such times as are required to adequately fund the activities, maintenance and business of the vessels assigned under agency agreements.

DISBURSEMENTS

**Sec. 5 Disbursements at principal office of agent.**

All expenses directly applicable to the activities, maintenance and business of the vessels assigned under agency agreements shall be paid from funds advanced by the owner unless otherwise specifically provided. When paid by check, invoices shall reflect the numbers of the checks by which the invoices were paid; when paid other than by check of the agent at his principal office, invoices must bear evidence of payment.

**Sec. 6 Disbursements at other domestic ports.**

Disbursements at domestic ports other than the principal office of the

agent for expenses as referred to in section 5 shall be made by one of the three following methods:

(a) After proper certification by the branch house or subagent, invoices shall be forwarded to the agent for payment, or

(b) The branch house or subagent shall pay invoices and thereafter apply to the agent for reimbursement, supporting its voucher with invoices bearing evidence of payment covering individual disbursement, or

(c) The agent may advance from time to time from the joint bank account the funds necessary to meet the requirements of such branch houses or subagents in connection with the activities, maintenance and business of the vessels assigned under the agency agreement. In such cases the branch house or subagent shall pay invoices from such advances and make proper accounting to the agent for each advance supported by invoices bearing evidence of payment and accompanied by remittance covering any unexpended balance of the advance, promptly after the departure of each vessel for which such advance was made.

**Sec. 7 Disbursements at foreign ports.**

Disbursement procedures at foreign ports may differ in the case of individual agents and in view of existing conditions. Disbursements at foreign ports shall be made by one of the following methods or by any other method outlined to and approved by the owner in advance of its use:

(a) The agent may advance from time to time from the joint bank account the funds necessary to meet the requirements of the business of the vessels assigned under the agency agreement. In such cases the foreign branch house or sub-agent shall pay invoices from such advances and shall make proper accounting to the agent for all advances supported by invoices bearing satisfactory evidence of payment. Any gains or losses in exchange on such advances or disbursements shall be for the account of the owner.

(b) The foreign branch house or subagent may pay all invoices from his own funds and thereafter draw on the agent for reimbursement, at the same time forwarding the disbursements account by air mail.

(c) The agent may establish Letters of Credit making funds available to the foreign branch house or sub-agent against which funds may be drawn by the sub-agent for branch house for payment of properly approved documents.

DOCUMENTS

**Sec. 8 Disbursement documents.**

(a) *Preparation of invoices by contractors and/or vendors.* (1) Invoices from contractors or vendors shall be supported by evidence of delivery of supplies (delivery receipts), performance of services, or use in facilities furnished the vessels, and shall include the following:

(i) Name of vessel.

(ii) Name of port at which the services, supplies, or facilities were furnished.

(iii) Date of delivery or service.

(iv) Necessary details as to the nature of services, supplies, or facilities furnished including quantity, rate, price and total amount.

(2)(i) In addition to the foregoing, contractors or vendors shall certify each invoice or voucher (original only) in the following manner:

I certify that the above bill is correct and just and that payment therefor has not been received.

*Name of contractor or vendor* _____

By: _____

*Name* *Title*

(ii) The agent shall advise its domestic and foreign branch houses, subagents, or other representatives to the effect that the foregoing information and certifications must be shown on all invoices or vouchers when received from contractors or vendors.

(iii) In instances where the foregoing certification is unobtainable for foreign purchases only, it may be waived: *Provided,* That, in lieu of such certification the agent certifies the invoice as follows:

We certify that the prescribed certification of the payee was unobtainable.

*General agent or berth agent*

By: _____

*Name* *Title*

(3) In instances where it is not possible or practicable to obtain invoices bearing evidence of payment covering disbursements at foreign ports, that requirement will be waived, provided the agent certifies as follows:

We certify that, to the best of our knowledge and belief, this invoice has been paid.

*General agent or berth agent*

By: _____

*Name* *Title*

(4) Invoices rendered to the agent by its branch houses or sub-agents shall be only those of the contractors or vendors who actually rendered the services or furnished the supplies or facilities.

(5) If the laws of any country require the foreign sub-agent or branch house to retain the original invoice with stamps affixed, or if such laws require the original receipt as prima facie evidence of payment, the corresponding duplicate copy of the invoice, in proper form, must be forwarded to the agent with notation to that effect made thereon by the foreign sub-agent or branch house.

(b) *Certification of master, ship's officers, branch houses, sub-agents, or duly authorized representatives.* (1) Evidence of delivery of supplies, performance of services, or use of facilities, as normally provided by delivery receipts, or an equivalent form, comprises an essential part of proper documentation for disbursing purposes.

(i) Where supplies are delivered or services or facilities are furnished directly to a vessel, evidence of delivery or performance normally should be signed by a ship's officer.

(ii) Where such evidence is not signed by a ship's officer, any duly authorized representative of the agent may sign as "Duly Authorized Representative," provided the agent shall be responsible for the designation of proper and qualified representatives and provided the agent shall furnish, when so required by the owner, adequate evidence that the signing representative was duly authorized by him. In instances in which the agent may not be able to identify in advance the representative who may sign, the agent shall have the responsibility for determining that the person signing was qualified to execute evidence of delivery of supplies, performance of services, or use of facilities involved.

(2) For charges for watching cargo, stevedoring, wharfage, receiving and delivering cargo, clerking and checking, or other services or facilities not rendered directly to the vessel, for which normally delivery receipts or any equivalent form are not furnished, the following certification on the face of the original invoice by a duly authorized representative of the agent is required.

I certify that the services or facilities as specified have been furnished.

*Name*

Duly authorized representative

(3) Ships' payrolls shall be certified by the master (or his authorized representative) as follows:

I certify that this payroll is true and correct, and that the persons named hereon have performed the services for the period stated.

*Master* (*or his authorized representative*)

(4) In instances where vessels are under foreign articles the payroll shall bear proper evidence of having been paid off before a United States Shipping Commissioner or an American Consul.

(5) The slop chest account shall be certified by the master as follows:

I hereby certify that the above is a true statement of all Slop Chest transactions on this vessel and voyage.

*Master* (*or his authorized representative*)

(6) A similar certification shall be made by the Chief Steward (or his authorized representative) covering bar transactions (if any).

(c) *Certification by branch house or sub-agent where agent does not handle transactions directly.* The certification of the branch house or sub-agent must be shown on the original invoice (if rendered singly) or on the summary disbursement statement (if rendered in groups) in the following manner:

(1) *On single invoices.*

I certify that the prices charged are reasonable and correct.

By: _____ *Branch house or sub-agent*

*Name* *Title*

(2) *On the summary statement.*

I certify that the prices charged per invoices detailed above are reasonable and correct.

By: _____ *Branch house or sub-agent*

*Name* *Title*

**Sec. 9 Maintenance of documents.**

The agent shall maintain the originals of all documents at his principal office. All documents originating at other domestic ports and at foreign ports shall be transmitted as currently as possible to the principal office of the agent. The agent shall in all cases perform his audit and review functions promptly and shall be in a position to supply complete documentation for a current audit by representatives of the owner. The agent shall maintain to the maximum extent possible a complete and orderly file of all authorizations for facilities, services and supplies, and complete tariffs and port schedules covering charges at domestic and foreign ports incident to the operation of the vessels assigned under the agency agreement.

**Sec. 10 Lost documents.**

In the event of the loss of documents, photostat, carbon, or other suitable copies may be substituted therefor, in which event the following certification shall be placed on such copies:

I certify that, to the best of my knowledge and belief, this is a true copy of an original that has been lost.

By: _____ *Branch house or sub-agent*

*Name* *Title*

REPORTS AND AUDIT

**Sec. 11 Reports to the owner.**

The agent shall submit to the local District Finance Officer of the owner, in triplicate, not later than 20 days after the end of each month, its general ledger trial balance and such schedules and support thereof as may be required. The agent shall also submit to the owner, in original and four copies, not later than 10 days after the end of each month a statement in the form and content to be prescribed reflecting cash receipts and cash disbursements for the preceding month and cumulative totals for the year to date; the original and one copy will be transmitted to the local District Finance Officer and three copies will be transmitted to the Chief, Office of Finance, Maritime Administration, Washington.

[FIS–1, 16 FR 2885, Apr. 3, 1951, as amended at 33 FR 5952, Apr. 18, 1968. Redesignated at 45 FR 44587, July 1, 1980]

**Sec. 12 Audit.**

(a) The owner will audit as currently as possible subsequent to audit by the agent, all documents relating to the activities, maintenance and business of the vessels assigned under agency agreements.

(b) The agent shall maintain all documents in his principal office, for the time being in accordance with his customary practice of filing.

(c) Subsequent to audit by the owner, at such intervals as may be determined, the owner will authorize entries to be made to revenue and expense accounts and to accounts reflecting relations between the owner and the agent.

NOTE: Books of accounts and documents referred to in the above order, shall be retained until the completion of the audit by the General Accounting Office, at which time the Maritime Administration will take custody of the records.

[16 FR 2885, Apr. 3, 1951, as amended at 21 FR 8105, Oct. 23, 1956. Redesignated at 45 FR 44587, July 1, 1980]

## PART 325—PROCEDURE TO BE FOLLOWED BY GENERAL AGENTS IN PREPARATION OF INVOICES AND PAYMENT OF COMPENSATION PURSUANT TO PROVISIONS OF NSA ORDER NO. 47

Sec.

1. What this order does.
2. Terms.
3. Preparation of invoices.
4. Method of payment.
5. Accounting.

AUTHORITY: Sec. 204, 49 Stat. 1987, as amended; 46 U.S.C. 1114.

SOURCE: FIS–2, 16 FR 10026, Oct. 2, 1951, unless otherwise noted. Redesignated at 45 FR 44587, July 1, 1980.

### Section 1 What this order does.

This order prescribes procedures for the preparation of invoices for, and payment and the accounting for, compensation payable to General Agents of the National Shipping Authority for services rendered in connection with the husbanding and conduct of the business of dry cargo vessels assigned to General Agents under the standard form of Service Agreement GAA, March 19, 1951, as prescribed in NSA Order No. 47. (AGE–4 of this chapter).

### Sec. 2 Terms.

The terms employed in this order shall have the same meaning as those contained in NSA Order No. 47.

### Sec. 3 Preparation of invoices.

(a) Pursuant to Article 4 of the Service Agreement, the General Agent shall prepare monthly invoices for compensation earned during the preceding month under the applicable provisions of NSA Order No. 47.

(1) Invoices shall be prepared so as to show separately husbanding services and other services in conducting the business of the vessels.

(2) Husbanding services shall be stated to indicate the names of all vessels delivered to the General Agent during the month involved, the number of days each vessel was serviced or operated by the General Agent during the month, rate of compensation per day, and the amount produced by the calculation.

(3) Services in conducting the business of the vessels shall be stated to indicate the name of the vessel, the voyage number, the amount of revenue, the rate of compensation, and the amount produced by the calculation; and, in the instance of vessels employed in MSTS service, the number of days the vessels were so employed, the rate of compensation per day, and the amount produced by the calculation.

(b) Invoices shall be certified by a duly authorized officer of the General Agent as follows:

I certify that this invoice is correct and just, that it is a correct statement of the compensation calculated in accordance with the provisions of NSA Order No. 47 due the undersigned General Agent for the month of _____ under Service Agreement No. _____ made as of _____ with the National Shipping Authority, and that payment thereof has not been received.

_____
Name of General Agent

_____
Signature

_____
Title

### Sec. 4 Method of payment.

The General Agent shall prepare check drawn on the NSA Special bank account for countersignature by an authorized representative of the Owner. All such payments to the General Agent shall be considered as payments on account and are subject to post-audit by the Owner.

### Sec. 5 Accounting.

The General Agent shall record the amounts of compensation paid from the NSA Special bank account in its agency books, in the following designated accounts:

Account 887—Husbanding Compensation.
Account 888—All Other Compensation.
This account shall be maintained to show separately compensation paid under sections 3(a), 3(b), 3(c), and 3(d) of NSA Order No. 47.

NOTE: Invoices and account books referred to in the above order, shall be retained until the completion of the audit by the General Accounting Office, at which time the Maritime Administration will take custody of the records.

[16 FR 2885, Apr. 3, 1951, as amended at 21 FR 8105, Oct. 23, 1956. Redesignated at 45 FR 44587, July 1, 1980]

## PART 326—MARINE PROTECTION AND INDEMNITY INSURANCE UNDER AGREEMENTS WITH AGENTS

Sec.
326.1 Purpose.
326.2 Insurer.
326.3 Insured.
326.4 Reports of accidents and occurrences.
326.5 Report of claims.
326.6 Settlement of claims.
326.7 Litigation.

AUTHORITY: 50 U.S.C. App. 1744; 46 U.S.C. 121a; 1114(b); 49 CFR 1.66.

SOURCE: 53 FR 37572, Sept. 27, 1988, unless otherwise noted.

### § 326.1 Purpose.

This part states that the Maritime Administration (MARAD) shall be responsible for providing or obtaining marine protection and indemnity (P&I) insurance for any vessel that has been placed in the National Defense Reserve Fleet (NDRF), which includes the Ready Reserve Force component, which vessel is assigned under a General Agency Agreement. These various forms of Agreements are entered into by the United States, acting by and through the National Shipping Authority, MARAD, and a private company (Agent). An agreement also contains procedures for the Agent to report accidents and occurrences of a P&I nature to MARAD and to report and settle P&I claims.

### § 326.2 Insurer.

MARAD shall be responsible for providing or obtaining P&I insurance for all vessels assigned to Agents under an Agreement. At its election, MARAD may be a self-insurer of any one or more vessels covered by the Agreement, or may obtain P&I insurance coverage under one or more policies written by underwriters of marine insurance. MARAD shall determine the amount of coverage to be provided or obtained.

### § 326.3 Insured.

The insureds are: The United States of America, acting by and through the Director, National Shipping Authority, Maritime Administration, Department of Transportation, and its Agents (including Agents' employees). Subagents shall be insureds only as expressly provided in the Agreement. Independent contractors of the Agents are not insureds.

### § 326.4 Reports of accidents and occurrences.

The Agent shall report every accident or occurrence of a P&I nature promptly to both the Director, Office of Trade Analysis and Insurance, Maritime Administration, 500 Seventh Street, SW., Room 8121, Washington, DC 20590, Tel. (202) 366–1461, and the contracting officer named in the Agreement. If MARAD has obtained P&I insurance through a marine insurance underwriter, the Agent also shall concurrently file a report of such accident or occurrence with the underwriter. MARAD shall disclose full details as the identity of such underwriter to the Agent.

### § 326.5 Report of claims.

The Agent also shall submit a quarterly report of all claims of a P&I insurance nature to the Director, Office of Trade Analysis and Insurance. The report shall contain all relevant information, e.g., the names of the vessels and of the claimant, the date of the injury or occurrence, the amount claimed, the basis for any payments already disbursed in behalf of the United States, estimated future costs and an evaluation of the claim of the merits.

### § 326.6 Settlement of claims.

(a) After ascertaining from MARAD the availability of funds, the Agent is authorized to settle individual claims of a P&I insurance nature that do not exceed $5,000. For a settlement in excess of $5,000, the Agent shall obtain MARAD's prior approval through the Director, Office of Trade Analysis and Insurance. If MARAD has placed the P&I insurance with an insurance underwriter, the Agent also shall obtain the prior approval of the underwriter to settle claims.

(b) The amount of individual claims that do not exceed the Agent's limit for settlement shall be chargeable by the Agent to the vessel expense and shall be accounted for in accordance with current accounting instructions of MARAD.

(c) When settling any such claim, the Agent shall advise the claimant that such settlement shall be accounted for in accordance with current accounting instructions, and shall also advise the claimant that such settlement is not to be construed as an admission of liability by or on behalf of the United States, the Agent or any other person.

(d) The Agent shall apply sound judgment and follow standard practices of vessel operators in the settlement or other disposition of such P&I insurance claims, and shall settle such claims

only when the settlement is adequately supported by all the facts and circumstances and is in the best interest of the United States.

### § 326.7 Litigation.

(a) If a court suit of a P&I nature is filed which arises out of the activities of the Agent under its Agreement, wherein the Agent is named as the party defendant or one of the parties' defendant irrespective of whether the risk is covered by P&I insurance, the Agent shall immediately forward copies of the pleading and all other related legal documents, by first class mail, to the Chief Counsel, Maritime Administration, Department of Transportation, Washington, DC 20590, and to the Attorney General, Attn: Civil Division, Torts Branch, Department of Justice, Washington, DC 20530. No agent or authorized subagent shall incur any legal expenses in connection with any claim of a P&I nature, unless approved in advance by MARAD, and by the underwriter, where applicable. However, the Agent may incur legal expenses if the mission of the vessel will be frustrated or impeded and/or time will not permit such prior approval.

(b) In the event of any attachment or seizure of a vessel, whether or not the risk is of a P&I nature, the Agent shall immediately notify the Chief Counsel, Maritime Administration, Washington, DC 20590, Tel. (202) 366–05711, by telegram, radio, or cable.

## PART 327—SEAMEN'S CLAIMS; ADMINISTRATIVE ACTION AND LITIGATION

Sec.

327.1 Purpose.
327.2 Statutory provisions.
327.3 Required claims submission.
327.4 Claim requirements.
327.5 Filing of claims.
327.6 Notice of allowance or disallowance.
327.7 Administrative disallowance presumption.
327.8 Court action.

AUTHORITY: 46 app. U.S.C. sections: 1114(b), 1241a; 50 U.S.C. app. 1291(a).

SOURCE: 56 FR 50275, Oct. 4, 1991, unless otherwise noted.

### § 327.1 Purpose.

This part prescribes rules and regulations pertaining to the filing of claims designated in § 327.3 of this part and the administrative allowance, or disallowance (actual and presumed), of such claims, in whole or in part, filed by officers and members of crews (hereafter referred to as "seamen") employed on vessels as employees of the United States through the National Shipping Authority (NSA), Maritime Administration (MARAD), or successor.

### § 327.2 Statutory provisions.

(a) In connection with the Vessel Operations Revolving Fund created for the purpose of carrying out the vessel operating functions of the Secretary of Transportation, the Third Supplemental Appropriation Act, 1951 (46 app. U.S.C. 1241a), provides, in part:

> That the provisions of sections 1(a), 1(c), 3(c) and 4 of Public Law 17, Seventy-eighth Congress (57 Stat. 45), as amended, shall be applicable in connection with such operations and to seamen employed through general agents as employees of the United States, who may be employed in accordance with customary commercial practices in the maritime industry, notwithstanding the provisions of any law applicable in terms to the employment of persons by the United States.

(b) Section 1(a) of Public Law 17 (50 U.S.C. app. 1291(a)), as amended, provides that:

> (a) Officers and members of crews (hereinafter referred to as "seamen") employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to (1) laws administered by the Public Health Service and the Social Security Act, as amended by subsection (b) (2) and (3) of this section; (2) death, injuries, illness, maintenance and cure, loss of effects, detention, or repatriation, or claims arising therefrom not covered by the foregoing clause (1); and (3) collection of wages and bonuses and making of allotments, have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels. * * *. Claims arising under clause (1) hereof shall be enforced in the same manner as such claims would be enforced if the seamen were employed on a privately owned and operated American vessel. Any claim referred to in

clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act. * * *. When used in this subsection the term "administratively disallowed" means a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration. When used in this subsection the terms "War Shipping Administration" and "Administrator, War Shipping Administration" shall be deemed to include the United States Maritime Commission with respect to the period beginning October 1 1941, and ending February 11, 1942, and the term "seaman" shall be deemed to include any seaman employed as an employee of the United States through the War Shipping Administration on vessels made available to or subchartered to other agencies or departments of the United States.

(c) The functions of the War Shipping Administrator and War Shipping Administration were transferred for liquidation purposes by title II of Public Law 492, 79th Congress (60 Stat. 501) to the United States Maritime Commission and, on August 20, 1949, by Reorganization Plan No. 6 of 1949 (63 Stat. 1069) to the Chairman of said Commission; certain of the functions of the United States Maritime Commission and of its Chairman were transferred on May 24, 1950, by part II of Reorganization Plan No. 21 of 1950 (64 Stat. 1273, 1276; 46 U.S.C. 1111–1114) to the Secretary of Commerce, and thereafter redelegated by the Secretary of Commerce to the Maritime Administrator (Department Order No. 117 (Amended), Manual of Orders, Department of Commerce); vessel operating functions were redelegated by the Maritime Administrator to the Director, National Shipping Authority, Maritime Administration (Administrator's Order No. 11 (Amended), Manual of Orders, Federal Maritime Board/Maritime Administration). In 1981, Public Law 99–31 (95 Stat. 165) transferred the Maritime Administration from the Department of Commerce to the Department of Transportation. By DOT Order 1100.60A, the Secretary of Transportation has delegated to the Maritime Administrator the authority to carry out the Act of June 2, 1951 (46 app. U.S.C. 1241a), regarding the Vessel Operations Revolving Fund (49 CFR 1.66). The Maritime Administrator has redelegated that authority to the Associate Administrator for Shipbuilding and Ship Operations (Maritime Administrative Order 70–1).

### § 327.3 Required claims submission.

All claims specified in 50 U.S.C. app. 1291(a) (2) and (3), quoted in § 327.2(b) of this part, shall be submitted for administrative consideration, as provided in §§ 327.4 and 327.5 of this part, prior to institution of court action thereon.

### § 327.4 Claim requirements.

(a) *Form.* The claim may be in any form and shall be

(1) In writing,

(2) Designated as a claim,

(3) Disclose that the object sought is the administrative allowance of the claim,

(4) Comply with the requirements of this part, and

(5) Filed as provided in § 327.5 of this part.

The claim need not be sworn or attested to by the claimant. However, the statements made in the claim are subject to the provision of 18 U.S.C. 287 and 1001 and all other penalty provisions for making false, fictitious, or fraudulent claims, statements or entries, or falsifying, concealing, or covering up a material fact in any matter within the jurisdiction of any department or agency of the United States. Any lawsuits filed contrary to the provisions of section 5 of the Suits in Admiralty Act, as amended by Public Law 877, 81st Congress (64 Stat. 1112; 46 app. U.S.C. 745), shall not be in compliance with the requirements of this part.

(b) *Contents.* Each claim shall include the following information:

(1) With respect to the seaman:

(i) Name;

(ii) Mailing address;

(iii) Date of birth;

(iv) Legal residence address;

(v) Place of birth; and

(vi) Merchant mariner license or document number and social security number.

(2) With respect to the basis for the claim:

(i) Name of vessel on which the seaman was serving when the incident occurred that is the basis for the claim;

(ii) Place where the incident occurred;

(iii) Time of incident—year, month and day, and the precise time of day, to the minute, where possible;

(iv) Narrative of the facts and circumstances surrounding the incident; and

(v) The names of others who can supply factual information about the incident and its consequences.

(3) The dollar amount of claim for:

(i) Past loss of earnings or earning capacity;

(ii) Future loss of earnings or earning capacity;

(iii) Medical expenses paid out of pocket;

(iv) Pain and suffering; and

(v) Any other loss arising out of the incident (describe).

(4) All medical and clinical records of physicians and hospitals related to a seaman's claim for injury, illness, or death shall be attached. If the claimant does not have a copy of each record, the claimant shall identify every physician and hospital having records relating to the seaman and shall provide written authorization for MARAD to obtain all such records. The claim shall also include the number of days the seaman worked as a merchant mariner and the earnings received for the current calendar year, as well as for the two preceding calendar years.

(5) If the claim does not involve a seaman's death, the following information shall be submitted with the claim:

(i) Date the seaman signed a reemployment register as a merchant mariner;

(ii) Copy of the medical fit-for-duty certificate issued to the seaman;

(iii) Date and details of next employment as a seaman; and

(iv) Date and details of next employment as other than a seaman.

(6) If the claim is for other than personal injury, illness or death, the claim shall provide all supporting information concerning the nature and dollar amount of the loss.

### § 327.5 Filing of claims.

(a) Claims may be filed by or on behalf of seamen or their surviving dependents or beneficiaries, or by their legal representatives. Claims shall be filed either by personal delivery or by registered mail.

(b) Each claim shall be filed with the Ship Manager or General Agent of the vessel with respect to which such claim arose. The claimant shall send a copy directly to the Chief, Division of Marine Insurance, Maritime Administration, Department of Transportation, 400 Seventh Street SW., Washington, DC 20590.

### § 327.6 Notice of allowance or disallowance.

MARAD shall give prompt notice in writing of the allowance or disallowance of each claim, in whole or in part, by mail to the last known address of, or by personal delivery to, the claimant or the claimant's legal representative. In the case of administrative disallowance, in whole or in part, such notice shall contain a brief statement of the reason for such disallowance.

### § 327.7 Administrative disallowance presumption.

If MARAD fails to give written notice of allowance or disallowance of a claim in accordance with § 327.6 of this part within sixty (60) calendar days following the date of the receipt of such claim by the proper person designated in § 327.5 of this part, such claim shall be presumed to have been "administratively disallowed," within the meaning in section 1(a) of 50 U.S.C. app. 1291(a), quoted in § 327.2(b) of this part.

### § 327.8 Court action.

No seamen, having a claim specified in subsections (2) and (3) of section 1(a) of 50 U.S.C. 1291(a), quoted in § 327.2(b) of this part, their surviving dependents and beneficiaries, or their legal representatives shall institute a court action for the enforcement of such claim unless such claim shall have been prepared and filed in accordance with §§ 327.4 and 327.5 of this part and shall have been administratively disallowed in accordance with § 327.6 or 327.7 of this part.

## PART 328—SLOP CHESTS

Sec.

1. What this order does.

2. General Agent's requirements.
3. Master's requirements.
4. General provisions.

AUTHORITY: Sec. 204, 49 Stat. 1987, as amended; 46 U.S.C. 1114. Interpret or apply sec. 11, 23 Stat. 56; 46 U.S.C. 670.

### Section 1 What this order does.

In accordance with the provisions of section 11 f the act of Congress approved June 26, 1884, 23 Stat. 56; 46 U.S.C. 670, this order requires all vessels operated by the National Shipping Authority under General Agency Agreement 3–19–51, Amendment 8–65, to be provided with a slop chest subject to all limitations contained in said act.

[OPR–1, 16 FR 4137, May 5, 1951, as amended at 33 FR 5952, Apr. 18, 1968. Redesignated at 45 FR 44587, July 1, 1980]

### Sec. 2 General Agent's requirements.

The General Agent shall:

(a) Obtain from the Master, a requisition for slop chest items required for the intended voyage. Purchase for the account of the NSA, from recognized bona fide slop chest suppliers, at prices not in excess of the fair and reasonable level prevailing at the respective domestic ports, only such items and quantities reflecting past experience of actual requirements.

(b) Arrange for delivery on board to the custody of the Master all slop chest items purchased, together with a copy of the vendor's invoice showing items, units, unit cost and totals.

(c) Furnish the Master with a Slop Chest Statement showing on hand at the beginning of each voyage the items, units, unit cost, totals and selling price per unit of each item. The selling price shall approximate but not exceed 110 percent of the reasonable wholesale value of the same at the port at which the voyage commenced. The Slop Chest Statement shall also provide spaces for:

(1) Quantities and total value sold.

(2) Quantities and total cost value on hand, end of voyage.

(3) Quantities of each item required for next voyage.

(d) Submit to the Coast Director in the district in which the General Agent is located, upon termination of each voyage a copy of the Slop Chest Statement obtained from the Master as provided for in section 3(b) of this order and a copy of all invoices for slop chest purchases showing items by brand or trade name, unit cost and total.

(e) Account to the cognizant Coast Director for the purchase, delivery to the Master, receipts from sales, condemnations, transfers and all other transactions in connection with slop chests.

[OPR–1, 16 FR 4137, May 5, 1951, as amended by Amdt. 1, 33 FR 6475, Apr. 27, 1968. Redesignated at 45 FR 44587, July 1, 1980]

### Sec. 3 Master's requirements.

The Master shall:

(a) Receive and receipt for the quantities of slop chest items delivered on board.

(b) Upon the termination of each voyage complete the Slop Chest Statement referred to in section 2(c) of this order, as to quantities and total value sold, quantities and total cost value on hand at end of voyage and quantities of each item required for the next voyage.

(c) Sell, from time to time as specified by him, any of the contents of the slop chest to any or every seaman applying therefor, at the unit price, specified by the Slop Chest Statement furnished the Master by the General Agent as provided in section 2(c) of this order.

(d) Account to the General Agent for all slop chest items received on board, for all receipts and for all other slop chest transactions engaged in during the voyage.

(e) Cause entry to be made in the ship's log authenticated by the person designated by the Master to be in charge of the slop chest, together with signatures of two other witnesses, for all losses sustained due to fire, water or other damage which renders articles unsaleable. Such log entries shall itemize the quantities damaged and the cost thereof.

(f) Submit a detailed written report to the General Agent covering losses incurred due to damage, theft or pilferage of slop chest items. The report shall be submitted at the termination of the voyage during which the damage, theft or pilferage occurred.

(g) Retain on board, all damaged slop chest items, for survey, removal and

disposition by the General Agent at a domestic port.

[OPR–1, 16 FR 4137, May 5, 1951. Redesignated at 45 FR 44587, July 1, 1980]

### Sec. 4 General provisions.

(a) All slop chest items, damaged or otherwise, shall be removed or transferred only in compliance with applicable regulations dealing with Property Removals.

(b) In the transfer of a vessel from one General Agent to another General Agent the physical transfer of the complete slop chest shall also be accomplished between the respective General Agents. The General Agents participating in such transfer shall complete and have their respective representatives sign, a joint inventory containing the unit cost price and extensions of all slop chest items, a copy of which shall be submitted to the Division of Operations, NSA, Washington, DC 20590, together with a copy of the Slop Chest Statement for the voyage terminated prior to transfer of the vessel. An additional copy of the Slop Chest Statement shall be submitted to the Comptroller's Office, Division of Accounts, Maritime Administration, Washington, DC 20590.

(c) In pricing the contents of the slop chest, the General Agent shall comply with all applicable regulations of the Office of Price Stabilization, Economic Stabilization Agency.

(d) It shall be the responsibility of each General Agent and Master to exercise reasonable care and diligence in the compliance with the Owner's obligations hereunder and in the protection and disposition of slop chest items.

(e) Neither the General Agent nor the Master shall place insurance on the contents of the slop chest purchased for the account of the NSA.

All slop chests purchased on or after the effective date of this regulation shall conform to the instructions contained in this order.

NOTE: Records and logs referred to in the above order, shall be retained until the completion of the audit by the General Accounting Office, at which time the Maritime Administration will take custody of the records.

[OPR–1, 16 FR 4137, May 5, 1951, as amended at 21 FR 8105, Oct. 23, 1956; 33 FR 5952, Apr. 18, 1968. Redesignated at 45 FR 44587, July 1, 1980]

## PART 329—VOYAGE DATA

Sec.
1. What this order does.
2. Voyage numbers.
3. Voyage commencements.
4. Voyage terminations.
5. Idle status period.
6. General provisions.
7. Operation under current GAA/MSTS Southeast Asia Program.

AUTHORITY: Sec. 204, 49 Stat. 1987, as amended; 46 U.S.C. 1114.

SOURCE: OPR–2, 16 FR 5950, June 22, 1951, unless otherwise noted. Redesignated at 45 FR 44587, July 1, 1980.

### Section 1 What this order does.

The General Agents, as appointed by the National Shipping Authority, promulgated under GAA, 3/19/51, shall be instructed in the manner of recording voyage activities of dry cargo vessels operated for the account of the National Shipping Authority.

### Sec. 2 Voyage numbers.

(a) The voyages of National Shipping Authority vessels shall be numbered consecutively commencing with voyage No. 1 having the prefixed designation NSA and followed by the General Agents' abbreviated designation and voyage number, as NSA–1/ABC–1.

(b) The continuity of NSA voyage numbers shall not change with berth agency operations or in the transfer of vessels to other General Agents.

(c) The General Agents' designated abbreviation and voyage numbers shall terminate upon transfer of the vessel and the succeeding General Agent shall affix his abbreviated designation and initial voyage numbers, as NSA–13/XYZ–1.

### Sec. 3 Voyage commencements.

(a) All voyages shall commence at 0001 hours of the date on which any of the following activities occur first:

(1) Vessel goes on loading berth, or

(2) Vessel sails outward on a new voyage, or

(3) Following termination of the previous voyage as prescribed in section 4(a) of this order.

(4) Following termination of an idle status period as prescribed in section 5 (a) and (b) of this order.

**Sec. 4 Voyage terminations.**

(a) All voyages shall terminate at a continental United States port at 2400 hours of the date on which any of the following activities were completed, whichever occurs last:

(1) Final discharge of cargo or ballast.

(2) Paying off of crew from sea articles.

(3) Completion of voyage repairs.

(b) [Reserved]

**Sec. 5 Idle status period.**

(a) The General Agent shall place a vessel in idle status during the period of reactivation or deactivation or upon redelivery from Military Sea Transportation Service notwithstanding the fifteen (15) days minimum period as provided for in paragraph (b) of this section.

(b) The General Agent shall place a vessel in idle status, although the voyage may have commenced, whenever and as soon as it is anticipated that the minimum period of inactivity will exceed fifteen (15) days, due, but not limited to: (1) Repairs, (2) labor, (3) awaiting allocation, (4) awaiting cargo.

(c) Should the anticipated period of inactivity terminate prior to the expiration of the 15 day minimum idle status period, except as provided in paragraph (a) of this section, the General Agent shall cancel the idle status and antedate the succeeding voyage commencement to the termination of the previous voyage as prescribed in section 4(a) of this order.

(d) Should an idle status period be established after a voyage has commenced, the voyage shall be suspended for the duration of the idle status period and resumed when the idle status period is terminated.

(e) Idle status periods as defined in this order, shall be established only in continental United States ports.

(f) Idle status periods shall be treated as separate accounting periods.

[OPR–2, 16 FR 5950, June 22, 1951, as amended by Amdt. 1, 17 FR 3830, Apr. 30, 1952; Amdt. 2, 22 FR 165, Jan. 8, 1957. Redesignated at 45 FR 44587, July 1, 1980]

**Sec. 6 General provisions.**

(a) In cases of overlapping activities and all other questions arising in respect to voyage commencements, terminations and idle status periods as defined in sections 4 and 5 of this order, the General Agent shall immediately inform the nearest Coast Director, or his local representative of the circumstances and submit recommendations for terminating a voyage. The resulting recommendations, decisions and instructions shall be confirmed in writing to the General Agent, with a copy of such correspondence being sent to the Division of Operations, N.S.A., Washington 25, DC.

(b) In the event a vessel is employed in intermediate voyage or voyages, or in cross trading outside the continental United States, the voyage shall continue until terminated at a continental United States port.

(c) There shall be no voyage terminations outside continental United States ports except in cases of,

(1) Total loss or constructive total loss of the vessel.

(2) Transfer of operations.

**Sec. 7 Operation under current GAA/MSTS Southeast Asia Program.**

In order to adapt the provisions of NSA Order 35 (OPR–2) to the particular circumstances of the present GAA/MSTS Southeast Asia Program, the following material partially modifying certain sections of that order is published.

For General Agency operations not related to the current GAA/MSTS Southeast Asia Program, NSA Order 35 (OPR–2) remains unchanged and wholly applicable. Except where specifically altered by the material which follows, it also remains applicable to the present situation.

For voyages made under the current GAA/MSTS program only, the following provisions concerning voyage commencements and terminations shall apply in lieu of those appearing in

sections 3 and 4 of NSA Order 35 (OPR–2). Continental United States ports do not include ports in the states of Alaska or Hawaii.

(a) The commencement of the initial voyage shall occur in a continental U.S. port at 0001 hours of the day the vessel is tendered and accepted for use by MSTS. Subsequent voyages shall commence in a continental U.S. port at 0001 hours of the day after either of the following activities occurs:

(1) The previous voyage terminates.

(2) Reduced operational status period terminates and vessel returns to full operational status.

(b) Voyages shall terminate in a continental U.S. port at 2400 hours of the day that the following action is completed:

(1) Paying off of the crew from sea articles.

(c) Since, in all instances, the voyage termination procedure takes precedence over the voyage commencement procedure and since it is mandatory that voyages terminate in a continental U.S. port, the following exception to the requirement of paragraph (b) of this section shall be effective when warranted:

(1) If the vessel completes payoff as in paragraph (b) of this section and takes departure within the same calendar day, the General Agent shall immediately inform the nearest Coast Director of Area Representative of the circumstances and submit recommendations regarding voyage termination. The resulting recommendations, decisions, and instructions shall be confirmed in writing to the General Agent, copy to Division of Operations, Washington, DC 20590.

(d) Where a vessel is employed in intermediate voyages or in cross trading outside the continental United States, the original voyage shall continue until terminated under conditions in paragraph (b) of this section.

[OPR–2, Amdt. 3, 33 FR 6710, May 2, 1968. Redesignated at 45 FR 44587, July 1, 1980]

## PART 330—LAUNCH SERVICES

Sec.

1. What this order does.
2. Authority for launch hire.

AUTHORITY: Sec. 204, 49 Stat. 1987, as amended; 46 U.S.C. 1114.

SOURCE: OPR–3, 16 FR 12791, Dec. 20, 1951, unless otherwise noted. Redesignated at 45 FR 44587, July 1, 1980.

### Section 1 What this order does.

This order prescribes the circumstances under which launch hire will be accepted by National Shipping Authority as vessel operating expense.

### Sec. 2 Authority for launch hire.

Launch hire in foreign and domestic ports will be accepted by National Shipping Authority as vessel operating expense, subject to the provisions of Article 5 of GAA 3–19–51 and BAA 9–19–51, only under the following circumstances:

(a) When incurred by the Master of an NSA vessel, or by an agent of NSA or by his sub-agent, for the purpose of properly conducting the owners' activities and business of NSA vessels;

(b) When incurred in transporting liberty parties to or from an NSA vessel with the approval of the Master or the General Agent as properly for account of the vessel owner; and

(c) When incurred for the transportation of workmen required aboard the vessel, if the contract for the work provides that such service shall be for account of NSA, and the launch service is authorized by the representative of NSA or the agent who ordered the work to be performed for account of NSA.

## PART 332—REPATRIATION OF SEAMEN

Sec.

1. What this order does.
2. Definitions.
3. Classification of repatriates.
4. Manner of repatriation.
5. Repatriation charges.
6. General provisions.

AUTHORITY: Sec. 204, 49 Stat. 1937, as amended; 46 U.S.C. 1114.

SOURCE: OPR–5, 18 FR 1446, Mar. 13, 1953, unless otherwise noted. Redesignated at 45 FR 44587, July 1, 1980.

### Section 1 What this order does.

This order prescribes the manner in which seamen separated from vessels

operated for the account of the National Shipping Authority shall be repatriated and explains how charges in connection with such repatriation shall be handled.

**Sec. 2 Definitions.**

(a) For the purpose of this order, the term *seaman* shall include every person, irrespective of capacity or rating, whose last service has been on a vessel operated for the account of the National Shipping Authority, upon which vessel he had signed shipping articles and whether or not he had signed off such articles before a consular or other authorized official, but shall not include the master of such a vessel.

(b) The term *General Agent* shall include any designated representative of such General Agent.

**Sec. 3 Classification of repatriates.**

Seamen in need of repatriation, whether being repatriated to or from the United States, shall be classified as follows:

(a) Seamen separated from their vessels because of the destruction of, abandonment of, or damage to their vessels, or because of termination of shipping articles at a port outside the continental limits of the United States.

(b) Seamen separated from their vessels as the result of illness or injury received in the service of their vessels or otherwise through no fault of their own.

(c) Seamen separated from their vessels for any cause whatsoever not described in paragraph (a) or (b) of this section.

**Sec. 4 Manner of repatriation.**

(a) A seaman described in paragraph (a) of section 3 of this order shall be repatriated in accordance with the provisions of the shipping articles, or the applicable collective bargaining agreement, employment contract, or statute. If a seaman in this class is repatriated as a passenger, the General Agent of the vessel of which he was last a crew member shall arrange for his passage and pay the amount of expense involved.

(b) A seaman described in paragraph (b) of section 3 of this order may be repatriated as a passenger where space is available and circumstances permit. If applicable collective bargaining agreements, employment contracts, or statutes do not conflict, he may return as a workaway or, at the discretion of the master of the repatriating vessel, he may sign on articles either as a replacement of to complete a vessel's complement or, when deemed advisable by the official authorizing the repatriation and with the approval of the master of the repatriating vessel, he may be signed on the articles as a *repatriated seaman (non-working).* If a seaman in this class is repatriated as a passenger, or repatriate seaman (non-working), the General Agent of the vessel of which he was last a crew member shall arrange for his passage and pay the amount of expense involved.

(c) A seaman described in paragraph (c) of section 3 of this order shall be returned as a workaway or, at the discretion of the master of the repatriating vessel, he may sign on as a replacement or to complete a vessel's complement. Only in unusual cases, and only with the prior approval of the Chief, Division of Operations, shall a seaman in this class be repatriated as a passenger or as a repatriate seaman (non-working). If a seaman in this class is repatriated as a passenger, or as a repatriate seaman (non-working), the General Agent of the vessel of which he was last a crew member shall arrange for his passage and pay the amount of expense involved.

(d) A master shall be repatriated in accordance with applicable collective bargaining agreement, employment contract, statute, or established commercial practice.

**Sec. 5 Repatriation charges.**

(a) If it is deemed necessary to repatriate a seaman as a passenger aboard a privately operated vessel, plane, train, or other conveyance, the full amount of the reasonably incurred expense in connection therewith shall be billed against the General Agent of the vessel of which he was last a crew member.

(b) If a seaman is repatriated as a passenger, or as a repatriate seaman (non-working), aboard a vessel operated for the account of the National

Shipping Authority under a General Agency Agreement, a flat transportation charge of $5.00 per day shall be made for every day spent aboard the repatriating vessel, including day of embarkation and day of debarkation, which charge shall be in addition to necessary train or other conveyance expense, United States and foreign government taxes, port dues, landing fees or other charges of every nature levied in connection with such repatriation. In such a case, the General Agent of the vessel of which the repatriate was last a crew member shall be billed for the amount of expense involved, and appropriate entries covering the receipts and disbursements resulting from the repatriation shall be made in the proper books of account by the General Agent concerned. In the event the General Agent repatriating a seaman is also the General Agent of the vessel on which the seaman last served, it will not be necessary to issue a formal billing, but it is required that appropriate entries be made on the agency books of account to reflect a revenue of $5.00 per day in the account of the vessel rendering the transportation service and that a charge covering the cost of repatriation be recorded against the vessel on which the seaman last served. In all cases, the General Agent charged with the repatriation expense shall take necessary steps to secure reimbursement of such expense from the P & I underwriters insuring the vessel against which the expense is charged. No charge is to be made in the case of a seaman repatriate who signs on vessel articles as a workaway or in any other capacity except as a repatriate seaman (non-working). When repatriation is required, it shall be effected by the first available means considered appropriate by the official authorizing such repatriation.

**Sec. 6 General provisions.**

(a) In case of repatriation of any seaman as a passenger aboard a vessel operated for account of the National Shipping Authority, the requirements of the applicable collective bargaining agreement or employment contract shall be met. In any event, a seaman repatriate shall receive at least as good accommodations as would be his due while sailing in his capacity.

(b) Unless otherwise directed, a seaman when repatriated as a passenger aboard a vessel operated for the account of the National Shipping Authority, shall be issued a ticket in the form prescribed by the General Agent of the vessel for its own vessels. Such ticket shall be surrendered to the master of the repatriating vessel. When repatriated as a repatriate seaman (non-working), the master of the repatriating vessel shall be furnished with a certificate from the official authorizing the repatriation setting forth that the circumstances require that the seaman be signed on as a repatriate seaman (non-working). The master shall ascertain the seaman's full name and rating, cause of repatriation, and the names of the vessels and the General Agent to be charged with the cost of the repatriation.

(c) It is recognized that the procedure set forth in this order will not cover all situations arising out of obligations to repatriate seamen nor fix ultimate responsibility for repatriation expenses which may sometimes depend upon determinations of fact which cannot be made prior to repatriation. In cases of emergency or in situations not covered in this order, the General Agent shall proceed in accordance with established commercial practice.

(d) Nothing in this order shall be construed to interfere with the proper exercise of authority by United States consular officials relative to repatriation of seamen in accordance with applicable statutes.

## PART 335—AUTHORITY AND RESPONSIBILITY OF GENERAL AGENTS TO UNDERTAKE EMERGENCY REPAIRS IN FOREIGN PORTS

Sec.
1. What this order does.
2. General Agents' authority.
3. General Agents' responsibilities.
4. General provisions.

AUTHORITY: Sec. 204, 49 Stat. 1987, as amended; 46 U.S.C. 1114.

SOURCE: SRM–2, 16 FR 5321, June 6, 1951, unless otherwise noted. Redesignated at 45 FR 44587, July 1, 1980.

**Section 1 What this order does.**

This order outlines General Agents' responsibilities and limited authority in connection with repairs in foreign ports to vessels operated for the account of the National Shipping Authority under General Agency Agreement.

**Sec. 2 General Agents' authority.**

The General Agents are hereby delegated authority to undertake for the account of the National Shipping Authority only such emergency repairs outside the Continental United States as may be necessary to enable vessels to complete their voyages, provided the repair costs are not in excess of $5,000 per vessel.

**Sec. 3 General Agents' responsibilities.**

In the event the cost of emergency repairs to a vessel in a foreign port is estimated to exceed $5,000, requests for approval shall be transmitted by General Agents by cable or wire addressed to Chief, Division of Ship Repair and Maintenance, National Shipping Authority, Washington, DC 20590, and shall include the following information:

(a) The cost and time to effect permanent repairs on a straight time and overtime basis;

(b) The cost and time to effect such temporary repairs on a straight time and overtime basis as will enable the vessel to return to the United States under its own power or under tow;

(c) Whether required repairs can be effected by the use of facilities under the direct control of the Army, Navy, or other agencies of the United States Government, and if so, at what cost and time; and

(d) Where major repairs are involved, a recommendation regarding the advisability of repairing the vessel or abandoning it.

[SRM–2, 16 FR 5321, June 6, 1951, as amended at 33 FR 5952, Apr. 18, 1968. Redesignated at 45 FR 44587, July 1, 1980]

**Sec. 4 General provisions.**

The General Agents shall keep the Division of Ship Repair and Maintenance in Washington fully posted in detail as to the nature, extent, cost, and estimated time for completion of all foreign repairs where such repairs are for the account of the National Shipping Authority.

As soon as practicable after completion of either temporary or permanent repairs, the General Agent shall forward to the Division of Ship Repair and Maintenance, Washington, DC the following:

(a) A copy of the repair specifications;

(b) An itemized statement of the costs of the repairs supported by copies of invoices;

(c) A copy of the completion certificate showing the repair period, signature of a National Shipping Authority representative (if available), the Agent's technical representative, the Chief Engineer, and the Master of the vessel;

(d) A report indicating the causes and circumstances leading to the repairs.

General Agents shall forthwith instruct their subagents and other representatives in foreign areas and their Masters and Chief Engineers with respect to their operations, pursuant to this directive.

This directive is intended strictly to limit repairs in foreign waters on vessels under National Shipping Authority control to those absolutely necessary to enable the vessels to complete their respective voyages at a port in the United States.

This directive shall not be construed to affect outstanding directives of the Office of the Comptroller.

NOTE: Records and supporting documents referred to in the above order, shall be retained until the completion of the audit by the General Accounting Office, at which time the Maritime Administration will take custody of the records.

[16 FR 5321, June 6, 1951, as amended at 21 FR 8105, Oct. 23, 1956. Redesignated at 45 FR 44587, July 1, 1980]

# PART 336—AUTHORITY AND RESPONSIBILITY OF GENERAL AGENTS TO UNDERTAKE IN CONTINENTAL UNITED STATES PORTS VOYAGE REPAIRS AND SERVICE EQUIPMENT OF VESSELS OPERATED FOR THE ACCOUNT OF THE NATIONAL SHIPPING AUTHORITY UNDER GENERAL AGENCY AGREEMENT

Sec.
1. What this order does.
2. General Agents' authority.
3. General provisions.

AUTHORITY: Sec. 204, 49 Stat. 1987, as amended; 46 U.S.C. 1114.

## Section 1 What this order does.

This order outlines General Agents' limited authority to arrange for and award contracts for voyage repairs and servicing equipment of vessels operated for the account of the National Shipping Authority under General Agency Agreement.

[SRM–3, Rev., 18 FR 5035, Aug. 22, 1953. Redesignated at 45 FR 44587, July 1, 1980]

## Sec. 2 General Agents' authority.

The General Agents are:

(a) Hereby delegated authority to arrange for and award contracts for voyage repairs on vessels operated under the General Agency Agreement for the account of the National Shipping Authority when the aggregate cost of all such repairs in any one Continental United States port is not in excess of $25,000.

(b) Also delegated authority to arrange for and order the performance of minor repairs to or servicing of pantry and galley equipment, radios, gyro compasses, fathometers, radio direction finders, fire extinguisher systems, ships clocks, binoculars, barometers, typewriters, adding machines, and any other vessel equipment of a similar nature where the aggregate amount does not exceed $2,500 in any one continental United States port.

[SRM–3, Rev., 18 FR 5035, Aug. 22, 1953, as amended by Amdt. 2, 31 FR 16713, Dec. 30, 1966. Redesignated at 45 FR 44587, July 1, 1980]

## Sec. 3 General provisions.

(a) The voyage repairs, as covered by section 2(a), may be awarded by the General Agents within the limitation specified under the Master Repair Contract if the contractor is a holder thereof or if the contractor does not hold a Master Repair Contract under NSA-WORKSMALREP if the contract price does not exceed $2,000 and said contract is made in accordance with NSA Order 46 (SRM–5, Revised) and NSA Order 51 (SRM–6, Revised).

(b) The repairs to or servicing of ships equipment, as covered by section 2(b), may be awarded by the General Agents, within the limitation specified, by letter or purchase order.

(c) It is to be understood by all General Agents that the authority delegated by this order is not to be construed to cover alterations, additions, changes or betterments.

(d) The prime General Agents shall submit, in duplicate, to the Atlantic, Gulf or Pacific Coast Director, Maritime Administration, within whose District the Agents home offices are situated a monthly listing of all awards made by the General Agents and their Sub-Agents. This listing shall reflect individually the contractor, complete contract number, vessel, type of award, e.g., negotiated or bid, cost and repair period. This listing is to be submitted substantially in the following form:

| Contractor | Contract No. | Vessel | Award | Amount | Start | Completed |
|---|---|---|---|---|---|---|
| Steamboat Repairs, Inc ..... | MA–600–USL–1 ... | John Doe .... | Bid ..... | $8,000 | Jan. 1, 1953 .. | Jan. 9, 1953 |
| Steamboat Repairs, Inc ..... | MA–600–USL–1A | John Doe .... | Negotiated .. | 1,000 | ..... | Jan. 10, 1953 |

A copy of the monthly listing shall be forwarded by each prime General Agent to each Coast Director of the District in which any of the work involved was awarded. If no work was awarded by a General Agent under his delegated authority, a report to that effect shall be

submitted to the pertinent Coast Director as prescribed in this section. The required reports shall be submitted to the Coast Directors within five (5) days after the last day of the month being reported upon. This reporting requirement has been approved by the Bureau of the Budget in accordance with the Federal Reports Act of 1942.

NOTE: Records and supporting documents referred to in the above order, shall be retained until the completion of the audit by the General Accounting Office, at which time the Maritime Administration will take custody of the records.

[SRM–3, Rev., 18 FR 5035, Aug. 22, 1953, as amended at 21 FR 8106, Oct. 23, 1956. Redesignated at 45 FR 44587, July 1, 1980]

## PART 337—GENERAL AGENT'S RESPONSIBILITY IN CONNECTION WITH FOREIGN REPAIR CUSTOM'S ENTRIES

Sec.
1. What this order does.
2. Submission of repair entries.
3. Application for remission of duties.
4. Evidence required.
5. General Agent's authority to effect payment of duties.

AUTHORITY: Sec. 204, 49 Stat. 1987, as amended; 46 U.S.C. 1114.

SOURCE: 16 FR 9658, Sept. 21, 1951, unless otherwise noted. Redesignated at 45 FR 44587, July 1, 1980.

### Section 1 What this order does.

This order outlines the procedure to be followed by General Agents in filing foreign repair entries and obtaining relief from Custom's duties on equipment purchased for or repairs made to ships owned by or Bareboat Chartered to the U.S. Maritime Administration and operated under General Agency Agreement.

### Sec. 2 Submission of repair entries.

At the first United States port of arrival upon termination of a foreign voyage, the ship's Master must file with the District Director of Customs as defined in 19 CFR 1.1(d) an affidavit on Custom's Form 3417 certifying that no equipment was purchased for or repairs made to the ship at a foreign port or if this is not the case, an affidavit on Custom's Form 3415 describing the equipment purchased and/or repairs made. If equipment was purchased and/or repairs were made in a foreign port, the Master simultaneously with or shortly after filing of Custom's Form 3415, must file a repair entry on Custom's Form 7535 together with invoices and required supporting documents.

[16 FR 9658, Sept. 21, 1951, as amended at 33 FR 5952, Apr. 18, 1968. Redesignated at 45 FR 44587, July 1, 1980]

### Sec. 3 Application for remission of duties.

An application for relief from the payment of duties imposed is to be filed with the District Director of Customs as defined in 19 CFR 1.1(d) if the following circumstances prevail:

(a) When an item covered by the entry is not within the class of items liable to duty (i.e., that the item does not constitute equipment, repair parts or materials within the meaning of section 466 of the Tariff Act of 1930);

(b) When the purchase of the equipment, repair parts or materials or the making of the repairs was necessitated by stress of weather and/or other casualty encountered during the regular course of the particular voyage and was necessary to secure the safety and seaworthiness of the vessel; or

(c) When the equipment, repair parts or materials were manufactured or produced in the United States and the labor involved was performed by residents of the United States or by members of the regular crew of the vessel.

To insure consideration in the liquidation (i.e., the assessment of duty) of the entry, the application for relief must be filed within 90 days from the date of the entry, except in meritorious cases, the District Director may grant an extension of 90 more days upon written request therefor.

[16 FR 9658, Sept. 21, 1961, as amended at 33 FR 5952, Apr. 18, 1968. Redesignated at 45 FR 44587, July 1, 1980]

### Sec. 4 Evidence required.

When relief is claimed on the grounds of stress of weather or other casualty, there must be submitted to the Collector the following:

(a) An affidavit of the Master which shall set out fully the nature of the

casualty and/or stress of weather encountered; when and where the casualty and/or stress of weather occurred; nature of the damage sustained; the port where the repairs were made or the equipment purchased and a statement of the Master as to whether the repairs or equipment purchased were required to secure the safety or seaworthiness of the vessel to enable her to reach a port of destination in the United States;

(b) Itemized invoices covering the cost of repairs made or equipment purchased;

(c) Abstracts of the vessel's log;

(d) Classification surveyor's report confirming vessel's classification when the repairs were made in order to insure seaworthiness.

The Master shall certify as true copies or originals, as the case may be, one copy of each repair bill, abstract of vessel's log, survey report and other documents used in support of the application for relief. If a document is written in a foreign language, it should be accompanied by a translation certified to be accurate.

### Sec. 5 General Agent's authority to effect payment of duties.

(a) In those cases where the conditions outlined in section 3 of SRM–4 do not prevail, the General Agent shall effect payment of duties imposed by Customs and shall include the expenditure in the voyage accounts of the vessel. In those cases where the conditions as outlined in section 3 of SRM–4 do prevail, the General Agent shall exhaust every means toward obtaining remission of duty imposed.

(b) Should the General Agent fail to obtain remission of duties in such cases, he shall refer the matter to the appropriate Coast Director for his (The Director) determination as to whether further appeal to the Bureau of Customs is warranted or that payment of duty should be made by the General Agent.

NOTE: Records and supporting documents referred to in the above order, shall be retained until the completion of the audit by the General Accounting Office, at which time the Maritime Administration will take custody of the records.

[SRM–4, 16 FR 9658, Sept. 21, 1951, as amended by Amdt. 1, 18 FR 5035, Aug. 22, 1953; 21 FR 8106, Oct. 23, 1956. Redesignated at 45 FR 44587, July 1, 1980]

## PART 338—PROCEDURE FOR ACCOMPLISHMENT OF VESSEL REPAIRS UNDER NATIONAL SHIPPING AUTHORITY MASTER LUMP SUM REPAIR CONTRACT—NSA-LUMPSUMREP

Sec.

1. What this order does.
2. Use of contract for competitive bid and negotiated price awards.
3. Specifications.
4. Procedure for securing competitive bids.
5. Procedure for negotiated price awards.
6. Awarding of work.
7. Job order numbering.
8. Extra work and changes.
9. Payment.
10. Bonds.
11. Guarantee obligations.
12. Disposition of removed equipment and scrap.
13. Insurance.
14. Anti-Kickback and Davis-Bacon Acts.
15. Subcontracts.
16. Liquidated damages.
17. Performance of work resulting from damage sustained while undergoing repairs.
18. Group classification.
19. Ship Repair Summaries.
20. Reports of awards.
21. Delegations of authority.

AUTHORITY: Sec. 204, 49 Stat. 1987, as amended; 46 U.S.C. 1114. Interpret or apply R.S. 3709, as amended; 41 U.S.C. 5.

SOURCE: SRM–5, Revised, 18 FR 5035, Aug. 22, 1953, unless otherwise noted. Redesignated at 45 FR 44587, July 1, 1980.

### Section 1 What this order does.

This order cancels NSA Order No. 32 (SRM–1); and outlines the procedure to be followed by the several Coast Directors, their field Ship Repair and Maintenance Staffs, the General Agents of the Authority, and the ship repair contractors in the award and performance of vessel repairs under the National Shipping Authority Master Repair Contract, NSA-LUMPSUMREP. The Coast Directors, field Ship Repair and Maintenance Staffs and the General Agents shall be referred to hereafter in this

order as representatives of the Authority.

**Sec. 2 Use of contract for competitive bid and negotiated price awards.**

(a) The NSA-LUMPSUMREP Contract is a Master form of fixed price contract and is applicable to ship repair work awarded as a result of competitive bidding or negotiation. As a general rule all work awarded under the NSA-LUMPSUMREP Contract must be awarded upon the basis of competitive bids. Revised Statute section 3709 (41 U.S.C. 5), which requires the award of contracts on the basis of competitive bids, however, permits award upon a negotiated basis in certain situations, that is, "where immediate delivery or performance is required by the public exigency."

(b) There are set forth in paragraphs (b)(1) to (3) of this section three (3) examples of situations where the negotiation of fixed price awards for the accomplishment of work under the NSA-LUMPSUMREP Contract will be permitted in lieu of competitive bidding:

(1) *Where the desired results from competitive bidding cannot be obtained.* For example, where there is doubt as to the reality of competition or the fairness or reasonableness of a low bid, all bids shall be rejected. If the ship's availability permits a new Invitation for Bids for the work in question shall be issued. If the bids received as a result of the second invitation are not considered satisfactory the bids are to be again rejected and prices of all specification items are to be negotiated with and the job awarded to the lowest bidder. If the low bidder refuses to accept the award upon the condition referred to the offer of award subject to price negotiation may be made to the next lowest bidder, etc. Negotiated awards in such cases shall be made in accordance with the conditions set forth on the invitation form, e.g., time specified, liquidated damages, etc. If a satisfactory price cannot be secured by negotiation with the bidders as herein proved an award may be made upon a negotiated basis approved in section 5 of this order.

(2) *Where the element of time is paramount.* There will be instances where expeditious ship turnarounds will necessitate the award of work without the delay involved in awarding on the basis of competitive bids. In such cases immediate negotiation for a fixed price with one contractor will be permissible. However, full consideration must be given to the factors involved in order to determine whether, under the circumstances, the time requirements make necessary the negotiation of price rather than using the competitive bid procedure. Such relevant factors are the individual ship's commitments with respect to loading berths, sailing dates, and the charter hire, etc., that might accrue in the event additional ship lay-time is required because of competitive bidding. Definite dollar and time values cannot be established as specific guides for determining when to negotiate. The individual ship and circumstances involved are the governing elements. The practice of consistently favoring one contractor where this type of repair is required will not be permitted but instead, to the maximum extent possible, all qualified contractors in the particular port shall be given the opportunity to perform work for the National Shipping Authority.

(3) *Extra items of work found subsequent to the awarding of the work covered by the original specifications.* Where extra items of work are required after the commencement of the awarded work, it is permissible to negotiate with the contractor who is performing the awarded work, for the accomplishment of such extra work under the provisions of Article 6 of the NSA-LUMPSUMREP Contract. A discussion of this procedure is set out in section 8 of this order. However, where items of extra work are found after examinations have been made as called for by the original specifications, negotiation with the contractor to perform such items of extra work shall be permitted only if the aggregate estimated cost of such items of extra work would not amount to a substantial part of the entire job. If the items of extra work amount to a substantial part of the entire job, they shall be awarded in the same manner and after consideration of the same factors as are set forth above for awarding original work.

**Sec. 3 Specifications.**

(a) It shall be incumbent upon the representatives of the Authority on each and every vessel requiring repairs for the account of the National Shipping Authority to prepare complete, detailed and fully descriptive specifications of the particulars of each repair item, identified in each particular case by the appropriate voyage number. Decisions of the Coast Directors' Ship Repair and Maintenance Staffs with respect to the need for any particular item in repair specifications shall be final. The specifications for voyage repairs shall itemize the work involved and shall be numbered consecutively and shall be arranged in accordance with the group classification set forth in section 18 of this order with the segregation by the three departments, namely, deck, engine and steward.

(b) The specifications shall in their final written form be explicit in every respect and shall include drydocking, if required, as well as all other items of work known to be required or discernible through visual inspection and examination regardless of the fact that later decision may be made to eliminate or defer some of the items of work. In no case shall an item of work, the accomplishment of which is problematical, be so identified or segregated in the specifications. Resorting to such general phraseology as "overhaul as necessary," "open up for examination and repair or renew as necessary," "repair or renew," etc., shall not be permitted in preparing and writing the specifications.

(c) Where an exact and final determination of the extent of the work cannot be ascertained until an examination has been made, the particular items involved shall so specify and the specifications with respect to said items shall be limited to such examinations as are necessary.

(d) If it is desired by the representatives of the Authority to change any item in the specifications after the specifications have been issued to bid such changes shall be reduced to writing and shall be distributed to the invited bidders at least by such time prior to the time originally specified for the opening of bids as shall reasonably permit the bidders to revise their estimates. If determined to be necessary or desirable under the circumstances, the representative of the Authority may extend the time for opening of bids.

(e) Any exceptions taken to the specifications by a prospective bidder shall be made known to the represent- ative of the Authority prior to the time specified for opening the bids. If it is finally determined by the representative of the Authority that the exceptions are justified, then the procedure set forth in the preceding sub-paragraph shall be followed. Exceptions accompanying bids not processed as herein prescribed, but made known at the time the bids are opened will not be acceptable, and will be a cause for rejecting such bids.

(f) When it is anticipated that the cost of a job will be in excess of a Coast Director's delegated authority, one (1) copy of specifications, and in case of bids a copy of Invitation for Bids, Instructions to Bidders and listing of contractors invited to bid shall be forwarded to the Chief, Division of Ship Repair and Maintenance, Washington, DC, simultaneously with the specifications being issued to the contractors.

(g) In all cases where materials, parts or equipment are required in connection with the performance of any particular repair item the representatives of the Authority shall utilize to the fullest possible extent spares and replacement parts stocked in Maritime Administration warehouses. Prior to arranging for the purchase or furnishing of repair parts by repair contractors, it shall be the responsibility of the representatives of the Authority awarding work to determine that the required parts are not available in the Maritime Administration warehouse in the area involved, contingent upon the urgency of the particular situation, ship's sailing schedule, etc.

**Sec. 4 Procedure for securing competitive bids.**

(a) The geographical area within which bids will be invited involves the exercise of sound administrative judgment. All the relevant factors should be considered in deciding over what areas competitive bids should be invited. Such factors will include the

scope and nature of the work, the location of the vessel, and the time and expense involved in shifting and returning the vessel to its loading berth consistent with the operating requirements.

(b) Invitations for Bids shall be sent to all contractors, within the area as determined in paragraph (a) of this section, who are considered to be financially qualified and to be capable of performing all of the work set forth in the specifications either by the utilization of their own or subcontractors' facilities. In this regard attention is invited to section 15 of this order.

(c) When inviting Bids the NSA form entitled "Invitation for Bids, Instruction for Bidders, and Specifications for Repairs, Renewals, Alterations and Additions to the Vessel _____" shall be used.

(d) Attention is called to the fact that the Invitation for Bids form includes a statement of the completion date for the work. In the event bids are invited the individual vessel's period of availability and the extent of the proposed work shall be considered in fixing a completion date that is consistent with the scope of the work involved. Consideration must be given to the fact that it will not be possible in every case to get lower bids by extending a completion date beyond the normal time required to do the work merely because the vessel's availability is exceptionally long. At the same time, care is to be exercised to insure that the repair period is not shortened, when there is no urgent need for the use of the vessel, to such an extent that it is impossible for the contractor to accomplish the work under normal working conditions. A completion date can only be fixed so as to be financially and otherwise to the best interests of the Government after due consideration has been given to all of the factors involved.

(e) The Invitations for Bids shall provide that the contractors shall submit, simultaneously with their responses to Invitations for Bids, unit prices for each item of specification work in a separate sealed envelope. Only the envelope containing the separate item prices of the contractor determined to be the low bidder shall be retained by the representative of the Authority and shall not be opened until after the award is made. All other envelopes containing separate item prices shall be returned un- opened to each contractor by the representative of the Authority. In the event the low bid is rejected, the itemized prices of the low bidder shall be returned to him in the unopened envelope. Item prices submitted by contractors will not be subject to public perusal.

(f) Vessel repair work contracted for by representatives of the National Shipping Authority is subject to the provisions of the Davis-Bacon Act, except in those cases where at the time of the issuance of the Invitations for Bids the site of the work is not known. Where bids are being invited from bidders in more than one port area, the port area in which the award will be made will not be known, and the Invitations for Bids, accordingly, must state that the work in question is not subject to the Davis-Bacon Act.

(g) The Invitations for Bids shall also include a statement of the per day liquidated damages, for the particular type vessel on which the work is to be performed.

(h) The Invitation for Bids shall state where the bids are to be opened.

(i) When Invitations for Bids are issued by a General Agent, the General Agent, at the time the invitations are issued shall make available to the local Ship Repair and Maintenance office, three (3) copies of the specifications, three (3) copies of a list of contractors to whom invitations have been sent, and three (3) copies of the Invitation for Bids.

(j) Where the scope and probable cost of the work and the time required for effecting such work are secondary as compared to the ship's time, and where the preparation of formal specifications and the issuance of formal Invitations for Bids are not practicable, the representative of the Authority may orally contact as many qualified contractors as is feasible, in order to obtain written "Spot Bids." Each contractor who indicates its intention to bid shall be fully advised as to the specific work involved and given an opportunity to inspect the vessel to enable it to prepare a bid. The contractor shall

be verbally advised of a time and place for the submission of the "Spot Bids." If such bids are invited by the General Agent, the General Agent shall also advise the Coast Director or his duly appointed representative of the time and place of opening the "Spot Bids," and if practicable, the NSA representative shall attend such opening. If submission of such spot bids is not in writing the contractors shall immediately confirm their respective Spot Bids by written tenders. The representative of the Authority shall, if requested by responsive contractors, furnish invitations for bids and supporting specifications to the contractors.

**Sec. 5 Procedure for negotiated price awards.**

(a) In the award of vessel repair work upon the basis of negotiation or request for quotation, other than work covered by a supplemental job order, the contractor shall be furnished with the information provided for in Article 1(a) of the NSA-LUMPSUMREP Contract.

(b) The contractor, within the time specified in a request for a quotation, may quote a price and shall submit itemized prices and the price breakdown provided for in Article 1(c) of the NSA-LUMPSUMREP Contract. In the event a mutually satisfactory price cannot be agreed to, a price shall be determined by the representative of the Authority making the award which shall be set out in the job order or the supplemental job order issued to the contractor. Within thirty (30) days from the receipt of such job order or supplemental job order the contractor may appeal such price to the Director of the Authority as a dispute under Article 27 of the NSA-LUMPSUMREP Contract.

**Sec. 6 Awarding of work.**

(a) Those portions of all bids reflecting the total aggregate cost of the work involved shall be opened publicly. The work shall be awarded to the contractor submitting the lowest qualified bid. The term *lowest* shall mean the bid most advantageous to the Government after evaluation of all bids by the application of differentials and any other relevant factors set forth in the Invitation for Bids. All pertinent costs of moving the vessel from the port where said vessel is located at the time bids are invited to the port of the responsive bidders' work sites and/or plants are to be stated on the Invitation for Bids. If the vessel is scheduled to return to the same port where located at the time bids were invited, all costs of returning the vessel to that port shall also be included on the Invitation for Bids and considered in the bid evaluation.

(b) Immediately after an award of a job order or a supplemental job order on a negotiated basis a written report shall be submitted by the representative of the Authority, making the award, to the appropriate Coast Director's office stating the pertinent reasons for awarding the job on a negotiated rather than bid basis. A copy of this report must be attached to the Ship Repair Summary.

(c) When an award is made, a job order in the form attached to the NSA-LUMPSUMREP Contract shall be issued to the contractor and when awards are made in excess of the Coast Directors' Authority one copy each of all job orders and supplemental job orders and supporting specifications are to be forwarded to the Chief, Division of Ship Repair and Maintenance, Washington, DC, simultaneously with the issuance of said orders to the contractors.

**Sec. 7 Job order numbering.**

(a) The NSA-LUMPSUMREP Contract number shall be inserted in every job order and supplemental job order thereto awarded to a Contractor. The Chiefs of local Ship Repair and Maintenance offices shall give consecutive numbers starting with No. 1 to job orders awarded by them to each contractor. The General Agents shall give consecutive numbers starting with No. 1 to job orders awarded by each General Agent. Job orders and supplemental job orders covering work awarded by a General Agent shall bear the initials of the prime General Agent, as a prefix to the numeral for example, "Job Order No. USL–1." Thus, the first award made by a local Ship Repair and Maintenance office to each respective master repair contractor

shall bear "Job Order No. 1". The first award made by each General Agent to each respective master repair contractor shall also bear "Job Order No. 1" and in addition the Prime General Agents initials. Sub-agents shall use the initials of the Prime General Agent in identifying the job order number. Any additional means of numbering other than the numeral and Prime Agent's initials are not to be used. Supplemental job orders shall contain the original job order number suffixed by the letter "A" on the first supplemental job order, the letter "B" on the second supplemental job order, and so forth.

**Sec. 8 Extra work and changes.**

(a) At any time after the award of an original job order and during the time the work thereunder is being performed, additional or extra work or changes in the work covered by the job order may be directed by the representative of the Authority.

(b) Such additional or changed work shall be directed by a written Change Order as provided in Article 6 of the NSA-LUMPSUMREP Contract.

(c) A supplemental job order shall be issued to the Contractor covering such Change Order(s), which supplemental order shall include the agreed amount of contract price increase or decrease and any revision in the completion date of the job order work, as modified by the Change Order(s).

(d) In the event a change in the contract price or revision in the completion date cannot be agreed upon the representative of the Authority shall determine the contract price or revised completion date and issue a supplemental job order to the contractor who shall proceed with the work covered by the Change Order(s) and the Contractor may appeal such contract price or revised completion date as provided in Article 27 of the NSA-LUMPSUMREP Contract.

**Sec. 9 Payment.**

(a) Repair contractors invoices covering work awarded by the field staff of the National Shipping Authority:

(1) Repair Contractors will submit invoices for repair costs covered by job orders under Master Repair Contract or work orders under WORKSMALREP Contracts, directly to the local office of the National Shipping Authority awarding the work.

(2) The local office of the National Shipping Authority will:

(i) Review repair contractors' invoices to determine that the charges have been billed in accordance with the prices provided in the job order and repair contract.

(ii) Attach to each repair contractor's invoice, a copy of the WORKSMALREP work order or job order and supplemental job order(s), if any; a signed completion certificate; and, in the case of competitive bids, abstract of bids listing the contractors who submitted bids, the bid prices and completion time specified by each contractor, the name of the contractor to whom the work was awarded, and an explanation of the basis for the award when the contract is not awarded to the lowest bidder.

(iii) Review each repair contractor's invoice and attachments to ascertain completeness of supports and whether repair items included therein have been placed under the appropriate repair group numbers as set out in section 18 and make corrections as necessary.

(iv) Forward the invoices and supports to the District Ship Repair and Maintenance office for final review.

(3) The District office shall make a final review and if in order forward the contractor's invoices and other supports relating to (i) voyage and idle status repairs to the principal office of the General Agent, and (ii) reactivation repairs and all others which do not involve General Agency operated ships to the appropriate District Finance Officer.

(4) The General Agent, upon receiving repair contractors' invoices and attachments thereto from the District Ship Repair and Maintenance office will:

(i) Review each invoice and attachments to assure that the payment authorized by the District office appears to be proper on the basis of the attachments.

(ii) Upon determination that all necessary supporting documents are attached, make payment directly to the contractor.

(5) The District Finance Officer, upon receiving repair contractors' invoices pursuant to paragraph (a)(3)(ii) of this section will process them in accordance with prescribed procedures.

(b) Repair contractors invoices covering work awarded by General Agents:

(1) Repair contractors will submit invoices for repair costs covered by job orders under Master Repair Contracts or work orders and WORKSMALREP contracts directly to the principal office of the General Agent or authorized Sub-Agent contracting for the ship repair work.

(2) The General Agent or authorized Sub-Agent, upon receipt of an invoice from a contractor, will follow the procedure outlined in paragraph (a) (2)(i thru iii) and (4)(ii) of this section.

[SRM–5, Rev., 18 FR 5035, Aug. 22, 1953, as amended at 33 FR 5952, Apr. 18, 1968. Redesignated at 45 FR 44587, July 1, 1980]

**Sec. 10 Bonds.**

(a) All bids in response to an Invitation for Bids and all quotations in response to a request for a quotation in excess of $2,000, shall be accompanied by a guaranty or a bid bond in a sum equal to twenty-five (25) percent of such bid or quotation to insure the acceptance of the job order covering the awarded work and the furnishing of the performance and payment bonds required by Article 14 of the NSA-LUMPSUMREP Contract. The standard Government form of bid bond (Standard Form 24 Revised November 1950) shall be used.

(b) In compliance with the performance bond and payment bond requirements of Article 14 of the NSA-LUMPSUMREP Contract, the standard form of individual performance bond (Standard Form 25 Revised November 1950) and the standard form of individual payment bond (Standard Form 25A Revised November 1950) respectively, shall be used. Such bonds (in the respective penal sums of 50 percent of the respective job order contract prices but if the job order contract price is in excess of $1,000,000 in the penal sum of 40 percent of such job order contract price) shall guarantee the Contractor's performance and payment obligations in connection with the work covered by an original job order awarded on either competitive bid or negotiated basis, as that work may be modified by supplemental job orders to such original job orders.

(c) The individual bid, performance and payment bonds shall be submitted by the contractors to the awarding offices (General Agents or local offices of NSA) to verify the correctness of the penalty amount, contract and job order numbers, etc. The individual bonds shall then be forwarded by the awarding office to the office of the appropriate Coast Director for final action and approval pursuant to existing regulations.

(d) For the convenience of contractors, in lieu of submitting individual bid, performance and payment bonds they may file with the Authority approved annual or blanket bid, performance and payment bonds covering the Contractor's bond obligations under job orders (as such job orders may be modified by supplemental job orders) awarded under said contracts in such annual period. Annual bonds shall be submitted by the Contractors or their surety representative to the appropriate Coast Director's office for clearance pursuant to existing regulations. In this regard all annual bonds must be of the open penalty type.

(e) No repair voucher (progress or final) where bond coverage is required shall be passed for payment until such time as the required bid, performance and payment bonds have been given final clearance.

**Sec. 11 Guarantee obligations.**

(a) Under the provisions of Article 10 of the NSA-LUMPSUMREP Contract the Contractor's guarantee liability extends to defects and deficiencies in the Contractor's work developing within sixty (60) days from the date of the acceptance of all the work and the accepted redelivery of the vessel to the Authority.

(b) Notice of such defects and deficiencies must be given to the Contractor not later than ninety (90) days after the acceptance of the work.

(c) As soon as practicable, after the acceptance of work performed under a job order, and the supplemental job orders thereto, the office awarding the job order shall furnish to the General Agent two copies of the specifications, job order and supplemental job orders, together with a statement of the date of the expiration of the Contractor's guarantee responsibility with respect to some work.

(d) The General Agent shall during the period of the Contractor's guarantee responsibility screen all deficiencies and defects and repair items and list separately against the respective specifications, all items which represent defects or deficiencies in the Contractor's work.

(e) In order that the Contractor may be notified of such defects and deficiencies prior to the expiration of the 90-day notice period, the General Agent, particularly with respect to vessels in foreign ports or vessels which may be at sea, shall instruct the Master of the respective vessel to forward the information with respect to defects and deficiencies in the Contractor's work to the General Agent's home office by the most expeditious manner of communication.

(f) In connection with all deficiencies and defects, referred to in paragraph (d) of this section, the General Agent shall immediately notify the Contractor and the local Ship Repair and Maintenance Office Head in the vessel's port of call with copies of such notification to the Chief, Division of Ship Repair and Maintenance in Washington, DC, in all cases and to the Chairman, Trial and Guarantee Survey Boards, if the total contract price is equal to or in excess of $100,000. If practicable, the local Ship Repair and Maintenance Office Head shall arrange to view the defective or deficient work in question and, if possible, shall secure the correction of such defects or deficiencies by the Contractor in question.

(g) The General Agent, and the representative of the local Ship Repair and Maintenance staff, who acted under the provisions of paragraph (e) of this section promptly shall file with the Chief, Division of Ship Repair and Maintenance in Washington, DC, and also with the Chairman, Trial and Guarantee Survey Boards, if the total contract price equals or exceeds $100,000, separate or concurring reports setting out the defects and deficiencies, describing the actual conditions found, causes of failure, and the disposition of each defect or deficiency item.

**Sec. 12 Disposition of removed equipment and scrap.**

(a) Article 8 of the NSA-LUMPSUMREP Contract provides that any ship equipment, fuel, lube oil, supplies, stores, furniture, fixtures, salvage and other movable property removed from the vessel is the property of the United States and shall be disposed of in such manner as the Authority may direct within sixty (60) days from the date of the completion of the work. The representative of the Authority, by appropriate item in the specifications, shall cause the Contractor to segregate all equipment, salvageable material and scrap, removed from a vessel in the performance of repairs, in such a manner as to be readily identifiable, and shall submit a list thereof to the local Property and Supply office which is responsible for arranging for retention, disposal, etc., of said equipment, material, and scrap. A copy of the listing is to be attached as a support to the Ship Repair Summary (MA–159).

(b) After the 60-day period, if no direction for disposal is given the Contractor, the Contractor shall store and protect, in the shipyard or outside of the shipyard at its election, such property of the United States, for the additional period directed by said local Property and Supply office who shall furnish a copy of such written direction to the representative of the Authority. The increased contract price for the cost of the storage for such additional period shall be covered by purchase order prepared by the local Property and Supply office.

(c) All scrap removed from the vessel shall be the property of the United States and shall be handled as provided in paragraph (b) of this section: *Provided, however,* That any scrap or salvage may, upon the written approval of the local Property and Supply office,

be purchased or disposed of by the Contractor at the prevailing market price, or at not less than the fair value thereof in the absence of an established market therefor. The net sales price of the scrap or salvage disposed of by the Contractor shall be promptly paid to the office of the District Finance Officer, or at the option of the office of the District Finance Officer, shall be credited against the moneys due or to become due the Contractors.

[SRM–5, Rev., 18 FR 5035, Aug. 22, 1953, as amended at 33 FR 5952, Apr. 18, 1968. Redesignated at 45 FR 44587, July 1, 1980]

**Sec. 13 Insurance.**

Article 9 of the NSA-LUMPSUMREP Contract sets forth the Contractor's liabilities and obligations with respect to awarded work. Said Article 9 requires that the Contractor shall maintain insurance to cover such liabilities and obligations. Evidence of such insurance shall be submitted to the Chief, Division of Insurance, Washington, DC, by the contractors for approval.

**Sec. 14 Anti-Kickback and Davis-Bacon Acts.**

(a) All work awarded under the NSA-LUMPSUMREP Contract is subject to the provisions of the Anti-Kickback Act, and is also subject to the provisions of the Davis-Bacon Act (except in those cases where the Invitations for Bids or job order state that the work covered thereby is not subject to the Davis-Bacon Act). Article 24 of the NSA-LUMPSUMREP Contract requires the compliance of Contractor and its subcontractors with the applicable provisions of said acts. In this respect the Contractor agrees in the NSA-LUMPSUMREP Contract to comply with the regulations of the Secretary of Labor made pursuant to the Anti-Kickback Act.

(b) The Contractor shall, as provided in Article 24(a) of the NSA-LUMPSUMREP Contract, post at the site of the work the wage determination decision of the Secretary of Labor as provided in said Article 24(a).

(c) It shall be the responsibility of the representative of the Authority awarding the work to determine that the Contractor has made the postings required by Article 24(a) of the NSA-LUMPSUMREP Contract.

(d) In lieu of submitting weekly certified copies of all payrolls to the Authority, as provided in Article 24(d) of the Master LUMPSUMREP Contract the Contractor shall maintain his weekly payrolls for a period of three years and submit weekly an affidavit that the payrolls of the Contractor for the preceding week are correct and complete, that the wage rates contained therein are not less than those determined by the Secretary of Labor and that the classifications set forth for each labor mechanic conforms with the work he performed. The Contractor shall also submit, and shall be responsible for the submission by its subcontractors of the Anti-Kickback Act affidavits as provided in Article 24(f) of the Master LUMPSUMREP Contract. The Contractor shall submit one copy of each of the weekly payroll and Anti-Kickback Act affidavits to the Records Administration Section, Maritime Administration, Washington 25, DC.

(e) The representative of the Authority shall require Contractors, pursuant to the provisions of Article 24(d) of the NSA-LUMPSUMREP Contract, to classify or reclassify any class of laborers or mechanics employed on National Shipping Authority contract work and not listed in the Secretary of Labor's decision (schedule of wages). A report of such cases shall be forwarded to the District Ship Repair and Maintenance office for transmittal to the Office of Maritime Labor Policy.

(f) The representatives of the Authority shall be responsible for establishing procedures insuring that Contractors are complying with the Davis-Bacon Act and in cases of non-compliance withhold payment of contractors' invoices.

(g) The following certification shall be inserted by all contractors on all invoices rendered covering work awarded under the Master Repair Contract subject to the Anti-Kickback and Davis-Bacon Acts.

I hereby certify that in performing the work for which the invoice was rendered that all applicable terms and conditions of the Anti-Kickback and Davis-Bacon Acts as provided

in the Master Repair Contract and regulations of the Department of Labor have been complied with.

### Sec. 15 Subcontracts.

Under Article 29 of the NSA-LUMPSUMREP Contract, the Contractor is authorized to subcontract portions of the work. However, the Contractor must obtain prior approval from the representative of the Authority, awarding the work, for each subcontract in an amount exceeding 10 percent of the contract price for the work covered by a job order or supplemental job order.

### Sec. 16 Liquidated damages.

(a) The liquidated damages payable for each calendar day of delay shall be placed on each job order and supplemental job order whether awarded on a competitive bid or negotiated basis.

(b) The completion certificates are to contain the date on which work is actually completed, whereas the job order and supplemental job orders are to contain a completion date based on a fair and reasonable estimate of time to be allowed the contractor to perform the work. Thus, the difference between the completion date specified on the job order or supplemental job orders and on the completion certificates will be the period for which liquidated damages are assessed. If an extension of an original completion date is considered justifiable, the completion certificates are to bear in detail in the space provided for "exceptions" the reasons why the completion dates were extended beyond that specified in the original job orders. The face of the Ship Repair Summaries (MA–159) shall reflect the amounts of liquidated damages. The penalty amount shall be deducted from the invoice prior to payment for the work involved.

[18 FR 5035, Aug. 22, 1953; 18 FR 5294, Sept. 2, 1953. Redesignated at 45 FR 44587, July 1, 1980]

### Sec. 17 Performance of work resulting from damage sustained while undergoing repairs.

(a) When damage is sustained by a vessel during performance of repairs under the NSA Master Contract, negotiations for accomplishment of work necessary to correct such damage are to be made with the repair contractor involved, if practicable, and a job order issued to the contractor for the repair of damage. Such job orders are to be assigned a new number and are not to be supplemental to the original award. The following "without prejudice" clause is to be made a part of and place on each job order issued for the performance of work discussed in this section.

It is understood and agreed that the work covered by this job order is awarded and accepted without prejudice to, or waiver of, any rights of the United States or the Contractor.

(b) If it is determined that the contractor is at fault and the contractor refuses to accept the responsibility, the procedure outlined in Article 27 of the master repair contract shall be followed. It is to be understood that the payment of this type of account is to be withheld pending establishment that the contractor involved is relieved of all responsibility for the damage.

(c) In the event other than the original contractor effects the damage repairs immediate arrangements are to be made by and through the General Agent to collect from the contractor considered responsible for the damages.

(d) A damage survey is to be conducted in all such cases and a report thereon submitted to the Chief, Division of Ship Repair and Maintenance, Washington, DC.

### Sec. 18 Group classification.

In the preparation of specifications, Job Orders, Supplemental Job Orders and WORKSMALREP Contracts costs by Group Numbers as set forth and described below are to be inserted thereon:

| Number | Classification |
|---|---|
| 41 | *Maintenance Repairs* (deck, engine and stewards department repairs resulting from wear and tear). |
| 42 | *Original installation of, repairs to, and removal of national defense features.* |
| 44 | *Conversions* (conversion of vessels to troop carriers, hospital ships, and for other special purposes). |
| 51 | *Alterations, Additions and Betterments* (additional equipment, such as, spar decks, heavy lift equipment, change of cargo or passenger space, increasing speed of vessel, and structural changes). |

| Number | Classification |
|---|---|
| 52 | *Strengthening of Newly Constructed Vessels* (strengthening of vessels according to program). |
| 54 | *Damage Repairs* (claimed as a result of enemy action, heavy weather, stranding, collision, fire, stevedore damage, ice damage, and other damages). NOTE: All items chargeable to each separate casualty to be properly identified and segregated both with respect to casualty and cost. |
| 63 | *Builders' and Vendors' Guaranty Work* (repairs and replacements chargeable to builders and vendors of equipment—separate cost to be furnished for each item). |
| 64 | *Repair Contractors' Guarantee Items* (repairs to correct deficiencies due to faulty workmanship and/or materials incident to prior repairs performed under provisions of Master Repair Contract where responsible contractor did not effect the necessary corrections). |
| 65 | *Other Costs* (temporary lights, garbage disposal, tugs to shift vessel while in contractors' yard, and other miscellaneous work requiring distribution of costs over more than one group). |
| 66 | *Miscellaneous Expenses Applicable to Voyage Operating Expense* (removal of cargo debris, fresh water when not required for testing purposes, cleaning cargo and other tanks where no repairs or alterations are involved, and other similar expenses). |
| 67 | *Preparation of Vessels for Lay-up* (stripping, draining and preservation. No repairs to be included in this grouping). |

## Sec. 19 Ship Repair Summaries.

(a) Ship Repair Summaries shall be prepared on Form MA–159 by the General Agents and local offices of the Authority covering all work performed under their respective jurisdiction and submitted to the District Ship Repair and Maintenance office involved. The summaries must be properly identified and contain the correct cost breakdown as set forth in this order. If the summary covers work other than repairs related to a voyage, the summary must so state, e.g., reactivation, lay-up, idle status, etc. The District Ship Repair and Maintenance office shall review the summaries and supports to ascertain that they have been properly prepared in all respects. The originals of all summaries unsupported shall be forwarded by the District offices to the Chief, Operating Cost Control Branch, Office of Ship Operations, National Shipping Authority, Washington, DC, and two copies each of all summaries one of which is to be supported by one copy each of job orders, supplemental job orders, invitation for bids, specifications, invoices, itemized prices, completion certificates, ABS invoices and reports, purchase orders, price warehouse delivery tickets, property removal notices, WORKSMALREP Contracts, a statement that bid, performance and payment bonds were received and approved, abstract of bids containing the list of contractors invited to bid and response of each, an explanation of the basis for an award when the contract is not awarded to lowest bidder, listing of scrap, salvageable material and equipment removed from a vessel, etc., shall be forwarded to the Chief, Division of Ship Repair and Maintenance, Washington, DC.

(1) Within 60 days after termination of the respective voyages for work awarded by General Agents.

(2) Within 30 days after completion of all work awarded by the Local Offices within a port area.

(b) In the event invoices for particular services are not available such as, American Bureau of Venders Inspectors fees, the summary is nevertheless to be prepared as outlined in this order and estimated costs for the missing billings set forth on the summary. Upon receipt of said invoices a supplementary summary shall promptly be prepared and distributed as outlined in this section.

(c) If no work is performed under a General Agent's jurisdiction for a particular voyage, the General Agent must submit for distribution as stated herein a repair summary stating across the face that no repairs, either foreign or domestic, were performed for the particular voyage involved.

## Sec. 20 Reports of awards.

(a) The Coast Directors shall submit to the Chief, Division of Ship Repair and Maintenance, Washington, D.C., a monthly listing of all awards made under their jurisdiction. This listing shall reflect individually the complete contract number, contractor, vessel, type of award, e.g., negotiated or bid, costs and repair period. This listing shall be submitted substantially in the following form:

| Contractor | Contract No. | Vessel | Award | Amount | Start | Completed |
|---|---|---|---|---|---|---|
| Steamboat Repairs, Inc. ... | MA–600 J.O.1 | John Doe .... | Bid ..... | $15,000 | Jan. 1, 1953 ..... | Jan. 10, 1953 |

| Contractor | Contract No. | Vessel | Award | Amount | Start | Completed |
|---|---|---|---|---|---|---|
| Steamboat Repairs, Inc .... | MA–600 J.O.1A. | John Doe .... | Negotiated ..... | 1,000 | ..... | Jan. 11, 1953 |

(b) If no work was awarded during a reporting period, a report to that effect is to be made.

(c) The Coast Directors are to attach to their monthly reports, the originals of the monthly reports submitted by the General Agents pursuant to section 3(d) of NSA Order 34 (SRM–3, Revised).

### Sec. 21 Delegations of authority.

(a) The term *authorized representative of the Authority* appears in several of the contract provisions of the NSA-LUMPSUMREP Contract. The respective representatives of the authority are the "authorized representative of the Authority" for the respective contract provisions as set out in this section:

(b) Articles 1 and 2—Chief, Division of Ship Repair and Maintenance, Coast Directors, Chiefs of District Ship Repair and Maintenance offices, Chiefs of Local Ship Repair and Maintenance offices, and General Agents (within the General Agents' contract limitations); Article 3—Maritime Administration Marine Surveyors, Chief, Division of Ship Repair and Maintenance, Coast Directors, Chiefs of District Ship Repair and Maintenance offices, Chiefs of Local Ship Repair and Maintenance offices; and General Agents (within the General Agents' contract limitations); Article 4—Coast Directors, Chief, Division of Ship Repair and Maintenance, Chiefs of District Ship Repair and Maintenance offices, Chiefs of Local Ship Repair and Maintenance offices, and General Agents; Article 5—Maritime Administration Marine Surveyors and General Agents; Article 6—Coast Directors, Chief, Division of Ship Repair and Maintenance, Chiefs of District Ship Repair and Maintenance offices, Chiefs of Local Ship Repair and Maintenance offices, and General Agents (within the General Agent's contract limitations); Article 7—Chiefs of District Ship Repair and Maintenance Offices, Chiefs of Local Ship Repair and Maintenance Offices, and Maritime Administration Marine Surveyors; Article 18 (d)—Coast Directors; Chief, Division of Ship Repair and Maintenance, Chiefs of District Ship Repair and Maintenance offices, Chiefs of Local Ship Repair and Maintenance offices, and General Agents in connection with work awarded by General Agents; Article 27—Coast Directors, Chiefs of District Ship Repair and Maintenance offices and Chiefs of Local Ship Repair and Maintenance offices.

NOTE: Records and supporting documents referred to in the above order, shall be retained until the completion of the audit by the General Accounting Office, at which time the Maritime Administration will take custody of the records.

[SRM–5, Rev., 18 FR 5035, Aug. 22, 1953, as amended at 21 FR 8106, Oct. 23, 1956. Redesignated at 45 FR 44587, July 1, 1980]

## PART 339—PROCEDURE FOR ACCOMPLISHMENT OF SHIP REPAIRS UNDER NATIONAL SHIPPING AUTHORITY INDIVIDUAL CONTRACT FOR MINOR REPAIRS—NSA-WORKSMALREP

Sec.

1. What this order does.
2. Description of NSA-WORKSMALREP Contract.
3. When the NSA-WORKSMALREP Contract may be used.
4. Persons authorized to make awards under NSA-WORKSMALREP Contract.
5. Responsibility for duplicating copies of NSA-WORKSMALREP Contract.

AUTHORITY: Sec. 204, 49 Stat. 1987, as amended; 46 U.S.C. 1114. Interpret or apply R.S. 3709, as amended; 41 U.S.C. 5.

SOURCE: SRM–6, Revised, 18 FR 5040, Aug. 22, 1953, unless otherwise noted. Redesignated at 45 FR 44587, July 1, 1980.

### Section 1 What this order does.

This order authorizes the use of NSA-WORKSMALREP individual contract for minor repairs to Maritime Administration owned or controlled vessels. The procedure to be followed by the field personnel of the Authority, the

General Agents of the Authority, and the ship repair contractors is set forth in the "General Provisions for Small Repairs" and, therefore, no further reference is made to said procedure herein.

**Sec. 2 Description of NSA-WORKSMALREP Contract.**

This is an individual fixed price contract which may be awarded to any firm not holding an NSA-LUMPSUMREP Contract, as a result of formal competitive bids, spot bids, or by negotiation for the performance of ship repair work. NSA Order No. 46 (SRM–5, Revised) sets forth the conditions when work may be awarded on the basis of formal competitive bids, spot bids or negotiation, therefore, further reference thereto will not be made herein.

**Sec. 3 When the NSA-WORKSMALREP Contract may be used.**

This contract may be used for awards to firms performing specialized work such as repairs to and adjustment of compasses, direction finders, radios, refrigerators, etc., as well as minor voyage repairs of a general nature and fees of the American Bureau of Shipping. The use of this contract is limited to awards not to exceed a total aggregate cost of $2,000.

**Sec. 4 Persons authorized to make awards under the NSA-WORKSMALREP Contract.**

Authority is hereby delegated to the Atlantic, Gulf and Pacific Coast Directors, Chiefs of Local and District Ship Repair and Maintenance Offices and the General Agents to make awards under this form of contract, provided the aggregate cost of the work does not exceed $2,000, and is within their expenditure limitations.

**Sec. 5 Responsibility for duplicating copies of NSA-WORKSMALREP Contract.**

It will be the responsibility of the several Coast Directors, Local and District Ship Repair and Maintenance Offices and the General Agents to duplicate copies of the work order form and general provisions to suit their respective needs.

# PART 340—PRIORITY USE AND ALLOCATION OF SHIPPING SERVICES, CONTAINERS AND CHASSIS, AND PORT FACILITIES AND SERVICES FOR NATIONAL SECURITY AND NATIONAL DEFENSE RELATED OPERATIONS

Sec.
340.1 Scope.
340.2 Definitions.
340.3 General provisions.
340.4 Shipping services.
340.5 Containers and chassis.
340.6 Port facilities and services.
340.7 Application to contractors and subcontractors.
340.8 Priorities for materials and production.
340.9 Compliance.

AUTHORITY: Defense Production Act of 1950, as amended (50 U.S.C. App. 2061 *et seq.*;) Executive Order 10480, as amended (18 FR 4939); Executive Order 12656 (53 FR 47491); 44 CFR Part 322; 49 CFR 1.45; Department of Transportation Orders 1100.60, as amended: 1900.8 and 1900.7D.

SOURCE: 58 FR 29352, May 20, 1993, unless otherwise noted.

## § 340.1 Scope.

This part establishes procedures for assigning priority for use by defense agencies, on commercial terms, of commercial shipping services, containers and chassis, and port facilities and services and for allocating vessels employed in commercial shipping services, containers and chassis, and port facilities and services for exclusive use by defense agencies (as defined in 340.2), at any time where appropriate under provision of title I of the Defense Production Act of 1950 (50 U.S.C. App. 2061 *et seq.*) as determined by the Secretary of Transportation. The procedures will provide the means to require vessel and port operators to provide defense agencies with existing commercial services and facilities not obtainable through established transportation procurement procedures. Thus the procedures will minimize interference with commercial operations and ensure rapid response to defense needs in times of crisis or war.

## § 340.2 Definitions.

As used in this regulation:

(a) *Administrator* means the Maritime Administrator, Department of Transportation, who is, ex officio, the Director, National Shipping Authority, within the Maritime Administration (MARAD). Pursuant to 49 CFR 1.45(a)(5), the Maritime Administrator is authorized to carry out emergency preparedness functions assigned to the Secretary by Executive Order 12656 (53 FR 47490, November 18, 1988).

(b) *Container* means any type of container for intermodal surface movement that is 20 feet in length or longer, 8 feet wide, and of any height, including specialized containers, with International Standards Organization standard fittings.

(c) *Container service* means the intermodal movement, which includes an ocean movement leg, of goods in containers.

(d) *Container service operator* means a vessel operator (defined in §340.2(v)) that provides containerized ocean shipping service.

(e) *Container supplier* means a U.S.-citizen controlled (pursuant to 46 App. U.S.C. 802) company which manufactures containers, is a container service operator, or is in the business of leasing containers.

(f) *Chassis* means a vehicle built specifically for the purpose of transporting a container so that when the chassis and container are assembled the unit produced serves the same function as a road trailer.

(g) *Chassis supplier* means a U.S.-citizen controlled (pursuant to 46 App. U.S.C. 802) company which is a container service operator or is in the business of leasing chassis.

(h) *Defense agency* means the Department of Defense, or any other department or agency of the Federal Government as determined by the Secretary of Transportation, for the purposes of this regulation.

(i) *FEMA* means the Federal Emergency Management Agency.

(j) *NAO* means the NSA Allocation Order, which is an order allocating the exclusive use of a vessel employed in commercial shipping service, a container, a chassis, or a port facility for the purposes of providing its services to a defense agency for a specified period.

(k) *NSA* means the National Shipping Authority, which is the emergency shipping operations activity of the Department of Transportation (MARAD).

(l) *NSPO* means an NSA Service Priority Order, which is an order directing that priority of service be given to the movement of cargoes of a defense agency.

(m) *Planning order* means a notification of tentative arrangements to meet anticipated defense agency requirements, issued by NAO or NSPO format, for planning purposes only.

(n) *Port authority* means any state, municipal, or private agency, or firm that (1) owns port facilities (2) manages such facilities for common-user commercial shipping services under lease from an owner; (3) owns or operates a proprietary port facility or terminal; and (4) otherwise leases or licenses and manages a port facility.

(o) *Port facilities and services* means (1) all port facilities, for coastwise, intercoastal, inland waterways, and Great Lakes shipping and overseas shipping, including, but not limited to wharves, piers, sheds, warehouses, terminals, yards, docks, control towers, container equipment, maintenance buildings, container freight stations and port equipment, including harbor craft, cranes and straddle carriers; and (2) port services normally used in accomplishing the transfer or interchange of cargo and passengers between vessels and other modes of transportation, or in connection therewith.

(p) *Secretary* means the Secretary of Transportation or his or her designees to whom emergency authorities under the Defense Production Act of 1950 have been delegated, i.e., the Director of Office of Emergency Transportation or the Departmental Crisis Coordinator.

(q) *Secretarial Review* means the process by which the Secretary or his or her designee(s) exercises review, coordination, and control over departmental emergency preparedness programs and/or matters.

(r) *Shipper* means a civilian or Government agency that owns (or is responsible to the owner for) goods transported in waterborne service.

(s) *Shipping service* means a commercial service which provides for the

movement of passengers or cargo by one or more modes of transportation and includes a waterborne movement leg in the overseas, coastwise, intercoastal, inland waterways, or Great Lakes shipping trades.

(t) *Vessel* means a vessel employed in commercial service for waterborne movement of passengers or cargo in the overseas, coastwise, intercoastal, inland waterways or Great Lakes shipping trades, or any portion of the cargo-carrying capacity of such vessel.

(u) *Vessel operator* means a company owning and/or operating, to and from any U.S. port, an ocean-going overseas, coastwise, intercoastal, inland waterways or Great Lakes vessel that is U.S.-flag, or foreign-flag and U.S.-citizen controlled (pursuant to 46 App. U.S.C. 802), or foreign-flag and non-citizen controlled that is made available to the United States (as described in § 340.3(j)).

**§ 340.3 General provisions.**

(a) The provisions of this rule apply pursuant to authority granted to the President by title I, Defense Production Act of 1950, as amended (50 U.S.C. App. 2061 *et seq.*) that authority having been delegated to the Secretary of Transportation, with respect to civil transportation services, by § 322.3(b) of title 44, Code of Federal Regulations. In order to give priority to performance under contracts deemed necessary or appropriate to promote the national defense and to allocate materials and facilities in such manner, upon such conditions and to such extent as necessary or appropriate to promote the national defense, the following procedures shall be applicable:

(1) In connection with deployment of the Armed Forces of the United States, or other requirements of the nation's defense, a defense agency (as defined in § 340.2(h) of this part) may request priority use or allocation of vessels employed in commercial shipping services, containers, chassis, or port facilities and services.

(2) The Secretary may authorize initiation of priority and allocation authority in accordance with administrative and statutory authorities.

(3) The Administrator, on approval by the Secretary to initiate the use of priority and allocation authority under this regulation and in conformance with national program priorities, may direct owners and/or operators of vessels, containers, chassis, or port facilities to give priority usage to the defense agency or may allocate vessels, containers, chassis, or facilities for the defense agency's use during specified periods.

(b) A defense agency may transmit requests for assignment of priority for use or for allocation of vessels, containers, chassis, and port facilities and services to the Secretary by letter, memorandum, or electrical message.

(c) Justification for requested priorities or allocations may include references to military operations plans. When classified, justifications may be provided separately by correspondence or staff coordination. NSPOs and NAOs will not include classified information.

(d) The Administrator shall determine, before issuing an NSPO or NAO, that the action is necessary to meet the requirements of the national defense (as determined by the defense agency) and conforms to Secretarial guidance for coordinating the Department's crisis response, and that the proposed approach is the most effective way to do so. The Administrator, in conjunction with the defense agency, shall coordinate with vessel operators, container suppliers, chassis suppliers, port authorities and the Coast Guard to identify vessels, equipment and facilities to meet requirements covered by NSPOs and NAOs. The Administrator shall ensure that arrangements to provide defense support under NSPOs and NAOs satisfy the defense agency's requirements with minimum disruption to commercial activities.

(e) When resources are required for movement of hazardous or other special cargo, the Administrator shall ensure that the Commandant of the Coast Guard and the Captain of the Port and other concerned hazardous materials officials of the U.S. Department of Transportation, as required, are notified and that the views of all concerned agencies and interests are obtained and reflected in actions taken pursuant to this regulation. Any action taken pursuant to this regulation shall conform with existing regulations for the safe

transportation of hazardous materials and or cargoes, subject to Department of Transportation exemptions.

(f) The Secretary shall notify FEMA of the intention to issue any directive granting priority for use or allocation of vessels, containers, chassis, or port facilities and services, and shall provide information copies of NSPOs and NAOs as required to the defense agency concerned, FEMA, the Interstate Commerce Commission and the Coast Guard.

(g) Defense agencies which foresee difficulty in meeting their needs for vessels employed in commercial shipping services, containers, chassis, or port facilities and services shall coordinate with MARAD, the Coast Guard, vessel operators, container suppliers, chassis suppliers, and port authorities concerned before the need arises. The Administrator, after Secretarial review, may issue planning orders for information and guidance of affected agencies confirming tentative arrangements to meet the defense agencies' needs. No action will be taken to give effect to those arrangements until NSPOs and NAOs are issued at the time the services, equipment, or facilities are required.

(h) Defense agencies shall pay for services covered by NSPOs and NAOs on the basis of commercial tariffs, or on the basis of contracts concluded between the operator interests and the defense agencies concerned, or on the basis of existing contracts where both parties so agree.

(i) Defense agencies shall be responsible for payment of costs arising from:

(1) Shifting ships to unoccupied berths for defense use;

(2) Discharging commercial cargo to free ships for defense use; and

(3) Such other costs as may be agreed between the defense agency and the provider of service.

(j) The provisions of this regulation shall apply to foreign vessels, containers, and chassis only when and to the extent that such vessels, containers, and chassis are available to the United States because of control by U.S. citizens (46 App. U.S.C. 802) or by provision of international agreements for use of shipping services and related resources for the common defense.

(k) Recipients of NSPOs and NAOs shall notify the Administrator, without undue delay, when they cannot comply or are experiencing difficulty in complying with the provisions of the Orders.

### § 340.4 Shipping services.

(a) When a defense agency requires shipping services not obtainable through established transportation procurement practices, the following procedures shall apply:

(1) Except during periods of Presidentially-declared national defense emergencies, when requests shall be transmitted to the Administrator, the agency shall transmit a request to the Secretary specifying:

(i) The type of service required;

(ii) The route over which priority of service is required;

(iii) The period during which priority of service is required; and

(iv) Justification for priority use of the requested service.

(2) The Administrator, pursuant to the circumstances specified in § 340.4(a)(l), shall identify vessel operators that can provide the necessary service and issue NSPOs in coordination with the Secretary to those operators directing that priority be given to the movement and delivery of the defense agency's cargo and/or passengers by the type of service specified in the NSPO during the specified period.

(3) Each vessel operator in receipt of an NSPO shall:

(i) Give precedence to the cargoes of the defense agency in provision of equipment, loading, ocean transport and delivery; and

(ii) Coordinate with other operators in receipt of NSPOs applicable to the same priority movement program to ensure movement of the defense agency's cargoes on first available sailings.

(b) When a defense agency has need for vessels employed in commercial service on a continuing basis for national defense operations for a specified period or for the duration of a defense emergency which they cannot obtain through established transportation procurement practices, the following procedures shall apply:

(1) The agency shall transmit to the Secretary, with a copy to the Administrator, a request specifying the kinds of services required, the arrangements under which the agency proposes that the services be acquired, managed and compensated, and justification for allocation of the required vessels.

(2) The Administrator, upon receiving guidance from the Secretary, shall identify vessel operators that can supply the requested services and issue NAOs to operators directing that specified vessels be made available for use of the defense agency for specified periods. As far as practicable, the economic impact will be balanced among operators.

(3) Each vessel operator in receipt of an NAO shall provide vessels in coordination with the defense agency as specified in the NAO.

**§ 340.5 Containers and chassis.**

(a) When a defense agency requires priority use of containers and/or chassis not obtainable through established transportation procurement practices, the following procedures shall apply:

(1) Except during periods of Presidentially-declared national defense emergencies, when requests shall be transmitted to the Administrator, the agency shall transmit a request to the Secretary specifying:

(i) The route over which or the area in which priority use of containers and/or chassis is required;

(ii) The period during which priority use is required;

(iii) the approximate time-phased movement requirement in containers and/or chassis of specified sizes and types or in 20-foot equivalent units (TEU); and

(iv) Justification for priority use of containers and/or chassis.

(2) The Administrator pursuant to the circumstances in § 340.5(a)(l) shall):

(i) Identify container service operators capable of meeting the requirement; and

(ii) Issue NSPOs or NAOs in coordination with the Secretary to those container service operators, directing that priority be given to supply of containers and/or chassis against the defense requirement.

(3) Each container service operator in receipt of an NSPO shall:

(i) Coordinate with the defense agency on schedules for spotting empty containers and/or chassis and for movement of containerized cargoes; and

(ii) Supply containers and/or chassis to the defense agency in accordance with the defense agency's scheduling needs or supply the first available containers and/or chassis if those needs cannot be met.

(b) When a defense agency requires the allocation of containers and/or chassis on a continuing basis for national defense operations, the following procedures shall apply:

(1) They agency shall transmit to the Secretary, with a copy to the Administrator, request specifying:

(i) The number of containers and/or chassis required by type;

(ii) The general terms and conditions under which the agency proposes to acquire the needed containers and/or chassis and compensate the owners or operators;

(iii) The expected duration of the lease, if the containers and/or chassis are to be leased;

(iv) The locations at which the agency will take possession of the containers and/or chassis and the required delivery schedule; and

(v) Justification for allocation of containers and/or chassis.

(2) The Administrator in coordination with the Secretary shall identify container and chassis suppliers that can supply the required containers and/or chassis, and shall provide, so far as practicable, for balancing the defense agency's requirement against other requirements for containers and/or chassis so as to minimize disruption of inventory distribution, and shall issue NAOs to suppliers, directing the allocation of specified numbers of containers and/or chassis by type for exclusive use of the defense agency for a specified period.

(3) Each container and chassis supplier in receipt of an NAO shall deliver the containers and/or chassis specified in the NAO to the defense agency at the places and times specified in the NAO or separately agreed upon with the defense agency, under terms and

conditions agreed upon with the defense agency.

### § 340.6 Port facilities and services.

(a) When a defense agency requires priority use of port facilities and services not obtainable through established transportation procurement practices, the following procedures shall apply:

(1) Except during periods of Presidentially-declared national defense emergencies, when requests shall be transmitted to the Administrator, the agency shall transmit a request to the Secretary specifying:

(i) The ports at which priority use of port facilities and services are required and the kinds of facilities and services required at each port;

(ii) The approximate scale and duration of the operation for which priority support is required; and

(iii) Justification for priority use of port facilities and services.

(2) The Administrator in coordination with the Secretary shall issue NSPOs to the port authorities concerned, directing that priority be given to the receipt, in transit handling, and outloading of the defense agency's cargo during a specified period and specifying the facilities and services required.

(3) Each port authority in receipt of an NSPO shall:

(i) Make such dispositions of commercial cargoes and ships loading or discharging commercial cargoes as may be necessary to accommodate priority movement of the defense agency's cargoes; and

(ii) Ensure receipt, in transit handling and outloading of the defense agency's cargoes as rapidly as possible.

(b) When a defense agency requires the allocation of port facilities for exclusive use of the agency on a continuing basis, the following procedures shall apply:

(1) The agency shall transmit a request to the Secretary, with a copy to the Administrator specifying:

(i) The ports at which the allocation of facilities is required and the kinds of facilities needed at each port;

(ii) The general terms and conditions under which the agency proposes to acquire the needed facilities and compensate the owners or leaseholders;

(iii) The periods during which the facilities will be required; and

(iv) Justification for allocation of facilities.

(2) The Administrator in coordination with the Secretary shall identify facilities that meet the defense agency's needs, and shall issue to each concerned port authority and NAO directing the allocation of specified facilities for exclusive use of the defense agency during a specified period.

(3) Each port authority in receipt of an NAO shall make the specified facilities available to the defense agency for the specified period under terms and conditions agreed upon with the defense agency.

### § 340.7 Application to contractors and subcontractors.

(a) Vessel operators, port authorities and container and chassis suppliers requiring priorities for production services in order to comply with NSPOs and NAOs must submit their priority requirements for such services to the Maritime Administrator for action in accordance with Departmental policies governing supporting resource support.

(b) Vessel operators, port authorities and container and chassis suppliers requiring priorities for fuel in order to comply with NSPOs and NAOs must submit their priority requirements for fuel in accordance with Departmental policies governing supporting resources.

### § 340.8 Priorities for materials and production.

(a) Vessel operators, port authorities and container and chassis suppliers may request priority ratings to obtain production materials and services necessary to comply with orders issued under this regulation. Requests for priority rating authority must be made through and sponsored by the Maritime Administrator, in accordance with the Defense Priorities and Allocation System (15 CFR part 330 *et seq.* (49 FR 30412, July 30, 1984)) and Departmental policies governing supporting resources support.

(b) Vessel operators, port authorities and container and chassis suppliers may request priority ratings to obtain fuels necessary to comply with orders

issued under this regulation. Requests for priority ratings will be made in accordance with regulations issued by the Department.

**§ 340.9 Compliance.**

Pursuant to section 103 of the Defense Production Act, 1950 (50 U.S.C. App. 2073), any person who willfully performs any act prohibited, or willfully fails to perform any act required, by the provisions of this regulation shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

# SUBCHAPTER I-B—CONTROL AND UTILIZATION OF PORTS

## PART 345—RESTRICTIONS UPON THE TRANSFER OR CHANGE IN USE OR IN TERMS GOVERNING UTILIZATION OF PORT FACILITIES


Sec.
1. Definitions.
2. Effective date.
3. Federal control of port facilities.
4. Port facilities predesignated for emergency use.
5. Restrictions on the transfer or change in use or in terms governing utilization of port facilities.
6. Application for approval; place of filing; investigation; disposition by Federal Port Controller; request for review; disposition by the NSA.
7. Exemptions.
8. Applicability.
9. Communications.


AUTHORITY: The Defense Production Act of 1950, as amended (50 App. U.S.C. 2061, *et seq.;*) E.O. 12656, sec. 1401(7) (53 FR 47491, 3 CFR 1988 Comp.); E.O. 12919, section 201(a), June 3, 1994, 59 FR 29525; 49 CFR 1.45(5).

SOURCE: 44 FR 9381, Feb. 13, 1979, unless otherwise noted. Redesignated at 45 FR 44587, July 1, 1980.

### Section 1 Definitions.

As used in this part or any other part of this chapter XIX the term:

(a) *National Shipping Authority (NSA),* means the emergency shipping operations activity of the Maritime Administration established by the Secretary of Transportation, when specifically activated during an emergency affecting national security in accordance with existing statutory authority.

(b) *Person* means any individual, partnership, corporation, association, joint stock company, business trust, or other organized group of persons, or any trustee, receiver, assignee, or personal representative, and includes any department, agency, or corporation of the United States, any State, or any political, governmental, or legal entity.

(c) *Federal Port Controller* means a person designated as such in accordance with part 1902 of this chapter XIX, under a standard form of service agreement to exercise delegated authorities of the Director, NSA, in the control of operations of a designated port or group of ports upon deployment of the Armed Forces of the United States, or other requirements of the nation's defense.

(d) *Port* or *port area* includes any zone contiguous to or a part of the traffic network of an ocean or Great Lakes port, or outport location, including beach loading sites, within which facilities exist for transshipment of persons and property between domestic carriers and carriers engaged in coastal, intercoastal and overseas transportation.

(e) *Port facility* means a specific location in a port where passengers or commodities are transferred between land and water carriers or between two water carriers, specifically including: wharves, piers, sheds, warehouses, yards, and docks.

(f) *Port equipment* means mechanical and other devices used for loading and unloading passengers and commodities, including fork lifts, towmotors, jitneys, straddle carriers, floating cranes, etc.

(g) *Transfer* means to sell, lease, trade, lend, give, relinquish title or possession to, or to physically transfer in any other way.

[44 FR 9381, Feb. 13, 1979. Redesignated at 45 FR 44587, July 1, 1980, and amended at 60 FR 38736, July 28, 1995]

### Sec. 2 Effective date.

The provisions of this part are effective during the existence of a state of war or national emergency proclaimed by the President of the United States in accordance with existing statutory authority or by concurrent resolution of the Congress.

[44 FR 9381, Feb. 13, 1979. Redesignated at 45 FR 44587, July 1, 1980, and amended at 46 FR 36709, July 15, 1981]

### Sec. 3 Federal control of port facilities.

During any period when the provisions of this part are in effect the NSA shall exercise such control of ports in the United States and its territories or possessions as may be necessary to

meet the requirements of the national security. Control shall be consistent with the orders of the Coast Guard Captain of the Port relating to the safety and security of the port.

**Sec. 4 Port facilities predesignated for emergency use.**

(a) Certain port facilities selected for standby contracts or agreements for use by Government agencies shall be controlled directly by the NSA.

(b) Facilities which are not required by the United States immediately on the effective date of this part will be released. The Director, NSA shall have the discretion to approve contracts for subsequent exclusive use by the United States of port facilities in lieu of formal requisitioning of such properties.

**Sec. 5 Restrictions on the transfer or change in use or in terms governing utilization of port facilities.**

Except as otherwise provided in this part, and irrespective of the terms of any contract or other commitment, whether or not the facility has been designated for emergency use in accordance with section 3 of this part:

(a) No person shall transfer, and no person shall accept transfer of any port facility unless such transfer has been approved by the NSA.

(b) No person shall use any port facility for any purpose or use other than that for which it was being used on the day preceding the effective date of this part, unless such change in purpose or use has been approved by the NSA.

(c) No person shall change or alter the terms or conditions under which any port facility was being operated or used on the day preceding the effective date of this part, unless such change has been approved by the NSA: *Provided,* That this restriction shall not relate to the filing of tariffs with the Federal Maritime Commission as required by applicable law.

**Sec. 6 Application for approval; place of filing; investigation; disposition by Federal Port Controller; request for review; disposition by the NSA.**

(a) Application for approval of a transfer of, or change in use of, or change in terms governing utilization of any port facility shall be in writing, and shall contain the following information:

(1) Name, address, and principal place of business of applicant;

(2) Specific description and location of port facility involved;

(3) Name, address, and principal place of business of owner and/or operator of such port facility;

(4) Present use of such port facility;

(5) Proposed use of such port facility; and

(6) A statement of the reasons why such transfer, change in use, or change in terms, is in the interests of the war effort, national defense, or the maintenance of the essential civilian economy.

(b) The application shall be signed by the applicant or by any lawfully authorized agent or representative of the applicant who is familiar with the facts stated therein.

(c) The application and two clear copies thereof shall be filed in the office of the Federal Port Controller of the port in which the port facility is located, when a Federal Port Controller has been designated for the port. For all other ports, the application and copies shall be filed in the office of the Maritime Administration Region Director for the area where the port is located.

(d) The Federal Port Controller or Region Director may require the applicant to submit reasonable proof of statements made in support of the application, and may make such investigation as may be necessary for proper disposition of the application. The Federal Port Controller or Region Director shall not be required to make any disposition of the application unless and until such reasonable proof has been submitted: *Provided,* That the disposition of any such application by the Federal Port Controller or Region Director shall not be delayed for more than 60 days from the date of the filing thereof for the purpose of completing any such investigation.

(e) The Federal Port Controller, or Maritime Administration's Region Director or Area Officer may approve the application in whole or in part when the action covered by the application to the extent approved, is in the interests of the war effort, national defense,

or the maintenance of the essential civilian economy.

(f) Any applicant aggrieved by the action of the Federal Port Controller or Region Director in disapproving in whole or in part his application may request, in writing, that such action be reviewed by the Director, NSA. The written request shall contain a statement of reasons why the decision of the Federal Port Controller should be reversed or modified. The Director, NSA, or a designee, will review the application on the record made before the Federal Port Controller and will dispose of the application on its merits in accordance with the standards set forth above.

### Sec. 7 Exemptions.

The provisions of this part shall not apply to any port facility owned by, or organic to, any agency or department of the United States as of the effective date of this order.

### Sec. 8 Applicability.

This part shall apply to the States of the United States, Puerto Rico, and the Virgin Islands.

### Sec. 9 Communications.

Communications concerning this part should refer to 32A CFR part 1901 and should be addressed to the Maritime Administrator, Department of Transportation, Department of Transportation, Washington, DC 20590.

## PART 346—FEDERAL PORT CONTROLLERS

Sec.
1. Purpose.
2. Definitions.
3. Standby agreements.
4. Service agreements.

AUTHORITY: The Defense Production Act of 1950, as amended (50 App. U.S.C. 2061, *et seq.*;) E.O.12656, sec. 1401(7) (53 FR 47491, 3 CFR 1988 Comp.); E.O. 12919, section 201(a), June 3, 1994, 59 FR 29525; 49 CFR 1.45(5).

### Section 1 Purpose.

This part prescribes the standard form of the service agreement to be entered into by the United States of America, acting by and through the Director, National Shipping Authority (NSA) of the Maritime Administration, U.S. Department of Transportation, with State or municipal port authorities or, private corporations, covering the appointment of individuals within their organizations as Federal Port Controllers, and providing the required supporting staff and resources.

[44 FR 9382, Feb. 13, 1979. Redesignated at 45 FR 44587, July 1, 1980]

### Sec. 2 Definitions.

(a) *Federal control of use of port facilities and services* means the exercise of jurisdiction over the use of port facilities, as defined in section 340.2(o) of 46 CFR Part 340, equipment and services (other than port facilities, equipment and services owned by, or organic to any agency or department of the United States) in time of emergency to meet the needs of the national defense and maintain the essential civilian economy.

(b) *Federal Port Controller* means a person designated as such under a standard form of service agreement to exercise delegated authorities of the Director, NSA, in the use of port facilities of a designated port or group of ports in connection with the deployment of the Armed Forces of the United States, or other requirements of the nation's defense.

[44 FR 9382, Feb. 13, 1979. Redesignated at 45 FR 44587, July 1, 1980, and amended at 46 FR 36709, July 15, 1981; 60 FR 38736, July 28, 1995]

### Sec. 3 Standby agreements.

The Director, NSA, may negotiate the standard form of service agreement, specified in section 4, with port authorities on a standby basis, prior to the deployment of the Armed Forces of the United States, or other requirements of the nation's defense. In such cases, the contractor accepts the obligation to maintain a qualified incumbent in the position specified in Article 1 of the service agreement and to be prepared to furnish the resources specified in Articles 4 and 5. An agreement executed on a standby basis may become operational in connection with the deployment of the Armed Forces of the United States, or other requirements of the nation's defense. An

agreement executed after the deployment of the Armed Forces of the United States, or other requirements of the nation's defense may be operational upon execution.

[60 FR 38737, July 28, 1995]

## Sec. 4 Service agreements.

Contract MA _____

SERVICE AGREEMENT, FEDERAL PORT CONTROLLER

This agreement, made as of _____, 19___, between the United States of America (herein called the "United States"), acting by and through the Director, National Shipping Authority of the Maritime Administration, Department of Transportation, and _____, a _____, organized and existing under the laws of _____ (herein called the "Contractor").

WITNESSETH

It is this day mutually agreed between the parties as follows:

Article 1. *Appointment of Federal Port Controller.* The United States appoints the incumbent of the position of _____, an employee of the Contractor, as Federal Port Controller, to serve as the agent of the United States and not as an independent contractor, to exercise delegated authority of the Director, NSA, in the control of port operations in time of national emergency.

Art. 2. *Acceptance of appointment.* (a) The contractor agrees to the appointment and undertakes and promises to maintain a qualified incumbent in the position specified in articles 4 and 5 and otherwise required by the Federal Port Controller and agreed to by the United States. Maintaining the equivalent of such specified positions under any subsequent reorganization of port staff is deemed to be in compliance with this article.

(b) The contractor undertakes and promises to ensure that the Federal Port Controller and agreed supporting staff will be relieved of other staff duties and responsibilities during any period in which the arrangements provided for in this agreement are in effect, to the extent necessary to enable them to exercise diligently the authority delegated by the Director, NSA, in accordance with such directions, orders, or regulations not inconsistent with this agreement as the United States (NSA) has by that time prescribed or may from time to time subsequently prescribe to the satisfaction of the director, NSA.

Art. 3. *Scope of Control.* The Federal Port Controller shall exercise the authorities delegated with respect to port operations in the prescribed area of _____.

Art. 4. *Responsibilities and functions of the Federal Port Controller—(a) Responsibilities.* The Federal Port Controller, acting as an agent of the United States (NSA), is charged with exercising due diligence to protect the interests of the United States in support of any deployment of the Armed Forces of the United States, or other requirements of the nation's defense including maintenance of the essential civilian economy and be responsible for insuring the efficient and effective utilization of the port in accordance with such directions, orders, regulations, supervision, and inspections as the United States (NSA) may prescribe (or in the absence of such directions, orders, forms, and methods of supervision and inspection, in accordance with customary commercial practice). Responsibilities generally include:

(1) Formulation of port coordination and support policy and assurance of adherence thereto:

(2) Expediting of ship turnaround and prevention of congestion of ships and cargo in port;

(3) Correlation of arrangements for rapid clearance and rapid transit of commodities through the port;

(4) Correlation of arrangements for berthing ships and their loading and discharging;

(5) Provision through port control agency channels, of advice on daily port capacities and workload; and

(6) Disposition of frustrated cargo to prevent reduction of port capacity.

(b) *Functions.* Subject to the direction and control of the NSA, in accordance with such policies, programs, allocations, and priorities as may be adopted or established, the Federal Port Controller will:

(1) Furnish the NSA necessary information based upon the local situation and conditions, for establishment by the NSA, of periodic maximum quotas of cargo ocean lift for the port. As appropriate such information shall include but not be limited to estimates of port capacity; the port work load; and availability of berths, vessels, cargoes, labor, and equipment.

(2) Recommend changes of destination of ships or cargo to appropriate representatives of the NSA.

(3) Coordinate port operations to accommodate ships diverted in emergencies by naval authorities.

(4) Coordinate through the Federal agency responsible for land transportation, movement of traffic to and from port areas and, as necessary, exercise controls in coordination with said agency, over the movement of traffic into, within, and out of port areas in accordance with requirements and available port capacity for transshipment.

(5) Administer priorities for the movement of traffic through port areas.

(6) Provide guidance for the coordination of port terminal and forwarding operations; exercise control over the utilization of port facilities, port equipment, and port services, public and private, except those owned by, or organic to any agency or department of the United States and promote maximum efficiency.

(7) Coordinate and make recommendations with respect to the development of port facilities and rehabilitation of substandard port facilities; recommend restoration or replacement of damaged or destroyed port facilities and direct, coordinate and control the activities of Federal, State, local and private agencies in carrying out such restoration or replacement work as may be authorized by proper authority.

(8) Furnish the NSA with pertinent information and data with respect to local port operations in order to assist the NSA in performing its responsibilities at the national level.

(9) Handle "claimant" requests and problems arising at the local level within authorities delegated by the NSA.

(10) As directed, furnish current information to the Federal agency responsible for land transportation in order that it may approve and issue block releases for port bound traffic to the Department of Defense with respect to military traffic and to the NSA with respect to all other oceangoing traffic, in accordance with firm cargo ocean lift schedules for the port. Shipper agencies may provide individual permits to shippers and depots for specific movements to the port areas. Advise the Federal agency responsible for land transportation where circumstances warrant institution of control by the latter agency over traffic-bound inland from the port area in order to minimize congestion in the port.

Art. 5. *Federal Port Controller staff.* The contractor shall provide, in support of the Federal Port Controller, the staff personnel necessary to coordinate actions to overcome any constraints on the effective and efficient conduct of port operations as well as clerical staff to meet the administrative requirements of the Federal Port Controller. The numbers of staff will be determined and agreed to from time to time by the United States (NSA) and the contractor and entered in schedule A attached to this service agreement.

Art. 6. *Office Facilities.* The contractor shall provide or arrange for necessary office facilities for the Federal Port Controller activity, including office space, furniture, communications equipment, supplies, utilities, transportation, and other normal administrative support and support services, as necessary and agreed to from time to time by the United States (NSA) and the contractor and recorded in schedule B attached to this service agreement.

Art. 7. *Compensation.* (a) At least once a month, the United States (NSA) shall pay to the contractor compensation for the Federal Port Controller's services, the costs of his organization, and the costs of office facilities, administrative support services, as follows:

(1) Compensation for services of the Federal Port Controller and his staff shall be in accordance with salary levels plus monetary items directly related thereto (employee service expenses) in force at the time this agreement comes into force: *Provided,* That subsequent cost of living increases authorized under labor agreements and in accordance with Federal or State regulations will apply: *And provided,* That part-time services will be compensated for on a prorated basis. Any adjustments in compensation after the contract comes into force will be negotiated, if appropriate. Employee service expenses will include the employer contributions for social security and pensions, as well as life/health and workmen's compensation insurance.

(2) Compensation for support other than salaries and related expenses (see art. 6) shall be in accordance with published schedules of charges of the contractor; and if schedules of charges have not been published by the contractor, in such fair and reasonable amount as the United States shall from time to time determine and publish in addendums to this service agreement: *Provided,* That, when facilities and support services are shared by the Federal Port Controller and other agencies and activities compensation shall be prorated on a schedule acceptable to the United States and the contractor.

(b) The contractor shall also be entitled to payment or credit for any service, loss, cost, or expense, whether or not specifically provided for or excepted herein, if, and to the extent that such payment or credit is determined within the sole discretion of the Director, NSA, to be fair and equitable and in accordance with the basic principles or intent of this agreement.

Art. 8. *Warranty against contingent fees.* The contractor warrants that it has not employed any person to solicit or secure this agreement upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the United States the right to annul this agreement or in its discretion to deduct from any amount payable hereunder the amount of such commission, percentage, brokerage, or contingent fee.

Art. 9. *Equal opportunity.* During the performance of this agreement, the contractor agrees that the contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, age or national origin. The contractor will take affirmative action to insure that

all action related to employment is taken without regard to race, color, religion, sex, age, or national origin. Such action shall include, but not be limited to, employment, promotion, layoff or termination, direct or indirect compensation and selection for training, except where such provisions are governed by State civil service commissions or comparable government agencies. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the NSA setting forth the provisions of this nondiscrimination clause.

Art. 10. *Officials not to benefit.* No persons elected or appointed as members of or delegates to Congress, themselves or by any other persons in trust for them, or for their use or account shall hold or enjoy this agreement in whole or in part, except as provided in Section 433, Title 18, United States Code. The operator shall not employ any member of Congress, either with or without compensation as an attorney, agent, officer, or director.

Art. 11. *Right of Comptroller General to Examine Books and Records.* The Comptroller General of the United States or any of his duly authorized representatives shall have access to and the right to examine any pertinent books, documents, papers, and records of the contractor related to this agreement.

Art. 12. *Effective Date, Implementation, Duration and Termination. (a)* This agreement is effective as of the day and year set forth above.

(b)(1) if entered into on a standby basis, this agreement shall be operational as of the day and year when the United States notifies the contractor that the services specified in this agreement are required during a deployment of the Armed Forces of the United States, or other requirements of the nation's defense, *Provided* that during the standby period, the contractor will carry out the obligation specified in paragraph (a) of Article 2. No compensation will accrue to the contractor during the standby period.

(2) if entered into during a deployment of the Armed Forces of the United States, or other requirements of the nation's defense, this agreement shall be operational when executed.

(c) Unless sooner terminated, the agreement shall extend until 6 months after termination of the emergency.

(d) This agreement may be terminated upon thirty (30) days' written notice by either party to the other party hereto: *Provided, however,* That, notwithstanding any such termination, the contractor shall, at the option of the United States, continue to be responsible for the completion of any work which the contractor is performing on the effective date of termination. Termination or expiration of this agreement shall neither affect nor relieve any liability or obligation that may have accrued prior thereto.

(e) This agreement may be amended, modified or supplemented in writing at any time by mutual consent of the parties hereto. This agreement may not be amended, modified or supplemented otherwise than in writing.

Art. 13. *Renegotiation.* This contract shall be deemed to contain all the provisions required by section 104 of the Renegotiation Act of 1951.

Art. 14. *Headnotes.* The use of headnotes at the beginning of the articles of this agreement is for the purpose of description only and shall not be construed as limiting or in any other manner affecting the substance of the articles themselves.

In witness whereof, the parties hereto have executed this agreement in triplicate as of this _____ day of _____, 19____.

UNITED STATES OF AMERICA, DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION

(Seal)
Attest:

Secretary _____
*Director, National Shipping Authority* _____
(Corporate Seal)
Attest:
Secretary _____

By: _____

Approved as to Form:
General Counsel _____, Maritime Administration.

PART 1902. FEDERAL PORT CONTROLLER

Schedule A
Agreed positions.
Schedule B
Agreed office facilities, furniture and support resources.

[44 FR 9382, Feb. 13, 1979. Redesignated at 45 FR 44587, July 1, 1980, and amended at 46 FR 36710, July 15, 1981; 60 FR 38737, July 28, 1995]

# PART 347—OPERATING CONTRACT

Sec.
1. Purpose.
2. Stand-by agreements.
3. Terminal operating contract.

AUTHORITY: The Defense Production Act of 1950, as amended (50 App. U.S.C. 2061, *et seq.*); E.O. 12656, sec. 1401(7) (53 FR 47491, 3 CFR 1988 Comp.); E.O. 12919, section 201(a), June 3, 1994, 59 FR 29525; 49 CFR 1.45(5).

SOURCE: 44 FR 9384, Feb. 13, 1979, unless otherwise noted. Redesignated at 45 FR 44587, July 1, 1980.

## Sec. 1 Purpose.

This part prescribes the standard form of marine terminal contract to be entered into by the United States of America, acting by and through the Director, National Shipping Authority (NSA) of the Maritime Administration, U.S. Department of Transportation, with State or municipal authorities or private terminal operators for the provision of terminal operating services during civil defense emergencies or national emergencies declared by the President of the United States in accordance with existing statutory authority or by concurrent resolution of the Congress.

## Sec. 2 Stand-by agreements.

The Director NSA, Maritime Administration, in advance of an emergency, may negotiate the standard form of terminal operating contract specified in Section 3, with terminal operators on a stand-by basis. Stand-by arrangements establish the framework of rapid initiation of government shipping operations at the outset of an emergency.

At port facilities, (as defined in section 1(e) of 32A CFR part 1901) under the control of the Maritime Administration and allocated for long term exclusive use by the Department of Defense (DOD), provisions will ordinarily be made for the use of contractors under DOD contracts to move DOD cargo through selected ports, to perform such services as pre-stowing, receipt, intransit storage and loading of cargo under DOD procedures for the Defense Transportation System. When it becomes necessary to move DOD cargo through marine terminals under the control of the Maritime Administration, but not allocated for long term exclusive use by DOD, contractors will be required to perform such services as DOD requires for handling cargo and documenting shipments under the Defense Transportation System, with corresponding contractual obligations.

## Sec. 3 Terminal operating contract.

Contract MA _____

TERMINAL OPERATING CONTRACT

This agreement, made as of _____, 19___, between the United States of America (herein called the "United States"), acting by and through the Director, National Shipping Authority (NSA) of the Maritime Administration, Department of Transportation, and _____, a _____ organized and existing under the laws of _____ (herein called the "operator").

WITNESSETH

That in consideration of the covenants and agreements of the parties hereinafter contained and set forth, the parties here to do mutually covenant and agree as follows: Part. 1.

Article 1. *Relationship of parties.* (a) The United States engages the operator as an independent contractor to do and perform or arrange for the performance of all the customary duties and functions of a terminal operator, subject to the terms, covenants and conditions of this agreement and to such rules, regulations and orders as may be issued by the United States from time to time, with respect to such cargo and vessels as the United States may from time to time direct or designate, and at the following terminals: _____, more specifically described in Schedule A hereto attached and made a part hereof by reference, and at such other terminals as the United States may from time to time designate, which the operator may use under temporary assignment in order to expedite the loading and discharging of vessels under jurisdiction of the NSA.

(b) The operator hereby accepts such engagement and agrees to do and perform all the work required by it to be performed under this agreement in an economical and efficient manner and in accordance with the best operating practices, to exercise due diligence to protect and safeguard the interests of the United States in all respects and seek to avoid any delay, loss or damage whatsoever to United States shipping. The operator represents and warrants that it is the _____ of the herein before specified terminals.

Art. 2. *Compensation.* (a) As full and complete compensation for the work done and performed by the operator, the United States agrees to pay to the operator, as soon as practicable after the completion of each calendar month's work under the provisions of this agreement the following:

(1) For terminal services, an amount calculated on the basis of rates and charges contained in tariffs on file with the Federal Maritime Commission during the time this agreement is in effect: *Provided, however,* That the operator will be compensated, as a minimum, the amount per month set forth for each terminal in schedule A attached: *And provided further,* That, when the operator, with the approval of the Director, NSA, utilizes the terminal for cargo not controlled by the Director, NSA (that is, for commercial cargo), the compensation received by the operator for handling such cargo shall

apply against the minimum compensation; and

(2) For stevedoring services provided or arranged for by the operator and any related contractual services not specified in the terminal tariff such as handling lines or additional lashing or carpentry required for proper stowage or discharge activities, reimbursement for all direct costs of labor as well as those directly related or allocable to the provision of such labor and employee service expenses and costs of materials and equipment, an allowance of 15 percent for GAE is authorized except for those items which are ordinarily provided by the contractor and the basis for charges for which already includes GAE.

(3) An additional amount in payment or credit for any service, loss, cost of expense, whether or not specifically provided for or excepted herein; if, and to the extent that, such payment or credit is found by the Director, NSA, or his designated agent, in his sole discretion, to be fair and equitable and in accordance with the basic principles or intent of this agreement.

(b) Monies due and owing to the operator shall be paid to it only upon the submission of vouchers properly and duly supported and certified. All such vouchers under this agreement shall refer to the date and number of this agreement.

(c) In the event a voucher submitted for payment for the work, or any portion thereof, is not properly supported or certified, the United States may nevertheless make partial payment thereof or payments on account of such voucher as has been properly supported or certified. Such partial payment or payments on account shall not be deemed or held to be a waiver of the right of the United States to revise or adjust such partial payment or payments on account upon the basis of any data or information later received or submitted by the operator.

(d) No payment will be made for handling ship stores or providing services properly billed under vessel contracts or agency agreements related to vessel operations and repairs.

Art. 3. *Effective Date, Implementation, Duration and Termination*

(a) This agreement is effective as of the day and year set forth above.

(b)(1) if entered into on a standby basis, this agreement shall be operational as of the day and year when the United States notifies the contractor that the services specified in this agreement are required during a period of war or national emergency: *Provided*, That during the standby period, the contractor will carry out the obligation specified in paragraph (a) of Article 2. No compensation will accrue to the contractor during the standby period.

(2) if entered into during a period of war or national emergency, this agreement shall be operational when executed.

(c) Unless sooner terminated, this agreement shall extend until 6 months after the termination of the emergency.

(d) This agreement may be terminated upon thirty (30) days' written notice by either party to the other party hereto: *Provided, however,* That, notwithstanding any such termination, the operator shall, at the option of the United States, continue to be responsible for the completion of any work which the operator is performing on the effective date of termination. Termination or expiration of this agreement shall neither affect nor relieve any party of any liability or obligation that may have accrued prior thereto.

(e) This agreement may be amended, modified or supplemented in writing at any time by mutual consent of the parties hereto. This agreement may not be amended, modified or supplemented otherwise than in writing.

Art. 4. *Contract documents.* This agreement consists of part I, part II, and schedule A (the latter being hereto attached and made a part hereof by reference) and such other schedules or writing as may be made by the parties in accordance with the provisions of this agreement. Each and every one of the provisions of said part II, schedules and writings are part of this agreement as though hereinbefore set out at length.

In witness whereof, the parties hereto have duly executed this agreement in triplicate as of the day and year first above written.

(Seal)
Attest:

UNITED STATES OF AMERICA, DEPARTMENT OF TRANSPORTATION, MARITIME ADMINISTRATION

Secretary _____, Maritime Administration.

By: _____
Director, National Shipping Authority _____

(Corporate Seal)
Attest:

Secretary _____
Approved as to Form:

By: _____

General Counsel _____, Maritime Administration.

TERMINAL OPERATING CONTRACT

PART II.

Article 1. *Definitions,* (a) *Cargo* as used in this agreement means all general freight and commodities in bulk (including those damaged or solidified), merchandise, material, mail, baggage, express, ship's and subsistence stores, explosives, petroleum products, petroleum and other similar liquid cargo.

(b) *Terminal Work* as used in this agreement means the operation of the terminals specified in schedule A, as terminals and not for any other purpose, including the handling, receiving, delivering, assembling, checking, sorting, storing, coopering, protecting, and shifting of cargo at the said terminals; stowing and snugging cargo in the space on the terminal; issuing and receiving proper receipts for cargo; loading and discharging boxcars, lighters, scows, barges, carfloats, containers, trailers, and chasis; handling vessel's lines on docking and undocking; doing maintenance, and repair in accordance with the terms of this agreement; any and all other services, operations and functions usually or customarily done or performed by a terminal operator; and any and all other duties, services, operations or functions required by the terms of this agreement to be done or performed by the operator.

(c) *Port Terminal Facilities* as used in this agreement means piers, wharves, warehouses, covered and/or open storage space, cold storage plants, grain elevators and/or bulk loading and/or unloading structures, landings and receiving stations, used for the transmission, care and convenience of cargo and/or passengers in the interchange of same between land and water carriers or between two water carriers.

Art. 2. *Duties of the operator.* The operator shall:

(a) If lessee or licensee of the terminals, perform, comply with and abide by all applicable terms, covenants and conditions of the lease or license under which it occupies and uses said terminals;

(b) Make available and operate for the requirements of the United States (which requirements include all cargo and vessels designated by the NSA, whether or not owned by the United States all terminals hereinabove described;

(c) Perform the terminal work as defined and furnish all labor of every nature and description and furnish and use all gear and mechanical devices or other equipment necessary for the most efficient performance;

(d) When requested to do so by the NSA or when incident to its terminal operations, perform or arrange for the shifting of lighters, barges, scows, rail cars and/or carfloats and load and discharge the same;

(e) Insure that the terminals are maintained and kept in proper condition and all berths suitably dredged;

(f) Supply all telephone service, clerical work, light, heat, power, fuel, water and other supplies and services connected with or incidental to the work, within the limits imposed by national resource allocation and priorities systems in effect at the time.

(g) Insure that sub-contractors engaged are experienced and competent to perform adequately in their respective functional field, e.g., handling lines; directing tug operations for docking vessels; planning and conducting cargo stowage with ship or quayside gear and fully complying with all documentation requirements and safety, health and sanitation regulations.

Art. 3. *General labor and other provisions.* (a) The operator shall comply with the Social Security Act, the unemployment insurance laws of any State in which work is done, and the provisions of applicable collective bargaining agreements.

(b) The operator recognizes the relation of trust and confidence established between it and the United States by this agreement, and agrees to furnish its best skill and judgment in planning, supervising and performing the work, to make every effort to complete the work in the shortest time practicable, and to cooperate fully with the United States in furthering the interests of the United States. The operator agrees to furnish efficient business administration and superintendence in performing the work.

(c) Upon the execution of this agreement the operator shall immediately furnish to the Regional Office, NSA, written schedules of the wages and contractual working conditions, (including overtime, pay, insurance benefits and other compensation and employment benefits) payable by the operator in performing the work, and whenever requested from time to time thereafter, the operator shall furnish similar written schedules to the Regional Office, NSA, covering the then existing conditions. The operator shall notify the NSA concerning any proposed or actual change, modifications or alteration in such schedules as soon as knowledge thereof is available to the operator.

(d) The operator shall, if required by the NSA, employ identification cards with individual photograph affixed, or other methods of identification, as issued by the United States Coast Guard or other responsible Government authorities.

(e) Overtime work under this agreement shall be incurred or performed by the operator only when required. However, the operator whenever requested by the NSA, shall work overtime.

Art. 4. *Notice of labor disputes.* Whenever any actual potential labor dispute is delaying or threatens to delay the timely and efficient performance of the work, the operator will immediately give written notice thereof to the NSA.

Art. 5. *Liability of the operator.* (a) While performing the work, the operator shall, except as provided in paragraph 6(c) of part II hereof, be responsible for any and all loss, damage or injury, including death to persons, cargo, vessels, their stores, apparel or equipment, wharves, docks, piers, lighters, elevators, cars, carfloats or other property or thing, arising through the negligence or

fault of the operator, its employees or terminals: *Provided,* That, to the extent not covered by insurance, the operator shall not be responsible to the NSA, for any loss, damage or injury resulting from the negligence or wrongful acts of the NSA; or from acts of the operator and its employees performed only because specifically so directed by the NSA; or from defects or other gear supplied by the United States.

(b) The operator shall be under no liability to the United States in the event that the operator should fail to perform any work hereunder by reason of any labor shortage, dispute or difficulty, or any strike or lockout or any shortage of material or any act of God or peril of the sea or any other cause beyond the control of the operator, whether or not of the same or similar nature; or shall do or fail to do any act in reliance upon instructions of military or naval authorities.

Art. 6. *Insurance requirements and indemnification.* (a) The operator shall procure, and maintain during the term of this agreement, pay for one or more policies of insurance insuring it as follows, as the basis for calculating compensation payable under paragraph 5(a) above:

(1) Coverage of all piers, wharves, buildings, structures, facilities and equipment, as owner or in accordance with terms of lease.

(2) Standard workman's compensation insurance and employer's liability insurance, including longshoremen and harbor worker's compensation insurance, or such of these as may be proper under applicable State or Federal statutes. Such insurance shall, unless otherwise required by applicable State or Federal statutes, be subject to $50,000/100,000 limits and shall be full coverage with occupational disease endorsement. The operator may, however, be a self-insurer against the risks in this subparagraph, if it has obtained the prior approval of the Director, NSA, such approval to be given upon the submission of satisfactory evidence that the operator has duly qualified as a self-insurer under applicable provisions of law.

(3) Public liability insurance with limits of at least $1,000,000 for the death or bodily injuries to one person and at least $5,000,000 for the death or bodily injuries to more than one person in any one accident or occurrence.

(4) Property damage liability insurance covering damage to or loss of property resulting from the negligence of the operator with a limit of $1,000,000 for each occurrence.

(b) All liability insurance obtained by the operator as provided in paragraph (a)(3) of this section above shall name the United States as additional insured or provided for a waiver or subrogation.

(c) The operator's work is incident to war activities of the United States and will involve risks and hazards far in excess of those normally incident to peacetime commercial operations. To induce the operator to undertake the performance of the work for the compensation herein provided, and thus obtain for the United States the resulting benefit of such reduced compensation, the United States undertakes to and does indemnify the operator and hold it harmless against any loss or damage to the terminals (whether owned, leased or occupied under license) and against expense (including expense of litigation), liability to and claims of third persons because of loss, damage or injury to persons, cargo, vessels, their stores, apparel or equipment, wharves, piers, docks, lighters, barges, scows, elevators, rail cars, carfloats, or other property or thing, arising through the negligence or fault of the operator, its employees, gear or equipment, or otherwise, all subject, however, to the following conditions and limitations:

(1) The undertaking of the United States shall be applicable only and limited to:

(a) For public liability the amount such loss, expense, or liability arising from any single catastrophe, accident or occurrence exceeds the sum of $1,000,000 each person and $5,000,000 per accident or the sum of insurance approved or required to be carried in excess of these limits, whichever sum is greater and

(b) For property damage liability the amount such loss, expense or liability arising from any single catastrophe, accident or occurrence exceeds the sum of $1,000,000 per accident or the sum of insurance approved or required to be carried in excess of these limits whichever sum is greater.

(2) The undertaking of the United States shall not be applicable and the United States shall have no obligation or liability in respect of such undertaking or otherwise, in situations in which such loss, expense or liability is due in whole or in part to willful and deliberate disregard of instructions of the Administrator or the personal failure to exercise good faith or insofar as the character of the work permits under wartime operations that degree of care normally exercised under like conditions in the performance of the operator's peacetime commercial operations, by the elected corporate officers of the operator or by the representative of the operator having supervision and direction of all operations at any terminal where the operator may perform services hereunder.

(3) As soon as practicable after occurrence of any event from which the obligation of the United States to hold the operator harmless against loss, expense and liability might arise, written notice of such event shall be given by the operator to the United States, which notice shall contain full particulars of the event. If claim is made or suit is brought thereafter against the operator as a result or because of such event, the operator shall immediately deliver to the United States every demand, notice, summons or other process

received by it or its representatives, and the United States shall provide appropriate attachment or appeal bonds or undertakings where required in the course of such litigation.

(4) The operator shall cooperate with the United States and, upon the request of the United States, shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct (including defense) of suits; and the United States shall reimburse the operator for reasonable out-of-pocket expenses, other than loss of earnings, incurred in so doing. The operator shall not voluntarily, except at its own cost, make any payment, assume any obligation or incur any expense, other than for such immediate medical and surgical relief to others as shall be imperative at the time of said occurrence of such event.

(5) This undertaking of the United States to hold the operator harmless against loss, expense and liability as herein provided, shall not create or give rise to any right, privilege or power in any person or organization, except the operator, nor shall any person or organization be or become entitled to join the United States as a co-defendent in any action against the operator brought to determine the operator's liability or for any other purpose; *Provided, however,* That as to any risk borne or assumed by the United States through the undertaking set above, the United States shall be and hereby is subrogated by the operator to any claim, demand or cause of action against third persons or organizations which exists or may arise in favor of the operator, and the operator shall, if so required, forthwith execute a formal assignment or transfer of such claim, demand or cause of action.

(6) This undertaking of the United States shall not apply against any loss or expense resulting from enemy attack upon the United States.

Art. 7. *Covenant against assignment or sublease of terminals.* The operator shall not assign or sublet the terminals or any portion thereof nor grant any license with respect thereto, except in the ordinary course of terminal operations and subject to the approval of the NSA.

Art. 8. *Custom of the port.* No rule or custom of the port in conflict with any provision or term of this agreement will be binding upon the United States, unless the operator is legally obligated to comply with the same pursuant to the laws of the United States or laws of any State thereof or pursuant to the terms, provisions, covenants and conditions of any lease covering the terminals and entered into between the operator and its lessor or licensor thereof.

Art. 9. *Extra work.* The United States will neither compensate nor make any payments to the operator for any extra work in connection with the operation of terminals which it may render in addition to the work specifically required by this agreement, except as provided in paragraph 3(e) of part II hereof.

Art. 10. *Status of employees.* All employees of the operator or of any other person or organization employed in performance of the work shall at all times be the employees of the operator or of such other person or organization, as the case may be, and are not employees of the United States.

Art. 11. *Delegation of authority.* Wherever and whenever any right, power or authority herein is granted or given to the United States, such right, power or authority may be exercised by the NSA or such agent or agents as the United States may appoint, and the act or acts of such agent or agents when taken shall constitute the act of the United States hereunder. In performing the work, the operator may rely upon the instructions and directions of the Director, NSA, his officers and responsible employees, or any person or agency authorized by him. Whenever practicable, instructions and directions to the operator shall be in writing and oral instructions or directions given shall be confirmed promptly in writing. No Director's orders or regulations shall have retroactive effect without the written consent of the General Counsel, Maritime Administration.

Art. 12. *Warranty against contingent fees.* The operator warrants that it has not employed any person to solicit or secure this agreement upon any agreement for a commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the United States the right to annul this agreement or in its discretion to deduct from any amount payable hereunder the amount of such commission, percentage, brokerage, or contingent fee.

Art. 13. *Equal opportunity.* During the performance of this agreement, the operator agrees as follows:

(a) The operator will not discriminate against any employee or applicant for employment because of race, color, religion, sex, age or national origin. The contractor will take affirmative action to insure that all action related to employment is taken without regard to race, color, religion, sex, age or national origin. Such action shall include, but not be limited to, employment, promotion, layoff or termination, direct or indirect compensation and selection for training, except where such provisions are governed by State civil service commissions or comparable government agencies. The contractor agrees to post in conspicuous places, available to employees and applicants, notices to be provided by the NSA setting forth the provisions of this nondiscrimination clause.

(b) The operator will, in all solicitations or advertisements for employees placed by or

on behalf of the operator, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, age, or national origin.

(c) The operator will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the NSA, advising the labor union or worker's representative of the operator's commitments under section 202 of Executive Order No. 11246 of September 24, 1965, as amended, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The operator will comply with all provisions of Executive Order No. 11246, as amended, and by the rules, regulations and orders of the Secretary of Labor.

(e) The operator will furnish all information and reports required by Executive Order No. 11246, as amended, and by the rules, regulations and orders of the Secretary of Labor, or pursuant thereto, and will permit access to its books, records, and accounts by the NSA and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders.

(f) In the event of the operator's noncompliance with the nondiscrimination clauses of this agreement or with any of such rules, regulations or orders, this agreement may be cancelled, terminated or suspended in whole or in part, and the operator may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246, as amended, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246, as amended, or by rule, regulation or order of the Secretary of Labor, or as otherwise provided by law.

(g) The operator will include the provisions of this paragraph in every subcontract or purchase order unless exempted by rules, regulations or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order No. 11246, as amended, so that such provisions will be binding upon each subcontractor or vendor. The operator will take such action with respect to any subcontract or purchase order as the NSA may direct as a means of enforcing such provisions, including sanctions for noncompliance: *Provided, however,* That in the event the operator becomes involved in or is threatened with litigation with a subcontractor or vendor as a result of such direction by the NSA, the operator may request the United States to enter into such litigation to protect the interests of the United States.

Art. 14. *Officials not to benefit.* No persons elected or appointed as members of or delegates to Congress, themselves or by any other persons in trust for them, or for their use or account shall hold or enjoy this agreement in whole or in part, except as provided in Section 433, Title 18, United States Code. The operator shall not employ any member of Congress, either with or without compensation, as an attorney, agent, officer or director.

Art. 15. *Right of Controller General to examine books and records.* The Controller General of the United States or any of his duly authorized representatives shall have access to and the right to examine any pertinent books, documents, papers and records of the operator or any of its subcontractors engaged in the performance of the work under this agreement.

Art. 16. *Renegotiation.* This agreement shall be deemed to contain all the provisions required by section 104 of the Renegotiation Act of 1951. The operator shall, in compliance with said section 104, insert the provisions of this paragraph in each subcontract and purchase order made or issued in carrying out this agreement.

Art. 17. *Headnotes.* The use of headnotes at the beginning of the articles of this agreement is for the purpose of description only and shall not be construed as limiting or in any other manner affecting the substance of the articles themselves.

SCHEDULE A—TERMINAL OPERATING CONTRACT

Description of Terminal(s) and the agreed minimum dollars per month for each.

[44 FR 9384, Feb. 13, 1979. Redesignated at 45 FR 44587, July 1, 1980, and amended at 46 FR 36710, July 15, 1981]

# PART 349—REEMPLOYMENT RIGHTS OF CERTAIN MERCHANT SEAMEN

Sec.
349.1 Purpose.
349.2 Application for certification.
349.3 Certification criteria.
349.4 Decision on application.
349.5 Reemployment rights and benefits.
349.6 Enforcement.

AUTHORITY: Secs. 204(b), 302, Merchant Marine Act, 1936, as amended (46 App. U.S.C. 1114(b), 1132); 38 U.S.C. 4301 *et seq.;* 49 CFR 1.66

SOURCE: 62 FR 5159, Feb. 4, 1997, unless otherwise noted.

## §349.1 Purpose.

This part prescribes regulations implementing section 302, Merchant Marine Act, 1936 (Act), as amended (46 App. U.S.C. 1132), added by section 10 of Pub. L. 104–239, the Maritime Security Act of 1996. These regulations provide the procedures by which the Maritime

Administration (MARAD), under authority delegated by the Secretary of Transportation to the Maritime Administrator, certifies, upon application, that certain merchant seamen are entitled to reemployment rights and other benefits after completion of their service on vessels used by the United States for a war, armed conflict, national emergency or maritime mobilization need. It also describes the form of administrative assistance MARAD will provide to the seamen certified.

### § 349.2 Application for certification.

Pursuant to 46 App. U.S.C. 1132, an individual may submit an application to MARAD not later than 45 days after the date the individual completes the period of employment described in § 349.3 of this part.

### § 349.3 Certification criteria.

The Administrator shall apply the following criteria for certifying that an individual merchant seaman is entitled to reemployment rights and other benefits substantially equivalent to the rights and benefits provided by chapter 43 of title 38, United States Code, for any member of a Reserve Component of the Armed Forces of the United States who is ordered to active duty. It shall be the responsibility of each applicant for certification to submit relevant documentation to MARAD, Office of Maritime Labor, Training, and Safety, MAR–250, 400 Seventh St., S.W., Room 7302, Washington, D.C. 20590, establishing that—

(a) *Employment as merchant seaman.* The applicant was employed after October 8, 1996, in the activation or operation of a vessel—

(1) in the National Defense Reserve Fleet maintained by MARAD under authority of section 11 of the Merchant Ship Sales Act of 1946 (50 U.S.C. App. 1744) in a period in which that vessel was in use or being activated for use under 50 U.S.C. App. 1744(b);

(2) that is requisitioned under section 902 of the Act (46 App. U.S.C. 1242); or

(3) that is owned, chartered, or controlled by the United States and used by the United States for a war, armed conflict, national emergency, or maritime mobilization need (including for training purposes or testing for readiness and suitability for mission performance).

(b) *Seaman credentials.* During the period of employment described in paragraph (a) of this section, the seaman possessed a valid license, certificate of registry, or merchant mariner's document issued under chapter 73 (as applicable) of title 46, United States Code, as required by 46 App. U.S.C. 1132(c).

(c) *Additional information.* If applicable, periods of hospitalization, convalescence, illness, injury, shipwreck or detention beyond the mariner's control were incurred in, or aggravated during, the performance of employment described in § 349.3(a).

### § 349.4 Decision on application.

MARAD will issue or deny certification (accompanied by an explanation in writing) to each applicant not later than 20 days after receipt of an application for certification.

### § 349.5 Reemployment rights and benefits.

(a) *General.* An individual who is absent from a position of employment, in the private or public (federal, state or local government) sector, because of temporary employment of any duration described in § 349.3(a), shall be entitled to reemployment rights and benefits upon completion of the temporary employment as a merchant seaman.

(b) *Superior claims.* Pursuant to 38 U.S.C. 4312(g), the right of a person to reemployment shall not entitle such person to retention preference or displacement rights over any person with a superior claim under the provisions of title 5, United States Code, relating to veterans and other preference eligibles.

(c) *Notification of employer.* Any person who is absent from a position of employment by reason of service as described in § 349.3(a) shall be entitled to reemployment rights and benefits provided in § 349.3(e) if—

(1) The person has given advance written or verbal notice of such service to such person's employer, unless giving notice is precluded by military necessity, under regulations prescribed by the Secretary of Defense, or, under

all relevant circumstances, is impossible or unreasonable, pursuant to the provisions of 38 U.S.C. 4312(b); and

(2) The person submits an application for reemployment with the employer not later than 14 days after completion of a period of service of less than 181 days, or not later than 90 days after the completion of a period of service greater than 180 days, or if submitting such application within such period is impossible or unreasonable through no fault of the person, the next first full calendar day when submission of such application becomes possible.

(d) *Waiver of notice requirements.* A person who has not given notice, or who fails to report or apply for employment or re-employment within the appropriate period specified in paragraph (c) of this section shall not automatically forfeit such person's entitlement to the rights and benefits referred to in §349.5(e), but shall be subject to the rules of conduct, established by policy, and the general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work. MARAD will make a determination on the issue of whether notice of service was required in acting on the application for certification.

(e) *Exception to reemployment rights.* An employer is not required to reemploy an individual if the employer satisfies the burden of proving that, pursuant to 38 U.S.C. 4312(d)—

(1) The employer's circumstances have so changed as to make such reemployment impossible or unreasonable, or such reemployment, if required, would impose an undue hardship on the employer, as defined in 38 U.S.C. 4303(15); or

(2) The employment which the individual left for employment as a merchant seaman was for a brief, nonrecurrent period and there was not at the time of leaving such employment any reasonable expectation that such employment would continue indefinitely or for a significant period.

(f) *Reemployment benefits.* An individual certified by MARAD to be entitled to reemployment shall also be entitled to other "benefits of employment" (other than wages or salary for work performed), as defined in 38 U.S.C. 4303(2), that would have accrued to that individual by reason of an employment contract or agreement or an employer policy, plan or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment and benefits, vacations and the opportunity to select work hours or location of employment.

(g) *Reemployment position.* (1) An individual certified by MARAD as being entitled to reemployment shall be promptly reemployed by the former employer, according to the order of priority specified in 38 U.S.C. 4313(a), after submitting an application for reemployment. The three categories of priority, in ascending order, are for a merchant seaman who:

(i) Served for 90 days or less;

(ii) Served for more than 90 days; or

(iii) Has a disability incurred in, or aggravated during, the performance of such merchant service.

(2) For a person with such service related disability, the employer shall make "reasonable efforts", as defined in 38 U.S.C. 4303(10), "to accommodate the disability" to allow that person to be employed in the position that would have been occupied had the employment with the employer been continuous, or in the position in which employed on the date service began as a merchant seaman, and if that person is "not qualified" for either position, in a substantially equivalent position, as specified in 38 U.S.C. 4313 (a)(3) and (a)(4).

### §349.6 Enforcement.

MARAD shall provide administrative assistance to any individual certified to be entitled to reemployment rights and benefits pursuant to chapter 43 of title 38, United States Code, made applicable by 46 App. U.S.C. 1132(a) and these regulations, who alleges in writing to MARAD the failure, refusal, or imminent failure or refusal of an employer to grant such rights or other benefits. The complaint must be sent to MARAD at the address in §349.3. Such complaint may be in any format and shall include the name and address

of the employer against whom the complaint is filed and a summary of the allegations that form the basis for the complaint. MARAD will review, investigate and attempt to resolve the complaint by taking one or more of the following actions:

(a) *Consultation with claimant.* MARAD will communicate with the individual filing the complaint, in writing and/or by telephone or other means, to provide assistance in pursuing reemployment rights and benefits with the employer.

(b) *Employer contact.* MARAD may contact the employer and attempt to resolve the complaint to the mutual satisfaction of the complainant and the employer.

(c) *Consultation with Department of Labor.* If attempts by MARAD to resolve the complaint are unsuccessful, MARAD may seek advice on the matter from the U.S. Department of Labor.

(d) *Referral to Attorney General or Merit Systems Protection Board.* MARAD will notify the complainant of an unsuccessful effort to resolve a complaint. Pursuant to 38 U.S.C. 4323 and 4324, if the complainant so requests, MARAD will refer to the Attorney General a complaint relating to a private or State employer, or to the Merit Systems Protection Board, for litigation, a complaint relating to a Federal executive agency employer.

# SUBCHAPTER J—MISCELLANEOUS

## PART 350—SEAMEN'S SERVICE AWARDS

Sec.
350.1 Purpose.
350.2 Special medals and awards.
350.3 Other original recognition of service.
350.4 Eligibility for awards.
350.5 Replacement decorations.
350.6 Unauthorized sale, manufacture, possession or display.
350.7 Special certificate of recognition.

AUTHORITY: 46 App. U.S.C. 2001, *et seq.;* 49 CFR 1.66.

SOURCE: 60 FR 49804, Sept. 27, 1995, unless otherwise noted.

### § 350.1 Purpose.

The purpose of this part is to prescribe regulations to implement the Merchant Marine Decorations and Medals Act of 1988, 46 App. USC 2001, *et seq.*, to authorize the issue of decorations, medals, and other recognition for service in the U.S. merchant marine, and for other purposes, and to provide for the replacement of awards previously issued for service in the United States Merchant Marine under prior law.

### § 350.2 Special medals and awards.

The Secretary of Transportation, acting through the Maritime Administrator, may award decorations and medals of appropriate design for individual acts or service in the U.S. Merchant Marine.

(a) *Medals, awards.* The Secretary may award the Distinguished Service Medal, Meritorious Service Medal and Gallant Ship Unit Citation Award, as prescribed under sections 3 and 4 of Pub. L. 100–324.

(b) *Nominations.* Nominations for these awards shall be reviewed and submitted by the MARAD Merchant Marine Awards Committee to the Maritime Administrator for approval.

(c) *Inquiries.* Direct all inquiries concerning eligibility and procedures for the issuance of these medals to Chairperson, Merchant Marine Awards Committee, Office of Maritime Labor, Training and Safety, Maritime Administration, U.S. Department of Transportation, Washington, DC 20590.

### § 350.3 Other original recognition of service.

Under the provision of Pub. L. 100–324, the Administrator has the authority to review original applications for the following decorations:

(a) *World War II Service.* (1) *Merchant Marine Emblem,* awarded to merchant seamen for service during World War II from the period December 7, 1941 to July 25, 1947;

(2) *Victory Medal,* awarded to merchant seamen who served as members of the crews of ships for 30 days or more during the period December 7, 1941 to September 3, 1945;

(3) *Honorable Service Button,* awarded to merchant seamen who served as members of the crews of ships for 30 days or more during the period December 7, 1941 to September 3, 1945;

(4) *Mariner's Medal,* awarded to merchant seamen who, while serving on a ship from December 7, 1941 to July 25, 1947, were wounded or suffered physical injury as a result of an act of an enemy of the United States;

(5) *Merchant Marine Combat Bar,* awarded to merchant seamen who served on a ship which, at the time of such service, was attacked or damaged by an instrumentality of war, from December 7, 1941 to July 25, 1947. A star is attached if the seaman was forced to abandon ship. For each additional abandonment, a star is added;

(6) *Merchant Marine Defense Bar and Medal,* awarded to merchant seamen who served on merchant vessels between September 8, 1939 to December 7, 1941;

(7) *Atlantic War Zone Bar and Medal,* awarded to merchant seamen who served in the Atlantic War Zone, including the North Atlantic, South Atlantic, Gulf of Mexico, Caribbean, Barents Sea, and the Greenland Sea, between December 7, 1941 and November 8, 1945;

(8) *Mediterranean-Middle East War Zone Bar and Medal,* awarded to merchant seamen who served in the zone including the Mediterranean Sea, Red Sea, Arabian Sea, and Indian Ocean

west of 80 degrees east longitude, between December 7, 1941 and November 8, 1945;

(9) *Pacific War Zone Bar and Medal,* awarded to merchant seamen who served in the Pacific War Zone, including the North Pacific, South Pacific, and the Indian Ocean east of 80 degrees east longitude, during the period December 7, 1941 to March 2, 1946;

(10) *Presidential Testimonial Letter,* signed by President Harry S Truman, to all active merchant seamen who sailed during World War II;

(11) *Philippine Defense Ribbon,* awarded to merchant seamen who served as members of crews of ships in Philippine waters, for not less than 30 days, from December 8, 1941 to June 15, 1942;

(12) *Philippine Liberation Ribbon,* awarded to merchant seamen who served as members of crews of ships in Philippine Waters for not less than 30 days from October 17, 1944 to September 3, 1945;

(b) *Korean Conflict Service.* Korean Service bar and medal for merchant seamen who served in waters adjacent to Korea during the Korean Conflict, between June 30, 1950 and September 30, 1953.

(c) *Service in the Vietnam Conflict.* Vietnam Service bar and medal awarded to merchant seamen who served in waters adjacent to Vietnam between July 4, 1965 and August 15, 1973.

(d) *Operations DESERT SHIELD AND DESERT STORM.* The Merchant Marine Expeditionary Award, authorized on May 22, 1991, to those American merchant seamen who directly participated from August 2, 1990 to December 31, 1991 in the war zone designated by Executive Order 12744 as "the Persian Gulf, Red Sea, Gulf of Oman, Gulf of Aden, and that portion of the Arabian Sea that lies north of 10 degrees north latitude and west of 68 degrees east longitude."

### § 350.4 Eligibility for awards.

(a) *World War II awards.* Submission of the original applications for World War II merchant marine service awards to the Maritime Administration shall include:

(1) A copy of seaman's DD Form 214, "Certificate of Release or Discharge from Active Duty" with continuation sheet, if provided. The DD Form 214 is required to verify merchant marine service on vessels during World War II. The application and instructions for applying for this document may be obtained from the Maritime Administration, Office of Maritime Labor, Training and Safety. If a seaman was not eligible for this discharge, the Maritime Administration will accept official documents, including ships' discharges;

(2) A summary of World War II sailing history to include—theater(s) of operation and ports of discharge; and

(3) Book number or United States Maritime Service (USMS) number and World War II home address.

(b) *Korean and Vietnam Awards.* Applicants for the Korean Service bar and medal, Vietnam Service bar and medal and the Merchant Marine Expeditionary Award shall provide copies of the ship(s) discharge(s) for the appropriate voyages. All awardees will be given an appropriate certification card or certificate for their awards.

(c) The information establishing eligibility, along with a written request, shall be directed to Office of Maritime Labor, Training & Safety, Maritime Administration, Washington, DC 20590, Attention: Merchant Marine Awards.

(d) MARAD has entered into agreements with vendors to supply the medals and decorations to eligible mariners at cost. After reviewing applications, MARAD will instruct eligible mariners to submit their orders for the medals and decorations to the following vendors.

OWNCO Marketing, 1705 SW. Taylor Street, Portland, OR 97205, (503) 226–3841

PIECES OF HISTORY, P.O. Box 4470, Cave Creek, AZ 85331, (602) 488–1377, (602) 488–1316 (FAX)

THE QUARTERMASTER UNIFORM COMPANY, P.O. Box 829, 750 Long Beach Blvd., Long Beach, CA 90801–0829, 800–444–8643 Toll Free 7:00 AM—7:00 PM

SHIP'S SERVICE STORE, United States Merchant Marine Academy, Kings Point, NY 11024, (516) 773–5000 ext. 5229

VANGUARD MILITARY EQUIPMENT CORP., 41–45 39th Street, Sunnyside, NY 11104, Toll Free 1–800–221–1264

VANGUARD INDUSTRIES WEST, 6155 Conte Del Cedro, Carlsbad, CA 92009, Toll Free 1–800–433–1334

PAST GLORY COMPANY, P.O. Box 4470, Alexandria, VA 22302, (703) 491–7544

(e) Compliance with the procedure set forth in paragraph (a) of this section is required when purchasing a replacement. Certification cards need not be presented to the authorized vendors in order to purchase the bars. The possession or display, including the wearing of any Merchant Marine decoration by other than authorized personnel is prohibited by law and subject to fine and imprisonment.

### § 350.5 Replacement decorations.

The following decorations that have been previously issued may be replaced at cost upon written request made to the Office of Maritime Labor, Training and Safety:

(a) Distinguished Service Medal.

(b) Meritorious Service Medal.

(c) Mariner's Medal.

(d) Gallant Ship Unit Citation Bar.

(e) Presidential Testimonial Letter (no cost for replacement).

### § 350.6 Unauthorized sale, manufacture, possession or display.

The sale, manufacture, possession or display of any Merchant Marine decoration, or colorable imitations thereof, by anyone other than an authorized vendor is prohibited by law and subject to fine and imprisonment.

### § 350.7 Special certificate of recognition.

The Maritime Administration is authorized to issue a special certificate of recognition of service to an individual, or the personal representative of an individual, whose service in the U.S. Merchant Marine has been determined to be active duty under an earlier Act of Congress (Pub. L. 95–202). The issuance of this certificate to any individual does not entitle that individual to any rights, privileges or benefits under any law of the United States.

## PART 351—DEPOSITORIES

Sec.
351.1 Purpose.
351.2 Qualification of depository.

AUTHORITY: Sec. 204, 49 Stat. 1987, as amended; 46 U.S.C. 1114.

### § 351.1 Purpose.

The purpose of this part is to set forth the criteria necessary for depositories of funds under all programs authorized by the Merchant Marine Act, 1936, as amended (46 U.S.C. 1101 et seq.) (Act).

[38 FR 8061, Mar. 28, 1973]

### § 351.2 Qualification of depository.

(a) *General qualification.* Any depository which is a member of the Federal Deposit Insurance Corporation will be approved for deposit of funds under the maritime programs authorized by the Act. With respect to the Capital Construction Fund program, any depository which is a member of the Securities Investor Protection Corporation, and is organized as a corporation under the laws of the United States, any State, territory, or possession thereof or the District of Columbia, will also be approved for the deposit of funds.

(b) *Limitation on amount of deposits.* No person making deposits under the programs authorized by the Act shall make or maintain deposits which exceed 5 percent of the depository's total deposits.

[38 FR 8061, Mar. 28, 1973, as amended at 63 FR 55039, Oct. 14, 1998]

## PART 355—REQUIREMENTS FOR ESTABLISHING UNITED STATES CITIZENSHIP

Sec.
355.1 General.
355.2 Requirements regarding evidence of U.S. citizenship; affidavit guide.
355.3 Criteria to be applied in support of stock data in affidavit.
355.4 Changes in citizenship data.
355.5 Additional material.

AUTHORITY: Secs. 2, 204, 39 Stat. 729, as amended, 49 Stat. 1987, as amended, 73 Stat. 597; 46 U.S.C. 802, 803, 1114, 11.

SOURCE: General Order 89, Rev., 35 FR 11558, July 18, 1970, unless otherwise noted.

### § 355.1 General.

(a) Under section 2, Shipping Act, 1916, as amended and section 905(c), Merchant Marine Act, 1936, as amended, no corporation is deemed to be a citizen of the United States unless:

(1) It is organized under the laws of the United States or of a State, Territory, District, or possession thereof;

(2) Its chief executive officer, by whatever title, and the chairman of its board of directors are citizens of the United States, and no more of its directors than a minority of the number necessary to constitute a quorum are non-citizens (except that in the case of corporations under title VI, Merchant Marine Act, 1936, as amended, all directors must be citizens of the United States) and

(3) The controlling interest therein is owned by citizens of the United States or, in the case of a corporation operating any vessel in the coastwise trade, on the Great Lakes, or inland lakes of the United States, 75 per centum of the interest in such corporation is owned by citizens of the United States.

(b) As used in this part, the term "primary corporation" includes, but not exclusively, an applicant, for, or one already receiving, benefits under the Merchant Marine Act, 1936, as amended, as well as participants in certain transactions, such as banking institutions designated as lenders, mortgagees, and trustees pursuant to Public Law 89–346 (73 Stat. 597), as amended.

(c) To satisfy the statutory requirements, an Affidavit of U.S. Citizenship of a primary corporation by one of its officers duly authorized to execute such Affidavit, should be submitted. This affidavit should contain facts from which the corporation's citizenship can be determined. MARAD will accept electronic options (such as facsimile and Internet) for transmission of required information to MARAD, if practicable.

[General Order 89, Rev., 35 FR 11558, July 18, 1970, as amended at 68 FR 62538, Nov. 5, 2003; 69 FR 34311, June 21, 2004; 69 FR 61451, Oct. 19, 2004]

## § 355.2 Requirements regarding evidence of U.S. citizenship; affidavit guide.

(a) In order to establish that a corporation is a citizen of the United States within the meaning of section 2, Shipping Act, 1916, as amended, the form of affidavit to be used as a guide is hereby prescribed for execution in behalf of the primary corporation and filing with an application or, if required, subsequent filing within 30 days after the annual meeting of the stockholders (if the primary corporation is a wholly owned subsidiary and contrary to the bylaw provision does not hold the annual meeting of stockholders, the subsequent filing should be annually and related to the date of the original filing) as evidence of the continuing U.S. citizenship of a "person" as defined in section 1, Shipping Act, 1916, as amended, which shall read as follows:

AFFIDAVIT OF U.S. CITIZENSHIP

State of _____ County of _____ SS:

I, _____, (Name) of _____, (Residence address) being duly sworn, depose and say:

1. That I am the _____(Title of office(s) held) of _____, (Name of corporation) a corporation organized and existing under the laws of the State of _____ (hereinafter called the "Corporation"), with offices at _____, (Business address) in evidence of which incorporation a certified copy of the Articles or Certificate of Incorporation (or Association) is filed herewith (or has been filed) together with a certified copy of the corporate Bylaws. [Evidence of continuing U.S. citizenship status, including amendments to said Articles or Certificate and Bylaws, should be filed within 30 days after the annual meeting of the stockholders or annually, within 30 days after the original affidavit if there has been no meeting of the stockholders prior to that time.];

2. That I am authorized by and in behalf of the Corporation to execute and deliver this Affidavit of U.S. Citizenship;

3. That the names of the Chief Executive Officer, by whatever title, Vice Presidents or other individuals who are authorized to act in the absence or disability of the Chief Executive Officer, by whatever title, the Chairman of the Board of Directors, and the Directors of the Corporation are as follows:

| *Name* | *Title* | *Date and place of birth* |
|---|---|---|
| | | |

(The foregoing list should include the officers, whether or not they are also directors, and all directors, whether or not they are also officers.)

and that each of said individuals is a citizen of the United States by virtue of birth in the United States, birth abroad of U.S. citizen parents, by naturalization, by naturalization during minority through the naturalization of a parent, by marriage (if a woman) to a

U.S. citizen prior to September 22, 1922, or as otherwise authorized by law, except (give name and nationality of alien directors, if any); however, the Bylaws of the Corporation provide that _____(Number) of the directors are necessary to constitute a quorum; therefore, the alien directors named represent no more than a minority of the number necessary to constitute a quorum. [In the case of corporations under title VI, Merchant Marine Act, 1936, as amended, all directors must be citizens of the United States. Further, obtaining evidence necessary to support this Affidavit of U.S. Citizenship is the responsibility of the affiant.];

4. Information as to stock, where Corporation has 30 or more stockholders:[1]

That I have access to the stock books and records of the Corporation; that said stock books and records have been examined and disclose (a) that, as of _____, (Date) the Corporation had issued and outstanding _____ (Number) shares of _____, (Class or series) the only class or series of stock of the Corporation issued and outstanding [if such is the case], owned of record by _____(Number) stockholders, said number of stockholders representing the ownership of the entire issued and outstanding stock of the Corporation, and (b) that no stockholder owned of record as of said date five per centum (5%) or more of the issued and outstanding stock of the Corporation of any class or series. [If different classes or series of stock exist, give the same data for each class or series issued and outstanding, showing the monetary value and voting rights per share in each class or series. If there is an exception to the statement in clause (b), the name, address, and citizenship of the stockholder and the amount and class or series of stock owned should be stated.]

That the registered addresses of _____ owners of record of _____ shares of the issued and outstanding _____(Class or series) stock of the Corporation are shown on the stock books and records of the Corporation as being within the United States, said _____ shares being _____ per centum (_____%) of the total number of shares of said stock (each class or series). [The exact figure as disclosed by the stock books of the corporation must be given and the per centum figure must not be less than 65 per centum, except that for a corporation operating a vessel in the coastwise trade, the per centum figure must be not less than 95 per centum. These per centum figures apply to corporate stockholders as well as to the primary corporation.]

(The same statement should be made with reference to each class or series of stock, if there is more than one class or series.)

[1] Strike inapplicable paragraph 4.

4. Information as to stock, where Corporation has less than 30 stockholders:[1]

That the information as to stock ownership, upon which the Corporation relies to establish that the required percentage[2] of stock ownership is vested in citizens of the United States, is as follows:

| *Name of stockholder* | *Number of shares owned (each class or series)* | *Percentage of shares owned (each class or series)* |
|---|---|---|
| | | |

and that each of said individual stockholders is a citizen of the United States by virtue of birth in the United States, birth abroad of U.S. citizen parents, by naturalization during minority through the naturalization of a parent, by marriage (if a woman) to a U.S. citizen prior to September 22, 1922, or as otherwise authorized by law.

NOTE: If a corporate stockholder, give information with respect to State of incorporation, the names of the officers, directors, and stockholders in the appropriate percentage of shares held, with statement that they are all U.S. citizens. Nominee holders of record of 5 percent or more of any class or series of stock and the beneficial owners thereof should be named and their U.S. citizenship affirmed.

5. That the controlling interest (or 75% of the interest)[3] in (each) said Corporation, as established by the data hereinbefore set forth, is owned by citizens of the United States; that the title to a majority (or 75%)[3] of the stock of (each) said Corporation is vested in citizens of the United States free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; that such proportion of the voting power of (each) said Corporation is vested in citizens of the United States; that through no contract or understanding is it so arranged that the majority (or more than 25%)[3] of the voting power of (each) said Corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; and that by no means whatsoever, is control of (each) said

[2] 75% if Corporation is operating in the coastwise trade, on the Great Lakes, or on bays, sounds, rivers, harbors, or inland lakes of the United States; and controlling interest if Corporation is operating solely in the foreign trade, both terms as defined in section 2, Shipping Act, 1916, as amended.

[3] Strike inappropriate language.

Corporation (or any interest in said Corporation in excess of 25%)[3] conferred upon or permitted to be exercised by any person who is not a citizen of the United States; and

6. That affiant has carefully examined this affidavit and asserts that all of the statements and representations contained therein are true to the best of his knowledge, information, and belief.

Dated: _____

(Name of affiant)

Subscribed and sworn to before me, a Notary Public in and for the State and County aforesaid, this _____ day of _____19____.

(Notary Public)

My Commission expires:

_____

PENALTY FOR FALSE STATEMENT: A fine or imprisonment, or both, are provided for violation of the proscriptions contained in 18 U.S.C. 1001 (see also 18 U.S.C. 286, 287).

(Approved by the Office of Management and Budget under control number 2133–0012)

[G.O. 89, Rev., 35 FR 11558, July 18, 1970, as amended at 35 FR 11686, July 22, 1970; 47 FR 25530, June 14, 1982; 69 FR 34311, June 21, 2004]

### § 355.3 Criteria to be applied in support of stock data in affidavit.

(a) The same criteria should be observed in obtaining information to be furnished for stockholders named (direct ownership of required percentage of shares of stock of each class or series) in the Affidavit as those observed for the primary corporation. If, on the other hand, the "fair inference rule" is applied with respect to stock ownership (see Collier Advertising Service, Inc. v. Hudson River Day Line, 14 Fed. Supp. 335), the extent of U.S. citizen ownership of stock should be ascertained in the requisite percentage (65 percent for foreign operation and 95 percent for coastwise operation) in order that the veracity of the statutory statements made in the Affidavit (paragraph 5) may be relied upon by the Maritime Administration.

(b) When applying the fair inference rule (where there are more than 30 stockholders, except where one or more of such number actually owns the controlling or 75 percent interest) in order to prove U.S. citizen ownership in the required percentages (1) for foreign operation, 65 percent of the shares of stock of each class or series must be shown to be held by persons with registered addresses within the United States to prove that 51 percent or controlling interest is vested in citizens of the United States and (2) for coastwise operation, 95 percent of the shares of stock of each class or series must be shown to be held by persons having registered addresses within the United States to prove that 75 percent of the interest in the corporation is vested in citizens of the United States.

(c) If the primary corporation is consecutively owned by several "parent" corporations (holders of 100 percent of the stock of each or all classes or series of stock issued and outstanding), the facts should be given in proper sequence either by chart or in narrative form, revealing the facts of stock ownership. The information with respect to the ultimate parent should include data relative to the basis upon which controlling or 75 percent (depending upon whether the primary corporation operates in the domestic or foreign commerce) is established, together with the names of the owners of record or beneficial owners of 5 percent or more of each class or series of stock, if more than one class or series, and statement that such owners are citizens of the United States. In any case where different classes or series of stock exist, each class or series shall be treated depending upon whether "closely held" or "publicly held," individually in applying the fair inference rule, if applicable, or giving the relevant information with respect to United States citizens owning of record 51 percent or 75 percent of the interest.

### § 355.4 Changes in citizenship data.

It shall be incumbent upon the parties filing affidavits under this part to apprise the Maritime Administration promptly in writing relative to changes in data last furnished with respect to officers, directors, and stockholders holding 5 percent or more of the issued and outstanding stock of each class or series, together with statements concerning the citizenship status thereof.

### § 355.5 Additional material.

If additional material is determined to be essential to clarify or support the

evidence of U.S. citizenship, such material shall be furnished by the aforementioned primary corporation upon request by the Maritime Administration.

# PART 356—REQUIREMENTS FOR VESSELS OF 100 FEET OR GREATER IN REGISTERED LENGTH TO OBTAIN A FISHERY ENDORSEMENT TO THE VESSEL'S DOCUMENTATION

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356.53 Conflicts with international agreements.

### Subpart I—Review of Harvesting and Processing Compliance

356.55 Review of compliance with harvesting and processing quotas.

AUTHORITY: 46 U.S.C. 12102; 46 U.S.C. 31322; Pub. L. 105–277, division C, title II, subtitle I, section 203 (46 U.S.C. 12102 note), section 210(e), and section 213(g), 112 Stat. 2681; Pub. L. 107–20, section 2202, 115 Stat. 168–170; 49 CFR 1.66.

SOURCE: 65 FR 44877, July 19, 2000, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 356 appear at 68 FR 5576, Feb. 4, 2003.

## Subpart A—General Provisions

### § 356.1 Purpose.

(a) Part 356 implements the U.S. Citizenship requirements of the American Fisheries Act of 1998, as amended, Title II, Division C, Public Law 105–277, for owners, Mortgage Trustees, and Mortgagees of vessels of 100 feet or greater in registered length that have a fishery endorsement to the vessel's documentation or where a fishery endorsement to the vessel's documentation is being sought. This part also addresses ancillary matters of charters, management agreements, exclusive sales or marketing contracts, conflicts with international agreements, determinations regarding violations of harvesting or processing limits, and exceptions for certain vessels, vessel owners and Mortgagees from the general requirements of the rule.

(b) An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid

OMB control number. Part 356 establishes a new requirement for the collection of information. The Office of Management and Budget ("OMB") has reviewed and approved the information collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) and assigned OMB control number 2133–0530 to the information collection requirements of this part 356.

### § 356.2 Waivers.

In special circumstances and for good cause shown, we may waive the procedures prescribed in this part, provided the waiver is consistent with the requirements of the AFA and with the intent of this part.

[66 FR 45947, Aug. 31, 2001]

### § 356.3 Definitions.

For the purpose of this part, when used in capitalized form:

(a) *1916 Act* refers to section 2 of the Shipping Act, 1916, as amended, 46 App. U.S.C. 802. The Controlling Interest requirements of the Shipping Act are found in section 2(b), 46 App. U.S.C. section 802(b). The citizenship requirements for eligibility to own a vessel with a fisheries endorsement are found in section 2(c), 46 App. U.S.C. 802(c), and 46 U.S.C. 12102(c).

(b) *AFA* means the American Fisheries Act of 1998, as amended, Title II, Division C, of Public Law 105–277;

(c) *Affiliate or Affiliated* refers to a Person that directly or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the first Person. For the purposes of this definition the term "control" (including the terms "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management policies of a Person, whether through the ownership of voting securities, by contract, as trustee or executor, or otherwise.

(d) *Charter* means any agreement or commitment by which the possession or services of a Fishing Industry Vessel are secured for a period of time, or for one or more voyages, whether or not a bareboat charter of the vessel. A long-term or exclusive contract for the sale of all or a portion of a Fishing Vessel's catch is not considered a Charter.

(e) *Citizen of the United States, Citizen or U.S. Citizen:*

(1) Means an individual who is a Citizen of the United States, by birth, naturalization or as otherwise authorized by law, or an entity that in both form and substance, at each tier of ownership and in the aggregate, satisfies the requirements of 46 U.S.C. 12102(c) and section 2(c) of the 1916 Act, 46 App. U.S.C. 802(c). In order to satisfy the statutory requirements an entity other than an individual must meet the requirements of paragraph (e)(2) of this section and the following criteria:

(i) The entity must be organized under the laws of the United States or of a State;

(ii) Seventy five percent (75%) of the ownership and control in the entity must be owned by and vested in Citizens of the United States free from any trust or fiduciary obligation in favor of any Non-Citizen;

(iii) No arrangement may exist, whether through contract or any understanding, that would allow more than 25% of the voting power of the entity to be exercised, directly or indirectly, in behalf of any Non-Citizen; and

(iv) Control of the entity, by any other means whatsoever, may not be conferred upon or permitted to be exercised by a Non-Citizen.

(2) Other criteria that must be met by entities other than individuals include:

(i) In the case of a corporation:

(A) The chief executive officer, by whatever title, and chairman of the board of directors and all officers authorized to act in the absence or disability of such persons must be Citizens of the United States; and

(B) No more of its directors than a minority of the number necessary to constitute a quorum are Non-Citizens;

(ii) In the case of a partnership all general partners are Citizens of the United States;

(iii) In the case of an association:

(A) All of the members are Citizens of the United States;

(B) The chief executive officer, by whatever title, and the chairman of the

board of directors (or equivalent committee or body) and all officers authorized to act in their absence or disability are Citizens of the United States; and,

(C) No more than a minority of the number of its directors, or equivalent, necessary to constitute a quorum are Non-Citizens;

(iv) In the case of a joint venture:

(A) It is not determined by the Citizenship Approval Officer to be in effect an association or a partnership; and,

(B) Each co-venturer is a Citizen of the United States;

(v) In the case of a Trust that owns a Fishing Industry Vessel:

(A) The Trust is domiciled in the United States or a State;

(B) The Trustee is a Citizen of the United States; and

(C) All beneficiaries of the trust are persons eligible to document vessels pursuant to the requirements of 46 U.S.C. 12102(c);

(vi) In the case of a Limited Liability Company (LLC) that is not found to be in effect a general partnership requiring all of the general partners to be Citizens of the United States:

(A) Any Person elected to manage the LLC or who is authorized to bind the LLC, and any Person who holds a position equivalent to a Chief Executive Officer, by whatever title, and the Chairman of the Board of Directors in a corporation are Citizens of the United States; and,

(B) Non-Citizens do not have authority within a management group, whether through veto power, combined voting, or otherwise, to exercise control over the LLC.

(f) *Citizenship Approval Officer* means MARAD's Citizenship Approval Officer within the Office of Chief Counsel. The Citizenship Approval Officer's address is: Maritime Administration, United States Department of Transportation, Citizenship Approval Officer, MAR–220, Room 7232, 400 7th Street, SW., Washington, DC 20590.

(g) *Commercial Lender* means an entity that is primarily engaged in the business of lending and other financing transactions and that has a loan portfolio in excess of $100,000,000, of which not more than 50 per centum in dollar amount consists of loans to borrowers in the commercial fishing industry, as certified by the Commercial Lender to the Citizenship Approval Officer.

(h) *Controlling Interest:*

(1) Means, in the context of an entity, that in both form and substance, at each tier of ownership and in the aggregate, the entity satisfies the controlling interest requirements of section 2(b) of the 1916 Act, 46 App. U.S.C. 802(b). In order to satisfy the statutory requirements, an entity other than an individual must meet the requirements of paragraph (g)(2) of this section and the following criteria:

(i) The entity must be organized under the laws of the United States or of a State;

(ii) A majority of the ownership and control in the entity must be owned by and vested in Citizens of the United States free from any trust or fiduciary obligation in favor of any Non-Citizen;

(iii) No arrangement may exist, whether through contract or any understanding, that would allow a majority of the voting power of the entity to be exercised, directly or indirectly, in behalf of any Non-Citizen; and

(iv) Control of the entity, by any other means whatsoever, may not be conferred upon or permitted to be exercised by a Non-Citizen.

(2) Other criteria that must be met by entities other than an individual include:

(i) In the case of a corporation:

(A) The Chief Executive Officer, by whatever title, and the Chairman of the Board of Directors (or equivalent committee or body) and all officers authorized to act in their absence or disability are Citizens of the United States; and,

(B) No more than a minority of the number of its directors, or equivalent, necessary to constitute a quorum are Non-Citizens;

(ii) In the case of a partnership all general partners are Citizens of the United States;

(iii) In the case of an association:

(A) The Chief Executive Officer, by whatever title, and the Chairman of the Board of Directors (or equivalent committee or body) and all officers authorized to act in their absence or disability are Citizens of the United States; and,

(B) No more than a minority of the number of its directors, or equivalent, necessary to constitute a quorum are Non-Citizens;

(iv) In the case of a joint venture:

(A) It is not determined by the Citizenship Approval Officer to be in effect an association or partnership; and

(B) A majority of the equity is owned by and vested in Citizens of the United States free and clear of any trust or fiduciary obligation in favor of any Non-Citizen;

(v) In the case of a Limited Liability Company (LLC) that is not found to be in effect a general partnership requiring all of the general partners to be Citizens of the United States:

(A) Any Person elected to manage the LLC or who is authorized to bind the LLC, and any Person who holds a position equivalent to the Chief Executive Officer, by whatever title, and the Chairman of the Board of Directors in a corporation and any Persons authorized to act in their absence are Citizens of the United States; and,

(B) Non-Citizens do not have authority within a management group, whether through veto power, combined voting, or otherwise, to exercise control over the LLC;

(3) A state or federally chartered financial institution that meets the Controlling Interest requirements of paragraphs (g)(1) and (2) of this section is deemed to be a Citizen of the United States for all purposes under subpart D of this part other than operation of the vessel pursuant to § 356.25.

(i) *Fishing Vessel* means a vessel of 100 feet or greater in registered length that has or for which the owner is seeking a fishery endorsement to the vessel's documentation and that commercially engages in the planting, cultivating, catching, taking, or harvesting of fish, shellfish, marine animals, pearls, shells, or marine vegetation or an activity that can reasonably be expected to result in the planting, cultivating, catching, taking, or harvesting of fish, shellfish, marine animals, pearls, shells, or marine vegetation;

(j) *Fishing Industry Vessel* means a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel;

(k) *Fish Processing Vessel* means a vessel of 100 feet or greater in registered length that has or for which the owner is seeking a fishery endorsement to the vessel's documentation and that commercially prepares fish or fish products other than by gutting, decapitating, gilling, skinning, shucking, icing, freezing, or brine chilling;

(l) *Fish Tender Vessel* means a vessel of 100 feet or greater in registered length that has or for which the owner is seeking a fishery endorsement to the vessel's documentation and that commercially supplies, stores, refrigerates, or transports (except in foreign commerce) fish, fish products, or materials directly related to fishing or the preparation of fish to or from a Fishing Industry Vessel or a fish processing facility;

(m) *Harvest* means to commercially engage in the catching, taking, or harvesting of fish or fishery resources or any activity that can reasonably be expected to result in the catching, taking or harvesting of fish or fishery resources;

(n) *Lender Syndicate* means an arrangement established for the combined extension of credit of not less than $20,000,000 made up of four or more entities that each have a beneficial interest, held through an agent, under a trust arrangement established pursuant to 46 U.S.C. 31322(f). Other than the exercise by the agent of powers related to routine administrative matters, none of the entities in a Lender Syndicate may exercise powers related to the Lender Syndicate's extension of credit without the concurrence of at least one other unaffiliated beneficiary. Powers related to routine administrative matters include those concerning the day-to-day management of the extension of credit such as monitoring compliance with loan covenants, collateral inspections and similar matters; however, more substantive powers such as amending loan and mortgage documents, releasing guarantors or collateral, or administering the loan in the event of a default are not considered routine.

(o) *MARAD* means the Maritime Administration within the United States Department of Transportation. The terms "we, our, and us" may also be

used to refer to the Maritime Administration;

(p) *Mortgagee* means a Person to whom a Fishing Industry Vessel or other property is mortgaged. (*See* the definition of Non-Citizen Lender and Preferred Mortgage in this section)

(q) *Mortgage Trustee*, for purposes of holding a Preferred Mortgage on a Fishing Industry Vessel, means a corporation that:

(1) Is organized and doing business under the laws of the United States or of a State;

(2) Is authorized under those laws to exercise corporate trust powers;

(3) Is eligible to hold a Preferred Mortgage under 46 U.S.C. 31322(a)(4)(A)–(E);

(4) Is subject to supervision or examination by an official of the United States Government, or of a State;

(5) Has a combined capital and surplus (as stated in its most recent published report of condition) of at least $3,000,000; and

(6) Meets any other requirements prescribed by the Citizenship Approval Officer.

(r) *Non-Citizen* means a Person who is not a Citizen of the United States within the meaning of paragraph (d) of this section, 46 U.S.C. 12102(c) and section 2(c) of the 1916 Act, 46 App. U.S.C. 802(c).

(s) *Non-Citizen Lender* means a lender that does not qualify as a Citizen of the United States.

(t) *Person* includes an individual, corporation, partnership, joint venture, association, limited liability company, Trust, and other entities existing under or authorized by the laws of the United States or of a State or, unless the context indicates otherwise, of any foreign country.

(u) *Preferred Mortgage* means a mortgage on a Fishing Industry Vessel that has as the Mortgagee:

(1) A person eligible to own a vessel with a fishery endorsement under 46 U.S.C. 12102(c);

(2) A state or federally chartered financial institution that is insured by the Federal Deposit Insurance Corporation;

(3) A farm credit lender established under title 12, chapter 23, of the United States Code [12 U.S.C. 2001 *et seq.*];

(4) A commercial fishing and agriculture bank established pursuant to State law;

(5) A commercial lender organized under the laws of the United States or of a State and eligible to own a vessel under 46 U.S.C. 12102(a); or

(6) A Mortgage Trustee that complies with the requirements of 46 U.S.C. 31322(f) and 46 CFR 356.27 through 356.31.

(v) *Related Party* means a holding company, subsidiary, affiliate, or associate of a Non-Citizen or an officer, director, agent, or other executive of the Non-Citizen or of a holding company, subsidiary, affiliate or associate thereof.

(w) *State* means a State of the United States, Guam, Puerto Rico, the Virgin Islands, American Samoa, the District of Columbia, the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States.

(x) *Submitted* means sent by mail and postmarked on that date, or sent by another delivery service or by electronic means, including E-mail and facsimile, and marked with an indication of the date equivalent to a postmark;

(y) *Trust* means:

(1) In the case of ownership of a Fishing Industry Vessel, a trust that is domiciled in and existing under the laws of the United States or of a State, of which the Trustee is a Citizen of the United States, and 100% of the interest in the Trust is held for the benefit of a Citizen of the United States; or

(2) In the case of a mortgage trust, a trust that is domiciled in and existing under the laws of the United States, or of a State, that has as its trustee a Mortgage Trustee as defined in this section, and that is authorized to act on behalf of a beneficiary in accordance with the requirements of §§ 356.27 through 356.31.

(z) *United States*, when used in the geographic sense, means the States of the United States, Guam, Puerto Rico, the Virgin Islands, American Samoa, the District of Columbia, and any other territory or possession of the United States; when used in other than the geographic sense, it means the United States Government.

(aa) *United States Government* means the Federal Government acting by or through any of its departments or agencies.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5576, Feb. 4, 2003]

## Subpart B—Ownership and Control

### § 356.5 Affidavit of U.S. Citizenship.

(a) In order to establish that a corporation or other entity is a Citizen of the United States within the meaning of section 2(c) of the 1916 Act, or where applicable, section 2(b) of the 1916 Act, the form of Affidavit is hereby prescribed for execution in behalf of the owner, charterer, Mortgagee, or Mortgage Trustee of a Fishing Industry Vessel. Such Affidavit must include information required of parent corporations and other stockholders whose stock ownership is being relied upon to establish that the requisite ownership in the entity is owned by and vested in Citizens of the United States. A certified copy of the Articles of Incorporation and Bylaws, or comparable corporate documents, must be submitted along with the executed Affidavit.

(b) This Affidavit form set forth in paragraph (d) of this section may be modified to conform to the requirements of vessel owners, Mortgagees, or Mortgage Trustees in various forms such as partnerships, limited liability companies, etc. A copy of an Affidavit of U.S. Citizenship modified appropriately, for limited liability companies, partnerships (limited and general), and other entities is available on MARAD's internet home page at *http://www.marad.dot.gov*.

(c) As indicated in § 356.17, in order to renew annually the fishery endorsement on a Fishing Industry Vessel, the owner must submit annually to the Citizenship Approval Officer evidence of U.S. Citizenship within the meaning of section 2(c) of the 1916 Act and 46 App. U.S.C. 12102(c).

(d) The prescribed form of the Affidavit of U.S. Citizenship is as follows:

State of _____ County of _____ Social Security Number: _____

I, _____, (Name) of _____, (Residence address) being duly sworn, depose and say:

1. That I am the _____ (Title of office(s) held) of _____, (Name of corporation) a corporation organized and existing under the laws of the State of_____ (hereinafter called the "Corporation"), with offices at _____, (Business address) in evidence of which incorporation a certified copy of the Articles or Certificate of Incorporation (or Association) is filed herewith (or has been filed) together with a certified copy of the corporate Bylaws. [Evidence of continuing U.S. citizenship status, including amendments to said Articles or Certificate and Bylaws, should be filed within 45 days of the annual documentation renewal date for vessel owners. Other parties required to provide evidence of U.S. citizenship status must file within 30 days after the annual meeting of the stockholders or annually, within 30 days after the original affidavit if there has been no meeting of the stockholders prior to that time.];

2. That I am authorized by and in behalf of the Corporation to execute and deliver this Affidavit of U.S. Citizenship;

3. That the names of the Chief Executive Officer, by whatever title, the Chairman of the Board of Directors, all Vice Presidents or other individuals who are authorized to act in the absence or disability of the Chief Executive Officer or Chairman of the Board of Directors, and the Directors of the Corporation are as follows:[1]

_____

Name Title

_____

Date and Place of Birth

_____

_____

(The foregoing list should include the officers, whether or not they are also directors, and all directors, whether or not they are also officers.) Each of said individuals is a Citizen of the United States by virtue of birth in the United States, birth abroad of U.S. citizen parents, by naturalization, by naturalization during minority through the naturalization of a parent, by marriage (if a woman) to a U.S. citizen prior to September 22, 1922, or as otherwise authorized by law, except (give name and nationality of all Non-Citizen officers and directors, if any). The By-laws of the Corporation provide that ___ (Number) of the directors are necessary to constitute a quorum; therefore, the Non-Citizen directors named represent no more than a minority of the number necessary to constitute a quorum.

[1] Offices that are currently vacant should be noted when listing Ofifcers and Directors in the Affidavit.

4. Information as to stock, where Corporation has 30 or more stockholders:

_____

That I have access to the stock books and records of the Corporation; that said stock books and records have been examined and disclose (a) that, as of ___, (Date) the Corporation had issued and outstanding _____ (Number) shares of _____, (Class) the only class of stock of the Corporation issued and outstanding [if such is the case], owned of record by _____ (Number) stockholders, said number of stockholders representing the ownership of the entire issued and outstanding stock of the Corporation, and (b) that no stockholder owned of record as of said date five per centum (5%) or more of the issued and outstanding stock of the Corporation of any class. [If different classes of stock exist, give the same information for each class issued and outstanding, showing the monetary value and voting rights per share in each class. If there is an exception to the statement in clause (b), the name, address, and citizenship of the stockholder and the amount and class of stock owned should be stated and the required citizenship information on such stockholder must be submitted.] That the registered addresses of _____ owners of record of _____ shares of the issued and outstanding _____ (Class) stock of the Corporation are shown on the stock books and records of the Corporation as being within the United States, said _____ shares being _____ per centum ___(%) of the total number of shares of said stock (each class). [The exact figure as disclosed by the stock books of the corporation must be given and the per centum figure must not be less than 65 per centum for a corporation that must satisfy the controlling interest requirements of section 2(b) of the Shipping Act, 1916, 46 App. U.S.C. §802(b), or not less than 95 per centum for an entity that is demonstrating ownership in a vessel for which a fishery endorsement is sought. These per centum figures apply to corporate stockholders as well as to the primary corporation.] (The same statement should be made with reference to each class of stock, if there is more than one class.)

or

[NOTE: An entity that has less than 30 stockholders should use the following alternate paragraph (4) and strike the inapplicable paragraph (4).]

4. Information as to stock, where Corporation has less than 30 stockholders: That the information as to stock ownership, upon which the Corporation relies to establish that 75% of the stock ownership is vested in Citizens of the United States, is as follows:

| Name of stockholder | Date and place of birth | Number of shares owned (each class) | Percentage of shares owned (each class) |
|---|---|---|---|
| | | | |

and that each of said individual stockholders is a Citizen of the United States by virtue of birth in the United States, birth abroad of U.S. citizen parents, by naturalization during minority through the naturalization of a parent, by marriage (if a woman) to a U.S. citizen prior to September 22, 1922, or as otherwise authorized by law. NOTE: If a corporate stockholder, give information with respect to State of incorporation, the names of the officers, directors, and stockholders and the appropriate percentage of shares held, with statement that they are all U.S. citizens. Nominee holders of record of 5% or more of any class of stock and the beneficial owners thereof should be named and their U.S. citizenship information submitted to MARAD.

5. That 75% of the interest in (each) said Corporation, as established by the information hereinbefore set forth, is owned by Citizens of the United States; that the title to 75% of the stock of (each) class of the stock of (each) said Corporation is vested in Citizens of the United States free from any trust or fiduciary obligation in favor of any person not a Citizen of the United States; that such proportion of the voting power of (each) said Corporation is vested in Citizens of the United States; that through no contract or understanding is it so arranged that more than 25% the voting power of (each) said Corporation may be exercised, directly or indirectly, in behalf of any person who is not a Citizen of the United States; and that by no means whatsoever, is any interest in said Corporation in excess of 25% conferred upon or permitted to be exercised by any person who is not a Citizen of the United States; and

or

[NOTE: An entity that is required to comply with the controlling interest requirements of section 2(b) of the Shipping Act, 1916, 46 App. U.S.C. §802(b), should use the following alternate paragraph (5) and strike the inapplicable paragraph (5).]

5. That the Controlling Interest in (each) said Corporation, as established by the information hereinbefore set forth, is owned by Citizens of the United States; that the title to a majority of the stock of (each) said Corporation is vested in Citizens of the United States free from any trust or fiduciary obligation in favor of any person not a Citizen of

the United States; that such proportion of the voting power of (each) said Corporation is vested in Citizens of the United States; that through no contract or understanding is it so arranged that the majority of the voting power of (each) said Corporation may be exercised, directly or indirectly, in behalf of any person who is not a Citizen of the United States; and that by no means whatsoever, is control of (each) said Corporation conferred upon or permitted to be exercised by any person who is not a Citizen of the United States; and

6. That the affiant has submitted all of the necessary documentation required under 46 CFR § 356.13 in connection with this Affidavit of U.S. Citizenship for the vessels herein identified.

| Vessel Name | Official Number |
|---|---|
| 1..<br>2. ..... | |

[NOTE: Paragraph 6 should be included in the Affidavit of U.S. Citizenship submitted by an entity that owns a Fishing Industry Vessel.]

7. That affiant has carefully examined this affidavit and asserts that all of the statements and representations contained therein are true to the best of his knowledge, information, and belief.

_____

(Name and title of affiant)

_____

(Signature of affiant)

_____

Date

Penalty for False Statement: A fine or imprisonment, or both, are provided for violation of the proscriptions contained in 18 U.S.C. § 1001 (see also, 18 U.S.C. §§ 286, 287).

(e) The format for an Affidavit of United States Citizenship, modified appropriately for limited liability companies, partnerships, etc., will be available from the Citizenship Approval Officer and on MARAD's internet web site at *http://www.marad.dot.gov*.

(f) The same criteria should be observed in obtaining information to be furnished for stockholders named (direct ownership of required percentage of shares of stock of each class) in the Affidavit as those observed for the owner of the Fishing Industry Vessel. If, on the other hand, the "fair inference rule" is applied with respect to stock ownership as outlined in § 356.7(c), the extent of U.S. Citizen ownership of stock should be ascertained in the requisite percentage (65 % for state or federally chartered financial institutions and 95 % for Fishing Industry Vessel owners, bareboat charterers, trustees, as well as entities owning 5% or more of the stock of such entities). Any entity that must establish its U.S. citizenship has to submit proof of U.S. citizenship of any five percent stockholder of each class of stock in order that the veracity of the statutory statements made in the Affidavit (paragraph 5) may be relied upon by MARAD.

(g) It shall be incumbent upon the parties filing affidavits under this part to notify the Citizenship Approval Officer in writing within 30 calendar days of any changes in information last furnished with respect to the officers, directors, and stockholders, including 5 percent or more stockholders of the issued and outstanding stock of each class, together with information concerning their citizenship status. If other than a corporation, comparable information must be filed by other entities owning Fishing Industry Vessel, including any entity whose ownership interest is being relied upon to establish 75% ownership by Citizens of the United States.

(h) If additional material is determined to be essential to clarify or support the evidence of U.S. citizenship, such material shall be furnished by the owner of the Fishing Industry Vessel upon request by the Citizenship Approval Officer.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5577, Feb. 4, 2003]

## § 356.7 Methods of establishing ownership by United States Citizens.

(a) An entity may demonstrate that the interest in the entity (75% for Citizens of the United States or 51% for entities meeting the Controlling Interest requirements) is owned by Citizens of the United States either by direct proof or through the fair inference method depending on the size of the entity.

(b) The "direct proof" method is used for closely held companies that have 30 or fewer stockholders. Under the direct proof method, the following information must be set forth in paragraph four of the Affidavit of U.S. Citizenship:

(1) The identity of the holders of stock or other equitable interests;

(2) The amount of stock or interest that each stockholder owns;

(3) A representation as to the citizenship of the stockholder; and

(4) If the stockholder is a corporation or other entity, the names and citizenship of officers, directors, stockholders, etc. must be set out in the Affidavit of U.S. Citizenship.

(c) The "fair inference method" is used by corporations whose stock is publicly traded (more than 30 stockholders). Use of the fair inference method requires that:

(1)(i) At least 95% of the stock (each class) of the corporation be held by Persons having a registered U.S. address in order to infer at least 75% ownership by U.S. Citizens, or

(ii) At least 65% of the stock (each class) of the corporation be held by Persons having a registered U.S. address in order to infer at least 51% ownership by U.S. Citizens; and

(2) Disclosure be made in the Affidavit of U.S. Citizenship of the names and citizenship of any stockholders who holds five percent or more of the corporation's stock (including all classes of stock, voting and non-voting), officers, and directors.

(d) If the owner of a Fishing Industry Vessel is consecutively owned by several "parent" corporations, the facts revealing the stock ownership of each entity must be set forth in the Affidavit of U.S. Citizenship.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5579, Feb. 4, 2003]

### § 356.9 Tiered ownership structures.

Non-Citizens may not own or control, either directly through the first tier of ownership or in the aggregate through an interest in other entities at various tiers, more than 25% of the interest in an entity which owns a Fishing Industry Vessel. The prohibition against Non-Citizens owning or controlling more than 25%, in the aggregate, of the interest in an entity that owns a Fishing Industry Vessel means, for example, that:

(a) Non-Citizens that own or control a 25% stake in the ownership entity of a Fishing Industry Vessel at the first tier may not have any interest whatsoever in any entity that is being relied upon to establish the required 75% U.S. Citizen ownership; and

(b) Non-Citizens that own or control less than a 25% stake at the first tier may participate in the ownership and control of other entities that are being relied upon to establish the required 75% U.S. Citizen ownership and control at the first tier. However, the total ownership and control by Non-Citizens of the entity owning a Fishing Industry Vessel may not exceed 25% in the aggregate as computed by MARAD.

### § 356.11 Impermissible control by a Non-Citizen.

(a) An impermissible transfer of control will be deemed to exist where a Non-Citizen, whether by agreement, contract, influence, or any other means whatsoever:

(1) Has the right to direct the business of the entity which owns the Fishing Industry Vessel. The right to "direct the business of the entity" does not include the right to simply participate in the direction of the business activities of an entity which owns a Fishing Industry Vessel;

(2) Has the right in the ordinary course of business to limit the actions of or replace the chief executive officer, a majority of the board of directors, any general partner or any person serving in a management capacity of the entity which owns the Fishing Industry Vessel. Standard rights of minority shareholders to restrict the actions of the entity are permitted provided they are unrelated to day-to-day business activities. These rights include provisions to require the consent of the minority shareholder to sell all or substantially all of the assets, to enter into a different business, to contract with the majority investors or their affiliates or to guarantee the obligations of majority investors or their affiliates;

(3) Has the right to direct the transfer, operation, or manning of a Fishing Industry Vessel. The right to "direct the transfer, operation, or manning" of such vessels does not include the right to simply participate in the direction of the transfer, operation, and manning of such vessels;

(4) Has the right to restrict unduly the day-to-day business activities and management policies of the entity owning a Fishing Industry Vessel through loan covenants other than those approved for use by the Citizenship Approval Officer or other means;

(5) Has the right to derive, through a minority shareholder and in favor of a Non-Citizen, a significantly disproportionate amount of the economic benefit from the ownership and operation of the Fishing Industry Vessel;

(6) Has the right to control the management of or to be a controlling factor in the entity owning a Fishing Industry Vessel ;

(7) Has the right to cause the sale of a Fishing Industry Vessel other than:

(i) By an entity that is eligible to hold a Preferred Mortgage on the vessel pursuant to § 356.19(a)(2) through (a)(5);

(ii) By an approved Mortgage Trustee that is exercising loan and mortgage covenants on behalf of a beneficiary that qualifies as a Commercial Lender, a Lender Syndicate or an entity eligible to hold a Preferred Mortgage under § 356.19(a)(2) through (a)(5);

(iii) By an approved Mortgage Trustee that is exercising loan or mortgage covenants for a beneficiary that is not qualified to hold a Preferred Mortgage, provided that the loan or mortgage covenants have been approved by the Citizenship Approval Officer; or

(iv) Where it is necessary in order to allow a Non-Citizen to dissolve its interest in the entity;

(8) Absorbs all of the costs and normal business risks associated with ownership and operation of the Fishing Industry Vessel;

(9) Has the responsibility for the procurement of insurance on the Fishing Industry Vessel, or assumes any liability in excess of insurance coverage; or,

(10) Has the ability through any other means whatsoever to control the entity that owns a Fishing Industry Vessel.

(b) In addition to the actions in paragraph (a) of this section that are considered absolute indicia of control, we will consider other factors which, in combination with other elements of Non-Citizen involvement, may be deemed impermissible control. The following factors may be considered indicia of control:

(1) If a Non-Citizen minority stockholder takes the leading role in establishing an entity that will own a Fishing Industry Vessel;

(2) If a Non-Citizen has the right to preclude the owner of a Fishing Industry Vessel from engaging in other business activities;

(3) If a Non-Citizen and owner use the same law firm, accounting firm, etc.;

(4) If a Non-Citizen and owner share the same office space, phones, administrative support, etc.;

(5) If a Non-Citizen absorbs considerable costs and normal business risks associated with ownership and operation of the Fishing Industry Vessel;

(6) If a Non-Citizen provides the start up capital for the owner or bareboat charterer on less than an arm's-length basis;

(7) If a Non-Citizen time charterer has the general right to inspect the books and records of the owner, bareboat charterer, or time charterer of a Fish Processing Vessel or Fish Tender Vessel;

(8) If the owner or bareboat charterer uses the same insurance agent, law firm, accounting firm, or broker of any Non-Citizen with whom the owner or a bareboat charterer has entered into a mortgage, long-term or exclusive sales or marketing agreement, unsecured loan agreement, or management agreement; or

(9) If a Non-Citizen has the right to control, whether through sale, lease or other method, the fishing quota, fishing rights or processing rights allocated to a vessel or vessel-owning entity.

(c) In most cases, any single factor listed in paragraph (b) of this section will not be sufficient to deem an entity a Non-Citizen. However, a combination of several factors listed in paragraph (b) of this section may increase our concern as to whether the entity complies with the U.S. Citizen ownership and control provisions of the AFA and any single factor listed in paragraph (b) of this section may be the basis for a request from us for further information.

(d) If we have a concern regarding a Non-Citizen, we will notify the entity

of the concern and work with the entity toward a satisfactory resolution, provided there is no verifiable evidence of fraud. Resolution of any control issues may result in a request by us for additional information to clarify the intent of the provision or to amend or delete the provision in question.

(e) Information that is specifically required to be submitted for our consideration is set out in § 356.13. However, in determining whether an entity has control over a Fishing Industry Vessel, we may review any contract or agreement that may, by any means whatsoever, result in a transfer of control to a Non-Citizen.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5579, Feb. 4, 2003]

## Subpart C—Requirements for Vessel Owners

### § 356.13 Information required to be submitted by vessel owners.

(a) In order to be eligible to document a Fishing Industry Vessel with a fishery endorsement, the entity that owns the vessel must submit documentation to demonstrate that 75 percent (75%) of the interest in such entity is owned and controlled by Citizens of the United States. Unless otherwise exempted, the following documents must be submitted to the Citizenship Approval Officer in support of a request for a determination of U.S. Citizenship:

(1) An Affidavit of U.S. Citizenship. This affidavit, set out in § 356.15, must contain all required facts, at all tiers of ownership, needed for determining the citizenship of the owner of the Fishing Industry Vessel.

(2) A certified copy of the Articles of Incorporation and Bylaws of the owner of the Fishing Industry Vessel, and any parent corporation, must be submitted. The certification must be by the Secretary of State in which the corporation is incorporated or by the Secretary of the corporation. For entities other than corporations, comparable certified documents must be submitted. For example, for a limited liability company, a copy of the Certificate of Formation filed with a State must be submitted, along with a certified copy of the Limited Liability Company Operating Agreement;

(3) An Affidavit of U.S. Citizenship for each charterer of a Fishing Industry Vessel, with the exception of time or voyage charterers of Fish Processing Vessels and Fish Tender Vessels permitted under § 356.39(b)(2);

(4) A copy of any time charter or voyage charter to a Non-Citizen of a Fish Tender Vessel or Fish Processing Vessel;

(5) Any loan agreements or other financing documents applicable to a Fishing Industry Vessel where the lender has not been approved by MARAD to hold a Preferred Mortgage on Fishing Industry Vessels, excepting financing documents that are exempted from review pursuant to § 356.19(d) and loan documents that have received general approval from the Citizenship Approval Officer pursuant to § 356.21 for use with an approved Mortgage Trustee.

(6) A description of any operating and/or management agreements entered into between the owner or bareboat charterer of a Fishing Industry Vessel and an entity that has not been determined by MARAD to be a U.S. Citizen, accompanied by a representation and warranty that the agreement does not contain any provisions that convey control over the vessel or vessel-owning entity to a Non-Citizen;

(7) Copies of any sales or purchase agreements that relate to the sale or purchase of all or a significant portion of a vessel's catch where the agreement is with an entity that has not been determined by MARAD to be a U.S. Citizen and the agreement contains provisions that could convey control to a Non-Citizen other than those expressly authorized in § 356.43. Agreements that only contain provisions expressly authorized in § 356.43 do not have to be submitted; however, the agreements and the parties to the agreements must be identified;

(8) Any stockholder's agreement, voting trust agreements, or any other pooling agreements, including any proxy appointment, relating to the ownership of all classes of stock, whether voting or non-voting of the owner of the Fishing Industry Vessel, including any parent corporation or other stockholder whose stock is being

relied upon to establish 75 percent U.S. Citizen ownership;

(9) Any agreements relating to an option to buy or sell stock or other comparable equity interest in the owner of the Fishing Industry Vessel, or Fish Tender Vessel, or any agreement that restricts the sale of such stock or equity interests in the owner of the Fishing Industry Vessel, including any parent corporation or other stockholder whose stock is being relied upon to establish 75 percent U.S. Citizen ownership;

(10) Any documents relating to a merger, consolidation, liquidation or dissolution of the owner of the Fishing Industry Vessel, including any parent corporation where all of the parties have not been determined by the Citizenship Approval Officer to be U.S. Citizens;

(11) Disclosure of any interlocking directors or other officials by and between the owner of a Fishing Industry Vessel (including any parent corporation) and any Non-Citizen minority stockholder of the owner and any parent corporation. This requirement is also applicable to any lender, purchaser of fish catch, or other entity that is a Non-Citizen;

(12) Any contract or agreement that purports to sell, lease or otherwise transfer to a Non-Citizen the fishing rights, a fishing quota, a processing quota or any other right allocated to a vessel owner, bareboat charterer, or a particular Fishing Industry Vessel; and

(13) A copy of the Large Vessel Certification required by § 356.47.

(b) In the event the owner or bareboat charterer of a Fishing Industry Vessel enters into any agreement reflected in any of the documents set forth in paragraph (a) of this section after the submission of the Affidavit of U.S. Citizenship, the owner or bareboat charterer must notify the Citizenship Approval Officer within 30 calendar days. Failure to notify the Citizenship Approval Officer of such agreements within the prescribed time may result in the vessel owner being deemed ineligible to document the vessel with a fishery endorsement.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5579, Feb. 4, 2003]

## § 356.15 Filing of affidavit of U.S. Citizenship.

(a) New owners of Fishing Industry Vessel after October 1, 2001, must file the Affidavit of U.S. Citizenship and other required documentation with the Citizenship Approval Officer in order for the Citizenship Approval Officer to make a determination whether the owner is eligible to own a vessel with a fishery endorsement to the vessel's documentation. A vessel may not receive a fishery endorsement to its documentation or operate in the fisheries of the United States before this determination has been made.

(b) If the Citizenship Approval Officer believes that there is a defect in the Affidavit of U.S. Citizenship or the supporting documentation, the applicant will be notified and will be given an opportunity to work with the Citizenship Approval Officer to resolve the matter before a determination is made whether the applicant qualifies as a U.S. Citizen.

(c) A vessel owner that has a valid fishery endorsement prior to October 1, 2001, must obtain a citizenship determination from the Citizenship Approval Officer no later than October 1, 2001, which states that the owner is a U.S. Citizen eligible to own a vessel with a fishery endorsement. If the owner obtains the required determination from the Citizenship Approval Officer, the fishery endorsement will remain valid and will be subject to renewal at the time of its next regularly scheduled annual filing to document the vessel with the Coast Guard, at which point the owner will be required to obtain an annual ruling from the MARAD's Citizenship Approval Officer that it is still a U.S. Citizen. If a vessel owner that owns a vessel with a valid fishery endorsement prior to October 1, 2001, does not obtain the required determination from the Citizenship Approval Officer by October 1, 2001, the vessel's fishery endorsement may be deemed invalid. In order to obtain a new fishery endorsement, the vessel owner will be required to obtain a citizenship determination from the Citizenship Approval Officer and to apply to the U.S. Coast Guard for a new fishery endorsement.

(d) The owner of a Fishing Industry Vessel or a prospective owner of such a vessel may request a letter ruling from the Citizenship Approval Officer in order to determine whether the owner under a proposed ownership structure will qualify as a U.S. Citizen that is eligible to document the vessel with a fishery endorsement. A complete request for a letter ruling must be accompanied by an Affidavit of U.S. Citizenship and all other documentation required by " 356.13. The Citizenship Approval Officer will issue a letter ruling based on the ownership structure that is proposed; however, the Citizenship Approval Officer reserves the right to reverse the determination if any of the elements of the ownership structure, contractual arrangements, or other material relationships are altered when the vessel owner submits the executed Affidavits and supporting documentation.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5579, Feb. 4, 2003]

### § 356.17 Annual requirements for vessel owners.

(a) An owner of a Fishing Industry Vessel must submit a certification in the form of an Affidavit of United States Citizenship to the Citizenship Approval Officer on an annual basis as provided in paragraph (b) of this section. The vessel owner does not have to submit duplicate copies of documents that have already been submitted and that have not changed, provided a copy is still retained by us. This annual certification requirement does not excuse the owner from the requirements of § 356.5 to notify the Citizenship Approval Officer throughout the year when changes in the citizenship information occur.

(b) The annual certification required by paragraph (a) of this section must be filed at least 45 days prior to the renewal date for the vessel's documentation and fishery endorsement. Where multiple Fishing Industry Vessels are owned by the same entity or by entities that ultimately have common ownership, an Affidavit of U.S. Citizenship and supporting documentation may be filed for all of the vessels in conjunction with the first vessel documentation renewal during each calendar year. Any information or supporting documentation unique to a particular vessel that would normally be required to be submitted under § 356.13 or any other provision of this part 356 such as charters, management agreements, loans or financing agreements, sales, purchase or marketing agreements, or exemptions claimed under this part must be submitted with the annual filing for that vessel if the documents are not already on file with the Citizenship Approval Officer.

(c) Failure to file the annual certification in a timely manner may result in the expiration of the vessel's fishery endorsement, which will prohibit the vessel from operating in the fisheries of the United States.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5579, Feb. 4, 2003]

## Subpart D—Mortgages

### § 356.19 Requirements to hold a Preferred Mortgage.

(a) In order for a Mortgagee to be eligible to obtain a Preferred Mortgage on a Fishing Industry Vessel, it must be:

(1) A Citizen of the United States;

(2) A state or federally chartered financial institution that is insured by the Federal Deposit Insurance Corporation;

(3) A farm credit lender established under title 12, chapter 23, of the United States Code (12 U.S.C. 2001 *et seq.*);

(4) A commercial fishing and agriculture bank established pursuant to State law;

(5) A Commercial Lender organized under the laws of the United States or of a State and eligible to own a vessel under 46 U.S.C. 12102(a); or

(6) A Mortgage Trustee that complies with the requirements of 46 U.S.C. 31322(f) and 46 CFR 356.27 through 356.37.

(b) A Mortgagee must demonstrate to the Citizenship Approval Officer that it satisfies one of the requirements set forth in paragraph (a) of this section before it will be qualified to obtain a Preferred Mortgage on a Fishing Industry Vessel after April 1, 2003. A Mortgagee that has an existing Preferred Mortgage on a Fishing Industry Vessel prior to April 1, 2003, will be required to demonstrate that it satisfies one of

the requirements set forth in paragraph (a) of this section before the vessel's next certificate of documentation renewal date after April 1, 2003. Failure to submit the required information may result in the loss of the preferred status for the mortgage. A sample format that may be used to submit the required information for Mortgagees, Commercial Lenders and Lender Syndicates is available on the MARAD website at *http://www.marad.dot.gov/afa.html.* The required information that must be submitted in order to make such a demonstration for each category in paragraph (a) is as follows:

(1) If a Mortgagee plans to qualify as a United States Citizen under paragraph (a)(1) of this section, the Mortgagee must file an Affidavit of United States Citizenship demonstrating that it complies with the citizenship requirements of 46 U.S.C. 12102(c) and section 2(c) of the 1916 Act, which require that 75% of the ownership and control in the Mortgagee be vested in U.S. Citizens at each tier and in the aggregate. In addition to the Affidavit of U.S. Citizenship, a certified copy of the Articles of Incorporation and Bylaws, or other comparable corporate documents must be submitted to the Citizenship Approval Officer.

(2) A state or federally chartered financial institution must provide a certification that indicates whether it is a state chartered or federally chartered financial institution and that certifies that it is insured by the Federal Deposit Insurance Corporation ("FDIC"). The certification must include the FDIC Certification Number assigned to the institution.

(3) A farm credit lender must provide a certification indicating that it qualifies as a farm credit lender established under title 12, chapter 23, of the United States Code (12 U.S.C. 2001 *et seq.*);

(4) A commercial fishing and agriculture bank must provide a certification indicating that it has been lawfully established as a commercial fishing and agriculture bank pursuant to State law and that it is in good standing;

(5) A Commercial Lender that seeks to be qualified to hold a Preferred Mortgage directly or through a Mortgage Trustee must provide evidence that it is engaged primarily in the business of lending and other financing transactions and a certification that it has a loan portfolio in excess of $100 million, of which no more than 50 percent of the dollar amount of the loan portfolio consists of loans to borrowers in the commercial fishing industry. The certification must include information regarding the approximate size of the loan portfolio and the percentage of the portfolio that consists of loans to borrowers in the commercial fishing industry. A Commercial Lender that seeks to be qualified to hold a Preferred Mortgage directly must also submit an Affidavit of U.S. Citizenship to the Citizenship Approval Officer to demonstrate that it qualifies as one of the following:

(i) An individual who is a citizen of the United States;

(ii) An association, trust, joint venture, or other entity—

(A) All of whose members are citizens of the United States; and

(B) That is capable of holding title to a vessel under the laws of the United States or of a State;

(iii) A partnership whose general partners are citizens of the United States, and the controlling interest in the partnership is owned by citizens of the United States;

(iv) A corporation established under the laws of the United States or of a State, whose chief executive officer, by whatever title, and chairman of its board of directors are citizens of the United States and no more of its directors are Non-citizens than a minority of the number necessary to constitute a quorum;

(v) The United States Government; or

(vi) The government of a State.

(6) A Mortgage Trustee must submit the Mortgage Trustee Application and other documents required in § 356.27. If the beneficiary under the trust arrangement has not demonstrated to the Citizenship Approval Officer that it qualifies as a Commercial Lender, a Lender Syndicate or an entity eligible to hold a preferred mortgage under paragraphs (a)(1) through (5) of this section, the Mortgage Trustee must

submit to the Citizenship Approval Officer copies of the trust agreement, security agreement, loan documents, preferred mortgage, and any issuance, assignment or transfer of interest so that a determination can be made as to whether any of the arrangements results in an impermissible transfer of control of the vessel to a person not eligible to own a vessel with a fishery endorsement under 46 U.S.C. 12102(c).

(c) A Mortgagee is required to provide the certification required by paragraph (b) of this section to the Citizenship Approval Officer on an annual basis during the time in which it holds a preferred mortgage on a Fishing Industry Vessel. The annual certification must be submitted at least 30 calendar days prior to the annual anniversary date of the original approval. The Citizenship Approval Officer will notify a Mortgagee if the Mortgagee fails to submit the required annual certification. If the Mortgagee does not provide the certification within 30 calendar days of the mailing date of the delinquency notice, the mortgage will no longer qualify as a Preferred Mortgage.

(d) The following entities may exercise rights under loan or mortgage covenants with respect to a Fishing Industry Vessel without obtaining MARAD approval:

(1) An entity that is deemed qualified to hold a Preferred Mortgage under paragraphs (a)(1) through (5) of this section and that has submitted the appropriate certification to the Citizenship Approval Officer under paragraph (b) of this section; and

(2) An approved Mortgage Trustee that is holding a Preferred Mortgage for a beneficiary that is qualified to hold a Preferred Mortgage under paragraphs (a)(1) through (a)(5) of this section or for a beneficiary that qualifies as a Commercial Lender or a Lender Syndicate and that has made an appropriate certification to the Citizenship Approval Officer that it meets the requirements of either § 356.3(g) or § 356.3(n).

(e) An entity that holds a Preferred Mortgage on a Fishing Industry Vessel or that is using a Mortgage Trustee to hold a Preferred Mortgage for its benefit may request a letter ruling from the Citizenship Approval Officer in order to determine whether a mortgage or mortgage trust arrangement is in compliance with the regulations in this part. The Citizenship Approval Officer reserves the right to reverse any advice given under a letter ruling if any of the elements of the proposed loan or mortgage are materially altered or if the entity requesting the letter ruling has failed to fully disclose all relevant information.

[68 FR 5579, Feb. 4, 2003]

### § 356.21 General approval of standard loan or mortgage agreements.

(a) A lender that is engaged in the business of financing Fishing Industry Vessels and that is not a Commercial Lender or Lender Syndicate using a Mortgage Trustee to hold a Preferred Mortgage for its benefit or an entity that is otherwise qualified to hold a Preferred Mortgage on Fishing Industry Vessels pursuant to § 356.19(a)(2) through (a)(5), may apply to the Citizenship Approval Officer for general approval of its standard loan and mortgage agreements for such vessels. In order to obtain general approval for its standard loan and mortgage agreements, a lender using an approved Mortgage Trustee must submit to the Citizenship Approval Officer:

(1) A copy of its standard loan or mortgage agreement for Fishing Industry Vessel, including all covenants that may be included in the loan or mortgage agreement; and,

(2) A certification that it will not use covenants or restrictions in the loan or mortgage agreement outside of those approved by the Citizenship Approval Officer without obtaining the prior approval of the Citizenship Approval Officer.

(b) A lender that receives general approval may enter into loans and mortgages on Fishing Industry Vessel without prior approval from us of each individual loan or mortgage; *provided*, that the loan or mortgage conforms to the standard agreement approved by the Citizenship Approval Officer and does not include any other covenants that have not been approved by the Citizenship Approval Officer.

(c) The lender must provide an annual certification to the Citizenship

Approval Officer certifying that all loans and mortgages on Fishing Industry Vessel entered into under this general approval conform to the standard agreement approved by us and do not contain deviations from the standard agreement or covenants that were not reviewed and approved by the Citizenship Approval Officer. The certification must be submitted at least 30 calendar days prior to the annual anniversary date of the previous approval.

(d) If the lender wishes to use covenants that were not approved pursuant to this section, it must submit the new covenants to the Citizenship Approval Officer for approval.

(e) A lender that has received general approval for its lending program and that uses covenants in a loan or mortgage on a Fishing Industry Vessel that have not been approved by the Citizenship Approval Officer will be subject to loss of its general approval and the Citizenship Approval Officer may review and approve all of the lender's mortgage and loan covenants on a case-by-case basis. The Citizenship Approval Officer may also determine that the arrangement results in an impermissible transfer of control to a Non-Citizen and therefore does not meet the requirements to qualify as a Preferred Mortgage. If the lender knowingly files a false certification with the Citizenship Approval Officer or has used covenants in a loan or mortgage on a Fishing Industry Vessel that are materially different from the approved covenants, it may also be subject to civil and criminal penalties pursuant to 18 U.S.C. 1001.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5581, Feb. 4, 2003]

### § 356.23 Restrictive loan covenants approved for use by lenders.

(a) We approve the following standard loan covenants, which may restrict the activities of the borrower without the lender's consent and which may be included in loan agreements or other documents between an owner of a Fishing Industry Vessel and an unrelated lender that is using an approved Mortgage Trustee to hold the mortgage and debt instrument for the benefit of the lender and that is not exempted under § 356.19(d) from MARAD review of its loan and mortgage covenants, so long as the lender's consent is not unreasonably withheld:

(1) Borrower cannot sell part or all of its assets;

(2) Borrower cannot merge, consolidate, reorganize, dissolve, or liquidate;

(3) Borrower cannot undertake new borrowing or contingent liabilities;

(4) Borrower cannot insure, guaranty or become otherwise liable for debt obligations of any other entity, Person, etc.;

(5) Borrower cannot Charter or lease a vessel that is collateral for the loan;

(6) Borrower cannot incur liens, except any permitted liens that may be set forth in the loan or other financing documents;

(7) Borrower must limit its investments to marketable investments guaranteed by the United States or a State, or commercial paper with the highest rating of a generally recognized rating service;

(8) Borrower cannot make structural alterations or any other major alteration to the vessel;

(9) Borrower, if in arrears in its debt obligations to the lender, cannot make dividend payments on its capital stock; and,

(10) Borrower, if in arrears in its debt obligations to the lender, cannot make excessive contributions to pension plans, make payment of employee bonuses, or make excessive contributions to stock option plans, or provide other major fringe benefits in terms of dollar amount to its employees, officers, and directors, such as loans, etc.

(b) The mortgage may not include covenants that allow the Mortgagee to operate the vessel except as provided for in § 356.25.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5581, Feb. 4, 2003]

### § 356.25 Operation of Fishing Industry Vessel Mortgagees.

(a) A Mortgagee that has demonstrated to MARAD that it qualifies as a Citizen of the United States and is eligible to own a vessel with a fishery endorsement may operate a Fishing Industry Vessel.

(b) A Mortgagee not eligible to own a Fishing Industry Vessel cannot operate or cause operation of, the vessel in the

fisheries of the United States. Except as provided in paragraph (c) of this section, the vessel may not be operated for any purpose without the prior written approval of the Citizenship Approval Officer.

(c) A Mortgagee not eligible to own a Fishing Industry Vessel may operate the vessel for a non-commercial purpose to the extent necessary for the immediate safety of the vessel or for repairs, drydocking or berthing changes; provided, that the vessel is operated under the command of a Citizen of the United States and for no longer than 15 calendar days.

(d) A Mortgagee that is holding a Preferred Mortgage on a Fishing Industry Vessel but that is not eligible to own a Fishing Industry Vessel may take possession of the vessel in the event of default by the mortgagor other than by foreclosure pursuant to 46 U.S.C. 31329, if provided for in the mortgage or a related financing document. However, the vessel may not be operated, or caused to be operated in commerce, except as provided in paragraph (c) of this section or with the approval of the Citizenship Approval Officer.

(e) A Non-Citizen Lender that has brought a civil action in rem for enforcement of a Preferred Mortgage lien on a Citizen-owned Fishing Industry Vessel pursuant to 46 U.S.C. 31325(b)(1) may petition the court pursuant to 46 U.S.C. 31325(e)(1) for appointment of a receiver, and, if the receiver is a Person eligible to own a Fishing Industry Vessel , to authorize the receiver to operate the mortgaged vessel pursuant to terms and conditions consistent with this part 356. If the receiver is not a Citizen of the United States that meets the requirements of section 2(c) of the 1916 Act, 46 App. U.S.C. 802(c), and 46 U.S.C. 12102(c), the vessel may not be operated in the fisheries of the United States.

## Subpart E—Mortgage Trustees

### § 356.27 Mortgage Trustee requirements.

(a) A lender who is not qualified under § 356.19(a)(1) through (5) to hold a Preferred Mortgage directly on a Fishing Industry Vessel may use a qualified Mortgage Trustee to hold, for the benefit of the lender, the Preferred Mortgage and the debt instrument for which the Preferred Mortgage is providing security.

(b) In order to qualify as an approved Mortgage Trustee, the Mortgage Trustee must:

(1) Be eligible to hold a Preferred Mortgage on a Fishing Industry Vessel under § 356.19(a)(1) through (a)(5);

(2) Be organized as a corporation and doing business under the laws of the United States or of a State;

(3) Be authorized under the laws of the United States or of the State under which it is organized to exercise corporate trust powers;

(4) Be subject to supervision or examination by an official of the United States Government, or of a State;

(5) Have a combined capital and surplus (as stated in its most recent published report of condition) of at least $3,000,000; and

(6) Meet any other requirements prescribed by the Citizenship Approval Officer.

(c) The Mortgage Trustee must submit to the Citizenship Approval Officer the following documentation in order to be an approved Mortgage Trustee:

(1) An application for approval as a Mortgage Trustee as set out in paragraph (g) of this section;

(2) The appropriate certification and documentation required under § 356.19(b)(1) through (5) to demonstrate that it is qualified to hold a Preferred Mortgage on Fishing Industry Vessels;

(3) A copy of the most recent published report of condition of the Mortgage Trustee; and,

(4) A certification that the Mortgage Trustee is authorized under the laws of the United States or of a State to exercise corporate trust powers and is subject to supervision or examination by an official of the United States or of a State;

(5) A certification that the Mortgage Trustee is authorized under the laws of the United States or of a State to exercise corporate trust powers and is subject to supervision or examination by an official of the United States or of a State;

(d) Any right set forth in a mortgage on a Fishing Industry Vessel cannot be

issued, assigned, or transferred to a person who is not eligible to be a Mortgagee without the approval of the Citizenship Approval Officer.

(e) Mortgage Trustees approved by the Citizenship Approval Officer must not assume any fiduciary obligations in favor of Non-Citizen Lenders that are in conflict with the U.S. Citizen ownership and control requirements set forth in the AFA, without the approval of the Citizenship Approval Officer. An approved Mortgage Trustee may request that the Citizenship Approval Officer pre-approve a trust agreement form to ensure that the fiduciary duties assumed by the Mortgage Trustee in favor of a Non-Citizen Lender are consistent with the ownership and control requirements of this part and the AFA.

(f) We will periodically publish a list of Approved Mortgage Trustees in the FEDERAL REGISTER, but current information as to the status of any particular Mortgage Trustee must be obtained from the Citizenship Approval Officer.

(g) An application to be approved as a Mortgage Trustee should include the following:

The undersigned (the "Mortgage Trustee") hereby applies for approval as Mortgage Trustee pursuant to 46 U.S.C. 31322(f) and the Regulation (46 CFR part 356), prescribed by the Maritime Administration ("MARAD"). All terms used in this application have the meaning given in the Regulation. In support of this application, the Mortgage Trustee certifies to and agrees with MARAD as hereinafter set forth:

The Mortgage Trustee certifies:

(a) That it is acting or proposing to act as Mortgage Trustee on a Fishing Industry Vessel documented, or to be documented under the U.S. registry;

(b) That it—

(1) Is organized as a corporation under the laws of the United States or of a State and is doing business in the United States;

(2) Is authorized under those laws to exercise corporate trust powers;

(3) Is qualified to hold a Preferred Mortgage on Fishing Industry Vessels pursuant to 46 CFR 356.19(a);

(4) Is subject to supervision or examination by an official of the United States Government or a State; and

(5) Has a combined capital and surplus of at least $3,000,000 as set forth in its most recent published report of condition, a copy of which, dated _____, is attached.

The Mortgage Trustee agrees:

(a) That it will, so long as it shall continue to be on the List of Approved Mortgage Trustees referred to in the Regulation:

(1) Notify the Citizenship Approval Officer in writing, within 20 days, if it shall cease to be a corporation which:

(i) Is organized under the laws of the United States or of a State, and is doing business under the laws of the United States or of a State;

(ii) Is authorized under those laws to exercise corporate trust powers;

(iii) Is qualified under 46 CFR. 356.19(a) to hold a Preferred Mortgage on Fishing Industry Vessels;

(iv) Is subject to supervision or examination by an authority of the U.S. Government or of a State; and

(v) Has a combined capital and surplus (as set forth in its most recent published report of condition) of at least $3,000,000.

(2) Furnish to the Citizenship Approval Officer on an annual basis:

(i) The appropriate certification and documentation required under §356.19(b)(1)–(5) to demonstrate that it is qualified to hold a Preferred Mortgage on Fishing Industry Vessels;

(ii) A copy of the most recent published report of condition of the Mortgage Trustee;

(iii) A list of the Fishing Industry Vessels for which it is acting as Mortgage Trustee; and,

(iv) The identity and address of all beneficiaries for which it is acting as a Mortgage Trustee.

(3) Furnish to the Citizenship Approval Officer copies of each Trust Agreement as well as any other issuance, assignment or transfer of an interest related to each transaction where the beneficiary under a trust arrangement is not a Commercial Lender, a Lender Syndicate or an entity that is eligible to hold a Preferred Mortgage under 46 CFR 356.19(a)(1)–(5);

(4) Furnish to the Citizenship Approval Officer any further relevant and material information concerning its qualifications as Mortgage Trustee under which it is acting or proposing to act as Mortgage Trustee, as the Citizenship Approval Officer may from time to time request; and,

(5) Permit representatives of the Maritime Administration, upon request, to examine its books and records relating to the matters referred to herein;

(b) That it will not issue, assign, or in any manner transfer to a person not eligible to own a documented vessel, any right under a mortgage of a Fishing Industry Vessel, or operate such vessel without the approval of the Citizenship Approval Officer; except that it may operate the vessel to the extent necessary for the immediate safety of the vessel, for its direct return to the United States or for its movement within the United States

for repairs, drydocking or berthing changes, but only under the command of a Citizen of the United States for a period not to exceed 15 calendar days;

(c) That after a responsible official of such Mortgage Trustee obtains knowledge of a foreclosure proceeding, including a proceeding in a foreign jurisdiction, that involves a documented Fishing Industry Vessel on which it holds a mortgage pursuant to approval under the Regulation and to which 46 App. U.S.C. 802(c), 46 U.S.C. 31322(a)(4) or 46 U.S.C. 12102(c) is applicable, it shall promptly notify the Citizenship Approval Officer with respect thereto, and shall ensure that the court or other tribunal has proper notice of those provisions; and

(d) That it shall not assume any fiduciary obligation in favor of Non-Citizen beneficiaries that is in conflict with any restrictions or requirements of the Regulation.

This application is made in order to induce the Maritime Administration to grant approval of the undersigned as Mortgage Trustee pursuant to 46 U.S.C. 31322 and the Regulation, and may be relied on by the Citizenship Approval Officer for such purposes. False statements in this application may subject the applicant to fine or imprisonment, or both, as provided for violation of the proscriptions contained in 18 U.S.C. 286, 287, and 1001.

Dated this _____ day of _____, 20___.

ATTEST:

_____

(Print or type name below)

(SEAL)

MORTGAGE TRUSTEE'S NAME & ADDRESS

_____

By:

(Print or type name below)

TITLE

[65 FR 44877, July 19, 2000, as amended at 68 FR 5581, Feb. 4, 2003]

### § 356.31 Maintenance of Mortgage Trustee approval.

(a) A Mortgage Trustee that holds a Preferred Mortgage on a Fishing Industry Vessel must submit the following information to the Citizenship Approval Officer during each calendar year that it is acting as a Mortgage Trustee:

(1) The appropriate certification and documentation required under § 356.19(b)(1) through (b)(5) to demonstrate that it is qualified to hold a Preferred Mortgage on Fishing Industry Vessels;

(2) A copy of the most recent published report of condition of the Mortgage Trustee;

(3) A list of the Fishing Industry Vessels for which it is acting as Mortgage Trustee; and

(4) The identity and address of all beneficiaries for which it is acting as a Mortgage Trustee.

(b) The Mortgage Trustee must file the documents required in paragraph (a) of this section within 30 calendar days prior to the anniversary date of the original approval from the Citizenship Approval Officer.

(c) If at any time the Mortgage Trustee fails to meet the statutory requirements set forth in the AFA, the Mortgage Trustee must notify the Citizenship Approval Officer of such failure to qualify as a Mortgage Trustee not later than 20 calendar days after the event causing such failure. Upon learning that a Mortgage Trustee fails to meet the statutory or regulatory requirements to qualify as a Mortgage Trustee, we will publish a disapproval notice in the FEDERAL REGISTER and will notify the U.S. Coast Guard, the Mortgage Trustee, and the beneficiary of each Preferred Mortgage of such disapproval by providing them a copy of the disapproval notice. The notice to beneficiaries will be provided by standard U.S. mail to the address supplied to the Citizenship Approval Officer by the Mortgage Trustee. Within 30 calendar days of publication in the FEDERAL REGISTER of the disapproval notice, the disapproved Mortgage Trustee must either transfer its fiduciary responsibilities to a successor Mortgage Trustee that has been approved by the Citizenship Approval Officer or cure the defect in its approval. The preferred status of the mortgage will be maintained during the 30 day period following publication of the notice in the FEDERAL REGISTER and pending transfer of the Mortgage Trustee's fiduciary responsibilities to a successor Mortgage Trustee or cure of the defect.

[68 FR 5582, Feb. 4, 2003]

### § 356.37 Operation of a Fishing Industry Vessel by a Mortgage Trustee.

An approved Mortgage Trustee cannot operate a Fishing Industry Vessel without the approval of the Citizenship

Approval Officer, except where non-commercial operation is necessary for the immediate safety of the vessel, or for repairs, drydocking or berthing changes; provided, that the vessel is operated under the command of a Citizen of the United States for a period of no more than 15 calendar days.

[68 FR 5582, Feb. 4, 2003]

## Subpart F—Charters, Management Agreements and Exclusive or Long-Term Contracts

### § 356.39 Charters.

(a) Charters to Citizens of the United States:

(1) Bareboat charters may be entered into with Citizens of the United States subject to approval by the Citizenship Approval Officer that the charterer is a Citizen of the United States. The bareboat charterer of Fishing Industry Vessel must submit an Affidavit of U.S. Citizenship to the Citizenship Approval Officer for review and approval prior to entering into such charter.

(2) Time charters, voyage charters and other charter arrangements that do not constitute a bareboat charter of the Fishing Industry Vessel may be entered into with Citizens of the United States. The charterer must submit an Affidavit of U.S. Citizenship to the Citizenship Approval Officer within 30 calendar days of execution of the charter.

(b) Charters to Non-Citizens:

(1) Bareboat or demise charters to Non-Citizens of Fishing Industry Vessel for use in the United States are prohibited. Bareboat charters to Non-Citizens of Fish Processing Vessels and Fish Tender Vessels for use solely outside of the United States are permitted.

(2) Time charters, voyage charters and other charters that are not a demise of the vessel may be entered into with Non-Citizens for the charter of dedicated Fish Tender Vessels and Fish Processing Vessels that are not engaged in the Harvesting of fish or fishery resources. A copy of the charter must be submitted to the Citizenship Approval Officer prior to being executed in order for the Citizenship Approval officer to verify that the charter is not in fact a demise of the vessel.

(3) Time charters, voyage charters and other charters of Fishing Industry Vessels to Non-Citizens are prohibited if the Fishing Industry Vessel will be used to Harvest fish or fishery resources.

(c) We reserve the right to request a copy of any time charter, voyage charter, contract of affreightment or other Charter of a Fishing Industry Vessel in order to confirm that the Charter is not a bareboat charter of the Fishing Industry Vessel.

(d) Any violation of this section will render the vessel's fishery endorsement immediately invalid upon notification from the Citizenship Approval Officer.

### § 356.41 Management agreements.

(a) An owner or bareboat charterer of a Fishing Industry Vessel may enter into a management agreement with a Non-Citizen in which the management company provides marketing services, consulting services or other services that are ministerial in nature and do not convey control of the vessel to the Non-Citizen.

(b) An owner or bareboat charterer of a Fishing Industry Vessel may not enter into a management agreement that allows the Non-Citizen to appoint, discipline or replace the crew or the master, direct the operations of the vessel or to otherwise effectively gain control over the management and operation of the vessel or vessel-owning entity.

(c) The owner or bareboat charterer must file with the Citizenship Approval Officer a description of any management agreement entered into with a Non-Citizen. The description must be submitted within 30 days of the execution and must include:

(1) A description of the agreement with a summary of the terms and conditions, and,

(2) A representation and warranty that the agreement does not contain any provisions that convey control over the vessel or vessel-owning entity to a Non-Citizen.

(d) The Citizenship Approval Officer may request a copy of any management agreement to determine if it contains provisions that convey control

over the vessel or vessel-owning entity to a Non-Citizen.

### § 356.43 Long-term or exclusive sales contracts.

(a) An owner or bareboat charterer of a Fishing Industry Vessel may enter into an agreement or contract with a Non-Citizen for the sale of all or a significant portion of its catch where the contract or agreement is solely for the purpose of employment of certain vessels on an exclusive basis for a specified period of time. Such contracts or agreements will not require our prior approval; provided, that the contract or agreement does not convey control over the owner or bareboat charterer of the vessel or the vessel's operation, management and harvesting activities.

(b) Provisions of a long-term or exclusive contract or agreement for the sale of all or a significant portion of a vessel's catch entered into pursuant to paragraph (a) of this section that are not considered to convey impermissible control to a Non-Citizen and do not require our approval include provisions that:

(1) Specify that the owner or bareboat charterer agrees to sell and purchaser agrees to procure, on a preferential basis, a certain quantity of fish caught by a vessel owner or bareboat charterer on a specific vessel;

(2) Specify that the vessel owner or charterer is responsible for supplying a specific type of fish to off-loading points designated by the purchaser;

(3) Provide for the replacement by the vessel owner of vessels covered by the contract or agreement in the event of loss or damage;

(4) Specify refrigeration criteria;

(5) Provide that the owner or bareboat charterer has to comply with fishing schedules that specify the maximum age of fish to be delivered and a method to coordinate delivery to the purchaser;

(6) Provide for methods of calculating price per pound or other price schedules and a schedule for payment for delivered fish;

(7) Provide for an arbitration mechanism in the event of dispute; and

(8) Provide for the purchaser to furnish off-loading crew and/or processing or quality control technicians but no other vessel crew members.

(c) An owner or bareboat charterer of a Fishing Industry Vessel must obtain the approval of the Citizenship Approval Officer prior to entering into any agreement or contract with a Non-Citizen for the sale of all or a significant portion of a vessel's catch if the agreement or contract contains provisions that in any way convey to the purchaser of the vessel's catch control over the operation, management or harvesting activities of the vessel, vessel owner, or bareboat charterer other than as provided for in paragraph (b) of this section.

(d) An owner or bareboat charterer must submit, with its Affidavit of United States Citizenship and annually thereafter, a list of any long-term or exclusive sales agreements to which it is a party and the principal parties to those agreements. If requested, a copy of such agreements must be provided to the Citizenship Approval Officer.

### § 356.45 Advance of funds.

(a) A Non-Citizen may advance funds to the owner or bareboat charterer of a Fishing Industry Vessel:

(1) As provisional payment for products delivered for consignment sales, but not yet sold; or

(2) Where the basis of the advancement is an agreement between the Non-Citizen and the vessel owner or bareboat charterer to sell all or a portion of the vessel's catch to the Non-Citizen and the agreement meets the following conditions:

(i) The amount of the advancement does not exceed the annual value of the sales contract, measured as the value of the product to be supplied to the processor;

(ii) The Non-Citizen is not granted any rights whatsoever to control the operation, management and harvesting activities of the Fishing Industry Vessel other than as provided for in § 356.43;

(iii) The owner or bareboat charterer submits to the Citizenship Approval Officer within 30 days of execution a description of the arrangement and a certification and warranty that the agreement or contract with the Non-Citizen

does not convey control over the vessel, the vessel owner or bareboat charterer in any manner whatsoever other than as provided for in § 356.43; and,

(iv) No security interest in the vessel is conveyed as collateral for the advance of funds, unless a qualified Mortgage Trustee is used to hold the debt instrument for the benefit of the Non-Citizen.

(b) An owner or bareboat charterer may enter into an unsecured letter of credit or promissory note with a U.S. branch of a Non-Citizen Lender if:

(1) The Non-Citizen Lender is not affiliated with any party with whom the owner or bareboat charter has entered into a mortgage, long-term or exclusive sales or purchase agreement, or other similar contract;

(2) The Non-Citizen Lender is not granted any rights whatsoever to control the owner or the operation, management and harvesting activities of the Fishing Industry Vessel; and,

(3) The owner or bareboat charterer submits to the Citizenship Approval Officer within 30 days of execution a description of the arrangement and a certification and warranty that the agreement or contract with the Non-Citizen Lender does not convey control over the vessel, the vessel owner or bareboat charter in any manner whatsoever.

(c) The Citizenship Approval Officer may request a copy of any agreement for an advance of funds or letter of credit in order to determine if it contains an impermissible conveyance of control to a Non-Citizen.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5582, Feb. 4, 2003]

## Subpart G—Special Requirements for Certain Vessels

### § 356.47 Special requirements for large vessels.

(a) Unless exempted in paragraph (b), (c) or (d) of this section, a vessel is not eligible for a fishery endorsement under 46 U.S.C. 12108 if:

(1) It is greater than 165 feet in registered length;

(2) It is more than 750 gross registered tons (as measured pursuant to 46 U.S.C. Chapter 145) or 1900 gross registered tons (as measured pursuant to 46 U.S.C. Chapter 143); or

(3) It possesses a main propulsion engine or engines rated to produce a total of more than 3,000 shaft horsepower; such limitation shall not include auxiliary engines for hydraulic power, electrical generation, bow or stern thrusters, or similar purposes.

(b) A vessel that meets one or more of the conditions in paragraph (a) of this section may still be eligible for a fishery endorsement if:

(1) A certificate of documentation was issued for the vessel and endorsed with a fishery endorsement that was effective on September 25, 1997;

(2) The vessel is not placed under foreign registry after October 21, 1998; and,

(3) In the event of the invalidation of the fishery endorsement after October 21, 1998, application is made for a new fishery endorsement within 15 business days of the receipt of written notification from MARAD or the Coast Guard identifying the reason for such invalidation. The fishery endorsement of a Fishing Industry Vessel that meets the criteria of paragraph (a) of this section is not deemed to be invalid for purposes of complying with this paragraph (a)(3), if the vessel is purchased pursuant to 46 U.S.C. 31329 by a Mortgagee that is not eligible to own a vessel with a fishery endorsement, provided that the Mortgagee is eligible to hold a preferred mortgage on such vessel at the time of the purchase;

(c) A vessel that is prohibited from receiving a fishery endorsement under paragraph (a) of this section will be eligible if the owner of such vessel demonstrates to MARAD that the regional fishery management council of jurisdiction established under section 302(a)(1) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1852(a)(1)) has recommended after October 21, 1998, and the Secretary of Commerce has approved, conservation and management measures in accordance with the American Fisheries Act of 1998, Title II, Division C, Public Law 105–277, to allow such vessel to be used in fisheries under such council's authority.

(d) A vessel that meets one or more of the conditions in paragraph (a) of

this section may still be eligible for a fishery endorsement if the vessel is engaged exclusively in the menhaden fishery in the geographic region governed by the South Atlantic Fisheries Council or the Gulf of Mexico Fisheries Council.

(e) The owner of a vessel that meets any of the criteria in paragraph (a) of this section is required to submit a certification each year in conjunction with its Affidavit of U.S. Citizenship in order to document that the vessel is eligible for documentation with a fishery endorsement. The certification should indicate that the vessel meets the criteria of paragraph (a) of this section; however, it is eligible to be documented with a fishery endorsement because it complies with the requirements of either paragraph (b), (c), or (d) of this section. A sample form for the certification is available on the MARAD Web site at *http://www.marad.dot.gov/afa.html* or may be obtained by contacting the Citizenship Approval Officer.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5582, Feb. 4, 2003]

### § 356.49 Penalties.

If the owner or the representative or agent of the owner has knowingly falsified or concealed a material fact or knowingly made a false statement or representation with respect to the eligibility of the vessel under 46 U.S.C. 12102(c), in applying for or applying to renew the vessel's fishery endorsement, the following penalties may apply:

(a) The vessel's fishery endorsement may be revoked;

(b) A fine of up to $100,000 may be assessed against the vessel owner for each day in which such vessel has engaged in fishing (as such term is defined in section 3 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1802)) within the exclusive economic zone of the United States; and

(c) The owner, representative or agent may be subject to additional fines, penalties or both for violation of the proscriptions of 18 U.S.C. 286, 287, and 1001.

### § 356.51 Exemptions for specific vessels.

(a) The following vessels are exempt from the requirements of 46 U.S.C. 12102(c) as amended by the AFA until such time after October 1, 2001, as 50% of the interest owned and controlled in the vessel changes; *provided*, the vessel maintains eligibility for a fishery endorsement under the federal law that was in effect prior to the enactment of the AFA:

(1) EXCELLENCE (United States official number 967502);

(2) GOLDEN ALASKA (United States official number 651041);

(3) OCEAN PHOENIX (United States official number 296779);

(4) NORTHERN TRAVELER (United States official number 635986); and

(5) NORTHERN VOYAGER (United States official number 637398) or a replacement for the NORTHERN VOYAGER that complies with paragraphs 2, 5, and 6 of section 208(g) of the AFA.

(b) The NORTHERN VOYAGER (United States official number 637398) and NORTHERN TRAVELER (United States official number 635986) will forfeit the exemption under paragraph (a) of this section if the vessel is used in a fishery under the authority of a regional fishery management council other than the New England Fishery Management Council or Mid-Atlantic Fishery Management Council established, respectively, under subparagraphs (A) and (B) of section 302(a)(1) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1852(a)(1)(A) and (B)).

(c) The EXCELLENCE (United States official number 967502), GOLDEN ALASKA (United States official number 651041), and OCEAN PHOENIX (United States official number 296779) will forfeit their exemption under paragraph (a) of this section if the vessel is used to Harvest fish.

(d) Owners of vessels that are exempt from the new ownership and control requirements of the AFA and this part 356 pursuant to paragraph (a) of this section must still comply with the requirements for a fishery endorsement under the federal law that was in effect on October 21, 1998. The owners must submit to the Citizenship Approval Officer on an annual basis:

(1) An Affidavit of United States Citizenship in accordance with § 356.15 demonstrating that they comply with the Controlling Interest requirements of section 2(b) of the 1916 Act. The Affidavit must note that the owner is claiming an exemption from the requirements of this part 356 pursuant to paragraph (e) of this section; and

(2) A description of the current ownership structure, a list of any changes in the ownership structure that have occurred since the filing of the last Affidavit, and a chronology of all changes in the ownership structure that have occurred since October 21, 1998.

(e) The following Fishing Industry Vessels are exempt from the new ownership and control standards under the AFA and this part 356 for vessel owners and Mortgagees:

(1) Fishing Industry Vessels engaged in fisheries in the exclusive economic zone under the authority of the Western Pacific Fishery Management Council established under section 302(a)(1)(H) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1852(a)(1)(H)); and

(2) Purse seine vessels when they are engaged in tuna fishing in the Pacific Ocean outside the exclusive economic zone of the United States or pursuant to the South Pacific Regional Fisheries Treaty.

(f) Fishing Industry Vessels that are claiming the exemption provided for in paragraph (e) of this section must certify to the Citizenship Approval Officer that the vessel is exempt from the ownership and control requirements of this part 356 pursuant to the exemption in paragraph (e) of this section. The vessel owner will be required to follow the U.S. Coast Guard's procedures for documenting a vessel with a fishery endorsement, as in effect prior to the passage of the AFA. The vessel owner must also notify the Coast Guard's National Vessel Documentation Center that it is claiming an exemption from the ownership and control requirements of this part 356 pursuant to paragraph (e) of this section.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5583, Feb. 4, 2003]

## Subpart H—International Agreements

### § 356.53 Conflicts with international agreements.

(a) If the owner or Mortgagee of a Fishing Industry Vessel believes that there is a conflict between the AFA or 46 CFR part 356 and any international treaty or agreement to which the United States is a party on July 24, 2001, and to which the United States is currently a party, the owner or Mortgagee may petition the Chief Counsel of the Maritime Administration at any time after July 19, 2000 to request a ruling that all or part of the requirements of this part 356 do not apply to that particular owner or particular Mortgagee with respect to a specific vessel; provided, the petitioner had an ownership interest in the Fishing Industry Vessel, or a mortgage on the vessel in the case of a Mortgagee, on July 24, 2001, and is covered by the international agreement.

(b) A petition for exemption from the requirements of this part 356 must include:

(1) Evidence of the ownership structure, or mortgage structure in the case of a Mortgagee, of the Fishing Industry Vessel as of July 24, 2001 (or on the date of the petition, for petitions filed prior to July 24, 2001), and any subsequent changes to the ownership structure, or mortgage structure in the case of a Mortgagee, of the vessel;

(2) A copy of the provisions of the international agreement or treaty which the owner or mortgagee believes are in conflict with the regulations in this part 356;

(3) A detailed description of how the provisions of the international agreement or treaty and the regulations in this part 356 are in conflict; and

(4) A certification in all petitions filed on or after July 24, 2001, that no interest in the vessel-owning entity has been transferred to a Non-Citizen after July 24, 2001.

(c) A separate petition must be filed for each Fishing Industry Vessel for which the vessel owner or a Mortgagee is requesting an exemption unless the Chief Counsel authorizes consolidated filing. Petitions should include two copies of all materials and should be

sent to the following address: Maritime Administration, Chief Counsel, Room 7228, 400 7th Street, SW., Washington, DC 20590.

(d) Upon receipt of a complete petition, the Chief Counsel may publish a notice in the FEDERAL REGISTER requesting public comment if the petition presents unique issues that have not been addressed in previous determinations. The FEDERAL REGISTER notice will include the petitioner's descriptions regarding how the AFA and this part 356 are in conflict with a particular investment treaty or agreement, but it will not include proprietary or confidential information about the petitioner. The Chief Counsel, in consultation with other departments and agencies within the Federal Government that have responsibility or expertise related to the interpretation or application of international investment agreements (*e.g.*, the Department of State, United States Trade Representative, Department of Treasury, etc.), will review the petition and the public comments, if any, to determine whether the international agreement and the requirements of the AFA and this part 356 are in conflict and, absent any extenuating circumstances, will render a decision within 120 days of the receipt of a fully completed petition. If MARAD's Chief Counsel determines after the receipt of a fully completed petition that there are extenuating circumstances that will preclude a decision from being rendered on the petition within 120 days, the petitioner will be notified around the 90th day and provided with an estimated date on which a decision will be rendered.

(e) To the extent that it is determined that an international agreement covering the petitioner is in conflict with the requirements of this part 356, the AFA, 46 U.S.C. 31322(a), 46 U.S.C. 12102(c), and this part 356 will not be applied to the petitioner with respect to the specific vessel. If the petitioner is a vessel owner, it will be required to comply with the documentation requirements as in effect prior to passage of the AFA on October 21, 1998. If the petitioner is a Mortgagee, it will be subject to requirements of 46 U.S.C. 31322(a) as in effect prior to passage of the AFA with regard to the mortgage on the particular vessel covered by the petition. Decisions of the Chief Counsel may be appealed to the Maritime Administrator within 15 business days of issuance.

(f) The owner of a Fishing Industry Vessel that is determined through the petition process to be exempt from all or part of the requirements of this part 356 must submit evidence of its ownership structure to the Chief Counsel on an annual basis. The owner must specifically set forth:

(1) The Vessel's current ownership structure;

(2) The identity of all Non-Citizen owners and the percentage owned;

(3) Any changes in the ownership structure that have occurred since the filing of the last Affidavit; and,

(4) A certification that no interest in the vessel was transferred to a Non-Citizen after July 24, 2001.

(g) The provisions of this part 356 shall apply:

(1) To all owners and Mortgagees of a Fishing Industry Vessel who acquired an interest in the vessel after July 24, 2001; and

(2) To the owner of a Fishing Industry Vessel on July 24, 2001, if any ownership interest in that owner is transferred to or otherwise acquired by a Non-Citizen or if the percentage of foreign ownership in the vessel is increased after such date.

(3) An ownership interest is deemed to be transferred under this paragraph (g) if:

(i) There is a transfer of direct ownership interest in the primary vessel owning entity. If the primary vessel owning entity is wholly owned by another entity, the parent entity will be considered the primary vessel owning entity; or

(ii) There is a transfer of indirect ownership at any tier.

(4) A transfer of interest in a vessel owner does not include:

(i) Transfers of disparately held shares of a vessel-owning entity if it is a publicly traded company and the total of the shares transferred in a particular transaction equals less than 5% of the shares in that class. An interest in a vessel owning entity that exceeds 5% of the shares in a class can not be sold to the same Non-Citizen through

multiple transactions involving less than 5% of the shares of that class of stock in order to maintain the exemption for the vessel owner; or

(ii) Transfers pursuant to a divorce or death.

[65 FR 44877, July 19, 2000, as amended at 68 FR 5583, Feb. 4, 2003]

## Subpart I—Review of Harvesting and Processing Compliance

### § 356.55 Review of compliance with harvesting and processing quotas.

(a) Upon the request of either the North Pacific Fishery Management Council ("NPFMC") or the Secretary of Commerce, the Chief Counsel will review any allegation that an individual or entity has exceeded the allowable percentage for harvesting or processing pollock as provided for in section 210(e)(1) or (2) of the AFA.

(b) Following a request for MARAD review under paragraph (a) of this section, the NPFMC and the Secretary of Commerce (through the National Oceanic and Atmospheric Administration and the National Marine Fisheries Service) will transmit to MARAD any relevant information in their possession including, but not limited to:

(1) The identity of the parties alleged to have exceeded the excessive share caps;

(2) The relevant harvesting or processing data (the amount harvested or processed by particular parties);

(3) Any information that would be helpful in determining if the parties are related;

(4) Any information regarding the ownership structure of the parties, including:

(i) Articles of incorporation;

(ii) Bylaws;

(iii) Identity of shareholders and the percentage owned;

(iv) Any contracts or agreements that would demonstrate ownership or control of one party by another allegedly related party; and

(v) Any other evidence that would demonstrate ownership or control of one party by another allegedly related party.

(c) If MARAD determines during the course of its review that additional information is required from the parties alleged to have exceeded the excessive share cap, the Chief Counsel will advise the Secretary of Commerce and/or the NPFMC what information is required. The Secretary and/or the NPFMC will request that specific parties submit the required information to MARAD.

(d) The Chief Counsel will make a finding as soon as practicable and will submit it to the Secretary of Commerce and the NPFMC.

(e) For purposes of this section, if 10% or more of the interest in an entity is owned or controlled either directly or indirectly by another individual or entity, the two entities will be considered the same entity for purposes of applying the harvesting and processing caps.

(1) For purposes of this section, an entity will be deemed to have an ownership interest in a pollock harvesting or processing entity if it either owns a percentage of the pollock harvesting or processing entity directly or if ownership can be traced through intermediate entities to the pollock harvesting or processing entity. To determine the percentage of ownership interest that an entity has in a pollock harvesting or processing entity where the ownership interest passes through one or more intermediate entities, the entity's percentage of direct interest in an intermediate entity is multiplied by the intermediate entity's percentage of direct or indirect interest in the pollock harvesting or processing entity.

(2) For purposes of this section, an entity will be deemed to exercise 10% or greater control over a pollock harvesting or processing entity if:

(i) It has the right to direct the business of the pollock harvesting or processing entity;

(ii) It has the right to appoint members to the management team of the pollock harvesting or processing entity such as the directors of a corporation or is a general partner or joint venturer in a harvesting or processing entity;

(iii) It has the right to direct the business of an entity that directly or indirectly owns or controls 10% of a harvesting or processing entity; or

(iv) It owns 50% or more of an entity that owns or controls 10 percent of a

pollock harvesting or processing entity.

(f) If the Secretary of Commerce determines that there is enough evidence to pursue an enforcement action for violation of the harvesting or processing caps contained in section 210(e) of the AFA, the Person against whom an enforcement action is taken is entitled to notice and an opportunity for a hearing before the Secretary of Commerce in accordance with 5 U.S.C. 554.

# PART 370—CLAIMS

## Subpart A—Processing of Time-Barred Claims

Sec.
370.1 Definitions.
370.2 General policy.

## Subpart A—Processing of Time-Barred Claims

### § 370.1 Definitions.

(a) *Time-barred claim* means a claim against the Government, for which the statutory period for filing suit has expired.

(b) *Contract* includes every agreement or contract entered into by the Maritime Administrator and/or Maritime Subsidy Board, the Director National Shipping Authority or their delegatee.

(Sec. 204, 49 Stat. 1987, as amended; 46 U.S.C. 1114)

[G.O. 102, 34 FR 6928, Apr. 25, 1969]

### § 370.2 General policy.

(a) Time-barred claims shall be rejected, except as follows:

(1) A time-barred claim which could be asserted in court by way of set-off against a claim in favor of the United States arising out of the same contract may be considered in an overall settlement where settlement will result in a net payment to the United States, provided claimant releases the United States from all claims arising from or in any way connected with said contract.

(2) Time-barred claims in favor of friendly foreign governments shall not be rejected solely because they are time-barred. However, should any such government adopt the practice of asserting the statute of limitations as a defense against claims of the United States, the time-barred claims of that government shall be rejected.

(3) Time-barred claims arising under Second Seamen's War Risk insurance (or similar earlier types of crew insurance) where the policy was issued or the risks were assumed by the Maritime Administration (or its predecessors), shall not be rejected where the beneficiaries were precluded from receiving the proceeds of the policy by reason of regulations or orders of the U.S. Government (i) by reason of the beneficiary being physically or mentally unable to present the claim, (ii) by the beneficiaries being unaware of their entitlement to the proceeds in question, or (iii) where the claim is not "stale" under general principles of equity.

(b) For the purpose of a claim by a General Agent under General Agency Agreements set forth in 32A CFR AGE–1 for reimbursement by the Maritime Administration on account of a timely payment made to a third party within a period of limitations running from the date the claim of the third party accrued, the period of limitations applicable to the General Agent shall run from the date of such payment. In all other cases involving claims arising under General Agency Agreements, including third-party claims, the policy provided in paragraph (a) of this section shall apply.

(c) Consideration of any claim governed by applicable regulations in this chapter II, including without limitation parts 272, 292, and 205 of this chapter, shall be controlled by the time limitations expressly provided for with respect to the submission of such claims.

(Sec. 204, 49 Stat. 1987, as amended; 46 U.S.C. 1114)

[G.O. 102, 34 FR 6928, Apr. 25, 1969]

# PART 380—PROCEDURES

## Subpart A—Filing of Applications Under Section 805(a), 1936 Act

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380.2 Filing applications.
380.3 Processing of application.

380.4 Notices; statements from interested parties and arrangements for hearing.
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### Subpart B—Application for Designation of Vessels as American Great Lakes Vessels

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### Subpart D [Reserved]

### Subpart E—Compulsory Disclosure

380.40 Subpoenas, other compulsory processes and requests.

## Subpart A—Filing of Applications Under Section 805(a), 1936 Act

AUTHORITY: Sec. 204, 49 Stat. 1987, as amended; 46 U.S.C. 1114.

SOURCE: General Order 86, Rev., 33 FR 810, Jan. 23, 1968, unless otherwise noted.

### § 380.1 Purpose.

To prescribe procedure to be followed for filing applications submitted to the Maritime Subsidy Board/Maritime Administration pursuant to the provisions of section 805(a), Merchant Marine Act, 1936, as amended.

### § 380.2 Filing applications.

(a) An applicant under section 805(a) shall file his application (16 copies, including three originals) with the Secretary, Maritime Subsidy Board/Maritime Administration at least 15 days in advance of the effective date of the action proposed in the application.

(b) The application shall concisely and clearly reflect:

(1) Whether the applicant holds an operating-differential subsidy contract under title VI of the Act, or has applied for such type contract, or

(2) Whether the applicant has a Government-owned vessel on charter under title VII of the Act or has applied for the charter of a Government-owned vessel thereunder;

(3) The action for which approval of the Maritime Subsidy Board/Maritime Administration is sought, stated in terms of a request for permission to, directly or indirectly, own, operate, or charter a vessel(s) in the domestic intercoastal or coastwise service, or to own a pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel(s) in the domestic intercoastal or coastwise service; and

(4) Whether the operator of the vessel to be engaged in the domestic trade is a citizen of the United States as required by and within the meaning of section 2 of the Shipping Act, 1916.

### § 380.3 Processing of application.

All applications under section 805(a) shall be referred to the Chief, Office of Government Aid, Maritime Administration, for consideration and such further action as may be appropriate.

### § 380.4 Notices; statements from interested parties and arrangements for hearing.

(a) A notice shall be published in the FEDERAL REGISTER which shall:

(1) Identify and abstract the subject of the application.

(2) Provide that interested parties may inspect the proposed application in the Office of Government Aid, Maritime Administration.

(3) Provide for a specific date by which parties having any interest (within the meaning of section 805(a)) in such application and desiring to be heard on issues pertinent to section 805(a) shall petition to intervene, or submit a written statement with reference to the application addressed to the Secretary, Maritime Subsidy Board/Maritime Administration.

(4) Provide that if no petitions for leave to intervene are received within the specified time, the Maritime Subsidy Board/Maritime Administration will take such action as may be deemed appropriate.

(5) Provide that in the event petitions are received from parties with standing to be heard on the application, a hearing will be held on a date specified in the notice.

(6) Indicate that the purpose of the hearing will be to receive evidence under section 805(a) relative to whether the proposed operation (i) could result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or (ii) would be prejudicial to the objects and policy of the Act relative to domestic trade operations.

### § 380.5 Exception to procedure.

The Maritime Subsidy Board or the Maritime Administrator may dispense with the publication of notice when not inconsistent with applicable laws.

## Subpart B—Application for Designation of Vessels as American Great Lakes Vessels

AUTHORITY: Sec. 204(b), Merchant Marine Act, 1936, as amended, (46 app. U.S.C. 1114(b)); Subtitle B, Pub. L. 101–624; 49 CFR 1.66.

SOURCE: 56 FR 3980, Feb. 1, 1991, unless otherwise noted.

### § 380.10 Purpose.

The purpose of this subpart is to prescribe the requirements for the submission of applications for designation of vessels as American Great Lakes vessels, subject to the conditions imposed by section 1522 of Pub. L. 101–624 (November 28, 1990).

### § 380.11 Designation of American Great Lakes Vessels.

The Secretary shall designate a vessel as an American Great Lakes vessel if—

(a) The vessel is documented under the laws of the United States;

(b)(1) The vessel is not more than 6 years old, and not less than 1 year old, on the effective date of the designation; or

(2) The vessel is not more than 11 years old, and not less than 1 year old, on the effective date of the designation, and the Secretary determines that suitable vessels are not available for providing the type of service for which the vessel will be used after designation;

(c) The vessel has not been previously designated as an American Great Lakes vessel; and

(d) The person who will be the owner of the vessel at the time of such designation agrees to enter into an agreement with the Secretary which provides that if the Secretary determines that the vessel is necessary to the defense of the United States, the United States Government shall have, during the 120-day period following the date of any revocation of such designation an exclusive right to purchase the vessel for a price equal to—

(1) The approximate world market value of the vessel; or

(2) The cost of the vessel to the owner less an amount representing reasonable depreciation of the vessel, whichever is greater.

### § 380.12 Application requirements.

(a) *Submission.* An application for designation of one or more vessels as an American Great Lakes vessel shall be filed with the Secretary, Maritime Administration, Department of Transportation, 400 Seventh St. SW., Room 7300, Washington, DC 20590, at least 60 days prior to the date when the owner wishes to commence operation of one or more vessels with such designation. The application shall state with specificity that the vessel complies with the requirements of § 380.11.

(b) *Fee.* Each application shall be accompanied by a fee of $50 per vessel. Payment shall be made by cashier's check, certified check, or money order, payable to "Maritime Administration."

(c) *Unavailability of suitable vessels.* Where the owner requests that the Secretary make a determination that would allow the designation of one or more vessels that would be over 6 years of age, but less than 11 years of age, on the effective date of designation, the owner shall include with the application all relevant and material information from which the Secretary may determine that suitable vessels will not be available for the type of service in which the vessel(s) will be used after designation.

## Subpart C—Records Retention Schedule

AUTHORITY: Secs. 204, 207, 49 Stat. 1987, as amended, 1988, as amended; 46 U.S.C. 1114, 1117; sec. 801, 49 Stat. 2011, 46 U.S.C. 1211.

### § 380.20 Purpose.

The purpose of this subpart is to prescribe the procedure to be followed by contractors for the retention and disposal of books, records, and accounts created and maintained by them under construction or operating-differential subsidy contracts with the Maritime Administration/Maritime Subsidy Board (hereinafter referred to as the "Administration"). The minimum retention periods prescribed herein govern only the Administration's requirements for the preservation of the hereinafter specified books, records, and accounts. The failure to describe a particular book, record, or account shall not exempt a contractor from retaining the particular book, record, or account, unless expressly so authorized by the Administration.

(Sec. 204(b), Merchant Marine Act, 1936, as amended (46 U.S.C. 1114(b)); Pub. L. 97–31 (August 6, 1981); 49 CFR 1.66 (46 FR 47458, Sept. 28, 1981))

[48 FR 45560, Oct. 6, 1983]

### § 380.21 Reproduction.

(a) The records described in § 380.24 may be microfilmed or otherwise reproduced in lieu of their retention in original form: *Provided,* That such reproductions shall not be made prior to completion of the audit of such records by the Administration.

(b) The following standards are established for reproduction processes:

(1) *Microfilm.* The film stock used in making photographic or microphotographic copies shall comply with Interim Federal Standard No. 125 covering photographic film and processed photographic film. The microfilm shall be regularly inspected for aging in accordance with Handbook 96, entitled, "Inspection of Processed Photographic Record Films for Aging Blemishes", published by the U.S. Department of Commerce, National Bureau of Standards. If blemishes are detected, a duplicate copy of the roll or print shall be made immediately.

(2) *Photocopy.* Electrostatic or wet processes only.

(Sec. 204(b), Merchant Marine Act, 1936, as amended (46 U.S.C. 1114(b)); Pub. L. 97–31 (August 6, 1981); 49 CFR 1.66 (46 FR 47458, Sept. 28, 1981))

[G.O. 101, 30 FR 12356, Sept. 28, 1965, as amended at 48 FR 45560, Oct. 6, 1983]

### § 380.22 Responsibility.

(a) Notwithstanding the minimum retention periods hereinafter set forth, it shall be the sole responsibility of any party subject to the provisions of this subpart to retain such books, records, and accounts:

(1) For the periods specifically provided by any statutory, regulatory, and contractual requirements of the Administration, or

(2) Pertaining to or related to matters in litigation, to matters which knowingly may become involved in litigation, to unsettled claims of whatsoever nature, and to all unsettled matters specifically reserved by the parties at the time of any final accounting as may be required under statute, contract and/or agreement.

(b) With respect to books, records, and accounts which, subject to the provision of paragraph (a) of this section, are to be disposed of upon the expiration of the minimum retention period prescribed herein, there shall be filed with the Records Officer, Maritime Administration, Washington, DC, 20590, a written notification, at least thirty (30) days prior to the contemplated, disposal requesting permission to dispose of records. MARAD will accept electronic options (such as facsimile and Internet) for transmission of required information to MARAD, if practicable. The request shall be in such form that the books, records, and accounts can be readily identified. Within thirty (30) days after receipt of such notification the Records Officer shall grant approval for disposal, or advise the necessity for continued retention of all or any specified portion thereof. Failure of the Record Officer to reply within the thirty (30) days period following receipt by the Administration of such request shall constitute approval.

(c) Applications for special authority to dispose of certain books, records, and accounts prior to the expiration of prescribed minimum retention periods, and any inquiries as to the interpretation or applicability of this subpart to specific items shall be submitted to the Records Officer, Maritime Administration. MARAD will accept written or electronic options (such as facsimile and Internet) for transmission of required information to MARAD, if practicable. The applicant shall describe in detail the items to be disposed of and explain why continued retention is unnecessary.

[G.O. 101, 30 FR 12356, Sept. 28, 1965, as amended at 68 FR 62538, Nov. 5, 2003; 69 FR 61452, Oct. 19, 2004]

### § 380.23 Supervision of records.

(a) Contractors and others subject to the provisions of this subpart shall designate, through formal action, the official company position by title, the incumbent of which shall be responsible for supervision of its document retention and disposal program. Immediately upon designation of the position, a copy of the formal action and name of the incumbent shall be filed with the Records Officer, Maritime Administration. MARAD will accept written or electronic options (such as facsimile and Internet) for transmission of required information, if practicable.

(b) The person in charge of the retention and disposal program shall maintain a record of all books, records, and accounts held in storage, and in such form that the items and their location are readily identifiable. A copy of the written, or by electronic options (such as facsimile and Internet), if practicable, notification requesting permission to dispose of any books, records, and accounts, and the original approval from the Administration, as required in § 380.22(b), together with a statement showing date, place and method of disposal will suffice as a record of such disposed items. These retention and disposal records shall be available at all times for inspection by Administration officials and auditors.

[69 FR 61452, Oct. 19, 2004]

### § 380.24 Schedule of retention periods and description of records.

(a) The following records shall be retained for not less than two (2) years after final release agreement or settlement agreement is completed between the Administration and contractors under operating-differential subsidy contracts:

(1) Official company or corporate records such as certificates or articles of incorporation, minute books, stock ledgers, bond registers, merger or acquisition records, patents and copyrights;

(2) Financial statements and reports such as annual reports to stockholders and audit reports by independent public accountants;

(3) Insurance records such as policies, underwriters' audit reports, indemnity bonds, salvage data, and claim files;

(4) Contracts, agreements, franchises, licenses, etc., such as subsidy, charter, ship construction, and pooling agreements;

(5) Vessel operating records such as log books, surveys, position reports, and vessel itineraries;

(6) Voyage account items such as manifests, bills of lading, master's accounts, ship's payrolls;

(7) Underlying traffic records pertaining to tariffs, dray tickets, pooling agreements, passenger reports, freight and passenger conference records.

(b) The following records shall be retained for three (3) years after final audit and/or approval by the Administration:

(1) Ship construction or reconversion records such as bids, plans, progress payments, and construction-differential subsidy data;

(2) Canceled checks;

(3) Miscellaneous documents and work papers such as correspondence, operating and construction-differential subsidy rate data, subsidy adjustments pursuant to 46 CFR part 276 and approvals pursuant to Article II–10(c) of operating-differential subsidy contracts;

(4) Any document generated under the provisions of the Shipping Act, 1916;

(5) Books of account such as general and subsidiary ledgers, journals, cash books, and check registers;

(6) Personnel records and supplementary records such as union agreements.

(c) Reports prepared by Federal, State, Local, or foreign governments pertaining to any documents referred to in this § 380.24, shall be retained for the same period as prescribed herein for the retention of the documents to which they apply.

(d) If identical copies of the same document serve more than one purpose, only the original copy is required to be retained.

(Approved by the Office of Management and Budget under control number 2133–0501)

(Sec. 204(b), Merchant Marine Act, 1936, as amended (46 U.S.C. 1114(b)); Pub. L. 97–31 (August 6, 1981); 49 CFR 1.66 (46 FR 47458, Sept. 28, 1981))

[48 FR 45560, Oct. 6, 1983]

## Subpart D [Reserved]

## Subpart E—Compulsory Disclosure

### § 380.40 Subpoenas, other compulsory processes and requests.

In any case where it is sought by subpoena, order, or other compulsory process or other demand of a court or other authority to require the production or disclosure of any record in the files of the Maritime Administration or other information acquired by an officer or employee of the Maritime Administration as a part of the performance of his official duties or because of his official status, the matter shall be immediately referred for determination, through the Secretary of the Maritime Administration and Maritime Subsidy Board, to the Maritime Administrator, Department of Transportation.

[G.O. 112, 36 FR 21816, Nov. 16, 1971]

# PART 381—CARGO PREFERENCE—U.S.-FLAG VESSELS

Sec.

381.1 Purpose.
381.2 Definitions.
381.3 Reporting information and procedure.
381.4 Fair and reasonable participation.
381.5 Fix American-flag tonnage first.
381.6 Informal grievance procedure.
381.7 Federal Grant, Guaranty, Loan and Advance of Funds Agreements.
381.8 Subsidized vessel participation.
381.9 Available U.S.-flag service.

AUTHORITY: 46 App. U.S.C. 1101, 1114(b), 1122(d) and 1241; 49 CFR 1.66.

SOURCE: General Order 103, 36 FR 6894, Apr. 10, 1971, unless otherwise noted.

### § 381.1 Purpose.

The purpose of this part 381 is to prescribe regulations to be followed by all departments and agencies having responsibility under the Cargo Preference Act of 1954, section 901(b) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1241(b)), in the administration of their programs with respect to that Act, and to provide a uniform system for the collection of data on the administration of such programs for use in preparing the annual reports to Congress required by that Act.

### § 381.2 Definitions.

(a) *Cargo Preference Act of 1954* means section 901(b) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1241(b)).

(b) *Cargoes subject to the Cargo Preference Act of 1954,* include equipment, material or commodities:

(1) Procured, contracted for or otherwise obtained within or outside the United States for the account of the United States;

(2) Furnished within or outside the United States to or for the account of any foreign nation without provision for reimbursement;

(3) Furnished within or outside the United States for the account of any foreign nation in connection with which the United States advances funds or credits or guarantees the convertability of foreign currencies.

(4) Procured, contracted for, or otherwise obtained within or outside of the United States with advance of funds, loans or guaranties made by or on behalf of the United States.

(c) *Department or agency having responsibility under the Cargo Preference Act of 1954* means any department or agency of the Federal Government, administering a program that involves the transportation on ocean vessels of cargoes subject to the Cargo Preference Act of 1954. At present, these agencies include:

(1) Department of State.

(2) Department of Agriculture.
(3) Department of Defense.
(4) Post Office Department.
(5) General Services Administration.
(6) Export-Import Bank of the United States.
(7) National Aeronautics and Space Administration.
(8) Inter-American Development Bank.
(9) U.S. Information Agency.
(10) Department of Interior.
(11) Department of Commerce.
(12) Department of Treasury.
(13) Department of Health, Education, and Welfare.
(14) Department of Housing and Urban Development.
(15) Department of Transportation.
(16) Atomic Energy Commission.
(17) Tennessee Valley Authority.
(18) Veterans Administration.
(19) Smithsonian Institution.
(20) Library of Congress.

(d) *Liner parcel* means any cargo, dry or liquid, normally carried under berth terms by common carriers in ocean trades.

(Reorganization Plans No. 21 of 1950 (64 Stat. 1273) and No. 7 of 1961 (75 Stat. 840) as amended by Pub. L. 91–469 (84 Stat. 1036) and Department of Commerce Organization Order 10–8 (38 FR 19707, July 23, 1973))

[G.O. 103, 36 FR 6894, Apr. 10, 1971, as amended by Amdt. 1, 36 FR 10739, June 2, 1971; 36 FR 19367, Oct. 5, 1971; 42 FR 57126; Nov. 1, 1977]

### §381.3 Reporting information and procedure.

(a) *Reports of cargo preference shipments.* Each department or agency subject to the Cargo Preference Act of 1954, except the Department of Defense for which separate regulations will be issued, shall furnish to the Office of National Cargo and Compliance, Maritime Administration, U.S. Department of Transportation, Washington, DC 20590, within 20 working days of the date of loading for shipments originating in the United States or within 30 working days for shipments originating outside the United States, the following information concerning each shipment of preference cargo:

(1) Identification of the sponsoring U.S. Government agency or department;
(2) Name of vessel;
(3) Vessel flag of registry;
(4) Date of loading;
(5) Port of loading;
(6) Port of final discharge;
(7) Commodity description;
(8) Gross weight in pounds;
(9) Total ocean freight revenue in U.S. dollars.

(b) *Format of reports.* The information listed in paragraph (a) of this section shall be furnished to the Maritime Administration in a format prepared by the reporting department or agency and approved by the Maritime Administrator, Department of Transportation as suitable for the purpose of carrying out his responsibility under section 901(b)(2) of the Merchant Marine Act, 1936, as amended, pursuant to the authority delegated to him thereunder by the Secretary of Transportation under section 3 of Department Organization Order 10–8, 36 FR 1223. Where obtainable, a properly notated and legible copy of the ocean bill of lading in English will suffice. Reporting formats shall be submitted for approval by April 30, 1971.

(c) *Shipments made subject to the Act.* In those instances where a shipment has been made that was not known to be subject to the Cargo Preference Act of 1954 when it was made, but subsequent events cause it to be subject to that Act, the agency taking the action that caused the shipment to be subject to the Act shall furnish to the Office of National Cargo and Compliance the information listed in paragraph (a) of this section in the approved reporting form.

[General Order 103, 36 FR 6894, Apr. 10, 1971, as amended at 57 FR 13047, Apr. 15, 1992]

### §381.4 Fair and reasonable participation.

In order to insure a fair and reasonable participation by U.S.-flag commercial vessels in liner parcel cargoes subject to the Cargo Preference Act of 1954, as required by that Act, the head of each department or agency having responsibility under that Act shall prescribe regulations or formal staff instructions providing for the cargo mix of liner parcel cargoes transported on ocean vessels to be divided between privately owned U.S.-flag vessels and foreign-flag vessels in such a manner as to

yield to the U.S.-flag vessels freight revenue per long ton at least equal to the freight revenue per long ton afforded the foreign-flag vessels participating in the same grant, loan, or purchase transaction. A copy of the regulations or staff instructions prescribed by each department or agency shall be furnished to the Secretary, Maritime Administration, no later than June 30, 1971, for approval.

[G.O. 103, Amdt. 1, 36 FR 10739, June 2, 1971]

### § 381.5 Fix American-flag tonnage first.

Each department or agency having responsibility under the Cargo Preference Act of 1954 shall cause each full shipload of cargo subject to said act to be fixed on U.S.-flag vessels prior to any fixture on foreign-flag vessels for at least that portion of all preference cargoes required by that Act and the Food Security Act of 1985 to be shipped on U.S.-flag vessels, computed by purchase authorization or other quantitative unit satisfactory to the agency involved and the Maritime Administration, except where such department or agency determines, with the concurrence of the Maritime Administration, that (a) U.S.-flag vessels are not available at fair and reasonable rates for U.S.-flag commercial vessels, or (b) that there is a substantially valid reason for fixing foreign-flag vessels first.

[G.O. 103, Amdt. 2, 36 FR 19254, Oct. 1, 1971, as amended at 57 FR 13047, Apr. 15, 1992]

### § 381.6 Informal grievance procedure.

(a) Whenever any person has a question, problem, complaint, grievance, or controversy pertaining to the terms and conditions of any tenders, charter party terms, or other matter involving the administration of the Cargo Preference Act of 1954, such person may request the Maritime Administration to afford him an opportunity to discuss the matter informally with representatives of the Maritime Administration and, if other U.S. Government agencies or foreign missions, embassies, or agencies acting on behalf of a foreign government are involved with them or persons authorized to speak for them.

(b) In such cases, a request may be made by telephone or letter to the Chief, Office of Market Development, Maritime Administration, Washington, DC 20590, (202) 366–4610. When such a request has been received, the Maritime Administrator, Department of Transportation or his designated representative will promptly consider the matter on its merits and provide assistance if possible. If the matter cannot be resolved satisfactorily by the Maritime Administration, the Maritime Administrator, Department of Transportation or his designated representative will then arrange for a meeting at a time and place satisfactory to all interested parties so that the matter may be freely discussed and resolved.

(c) At such meetings, the Maritime Administrator, Department of Transportation or his designated representative may request any U.S. Government agency, foreign mission, embassy, or agency acting on behalf of a foreign government, or others having an interest in the matter to attend such a conference, or to send representatives authorized to speak for them. All such meetings and conferences will be conducted in an informal manner.

[G.O. 103, Amdt. 3, 37 FR 3641, Feb. 18, 1972, as amended at 57 FR 13047, Apr. 15, 1992]

### § 381.7 Federal Grant, Guaranty, Loan and Advance of Funds Agreements.

In order to insure a fair and reasonable participation by privately owned United States-flag commercial vessels in transporting cargoes which are subject to the Cargo Preference Act of 1954 and which are generated by U.S. Government Grant, Guaranty, Loan and/or Advance of Funds Programs, the head of each affected department or agency shall require appropriate clauses to be inserted in those Grant, Guaranty, Loan and/or Advance of Funds Agreements and all third party contracts executed between the borrower/grantee and other parties, where the possibility exists for ocean transportation of items procurred, contracted for or otherwise obtained by or on behalf of the grantee, borrower, or any of their contractors or subcontractors. The clauses required by this part shall provide that at least 50 percent of the freight revenue and tonnage of cargo generated by the U.S. Government Grant, Guaranty, Loan or Advance of Funds be transported on privately owned United

States-flag commercial vessels. These clauses shall also require that all parties provide to the Maritime Administration the necessary shipment information as set forth in §381.3. A copy of the appropriate clauses required by this part shall be submitted by each affected agency or department to the Secretary, Maritime Administration, for approval no later than 30 days after the effective date of this part. The following are suggested acceptable clauses with respect to the use of United States-flag vessels to be incorporated in the Grant, Guaranty, Loan and/or Advance of Funds Agreements as well as contracts and subcontracts resulting therefrom:

(a) *Agreement Clauses.* "Use of United States-flag vessels:

"(1) Pursuant to Pub. L. 664 (43 U.S.C. 1241(b)) at least 50 percent of any equipment, materials or commodities procured, contracted for or otherwise obtained with funds granted, guaranteed, loaned, or advanced by the U.S. Government under this agreement, and which may be transported by ocean vessel, shall be transported on privately owned United States-flag commercial vessels, if available.

"(2) Within 20 days following the date of loading for shipments originating within the United States or within 30 working days following the date of loading for shipments originating outside the United States, a legible copy of a rated, 'on-board' commercial ocean bill-of-lading in English for each shipment of cargo described in paragraph (a)(1) of this section shall be furnished to both the Contracting Officer (through the prime contractor in the case of subcontractor bills-of-lading) and to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, DC 20590."

(b) *Contractor and Subcontractor Clauses.* "Use of United States-flag vessels: The contractor agrees—

"(1) To utilize privately owned United States-flag commercial vessels to ship at least 50 percent of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners, and tankers) involved, whenever shipping any equipment, material, or commodities pursuant to this contract, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels.

"(2) To furnish within 20 days following the date of loading for shipments originating within the United States or within 30 working days following the date of loading for shipments originating outside the United States, a legible copy of a rated, 'on-board' commercial ocean bill-of-lading in English for each shipment of cargo described in paragraph (b) (1) of this section to both the Contracting Officer (through the prime contractor in the case of subcontractor bills-of-lading) and to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, DC 20590.

"(3) To insert the substance of the provisions of this clause in all subcontracts issued pursuant to this contract."

(Reorganization Plans No. 21 of 1950 (64 Stat. 1273) and No. 7 of 1961 (75 Stat. 840) as amended by Pub. L. 91–469 (84 Stat. 1036) and Department of Commerce Organization Order 10–8 (38 FR 19707, July 23, 1973))

[42 FR 57126, Nov. 1, 1977]

### §381.8 Subsidized vessel participation.

(a) For the purpose of approving subsidized U.S.-flag liner and bulk vessels competing for the carriage of dry bulk preference cargoes, each department or agency having responsibility under the Cargo Preference Act of 1954 (46 U.S.C. 1214(b)), shall evaluate bids received from the operators of such vessels in the manner described in this section.

(b) When a subsidized vessel operator is the apparent low U.S.-flag responsive bidder for a dry bulk preference cargo, the responsible department or agency shall evaluate the subsidized operator's bid by:

(1) Requesting from MARAD an amount for the operating-differential subsidy (ODS) likely to be paid for the carriage of such cargo expressed as a cost per ton for performing the voyage by the apparent low responsive subsidized bidders;

(2) Deriving "augmented bids" for the subsidized operators by adding the ODS amount to each subsidized operator's bid;

(3) Comparing the augmented bids of the subsidized operators and the bids of unsubsidized operators to determine the apparent low responsive bidder;

(4) Requesting from MARAD a fair and reasonable guideline rate for the apparent low responsive bidder which shall be based on MARAD's calculation of anticipated costs (less ODS in the case of a subsidized vessel) for the voyage plus a reasonable amount for profit for the voyage; and

(5) Determining whether the subsidized operator's unaugmented bid or the unsubsidized operator's bid, whichever was determined to be the lowest responsive bid pursuant to paragraph (b)(3) of this section, is at or below the fair and reasonable guideline rate.

(c) If the amount of dry bulk cargo to be shipped is changed at any time prior to award, the department or agency shall request that MARAD provide new ODS amounts applicable to the carriage. The department or agency shall redetermine the augmented bids before determining the lowest responsive bid and requesting from MARAD a revised fair and reasonable guideline rate in accordance with the provisions of paragraph (b) of this section.

(d) Whenever a bid is submitted for a U.S.-flag vessel for the transportation of dry bulk preference cargo, the responsible department or agency shall only approve bids that apply to an individual vessel, and may not accept combined bids submitted for more than one vessel. If two or more vessels are offered, separate bids shall be submitted for each vessel. A bidder may submit a conditional lower bid for each vessel to be effective only if more than one vessel is contracted to carry the cargo.

(e) The requirements of this section shall apply only to those departments or agencies that directly pay or finance all or part of U.S.-flag ocean freight transportation costs for the carriage of dry bulk preference cargoes, in accordance with this part.

(f) The requirements of this section shall not apply to foreign aid consisting of direct cash transfer payments under specific agreements between departments or agencies and the recipient country with respect to the utilization of U.S.-flag vessels for transportation of commodities purchased with such funds.

[53 FR 24272, June 28, 1988]

### § 381.9 Available U.S.-flag service.

For purposes of shipping bulk agricultural commodities under programs administered by sponsoring Federal agencies from U.S. Great Lakes ports during the 1996–2000 Great Lakes shipping seasons, if direct all-U.S.-flag service, at fair and reasonable rates, is not available at U.S. Great Lakes ports, a joint service involving a foreign-flag vessel(s) carrying cargo no farther than a Canadian port(s) or other point(s) on the Gulf of St. Lawrence, with transshipment via a U.S.-flag privately-owned commercial vessel to the ultimate foreign destination, will be deemed to comply with the requirement of "available" commercial U.S.-flag service under the Cargo Preference Act of 1954. Shipper agencies considering bids resulting in the lowest landed cost of transportation based on U.S.-flag rates and service shall include within the comparison of U.S.-flag rates and service, for shipments originating in U.S. Great Lakes ports, through rates (if offered) to a Canadian port or other point on the Gulf of St. Lawrence and a U.S.-flag leg for the remainder of the voyage. The "fair and reasonable" rate for this mixed service will be determined by considering the U.S.-flag component under the existing regulations at 46 CFR Part 382 or 383, as appropriate, and incorporating the cost for the foreign-flag component into the U.S.-flag "fair and reasonable" rate in the same way as the cost of foreign-flag vessels used to lighten U.S.-flag vessels in the recipient country's territorial waters. Alternatively, the supplier of the commodity may offer the Cargo FOB Canadian transshipment point, and MARAD will determine fair and reasonable rates accordingly.

[61 FR 24897, May 17, 1996]

# PART 382—DETERMINATION OF FAIR AND REASONABLE RATES FOR THE CARRIAGE OF BULK AND PACKAGED PREFERENCE CARGOES ON U.S.-FLAG COMMERCIAL VESSELS

Sec.
382.1 Scope.
382.2 Data submission.
382.3 Determination of fair and reasonable rates.
382.4 Waivers.

AUTHORITY: 46 App. U.S.C. 1114, 1241(b); 49 CFR 1.66.

SOURCE: 63 FR 3828, Jan. 27, 1998, unless otherwise noted.

## §382.1 Scope.

The regulations in this part prescribe the type of information that shall be submitted to the Maritime Administration (MARAD) by operators interested in carrying bulk and packaged preference cargoes, and the method for calculating fair and reasonable rates for the carriage of dry (including packaged) and liquid bulk preference cargoes on U.S.-flag commercial vessels, except vessels engaged in liner trades, which is defined as service provided on an advertised schedule, giving relatively frequent sailings between specific U.S. ports or ranges and designated foreign ports or ranges.

## §382.2 Data submission.

(a) *General.* The operators shall submit information, described in paragraphs (b) and (c) of this section, to the Director, Office of Costs and Rates, Maritime Administration, Washington, DC 20590. To the extent a vessel is time chartered, the operator shall also submit operating expenses for that vessel. All submissions shall be certified by the operators. A further review based on the independent CPA performing an engagement consistent with professional standards, i.e., an attestation engagement, is recommended. Submissions are subject to verification, at MARAD's discretion, by the Office of the Inspector General, Department of Transportation. MARAD's calculations of the fair and reasonable rates for U.S.-flag vessels shall be performed on the basis of cost data provided by the U.S.-flag vessel operator, as specified herein. If a vessel operator fails to submit the required cost data, MARAD will not construct the guideline rate for the affected vessel, which may result in such vessel not being approved by the sponsoring Federal agency.

(b) *Required vessel information.* The following information shall be submitted not later than April 30, 1998, for calendar year 1997 and shall be updated not later than April 30 for each subsequent calendar year. In instances where a vessel has not previously participated in the carriage of cargoes described in §382.1, the information shall be submitted not later than the same date as the offer for carriage of such cargoes is submitted to the sponsoring Federal agency, and/or its program participant, and/or its agent and/or program's agent, or freight forwarder.

(1) Vessel name and official number.

(2) Vessel DWT (summer) in metric tons.

(3) Date built, rebuilt and/or purchased.

(4) Normal operating speed.

(5) Daily fuel consumption at normal operating speed, in metric tons (U.S. gallons for tugs) and by type of fuel.

(6) Daily fuel consumption in port while pumping and standing, in metric tons (U.S. gallons for tugs) and by type of fuel.

(7) Total capitalized vessel costs (list and date capitalized improvements separately), and applicable interest rates for indebtedness (where capital leases are involved, the operator shall report the imputed capitalized cost and imputed interest rate).

(8) Operating cost information, to be submitted in the format stipulated in 46 CFR 232.1, on Form MA–172, Schedule 310. Operators are encouraged to provide operating cost information for similar vessels that the operator considers substitutable within a category, as defined in §382.3(a)(1), in the aggregate on a single schedule. Information shall be applicable to the most recently completed calendar year.

(9) Number of vessel operating days pertaining to data reported in paragraph (b)(8) of this section for the year ending December 31. For purposes of this part, an operating day means any day on which a vessel or tug/barge unit

is in a seaworthy condition, fully manned, and either in operation or standing ready to begin pending operations.

(c) *Required port and cargo handling information.* The port and cargo handling costs listed in this paragraph shall be provided semiannually for each cargo preference voyage terminated during the period. The report shall identify the vessel, cargo and tonnage, and round-trip voyage itinerary including dates of arrival and departure at port or ports of loading and discharge. The semiannual periods and the information to be submitted are as follows:

| Period | Due date |
|---|---|
| April 1–September 30 | January 1. |
| October 1–March 31 | July 1. |

(1) *Port expenses.* Total expenses or fees, by port, for pilots, tugs, line handlers, wharfage, port charges, fresh water, lighthouse dues, quarantine service, customs charges, shifting expenses, and any other appropriate port expense.

(2) *Cargo expense.* Separately list expenses or fees for stevedores, elevators, equipment, and any other appropriate expenses.

(3) *Extra cargo expenses.* Separately list expenses or fees for vacuvators and/or cranes, lightering (indicate tons moved and cost per ton), grain-to-grain cleaning of holds or tanks, and any other appropriate expenses.

(4) *Canal expenses.* Total expenses or fees for agents, tolls (light or loaded), tugs, pilots, lock tenders and boats, and any other appropriate expenses. Indicate waiting time and time of passage.

(d) *Other requirements.* Unless otherwise provided, operators shall use generally accepted accounting principles and MARAD's regulations at 46 CFR part 232, Uniform Financial Reporting Requirements, for guidance in submitting cost data. Notwithstanding the general provisions in 46 CFR 232.2(c) for MARAD program participants, each operator shall submit cost data in the format that conforms with the accounting practices reflected in the operator's trial balance and, if audited statements are prepared, the audited financial statements. Data requirements stipulated in paragraph (b) of this section that are not included under those reporting instructions shall be submitted in a similar format. If the operator has already submitted to MARAD, for other purposes, any data required under paragraph (b) of this section, its submission need not be duplicated to satisfy the requirements of this part.

(e) *Presumption of confidentiality.* MARAD will initially presume that the material submitted in accordance with the requirements of this part is privileged or confidential within the meaning of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(4). In the event of a subsequent request for any portion of that data under the FOIA, MARAD will inform the submitter of such request and allow the submitter the opportunity to comment. The submitter shall claim or reiterate its claim of confidentiality at that time by memorandum or letter, stating the basis for such assertions of exemption from disclosure. The Freedom of Information Act Officer, or the Chief Counsel of MARAD, will inform the submitter of the intention to disclose any information claimed to be confidential, after the initial FOIA request, or after any appeal of MARAD's initial decision, respectively.

(Approved by the Office of Management and Budget under control number 2133–0514)

### § 382.3 Determination of fair and reasonable rate.

Fair and reasonable rates for the carriage of preference cargoes on U.S.-flag commercial vessels shall be determined as follows:

(a) *Operating cost component*—(1) *General.* An operating cost component for each category, based on average operating costs of participating vessels within a vessel size category, shall be determined, at least twice yearly, on the basis of operating cost data for the calendar year immediately preceding the current year that has been submitted in accordance with § 382.2. The operating cost component shall include all operating cost categories, as specified in 46 CFR 232.5, Form MA–172, Schedule 310, Operating Expenses. For purposes of these regulations, charter

hire expenses are not considered operating costs. MARAD shall index such data yearly to the current period, utilizing the escalation factors for wage and non-wage costs used in escalating operating subsidy costs for the same period.

(2) *Fuel.* Fuel costs within each category shall be determined based on the average actual fuel consumptions, at sea and in port, and current fuel prices in effect at the time of the preference cargo voyage(s).

(3) *Vessel categories.* Vessels shall be placed in categories by deadweight capacities (DWT), as follows:

Group I—under 10,000 DWT
Group II—10,000—19,999 DWT
Group III—20,000—34,999 DWT
Group IV—35,000 DWT and over.

(b) *Capital Component*—(1) *General.* An average capital cost component for each category shall be constructed, at least twice yearly, consisting of vessel depreciation, interest, and return on equity.

(2) *Items included.* The capital cost component shall include:

(i) *Depreciation.* The owners' capitalized vessel costs, including capitalized improvements, shall be depreciated on a straight-line basis over a 20-year economic life, except vessels purchased or reconstructed when their age was greater than 10 years old. To the extent vessels are chartered or leased, the operator shall submit the capitalized cost of the vessel owner and imputed interest rate. If these items are not furnished, MARAD will construct these amounts. When vessels more than 10 years old are acquired, a depreciation period of 10 years shall be used. Capitalized improvements made to vessels more than 10 years old shall be depreciated over a 10-year period. When vessels more than 10 years old are reconstructed, MARAD will determine the depreciation period.

(ii) *Interest.* The cost of debt shall be determined by applying each vessel owner's actual interest rates to the outstanding vessel indebtedness. MARAD shall assume that original vessel indebtedness is 75 percent of the owners' capitalized vessel costs, including capitalized improvements, and that annual principal payments are made in equal installments over the economic life of the vessels as determined in accordance with paragraph (b)(2)(i) of this section. Where an operator uses a variable interest rate, the operator's actual interest rate at the time of calculation of the average capital cost component shall be used. The ten-year Treasury bill (T-bill) rate plus one percent on the first business day of the year or the first business day on or after July 1 shall be used for operators without vessel debt and when the actual rate is unavailable.

(iii) *Return on equity.* The rate of return on equity shall be computed in the same manner as described in paragraph (b)(3) of this section. For the purpose of determining equity, it shall be assumed that the vessel's constructed net book value, less outstanding constructed principal, is equity. The constructed net book values shall equal the owners' capitalized cost minus accumulated straight-line depreciation.

(3) *Return on working capital.* For each voyage a return on working capital shall be included as a voyage related capital cost element, and thus not part of the averaged costs. Working capital shall equal the dollar amount necessary to cover 100 percent of the averaged operating costs and estimated voyage costs for the voyage. The rate of return shall be based on an average of the most recent return of stockholders' equity for a cross section of transportation companies, including maritime companies.

(4) *New vessel allowance.* Newly constructed vessels and vessels acquired during or before their fifth year of age will receive an additional allowance for acquisition capital as part of the capital cost element. For the first year following construction or acquisition by the operator, a daily amount equal to ten percent of capitalized acquisition costs, divided by 300 operating days, shall be included. This amount shall be reduced by one percent of capitalized acquisition costs each subsequent year. No allowance shall be included after the tenth year following construction.

(5) *Voyage component.* The annual average depreciation, interest, and return on equity for vessels in each category shall be divided by 300 vessel operating

days to yield the daily cost factors. Total voyage days shall be applied to the daily cost factors and totaled with the return on working capital and new vessel allowance for the voyage to determine the daily capital cost component.

(c) *Port and cargo handling cost component.* MARAD shall calculate an estimate of all port and cargo handling costs on the basis of the reported cargo tender terms. The port and cargo handling cost component shall be based on vessels in the category and the most current information available verified by information submitted in accordance with § 382.2(c), or as otherwise determined by MARAD, such as by analysis of independent data obtained from chartering agencies.

(d) *Brokerage and overhead component.* An allowance for broker's commission and overhead expenses of 8.5 percent shall be added to the sum of the operating cost component, the capital cost component, and the port and cargo handling cost component.

(e) *Determination of voyage days.* The following assumptions shall be made in determining the number of preference cargo voyage days:

(1) The voyage shall be round-trip with the return in ballast to a port or port range selected by MARAD as the most appropriate, unless the vessel is scrapped or sold after discharge of the preference cargo and does not return to the United States as a U.S.-flag vessel. In this event, only voyage days from the load port to the discharge port, including time allowed to discharge, shall be included.

(2) Cargo is loaded and discharged as per cargo tender terms interpreted in accordance with the "International Rules For the Interpretation of Trade Terms" (INCOTERMS) published by the International Chamber of Commerce.

(3) Total loading and discharge time includes the addition of a factor to account for delays and days not worked.

(4) One extra port day is included at each anticipated bunkering port.

(5) An allowance shall be included for canal transits, when appropriate.

(6) Transit time shall be based on the average speed of vessels in the category. When calculating the vessels' average speed, individual vessel speeds will be reduced by five percent for self-propelled vessels and ten percent for tugs/barges to account for weather conditions.

(f) *Determination of cargo carried.* The amount of cargo tonnage used to calculate the rate shall be based on the tender offer or charter party terms. In instances when separate parcels of preference cargo are booked or considered for booking on the same vessel, whether under a single program or different programs, a guideline rate shall be provided based on the combined voyage.

(g) *Total rate.* The guideline rate shall be the total of the operating cost component, the capital cost component, the port and cargo handling cost component, and the broker's commission and overhead component. The fair and reasonable rate can be expressed as total voyage revenue or be divided by the amount of cargo to be carried, as prescribed in paragraph (f) of this section, and expressed as cost per ton, whichever MARAD deems most appropriate.

### § 382.4 Waivers.

In special circumstances and for good cause shown, the procedures prescribed in this part may be waived in keeping with the circumstances of the present, so long as the procedures adopted are consistent with the Act and with the intent of this part.

## PART 383 [RESERVED]

## PART 385—RESEARCH AND DEVELOPMENT GRANT AND COOPERATIVE AGREEMENTS REGULATIONS

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AUTHORITY: Sec. 204(b), Merchant Marine Act, 1936, as amended (46 U.S.C. 1114(b)); Reorganization Plans No. 21 of 1950 (64 Stat. 1273), and No. 7 of 1961 (75 Stat. 840), as amended by Pub. L. 91–469 (84 Stat. 1036); Department of Commerce Organization Order 10–8 (36 FR 19707, July 23, 1973); and Secretary's Circular 30 (Nov. 5, 1979).

SOURCE: 45 FR 66168, Oct. 6, 1980, unless otherwise noted.

GENERAL

### § 385.1 Scope.

This part sets forth information about the Maritime Administration (MarAd) assistance regulations: Their purpose, authority, applicability, issuance, arrangement, implementation, and exception procedure; definitions of terms; and general MarAd assistance policies.

REGULATION SYSTEM

### § 385.2 Scope.

Sections 385.2 through 385.9 set forth introductory information pertaining to the MarAd assistance regulations: Their purpose, authority, applicability, exclusions, issuance, arrangement, publication, and exceptions.

### § 385.3 Purpose.

Sections 385.2 through 385.9 establish the MarAd assistance regulations which codify, implement, and publish uniform assistance policies and selected procedures applicable to MarAd and recipients of MarAd assistance awards. The MarAd assistance regulations do not, in and of themselves, provide authority for the use of assistance instruments nor the making of assistance awards where statutory authority has not been otherwise provided. Generic authority to award grants and cooperative agreements is provided in Pub. L. 95–224, the Federal Grant and Cooperative Agreement Act of 1977. The assistance regulations are distinct from the Federal and MarAd and Department of Transportation procurement regulations.

### § 385.4 Authority.

The MarAd assistance regulations are issued pursuant to section 204(b) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1114(b)), and pursuant to delegation of authority by the Secretary of Transportation to the Maritime Administrator, Department of Transportation.

### § 385.5 Applicability.

The MarAd assistance regulations apply to all MarAd research and development programs which will result in assistance awards, and to all recipients eligible for MarAd assistance awards such as state and local governments, institutions of higher education, hospitals, other nonprofit organizations, individuals, profitmaking organizations, and foreign organizations. The provisions of this part govern the award and administration of all such financial assistance matters, including resolutions and guidelines issued by MarAd except:

(a) As otherwise required by statute; and,

(b) As otherwise provided by specific program regulations.

### § 385.6 Exclusions.

Excluded from this part are requirements pertaining to procurement contracts subject to the Federal Property and Administrative Services Act of 1949 and the Federal and MarAd procurement regulations, interagency agreements, memorandums of understanding and programs or projects which directly disseminate technical information, or provide consultation, technical service, information, and data counseling to recipients without the use of an assistance instrument. Also excluded is the sale, lease, license, or other authorization to use Federal property, when such use is not incidental to the purpose of stimulation or support.

### § 385.7 Issuance.

The MarAd assistance regulations are issued in the Code of Federal Regulations as Part 385, Chapter II, of Title 46, Shipping, after publication in the FEDERAL REGISTER. Copies of the MarAd assistance regulations in the FEDERAL REGISTER and Code of Federal Regulations may be purchased from the Superintendent of Documents, Government Printing Office, Washington, DC 20402.

### § 385.8 Arrangement.

(a) *General Plan.* The general format, numbering system, and nomenclature used in this part conform with FEDERAL REGISTER standards.

(b) *Citation.* The MarAd assistance regulations will be cited in accordance with FEDERAL REGISTER standards. Thus, this paragraph, when referred to within divisions of the MarAd assistance regulations, should be cited as "§ 385.8(b)." When this section is referred to formally in other documents outside of this part, it should be cited as "46 CFR 385.8(b)."

(c) *Implementation.* Instructions and procedures needed by MarAd to internally implement this part will be contained in a separate MarAd Financial Assistance Manual, which will be available to the public upon request.

### § 385.9 Exceptions, deviations, or waivers.

Requests for exceptions, deviations, or waivers from the requirements of this part, unless exceptions are required by program legislation or program regulations, shall be submitted to the Grants Officer. Exceptions may be approved by the Grants Officer on matters within the scope of his authority, or obtained by said Grants Officer from higher authority within the Department of Transportation or from the Office of Management and Budget when required by law or other applicable Federal requirement.

## DEFINITION OF TERMS

### § 385.20 Scope.

Only those definitions needed to understand this part will be defined. Generally, terms defined elsewhere in statutes, OMB circulars, and other Federal requirements will not be restated. Special attention is directed to the definitions in the Standard General Provisions of MarAd's grant and cooperative agreements (See § 385.62).

### § 385.21 Definitions.

(a) *Assistance* is where the principal purpose of the relationship is the transfer of money, property, services or anything of value to a recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute rather than of acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government.

(b) *Assistance instrument* is a general term which identifies a class of instruments used to award assistance. These instruments include grant and cooperative agreements, as defined in § 385.32 (c) and (d) of this part.

(c) *Act* means the Federal Grant and Cooperative Agreement Act of 1977 (Pub. L. 95–224).

(d) *MarAd* means the Maritime Administration within the Department of Transportation.

(e) *Secretary* means the Secretary of Transportation.

(f) *Maritime Administrator* means the Maritime Administrator, Department of Transportation to whom the Secretary has delegated authority to administer within MarAd the provisions of the Act.

(g) *Grants Officer* means the primary delegate of the Maritime Administrator responsible for administration of grants and cooperative agreements for research and development within MarAd.

(h) *Awards Officer* means the principal executive subordinate to the Grants Officer responsible for the day-to-day administration of grants and cooperative agreements for research and development.

GENERAL POLICIES

### § 385.31 Scope.

Sections 385.31 through 385.62 set forth the regulations applicable to all assistance instruments as defined herein.

### § 385.32 Selection of award instrument.

(a) *General.* This section provides guidance on the appropriate use of award instruments consistent with the Act and the supplementary interpretative guidelines required by section 9 of the Act, which were published by the OMB in the FEDERAL REGISTER of August 18, 1978 (41 FR 36860), and are incorporated by reference herein. This section applies to all program and individual transactions where the choice of award instruments is within the administrative discretion of MarAd and is not otherwise prescribed or limited by law. A variety of award instruments is available as the means for defining the terms and conditions and the nature of the relationship between MarAd and eligible recipients. The award instruments are intended to be different in purpose, application, content, and nature. When properly employed, they create different relationships between the parties. Because of these differences, the decision to use a particular instrument must be made deliberately. The determination of whether a program, to be implemented through individual transactions, is principally one of acquisition or assistance will be made by the Grants Officer. MarAd generally will employ the cooperative agreement form of assistance instrument but will employ the grant form where deemed appropriate.

(b) *Procurement contract.* A procurement contract shall be used as the legal instrument to reflect a relationship between the Federal Government and a state or local government or other recipient whenever (1) the principal purpose of the instrument is the acquisition by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; or (2) whenever MarAd determines in a specific instance that the use of a type of procurement contract is appropriate.

(c) *Grant agreement.* A type of grant agreement shall be used as the legal instrument to reflect a relationship between the Federal Government and a state or local government or other recipient whenever the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the state or local government or other recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; and no substantial involvement is anticipated between MarAd, acting for the Federal Government, and the state or local government or other recipient during performance of the contemplated activity.

(d) *Cooperative agreement.* A type of cooperative agreement shall be used as the legal instrument to reflect a relationship between the Federal Government and a state or local government or other recipient whenever the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the state or local government or other recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; and substantial involvement is anticipated between MarAd, acting for the Federal Government, and the state or local government or other recipient during performance of the contemplated activity.

**§ 385.33 Unsolicited applications and proposals for financial assistance awards.**

(a) *Policy*. Although it is MarAd policy to solicit applications and proposals for assistance awards where possible, MarAd also values obtaining innovative ideas, methods, and approaches in maritime transportation areas offered by the public through unsolicited applications and proposals. It is the policy of the Government to foster and encourage the submission of unsolicited proposals. This § 385.33 is designed to encourage the submisson of unsolicited proposals relating to MarAd's mission and to eliminate restraints which discourage the generation and acceptance of innovative ideas through unsolicited proposals.

(b) *Scope*. This section applies to unsolicited proposals being considered for support through an assistance instrument. This section does not apply when a procurement contract is the appropriate award instrument in accordance with § 385.32(b).

(c) *Definition of unsolicited proposal*. The term *unsolicited proposal* means a written offer to perform a proposed task or effort, initiated and submitted to MarAd by a prospective recipient (offeror) without solicitation by MarAd, and with the objective of obtaining an award. The term may include both requests for support of a new project and requests for additional support of a previously funded project (renewals).

(d) *Advance consultation*. Organizations or individuals who are interested in submitting an unsolicited proposal are encouraged, before expending extensive effort in preparing a detailed unsolicited proposal or submitting any proprietary information to the Government, to make preliminary inquiries of MarAd program staff as to the general interest in the type of project contemplated. Prior contact with agency technical personnel is permissible and is encouraged, with the limited objectives of conveying to the prospective recipient an understanding of the agency mission and interest relative to the type of project contemplated. The project officer shall not indicate or imply in discussions with the potential proposer that a proposal will result in an award. Nothing is to be suggested to encourage or authorize the potential proposer to perform any work at MarAd expense in anticipation of support or an award. If there have been prior discussions with a particular MarAd program office, a statement of this fact should be stated on the face of the proposal.

(e) *Guides*. Guides for preparing the content of unsolicited proposals are available from the Awards Officer (M-900), Maritime Administration, U.S. Department of Transportation, Washington, DC 20590. Notwithstanding these guides, state and local governments may submit unsolicited applications or proposals using the application forms authorized by OMB Circular No. A–102, Attachment M.

(f) *Submission point*. All unsolicited proposals for new or renewals of financial assistance awards shall be submitted to Awards Officer (M-900), Maritime Administration, U.S. Department of Transportation, Washington, DC 20590.

(g) *Receipt and review*. (1) Receipt of unsolicited proposals will be acknowledged promptly by the Awards Officer and then forwarded expeditiously to potentially interested program offices for comment. Each unsolicited proposal that is circulated for a comprehensive evaluation shall have a legend attached or imprinted on it by the Awards Officer, identifying it as an unsolicited proposal and stating that it shall be used only for purposes of evaluation.

(2) The responsible program officials shall evaluate the proposal fairly and objectively using the criteria in §§ 385.50 through 385.52.

(3) An unsolicited proposal may include data which the proposer does not want disclosed for purposes other than the evaluation of the proposal. In such case, the proposer should mark each page containing such data with the words "Proprietory Data—Restricted Use" at the top of the page. In the event that an unsolicited proposal, in whole or in part, indicates that the proposer wishes to impose restrictions on the use or disclosure of the data contained in the proposal, MarAd personnel handling the proposal will take care to ensure that the information in

the proposal is not disclosed outside of MarAd. The Awards Officer has responsibility for ensuring that proposal reviewers are free of any direct affiliation with the individual(s) or institution submitting the proposal. MarAd policy on the use of information contained in proposals is to use such information only for evaluation purposes, except to the extent such information is generally available to the public, is already the property of the Government, or is available to the Government without restriction. Accordingly, if a proposal contains information the proposer wishes to protect, the proposer shall mark the cover page of the proposal with the following Notice:

NOTICE: The data contained in pages ____ of this proposal have been submitted in confidence and contain trade secrets and/or privileged or confidential commercial or financial information, and such data shall be used or disclosed only for evaluation purposes: *Provided*, That if this proposer receives an award as a result of or in connection with the submission of this proposal the Government shall have the right to use or disclose the data herein to the extent provided in the award. This restriction does not limit the Government's right to use or disclose data obtained without restriction from any source, including the proposer.

MarAd shall ensure that all copies of the proposal carry the above Notice, and that it is not disclosed outside MarAd, except with the consent of the proposer.

(h) *Criteria* for acceptance of an unsolicited proposal are those listed in §§ 385.50 through 385.52. If an unsolicited proposal fails to meet any of the criteria, the proposer will be notified by the Awards Officer in accordance with paragraph (j) of this section.

(i) *Funding determination*. The responsibility for deciding funding availability rests solely with the Grants Officer and will not be considered by the proposal reviewers.

(j) *Nonsupport of proposal.* If the proposal does not offer sufficient technical merit or program value; is not relevant to the accomplishment of a public purpose authorized by MarAd program legislation; or if funds are not available; the proposal will be returned to the proposer, if the proposer so requests. The Awards Officer shall prepare a letter to the proposer which sets forth the basis for rejection of the unsolicited proposal or application.

(k) *Support of proposal.* There is no prescribed format for the program documentation necessary to justify providing assistance. The minimum requirements are that: there be a reasonable basis for acceptance based on the criteria set forth in §§ 385.50 through 385.52; the rationale for providing support be written, and approvals be obtained as required by MarAd; and, that a copy of the documentation be included in the assistance instrument award file. The rationale for providing assistance may be included in documents required for project approval.

### § 385.34 Responsibility for issuing solicitations for proposals or applications.

(a) It is MarAd policy to favor solicitation of proposals or applications, where discretionary assistance awards are available, in preference to relying on unsolicited proposals, in order to maximize opportunities for open participation by the public in MarAd assistance awards.

(b) The Awards Officer shall be responsible for issuing solicitations, announcements, or the like, which call for the submission of proposals and applications by a certain due date which, if favorably acted upon by MarAd, may result in assistance awards.

### § 385.35 Program opportunity notices.

(a) A program opportunity notice can be used to stimulate the flow of unsolicited proposals or applications when the program objectives cannot be defined sufficiently to prepare a program solicitation.

(b) The program opportunity notice will contain the following, at a minimum:

(1) A number assigned for control and reference purposes;

(2) A brief description of the broad, general technical program or areas needing investigation (generally 50 words or less);

(3) A statement of the principal program objective in possibly funding unsolicited proposals as either:

(i) The acquisition of concepts, property, or services for the direct benefit or use of the Federal Government; or

(ii) The transfer of money, property, or services to a recipient for support or stimulation authorized by Federal statute;

(4) A statement about how unsolicited proposals will be evaluated and accepted:

(i) If the principal program objective is to accomplish a public purpose of support or stimulation, the criteria in §§ 385.50 through 385.52 shall be applied;

(ii) If the principal program objective is the acquisition of concepts, property, or services for the direct benefit or use of the Federal Government (i.e., procurement), the policy regarding evaluation and acceptance of unsolicited proposals in 41 CFR 9–4.9 shall apply;

(5) Restrictions, if any, as to who may submit proposals;

(6) A contact where additional information may be obtained;

(7) An expiration date which identifies when the program opportunity notice will no longer be current. This date shall not be used as a required common due date for submission of proposals;

(8) A statement that MarAd reserves the right to support or not support, in whole or in part, any or all proposals received;

(9) A statement that MarAd assumes no responsibility for any costs associated with specific proposal preparation if no award is made; but that if an award is made, MarAd will pay its allocable share of bid and proposal expenses as provided for in applicable Federal cost principles;

(10) A statement that proposals submitted pursuant to the notice shall be mailed to the Awards Officer (M–900), Maritime Administration, Room 4885, U.S. Department of Transportation, Washington, DC 20590.

(11) A reference that detailed information concerning assistance policy and procedures is contained in these assistance regulations, 46 CFR part 385;

(12) As much information as possible as to how proposals and applications will be evaluated;

(13) Policies and procedures for patents, data, and copyrights. Proposers have the right to request in advance of or within thirty (30) days after the effective date of award a waiver of all or any part of the United States rights in subject inventions.

(c) The program opportunity notice shall be in a format that best reflects the needs of the specific program, for example, letter, booklet, bulletin, or other documents.

(d) The program opportunity notice shall be distributed widely. It may be distributed to industry associations, including small business associations; schools, colleges, and universities; appropriate professional and scientific journals; state, local, and regional governmental organizations; the Commerce Business Daily; other MarAd offices; and individuals and organizations who request copies on a one-time basis.

(e) The submission of innovative methods, approaches or ideas will not be restricted to those problems or technical areas published in the program opportunity notice. Alternatives will be eligible for consideration.

### § 385.36 Public notice of availability of assistance awards.

(a) In order to maximize involvement of prospective recipients in MarAd assistance programs, it is MarAd's policy, wherever possible, to provide timely notice to the public as to the availability of assistance awards.

(b) Early notice regarding legislated grant or other assistance programs will br provided by MarAd to the Office of Management and Budget for publication in the Catalog of Federal Domestic Assistance pursuant to Office of Management and Budget Circular No. A–89. When legislated assistance programs or program objectives which are to be implemented through assistance instruments reach the point where applications or proposals need to be obtained, timely notice of such solicitations will be published in the FEDERAL REGISTER, Commerce Business Daily, trade and professional journals which are widely circulated to state and local governments, and news media, as appropriate to communicate with potentially interested applicants.

(c) When a MarAd assistance project involves making assistance available through prime recipients to subrecipients, such as through states to local governments, prime recipients should

provide timely advance notice to subrecipients as to the availability of such assistance, and provide a reasonable time period for subrecipients to prepare applications and secure prerequisite local approvals.

### § 385.37 Requirement for unrestricted solicitations for discretionary assistance awards.

(a) *Policy*. It is MarAd policy to maximize the opportunity for prospective recipients to be considered for assistance awards where eligibility is not prescribed by law. Therefore, when eligibility is not prescribed by law or a final program regulation, and when discretionary assistance awards are selected to accomplish a program objective, applications or proposals will be obtained, wherever practicable, by issuance of a written solicitation. When MarAd initiates the solicitation of applications or proposals, eligibility to be considered for discretionary awards will not be restricted by MarAd to one category of recipients or to a single recipient without adequate basis.

(b) *Justification of restricted eligibility*. Where program legislation explicitly restricts eligibility, e.g., to state governments, no justification is required. When program regulations restrict eligibility beyond the restrictions required by the program legislation, the basis for the restriction shall be set forth in the program rulemaking.

41 CFR 9–3.805–51 shall be used as a guide in preparing the "justification for restricting eligibility." The reasons offered will be evaluated for consistency with the policy in paragraph (a) of this section, MarAd's overall mission, and the objective of maintaining an open and fair system of making assistance awards.

(c) *Approvals.* Justifications of restricted eligibility will be signed by the Grants Officer and will be reviewed by Office of General Counsel for legal sufficiency prior to issuance of the restricted solicitation. The signed justification will be filed in official award file.

### § 385.38 Joint funding.

(a) Pursuant to section 10(c) of the Act, MarAd is authorized to participate in joint funded projects with other Federal agencies in any funding relationship which will serve the best interest of all of the participating agencies' program. Such joint funding project may include more than one type of assistance relationship, e.g., some components of project may be funded by grants and other components of the project may be funded by cooperative agreements.

(b) It is MarAd's positive policy, further, to encourage cost-sharing on the part of applicants for financial assistance. The willingness of applicants to cost-share is a primary factor in making, or not making, an assistance award.

### § 385.39 Socio-economic and environmental policies.

A number of socio-economic and environmental policies of the Federal Government are incorporated into the standard general provisions of the grant agreement and cooperative agreements, and are identified as explicit criteria in §§ 385.51 and 385.52.

### § 385.40 Disputes.

Procedures for resolution of disputes between a recipient and MarAd appear in the standard general provisions of the grant and cooperative agreements referenced in § 385.62, of this part.

## CRITERIA FOR AWARD

### § 385.50 Scope.

Sections 385.51 and 385.52 set forth the criteria to be used by MarAd in evaluating all projects and all potential recipients prior to award of a grant or cooperative agreement.

### § 385.51 Criteria: Projects.

The criteria to be used by MarAd in evaluating all projects prior to award of a grant or cooperative agreement are as follows:

(a) In terms of the accomplishment of a public purpose—

(1) The potential contribution which the proposed work is expected to make to the MarAd assistance mission;

(2) The economic, environmental, and societal significance which a successful demonstration or project may have for

the nation, and in particular the national merchant marine program;

(3) The relationship of the proposal to:

(i) The public need for the potential results of the research, development, or demonstration effort, and whether it is unlikely that similar results would be achieved in a timely manner in the absence of Federal assistance;

(ii) Whether the potential opportunities for non-Federal interests to recapture the investment in the undertaking through the normal commercial utilization of proprietary knowledge appear inadequate to encourage timely results;

(iii) The extent of the problems treated and whether the objectives sought by the undertaking are national, widespread, or regional in their significance;

(iv) The extent of opportunities to induce non-Federal support of the undertaking;

(v) The degree of risk of loss of the investment inherent in the research, and the availability of risk capital to the non-Federal entities which might otherwise engage in the field of the research so as to further timely development of the technology; and,

(vi) The availability of appropriations to MarAd.

(b) In terms of the particular objectives of the project, whether the project has:

(1) High technical merit which promises or represents an innovative idea, method, or approach;

(2) Program value not previously recognized or pursued by MarAd; and,

(3) A reasonable degree of probability of achieving the stated objectives.

### § 385.52 Criteria: Applicant.

The criteria to be used by MarAd in evaluating all applicants prior to award of a grant or cooperative agreement are as follows:

(a) The qualifications, capabilities, resources (both financial and technical) and experience of the applicant;

(b) The facilities or techniques which the proposer possesses and offers which are considered to be integral factors for achieving the objectives of the proposal;

(c) The qualifications, capabilities, and experiences of the proposed investigator, team leader, or key personnel, who are considered to be critical in achieving the objectives of the proposal;

(d) The precision and detail with which the applicant states its plan to further the formally adopted socioeconomic and environmental policies of the United States e.g., the encouragement of minority business enterprises); and,

(e) The extent to which the applicant will share the total estimated cost of the project.

## FORMS OF AGREEMENTS

### § 385.60 Scope.

Sections 385.61 through 385.62 describe the form and content of the two parts which comprise a grant agreement or a cooperative agreement which will be executed by MarAd and a recipient of financial assistance.

### § 385.61 Grant and cooperative agreements: Special provisions.

(a) MarAd has adopted two format matrices, one for grant agreements and one for cooperative agreements, to accommodate the variables inherent in undertaking a project with a particular recipient. These variables include, for example, identity of the recipient, scope of work, schedule of performance and obligations assumed by both parties.

(b) The format matrices are available on request from the Awards Officer, and a copy of each is included in the information kit provided to all potential recipients of financial assistance.[1]

(c) MarAd will adapt the appropriate format matrix to the extent deemed necessary when drafting the particular agreement to be executed by MarAd and a recipient of financial assistance for a specific project.

### § 385.62 Grant and cooperative agreements: Standard general provisions.

(a) MarAd has adopted two standard general provisions which apply to

[1] An informational copy of both format matrices accompany this regulation as filed in the Office of the Federal Register.

grant and cooperative agreements, respectively, and said provisions are hereby incorporated by reference into these regulations.[2]

(b) MarAd reserves the right to amend or to render inapplicable any portion of the particular standard general provisions required for any particular grant or cooperative agreement: *Provided,* That such modification shall be accomplished only by means of an explicit statement in the special provisions executed by MarAd and a particular recipient.

# PART 386—REGULATIONS GOVERNING PUBLIC BUILDINGS AND GROUNDS AT THE UNITED STATES MERCHANT MARINE ACADEMY

Sec.
386.1 Hours of admission to property.
386.3 Preservation of property.
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386.21 Vehicular and pedestrian traffic.
386.23 Weapons and explosives.
386.25 Enforcement, penalties and other laws.

AUTHORITY: 40 U.S.C. 318; 32 FR 11969 (August 18, 1967), Pub. L. 97–31 (95 Stat. 151, August 6, 1981); 49 CFR 1.66.

SOURCE: 52 FR 21534, June 8, 1987, unless otherwise noted.

## § 386.1 Hours of admission to property.

Academy property shall be closed to the public during other than normal working hours, as well as during Regimental leave periods and indoctrination training for the fourth class year. The closing of property shall not apply where the Superintendent has approved the after normal working hours use of buildings or athletic facilities for authorized activities. During normal working hours, property shall be closed to the public only when situations require this action to ensure the orderly conduct of Academy business. The Superintendent, or a designated representative of the Superintendent, shall make the decision to close all or any areas of Academy property. This action shall be coordinated with the Head, Department of Public Safety and Security (Security), of the Academy. When property, or a portion thereof, is closed to the public, admission to the property, or to any area thereof, shall be restricted to authorized persons, who shall register with Security personnel upon entry to the property. When requested, any person shall display Government or other identifying credentials to Security personnel when entering, leaving, or while on Academy property.

## § 386.3 Preservation of property.

Prohibited actions against property on the Academy grounds are improper disposal of rubbish; theft of or damage to property; throwing articles from an Academy building; and climbing on statues, fountains or any part of a building.

## § 386.5 Conformity with signs and posted regulations.

Persons in and on Academy property shall, at all times, comply with official signs and posted regulations of a prohibitional, instructional or directional nature, and shall also comply with the directions of Academy special police and other authorized officials. These regulations shall be enforced by uniformed special police and other designated security personnel.

## § 386.7 Disturbances.

Any loitering, disorderly conduct or other conduct on Academy property which creates loud or unusual noise or a nuisance which unreasonably obstructs the use of any area, including entrances, foyers, lobbies, corridors, offices, elevators, stairways, or parking lots; or impedes or disrupts the performance of official duties by Government employees or Midshipmen activities is prohibited.

[2] A copy of both such incorporated provisions accompany this regulation and are on file in the Office of the Federal Register.

### § 386.9 Gambling.

Unless permitted by Executive or Department of Transportation Order, participating in games of chance for money or other consideration, or in the operation of gambling devices, or the conduct of a lottery or a pool, or the selling or purchasing of numbers tickets, is prohibited on Academy property.

### § 386.11 Alcoholic beverages and controlled substances.

Operation of a motor vehicle on Academy property while intoxicated, under criteria set forth in the statutes of the State of New York, is prohibited. The consumption or possession by any person on Academy property of alcoholic beverages, narcotic drugs, hallucinogens, marijuana, barbiturates, amphetamines or any other substances controlled under the laws of the State of New York or the United States is prohibited. These prohibitions shall not apply in cases where drugs are being used as prescribed for a patient by a licensed physician. The prohibition against possession and consumption of alcoholic beverages shall not apply when possessed or consumed by staff or resident officers in private residences, or when the Superintendent, or a designee of the Superintendent, has granted an exemption in writing for an appropriate reason.

### § 386.13 Soliciting, vending, and debt collection.

Soliciting aims, or commercial soliciting and vending of all kinds, displaying or distributing commercial advertising, or collecting private debts is prohibited on Academy property. This prohibition does not apply to national or local drives for funds for charitable purposes, welfare, health, or other purposes as authorized by the "Manual on Fund Raising Within the Federal Service," issued by the U.S. Office of Personnel Management under Executive Order 10927 of March 18, 1961, and sponsored or approved by the Superintendent; and to commercial lessees and contractors authorized to sell goods or services.

### § 386.15 Distribution of handbills.

The distribution of materials such as pamphlets, handbills and flyers, and the displaying of placards or posting of materials on bulletin boards or elsewhere in or on Academy property shall be coordinated with the Head, Department of Public Safety and Security, of the Academy so as not to impede Academy employees in the performance of their duties or Midshipmen activities.

### § 386.17 Photographs for news, advertising, or commercial purposes.

Such photographs for news, advertising or commercial purposes may be taken on Academy premises only with the written consent of the Office of External Affairs at the Academy. Except where national security regulations apply or a Federal Court Order or rule prohibits, photographs for news purposes may be taken in entrances, lobbies, foyers or corridors, or in auditoriums in which public meetings are being held. Photographs for advertising and commercial purposes may be taken only with the written permission of and in locations specified by the Office of External Affairs.

### § 386.19 Dogs and other animals.

Persons are prohibited from bringing dogs and other animals on to the Academy premises, except for authorized purposes and except for seeing eye or other guide dogs, or pets approved in writing by the Superintendent or a designee of the Superintendent.

### § 386.21 Vehicular and pedestrian traffic.

Operators of all vehicles on Academy property shall drive in a careful and safe manner at all times and shall comply with the signals and directions of Academy special police, Security personnel or other authorized individuals, and all posted traffic signs and with restrictions indicated by marked traffic areas. The following acts are prohibited on Academy property: the blocking with vehicles of entrances, driveways, walks, loading platforms or fire hydrants; parking without a permit, except in emergencies; parking in unauthorized locations or in locations reserved for other persons, or parking contrary to the direction of posted signs or marked traffic areas, including yellow curbs. Vehicles parked in violation of the foregoing shall be subject to

the issuance of a Traffic Violation Notice and/or removal of the vehicle at the owner's risk and expense. The Superintendent may issue and post other specific traffic directives as may be required, applicable to drivers and pedestrians. When so issued and posted, such directives shall have the same force and effect as if made a part hereof. Proof that a motor vehicle was in violation of these regulations or such directives shall be evidence that the registered owner was responsible for the violation.

### § 386.23 Weapons and explosives.

No person shall carry or possess firearms, other dangerous or deadly weapons or parts thereof, explosives or items intended to be used to fabricate an explosive or incendiary device, or parts thereof, either openly or concealed, while on Academy property, except for official purposes specifically authorized in writing by the Superintendent or a designee of the Superintendent.

### § 386.25 Enforcement, penalties and other laws.

Whoever shall be found guilty of violating any regulations in this part while in or on Academy property is subject to a fine of not more than $50 or imprisonment of not more than 30 days, or both (40 U.S.C. 318c). Nothing in these regulations shall be construed to abrogate any other Federal laws or regulations or any State and local laws and regulations applicable to any area in which the property is situated. These regulations shall be posted prominently throughout the Academy. Penalties for their violation shall be incorporated in the Schedule of Fines for Petty Offenses established by order of the United States District Court for the Eastern District of New York.

## PART 387—UTILIZATION AND DISPOSAL OF SURPLUS FEDERAL REAL PROPERTY FOR DEVELOPMENT OR OPERATION OF A PORT FACILITY

Sec.

387.1 Scope.
387.2 Definitions.
387.3 Notice of availability of surplus property.
387.4 Applications.
387.5 Surplus property assignment recommendation.
387.6 Terms, reservations, restrictions, and conditions of conveyance.

AUTHORITY: Pub. L. 103–160, 107 stat. 1933 (40 U.S.C. 484 (q)).

SOURCE: 60 FR 42467, Aug. 16, 1995; 60 FR 43720, Aug. 23, 1995, unless otherwise noted.

### § 387.1 Scope.

This part is applicable to Surplus Property that is recommended by the Secretary as being needed for the development or operation of a Port Facility and is appropriate for being assigned to, or that has been assigned to the Secretary for conveyance as provided for in Public Law 103–160 and 40 U.S.C. 471 *et seq.*

### § 387.2 Definitions.

(a) *Act* means the Federal Property and Administrative Services Act of 1949 as amended, 40 U.S.C. 471 *et seq.*, and 41 CFR 101–47. Terms defined in the Act and not defined in this section have the meanings given to them in the Act.

(b) *Applicant* means any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, the Commonwealth of the Northern Mariana Islands, or any political subdivision, municipality, or instrumentality thereof, that has submitted an application to the Secretary to obtain surplus Federal property.

(c) *Disposal Agency* means the executive agency of the Government which has authority to assign property to the Secretary for conveyance for development or operation of a port facility.

(d) *Grantee* means the Applicant to which surplus Federal property is conveyed.

(e) *Grantor* means the Secretary.

(f) *Port Facility* means any structure and improved property, including services connected therewith, whether located on the waterfront or inland, which is used or intended for use in developing, transferring, or assisting maritime commerce and water dependent industries, including, but not limited to, piers, wharves, yards, docks,

berths, aprons, equipment used to load and discharge cargo and passengers from vessels, dry and cold storage spaces, terminal and warehouse buildings, bulk and liquid storage terminals, tank farms, multimodal transfer terminals, transshipment and receiving stations, marinas, foreign trade zones, shipyards, industrial property, fishing and aquaculture structures, mixed use waterfront complexes, connecting channels and port landside transportation access routes.

(g) *Secretary* means the Secretary of Transportation acting by and through the Maritime Administrator, Maritime Administration by delegation of authority.

(h) *Surplus Property* means Federal real and related personal property duly determined to be unneeded by a Federal agency which may be conveyed to an Applicant for use in the development or operation of a port facility.

### § 387.3 Notice of availability of surplus property.

The Disposal Agency shall publish notices of availability of excess and surplus Federal real and personal property. The Secretary will advise eligible public port agencies, in an appropriate manner, of the availability of Surplus Property that is deemed to have port facility potential. Potential Applicants shall notify the Secretary, in writing, of a desire to acquire surplus Federal property before the expiration of the notice period specified in the Notice of Surplus Property—Government Property.

### § 387.4 Applications.

Application forms for conveyance of Surplus Property can be obtained from the Maritime Administration, Division of Ports, 400 Seventh Street, SW, Washington, DC 20590. The applicant shall identify on the application form the requested property, agree to the terms/conditions of the conveyance and shall also submit a Port Facility Redevelopment Plan (PFRP) which details the plan of use for the property and the associated economic development plan.

### § 387.5 Surplus property assignment recommendation.

Before any assignment recommendation is submitted to the Disposal Agency by the Secretary the following conditions shall be met:

(a) The Secretary has received and approved an application for the property.

(b) The Applicant is able, willing, and authorized to assume immediate possession of the property and pay administrative expenses incidental to the conveyance (application preparation, documentation, legal and land transfer costs).

(c) The Secretary, after consultation with the Secretary of Labor, has determined that the property to be conveyed is located in an area of serious economic disruption.

(d) The Secretary, after consultation with the Secretary of Commerce, approves the PFRP as part of a necessary economic development program.

(e) The Secretary determines that the application complies with the provisions of the National Environmental Policy Act of 1969 as prepared by the Disposal Agency.

### § 387.6 Terms, reservations, restrictions, and conditions of conveyance.

(a) Conveyances of property shall be on forms approved by, and available from the Secretary, and shall include such terms, reservations, restrictions and conditions set forth in this part and such other terms, reservations, restrictions and conditions as the Secretary may deem appropriate or necessary.

(b) Property shall be conveyed by a quitclaim deed or deeds on an "as is, where is" basis without any warranty, expressed or implied.

(c) Property shall be used and maintained in perpetuity for the purpose for which it was conveyed, and that if the property ceases to be used or maintained for that purpose, all or any portion of the property shall, in its then existing condition, at the option of the Government, revert to the Government.

(d) The entire Port Facility, including all structures, improvements, facilities and equipment in which the deed conveys any interest shall be

maintained at all times in safe and serviceable condition, to assure its efficient operation and use, provided, however, that such maintenance shall be required as to structures, improvements, facilities and equipment only during the useful life thereof, as determined by the Grantor.

(e) No property conveyed shall be mortgaged or otherwise disposed of, or rights or interest granted by the Grantee without the prior written consent of the Grantor. However, the Grantor will only review leases of five years or more to determine the interest granted therein.

(f) Property conveyed for a Port Facility shall be used and maintained for the use and benefit of the public on fair and reasonable terms, without discrimination.

(g) The Grantee shall, insofar as it is within its powers and to the extent reasonable, adequately protect the water and land access to the Port Facility.

(h) The Grantee shall operate and maintain in a safe and serviceable condition, as deemed reasonably necessary by Grantor, the port and all facilities thereon and connected therewith which are necessary to service the maritime users of the Port Facility and will not permit any activity thereon which would interfere with its use as a Port Facility.

(i) The Port Facility is subject to the provisions of Title 46 Code of Federal Regulations (CFR) Part 340.

(j) The Grantee shall furnish the Grantor such financial, operational and annual utilization reports as may be required.

(k) Where construction or major renovation is not required or proposed, the Port Facility shall be placed into use within twelve (12) months from the date of this conveyance. Where construction or major renovation is contemplated at the time of conveyance, the property shall be placed in service according to the redevelopment time table approved by the Grantor in the PFRP.

(l) The Grantee shall not enter into any transaction which would operate to deprive it of any of the rights and powers necessary to perform or comply with any or all of the terms, reservations, restrictions and conditions set forth in the application and the deed.

(m) The Grantee shall keep up to date at all times a Port Facility layout map of the property described herein showing:

(1) the boundaries of the Port Facility and all proposed additions thereto, and

(2) the location of all existing and proposed port facilities and structures, including all proposed extensions and reductions of existing port facilities.

(n) In the event that any of the terms, reservations, restrictions and conditions are not met, observed, or complied with by the Grantee, the title, right of possession and all other rights conveyed by the deed to the Grantee, or any portion thereof, shall, at the option of the Grantor revert to the Government, in its then existing condition sixty (60) days following the date upon which demand to this effect is made in writing by Grantor or its successor in function, unless within said sixty (60) days such default or violation shall have been cured and all such terms, reservations, restrictions and conditions shall have been met, observed, or complied with, in which event said reversion shall not occur.

(o) The deed will contain a severability clause dealing with the terms, reservations, restrictions and conditions of conveyance.

(p) The Grantee shall remain at all times a State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, the Commonwealth of the Northern Mariana Islands, or any political subdivision, municipality, or instrumentality thereof.

(q) The Grantee shall comply at all times with all applicable provisions of law, including, the Water Resources Development Act of 1990.

(r) The Grantee shall not modify, amend or otherwise change its approved PFRP without the prior written consent of Grantor and shall implement the PFRP as approved by the Grantor.

(s) The Government under Section 120 (h)(3) of the Comprehensive, Environmental Response, Compensation

and Liability Act of 1980, as amended, warrants that:

(1) all remedial action necessary to protect human health and the environment with respect to any hazardous substance on the property has been taken before the date of the conveyance, and

(2) any additional remedial action found to be necessary after the date of the conveyance shall be conducted by the Government.

(t) The Government reserves the right of access to any and all portions of the property for purposes of environmental investigation, remediation or other corrective action and compliance inspection purposes.

(u) The Grantee shall agree that in the event, the Grantor exercises its option to revert all right, title, and interest in and to any portion of the property to the Government, or Grantee voluntarily returns title to the property in lieu of a reverter, the Grantee shall provide protection to, and maintenance of the property at all times until such time as the title is actually reverted or returned to and accepted by the Government. Such protection and maintenance shall, at a minimum, conform to the standards prescribed in regulations implementing the Act.

(v) The Grantor expressly reserves from the conveyance:

(1) oil, gas and mineral rights,

(2) improvements without land,

(3) military chapels, and

(4) property disposed of pursuant to 204 (c) of the Act.

(w) The Government reserves all right, title, and interest in and to all property of whatsoever nature not specifically conveyed, together with right of removal thereof from the Port Facility within one (1) year from the date of the deed.

(x) The Grantee shall agree to maintain any portion of the property identified as "historical" in accordance with recommended approaches in the Secretary of Interior Standards for Historic Property at 16 U.S.C. 461–470w–6.

(y) Prior to the use of any property by children under seven (7) years of age, the Grantee shall remove all lead-based paint hazards and all potential lead-based paint hazards in accordance with applicable lead-based paint laws and regulations.

(z) The Grantee agrees that any construction or alteration is prohibited unless a determination of no hazard to air navigation is issued by the Federal Aviation Administration.

(aa) The Grantee shall agree that in its use and occupancy of the Port Facility it shall comply with all laws relating to asbestos.

(bb) All construction on any portion of the property identified as "wetlands" as determined by the appropriate District of the Army Corps of Engineers shall comply with Department of the Army Wetland Construction Restrictions contained in Title 33 CFR, Parts 320 through 330.

(cc) The Grantee shall agree to maintain, indemnify and hold harmless the Grantor and the Government from any and all claims, demands, costs or judgments for damages to persons or property that may arise from the use of the property by the Grantee, guests, employees and lessees.

(dd) The Grantor, on written request from the Grantee, may grant release from any of the terms, reservations, restrictions and conditions contained in the deed, or the Grantor may release the Grantee from any terms, restrictions, reservations or conditions if the Grantor determines that the property so conveyed no longer serves the purpose for which it was conveyed.

(ee) The Grantor shall make reforms, corrections or amendments to the deed if necessary to correct such deed or to conform such deed to the requirements of applicable law.

## PART 388—ADMINISTRATIVE WAIVERS OF THE COASTWISE TRADE LAWS

Sec.
388.1 Purpose.
388.2 Definitions.
388.3 Application and fee.
388.4 Criteria for grant of a waiver.
388.5 Criteria for revocation of a waiver.
388.6 Process.

AUTHORITY: 46 App. U.S.C. 1114(b); Pub. L. 105–383, 112 Stat. 3445 (46 U.S.C. 12106 note): 49 CFR 1.66.

SOURCE: 69 FR 51772, Aug. 23, 2004, unless otherwise noted.

### § 388.1 Purpose.

This part prescribes regulations implementing the provisions of Title V of Public Law 105–383 (112 Stat. 3445), which grants the Secretary authority to review and approve applications for waiver of the coastwise trade laws to allow the carriage of no more than twelve passengers for hire on vessels, which are three years old or more, built or rebuilt outside the United States, and grants authority for revocation of those waivers.

### § 388.2 Definitions.

For the purposes of this part:

(a) *Administrator* means the Maritime Administrator.

(b) *Coastwise Trade Laws* include:

(1) The Coastwise Endorsement Provision of the Vessel Documentation Laws, (46 U.S.C. 12106);

(2) The Passenger Services Act, section 8 of the Act of June 19, 1886 (46 App. U.S.C. 289); and

(3) The Jones Act, section 27 of the Merchant Marine Act, 1920 (46 App. U.S.C. 883).

(c) *Eligible Vessel* means a vessel that—is either a small passenger vessel or an uninspected passenger vessel that—

(1) Was not built in the United States and is at least 3 years of age; or

(2) If rebuilt, was rebuilt outside the United States at least 3 years before the certificate of documentation with appropriate endorsement if granted, would become effective.

(d) *MARAD* means the Maritime Administration, U.S. Department of Transportation.

(e) *Secretary* means the Secretary of Transportation.

(f) The terms *small passenger vessel, uninspected passenger vessel* and *passenger for hire* have the meaning given such terms by 46 U.S.C. 2101.

(g) *Fraud* means the intentional misrepresentation of a material fact or facts.

[69 FR 51772, Aug. 23, 2004, as amended at 75 FR 28206, May 20, 2010]

### § 388.3 Application and fee.

(a) An owner of a vessel may choose either of two methods to apply for an administrative waiver of the coastwise trade laws of the United States for an eligible vessel to carry no more than twelve passengers for hire.

(1) The application form contained on MARAD's Web site at *http://www.marad.dot.gov* may be submitted electronically with credit card or Automated Clearinghouse (ACH) payment of the $500 application fee.

(2) Alternatively, applicants may send written applications to Small Passenger Vessel Waiver Applications, Office of Cargo Preference, MAR–730, 1200 New Jersey Ave., SE., Washington, DC 20590. Written applications need not be in any particular format, but must be signed, be accompanied by a check made out to the order of "Maritime Administration," and contain the following information:

(i) Name of vessel and owner for which waiver is requested and the vessel's official number.

(ii) Size, capacity and tonnage of vessel (state whether tonnage is measured pursuant to 46 U.S.C. 14502, or otherwise, and if otherwise, how measured).

(iii) Intended use for vessel, including geographic region of intended operation and trade.

(iv) Date and place of construction and (if applicable) rebuilding. (If applicant is unable to document the origin of the vessel, foreign construction will be assumed).

(v) Name, address, and telephone number of the vessel owner.

(vi) A statement on the impact this waiver will have on other commercial passenger vessel operators, including a statement describing the operations of existing operators.

(vii) A statement on the impact this waiver will have on U.S. shipyards.

(viii) A statement that the applicant represents that the foregoing information is true to the best of the applicant's knowledge.

(b) MARAD may ask additional questions of the applicant as part of the application review.

[69 FR 51772, Aug. 23, 2004, as amended at 70 FR 66797, Nov. 3, 2005; 75 FR 28206, May 20, 2010]

### § 388.4 Criteria for grant of a waiver.

(a) *General Criteria.* (1) A waiver of the foreign build and/or foreign rebuild prohibition in the coastwise trade laws

will be granted for an eligible vessel only if we determine that the employment of the vessel in the coastwise trade will not unduly adversely affect—

(i) United States vessel builders; or

(ii) The coastwise trade business of any person who employs vessels built in the United States in that business.

(2) The determination of "unduly adverse affect" on a coastwise operator or a U.S. vessel builder may not be limited to operators or builders of vessels carrying 12 or fewer passengers.

(3) We may evaluate the expected impact of the proposed waiver on the basis of the information received from all sources, including public comment, internal investigation and analysis, and any other sources of information deemed appropriate.

(b) *Impact on U.S. vessel builders.* We may use the following criteria to determine the effect on U.S. vessel builders: Whether a potentially affected U.S. vessel builder has a history of construction of similar vessels, or can demonstrate the capability and capacity and the fact it has taken definite steps to offer to build a similar vessel, for use in the same geographic region of the United States, as the proposed vessel of the applicant.

(c) *Impact on coastwise trade business.* We may use the following criteria to determine the effect on existing operators of U.S.-built vessels in coastwise trade:

(1) Whether the proposed vessel of the applicant and a vessel of an existing operator (or the vessel of an operator that can demonstrate it has taken definite steps to begin operation) would provide similar commercial service and would operate in the same geographic area.

(2) The number of similar vessels operating or proposed to operate in the same market with the same or similar itinerary, relative to the size of the market. For example, a single vessel may have a small impact on a large market.

(d) *Advance notice and approval needed for changes.* When we approve a waiver application, we will notify the applicant that no substantial change in the employment of the vessel in the coastwise trade may be made without prior notice to MARAD. In general, a substantial change in operating area will require a new waiver application.

### § 388.5 Criteria for revocation of a waiver.

We shall revoke a waiver previously granted under this part if we determine, after notice and opportunity for a hearing, that fraud was involved in any part of the waiver application.

### § 388.6 Process.

(a) *Initial process.* (1) We will review each application for completeness as received. We will notify the applicant if additional information is necessary or if the application does not meet the initial eligibility requirements for waiver. All applications will be available for public inspection electronically in the Department of Transportation Docket at *http://dot.dms.gov*.

(2) Applications being processed on the merits will be noticed in the FEDERAL REGISTER. Interested parties will be given an opportunity to comment on whether introduction of any proposed vessel would adversely affect them. In the absence of duly filed objections to an application, and in the absence of unduly adverse impact on vessel builders or businesses employing U.S.-built vessels otherwise discovered by us, we will conclude that there will be no adverse effect. If an objection to an application is received, additional information may be sought from the objector. The applicant will be given a sufficient amount of time to respond. The Director, Office of Ports and Domestic Shipping, will then either make a decision based on the written submissions and all available information or, on MARAD's motion or at the applicant's request, hold a hearing on the application and make a decision based on the hearing record. The decision will be communicated to the applicant, commenters and the United States Coast Guard in writing and placed in the docket. If MARAD grants a waiver, the applicant must thereafter contact the Coast Guard to obtain the necessary documentation for domestic operation. MARAD's waiver does not satisfy other requirements of the Coast Guard for documentation. The waiver, if approved, will be assigned to the vessel.

(b) *Revocation*. We may, upon the request of a U.S. builder or a coastwise trade business of a person who employs U.S.-built vessels or upon our own initiative propose to revoke a waiver granted under this part, on the basis that the waiver was obtained through fraud. The grantee of the waiver in question will be notified directly by mail, and a notice will be published in the FEDERAL REGISTER. The original docket of the application will be reopened. We may request additional information from the applicant granted the waiver or from any respondent to the notice. The Director, Office of Ports and Domestic Shipping, will then either make a decision based on the written submissions and all available information or, on MARAD's motion or at the applicant's request, hold a hearing on the proposed revocation and make a decision based on the hearing record. The decision will be communicated in writing to: the applicant granted the waiver, the requestor (if any), each respondent to the proposed revocation notice, the Coast Guard; and placed in the docket. If MARAD revokes a waiver, the Coast Guard, automatically and without further proceedings, shall revoke the vessel's coastwise endorsement.

(c) *Review of determinations*. (1) The decisions by the Director, Office of Ports and Domestic Shipping, to grant a waiver, deny a waiver, or revoke a waiver will not be final until time for discretionary review by the Administrator has expired. Each decision to grant, deny, or revoke a waiver will be made in writing and a copy of the written decision will be provided to each applicant and other parties to the decision. Applicants, persons who requested revocation of a waiver, and persons who submitted comments in response to a FEDERAL REGISTER notice may petition the Administrator to review a decision by the Director, Office of Ports and Domestic Shipping, to grant a waiver, deny a waiver, or revoke a waiver within five (5) business days after such decision is filed in the docket. Each petition for review should state the petitioner's standing and the reasons review is being sought, clearly pointing out alleged errors of fact or misapplied points of law. Within five (5) business days of submission of a petition for review, the applicant, and other persons with standing, may request that the Administrator not review a decision by the Director, Office of Ports and Domestic Shipping, to grant, deny, or revoke a waiver. Such petitions and responses must either be sent by facsimile to the Secretary, Maritime Administration, at (202) 366–9206 or filed electronically in the appropriate DOT docket at *http://dms.dot.gov*. The Administrator will decide whether to review within five (5) business days following the last day for submission of a request that the Administrator not take review. If the Administrator undertakes review, the decision by the Director, Office of Ports and Domestic Shipping, is stayed until final disposition. In the event the Administrator decides to undertake review, a decision will be made based on the written submissions and all available information. As a matter of discretion, the Administrator or designated representative may hold a hearing on the proposed action and make a decision based on the hearing record. The decision will be communicated in writing to the interested parties and the Coast Guard. In the review process, the decision of the Maritime Administrator is the final disposition. In the absence of any petition for review, the determination by the Director, Office of Ports and Domestic Shipping, becomes final on the sixth business day after the decision. The Secretary, MARAD, may extend any of the time limits, but only for good cause shown.

(2) Such petitions and responses must either be sent by facsimile to the Secretary, Maritime Administration, at (202) 366–9206 or filed electronically in the appropriate DOT docket at *http://dms.dot.gov*. The Administrator will decide whether to review within five (5) business days following the last day for submission of a request that the Administrator not take review. If the Administrator takes review, the decision by the Director, Office of Ports and Domestic Shipping, is stayed until final disposition. In the event the Administrator decides to take review, a decision will be made based on the written

submissions and all available information. As a matter of discretion, the Administrator or designated representative may hold a hearing on the proposed action and make a decision based on the hearing record. The decision will be communicated in writing to the interested parties and the Coast Guard. In the review process, the decision of the Maritime Administrator is the final disposition. In the absence of any petition for review, the determination by the Director, Office of Ports and Domestic Shipping, becomes final on the sixth business day after the decision. The Secretary, MARAD, may extend any of the time limits, but only for good cause shown.

# PART 389—DETERMINATION OF AVAILABILITY OF COASTWISE-QUALIFIED LAUNCH BARGES

Sec.

389.1 Purpose.
389.2 Definitions.
389.3 Registration.
389.4 Application and fee.
389.5 Review; issuance of determinations.

AUTHORITY: 49 U.S.C. 322(a); 46 U.S.C. 55102; 46 U.S.C. 55108; Public Law 108–293, 118 Stat 1028; 49 CFR 1.66.

SOURCE: 73 FR 30787, May 29, 2008, unless otherwise noted.

## § 389.1 Purpose.

This part prescribes regulations implementing the provisions of section 417 of Public Law 108–293, which grants the Secretary of Transportation, acting through the Maritime Administration, the authority to review and approve applications for determinations of availability of coastwise-qualified launch barges. Owners or operators of proposed platform jackets may submit information regarding a specific platform jacket transport, placement and/or launch project, following the procedures set forth in this regulation, in order for us to determine whether a suitable coastwise-qualified barge is available for the project. If we determine a suitable coastwise-qualified launch barge is not available, then a non-coastwise qualified foreign-built launch barge may be used.

## § 389.2 Definitions.

For the purposes of this Part:

"*Administrator*" means the Maritime Administrator.

"*Coastwise-qualified Vessel*" means a vessel that has been issued a certificate of documentation with a coastwise endorsement under 46 U.S.C. 12112.

Coastwise Trade Laws include:

(1) The Coastwise Endorsement Provision of the Vessel Documentation Laws, (46 U.S.C. 12112);

(2) The Passenger Services Act, section 8 of the Act of June 19, 1886 (46 U.S.C. 55103);

(3) The Jones Act, section 27 of the Merchant Marine Act, 1920 (46 U.S.C. 55102); and

(4) Section 2(c) of the Shipping Act of 1916 (46 U.S.C. 50501).

"*Launch barge*" means a vessel that is technically capable of transporting and, if needed, launching or installing an offshore drilling or production platform jacket in a timely manner.

"*Foreign launch barge*", for the purpose of this rule, means a non-coastwise-qualified launch barge that was built before December 31, 2000, and has a launch capacity of 12,000 long tons or more.

A "*long ton*" equals 2,240 pounds.

"*Platform Jacket*" refers to a single physical component and includes any type of offshore exploration, development, or production structure or component thereof, including platform jackets, tension leg or SPAR platform superstructures (including the deck, drilling rig and support utilities, and supporting structure), hull (including vertical legs and connecting pontoons or vertical cylinder), tower and base sections of a platform jacket, jacket structures, and deck modules (known as "*topsides*").

"*Secretary*" means the Secretary of the Maritime Administration, who will route the correspondence to the proper office within the Maritime Administration for handling.

"*Classed as a launch barge by a recognized classification society*" means that the vessel holds a current classification document to be used as a launch barge by at least one of the following classification societies: American Bureau of Shipping (ABS), Bureau Veritas (BV), Lloyd's Register (LR), Germanischer

Lloyd (GL), Det Norske Veritas (DNV), or Nippon Kaiji Kyokai (NK).

"*Applicant*" means the offshore development company as identified to the Minerals Management Service (MMS) in their Development Production Plan (DPP) or Development Operations Coordination Document (DOCD), who has applied to the Maritime Administration (MARAD) for a waiver.

### § 389.3 Registration

In order to provide timely notification and to identify the potential participants to each other so they may examine how they can best work together to maximize the use of coastwise-qualified launch barges, we will require early notification as outlined in this section.

(a) In January of each calendar year, the Maritime Administration will publish a notice in the FEDERAL REGISTER requesting that owners or operators or potential owners or operators of coastwise-qualified launch barges notify us of:

(1) Their interest in participating in the transportation and, if needed, the launching or installation of offshore platform jackets; and,

(2) Provide us with contact information for their company; and,

(3) Provide specifications of any currently owned or operated coastwise-qualified launch barges or plans to construct same.

(b) When current or potential owners or operators of any type of offshore exploration, development, or production structure expect to need the use of a launch barge they must notify the Maritime Administration. Such notification must be the earlier of either:

(1) The filing of their Development and Production Plan (DPP) or Development Operations Coordination Document (DOCD) with the Minerals Management Service as required by 30 CFR 250.201; or

(2) Not later than twenty-one (21) months before the proposed date of using a launch barge.

(c) The early notification information to be provided to the Maritime Administration by the platform owner or operator shall include:

(1) A summary of technical details of the platform jacket that will need to be transported and, if needed, launched or installed; and,

(2) The projected physical requirements for a suitable launch barge to be used in this project; and,

(3) The projected time period and load and launching sites for the launch barge operation; and,

(4) Full contact information for the company and the individuals having decision-making authority with respect to the utilization of the launch barge and the transportation and, if needed, the launching or installation of the platform jacket.

(d) The information in paragraphs (a), (b), and (c) of this section must be submitted either electronically to *cargo.marad@dot.gov* or delivered to the Secretary, Maritime Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. Any information that is business confidential must be so noted and accompanied by a justification.

(e) We will publish a list of potential coastwise-qualified launch barge owners/operators on our Web site at *http://marad.dot.gov*. We will publish a summary of the early notification information in paragraph (c) of this section on the website and also disseminate it to the registered potential coastwise-qualified launch barge owners/operators.

### § 389.4 Application and fee.

(a) When, after surveying the market and discussing the platform project with potential coastwise-qualified launch barge owners/operators, it appears that coastwise-qualified vessels will not be available, the platform jacket owner/operator may apply to the Maritime Administration for a determination of non-availability and request to use a foreign launch barge.

(1) The fully complete application must be submitted to the Secretary, Maritime Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590 at least 120 days prior to the proposed launch barge operations date.

(2) We reserve the right to waive or reduce or extend the time requirements based upon our evaluation of any national emergency or other situation.

(b) Applications must contain the information set forth in paragraphs (c)

and (d) of this section and be accompanied by a statement signed by an officer of the company containing the following language:

"This application is made for the purpose of inducing the United States of America to grant a determination of non-availability of a coastwise-qualified launch barge as set forth in 46 U.S.C. 55108. I have carefully examined the application and all documents submitted and, to the best of my knowledge, information and belief, the statements and representatives contained in said application and related documents are full, complete, accurate and true. Further, I agree to pay any fees that result from the work required by this application.

Signature: _____
Name (typed): _____
Title: _____
Date: _____

(c) The applicant must submit a nonrefundable check in the amount of $500 (Five Hundred Dollars) made payable to the Maritime Administration, which is a minimum fee and represents a deposit against any costs to the Government for processing the application. The applicant must also submit a signed statement (see paragraph (b) of this section) that they agree to pay all such additional costs that will be invoiced by the Government. Government costs will be billed for actual staff hours at applicable hourly rates plus overhead, administrative and other relevant costs.

(d) *Required Transport and Launch Project Information*.

(1) Applications must include a general description of the transport, placement and/or launch project, including:

(i) A description of the platform jacket structure with launching weight, center of gravity, major dimensions, and a general arrangement plan,

(ii) The projected loading date and site,

(iii) The projected launching date and site,

(iv) The names of the potential coastwise-qualified launch barges' owners/operators contacted and their response regarding suitability and availability, and

(v) The technical merits and availability studies for the coastwise-qualified launch barges considered.

(2) Characteristics of the applicant's desired foreign launch barge, including, at a minimum, the following information:

(i) Name of the vessel,

(ii) Registered owner of the vessel,

(iii) Physical dimensions, deadweight capacity in long tons, ballasting capacities and arrangements, and launch capacity in long tons, and arrangements,

(iv) Documentation showing classification as a launch barge by one of the following classification societies: American Bureau of Shipping (ABS), Bureau Veritas (BV), Lloyd's Register (LR), Germanischer Lloyd (GL), Det Norske Veritas (DNV), or Nippon Kaiji Kyokai (NK).

(v) Date and place of construction of the foreign launch barge and (if applicable) rebuilding. If applicant is unable to document the origin of the vessel, foreign construction will be assumed.

(vi) Name, address, and telephone number of the foreign launch barge owner.

(3) The signed statement that the applicant represents that the foregoing information is true to the best of the applicant's knowledge, as required by paragraph (b) of this section and the $500 deposit fee.

(e) We may require additional information from the applicant as part of the review process. The application will not be considered complete until we have received all relevant information.

### § 389.5 Review; issuance of determinations.

(a) The Maritime Administration will review each application for completeness including evidence of prior notification and payment of application fee. Applications will not be processed until deemed complete. We will notify the applicant if additional information is necessary. We encourage the submission of applications well in advance of project dates in order to allow sufficient time for review under this part.

(b) We will review the information required by § 389.4. When the application is deemed complete, we will publish a notice in the FEDERAL REGISTER describing the project and platform jacket involved, advising that all relevant information reasonably needed to assess the transportation and launching requirements will be made

available to interested parties upon request. The notice will request that information on the availability of coastwise-qualified launch barges be submitted within thirty (30) days after the publication date. We will also notify the coastwise-qualified owners/operators who have registered with us as per § 389.3.

(c) The Maritime Administration will review any submittals whereby an owner or operator of a coastwise-qualified launch barge asserts they are available and we will facilitate discussions between the offeror and the platform jacket owner/operator. If the parties are unable to reach agreement, we will make a determination regarding availability.

(d) If needed, the Maritime Administration's technical personnel will review the data required in § 389.4. The data must be complete and current. Any data submitted will not be returned to the applicant and will be retained by us on file for a period of time. The Maritime Administration review will not substitute for the review and approval by either a major classification society (ABS, BV, LR, GL, DNV, NK) or the U.S. Coast Guard. The Maritime Administration review will not verify the accuracy or correctness of the applicant's engineering proposal; rather, it will only pertain to the general reasonableness and soundness of the technical approach.

(e) The Maritime Administration will deny the application if:

(1) We find the applicant did not comply with the requirements in § 389.3 or § 389.4; or,

(2) We determine a suitable coastwise-qualified launch barge is reasonably available.

(f) The Maritime Administration will issue a determination of non-availability if we determine that no suitable coastwise-qualified vessel is reasonably available.

(g) Our determination will be issued within ninety (90) days from the date the application notice was published in the FEDERAL REGISTER.

(g) Our determination of non-availability will expire one-hundred and twenty (120) days after the date of issuance, unless we provide an extension for good cause.

Maritime Administration determinations in this regard should NOT be interpreted as a change setting new federal maritime precedents. The Maritime Administration continues to support the Jones Act, the Passenger Vessel Services Act, and other federal U.S.-flag requirements.

# SUBCHAPTER K—REGULATIONS UNDER PUBLIC LAW 91–469

## PART 390—CAPITAL CONSTRUCTION FUND

Sec.
390.1 Scope of the regulations.
390.2 Application for an agreement.
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390.4 Description of the agreement.
390.5 Agreement vessels.
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390.8 Investment of the fund.
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390.10 Nonqualified withdrawals.
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390.13 Failure to fulfill a substantial obligation under the agreement.
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APPENDIX I TO PART 390—U.S. DEPARTMENT OF TRANSPORTATION, MARITIME ADMINISTRATION—APPLICATION INSTRUCTIONS
APPENDIX II TO PART 390—SAMPLE CAPITAL CONSTRUCTION FUND AGREEMENT
APPENDIX III TO PART 390—U.S. DEPARTMENT OF TRANSPORTATION, MARITIME ADMINISTRATION—SAMPLE SEMIANNUAL REPORT
APPENDIX IV TO PART 390—SAMPLE ADDENDUM TO MARITIME ADMINISTRATION CAPITAL CONSTRUCTION FUND AGREEMENT
APPENDIX V TO PART 390—SAMPLE QUALIFIED TRADE AFFIDAVIT

AUTHORITY: Secs. 53501, *et seq.*, of Title 46, United States Code, formerly, sec. 607, Merchant Marine Act, 1936, as amended (46 App. U.S.C. 1177); 49 CFR 1.66.

SOURCE: 41 FR 4265, Jan. 29, 1976, unless otherwise noted.

### § 390.1 Scope of the regulations.

(a) *In general*—(1) *Scope.* The regulations prescribed in this part govern the capital construction fund ("fund") authorized by 46 U.S.C. 53501 *et seq.*

(2) *Establishment of a fund.* A fund is established by an agreement ("agreement"), which is a contract between the party ("party") and the United States.

(3) *Purpose of the fund.* Chapter 535 provides that any agreement entered into with the Secretary of Transportation must be for the purpose of providing replacement vessels, additional vessels or reconstructed vessels to be built and documented in the United States and operated in the United States foreign, Great Lakes or noncontiguous domestic trade.

(4) *Benefits of a fund.* Chapter 535 provides for the nontaxability of certain deposits of money or other property placed into a fund established pursuant to an agreement within certain ceilings. These ceilings are equal to:

(i) Earnings or gains realized from the operation of an agreement vessel;

(ii) Net proceeds realized from the sale or other disposition of an agreement vessel or from insurance or indemnification from the loss of an agreement vessel; and

(iii) Earnings from the investment or reinvestment of amounts on deposit in the fund.

(5) *Delegation.* The Secretary of Transportation has delegated the authority for matters relating to the United States Merchant Marine to the Maritime Administrator, Department of Transportation ("Maritime Administrator").

(b) *Act.* For purposes of this part, the term Act shall mean Chapter 535 of Title 46, United States Code.

(c) *Joint regulations.* For purposes of this part, the term *joint regulations* shall mean the regulations prescribed by the Secretary of Transportation and the Secretary of the Treasury under Chapter 535 and published in title 26, part 3 of the Code of Federal Regulations (reprinted in part 391 of this chapter).

(d) *Cross references.* For rules relating to the Federal Income Tax aspects of a fund, see the joint regulations. For rules governing agreements relating to the fisheries of the United States, see the separate Secretary of Commerce regulations published in title 50, part 259 of the Code of Federal Regulations.

[41 FR 4265, Jan. 29, 1976, as amended at 73 FR 56740, Sept. 30, 2008]

### § 390.2 Application for an agreement.

(a) *In general*—(1) *Application instructions.* The Maritime Administrator has adopted instructions for making application for an agreement. These instructions are contained in appendix I to

this part. MARAD will accept electronic options (such as facsimile and Internet) for transmission of required information to MARAD, if practicable.

(2) *General eligibility requirements.* Chapter 535 specifies who is eligible for a fund and the application instructions specify what information is required to establish such eligibility. An applicant must:

(i) Be a citizen of the United States within the meaning of 46 U.S.C. 50501, as amended (46 U.S.C. 802, 803). See part 355 of this title for requirements for establishing United States citizenship;

(ii) Own or be the lessee of one or more eligible vessels or share thereof as defined in 46 U.S.C. 53501, or be party to a contract for the construction of one or more eligible vessels, or share thereof, as defined in paragraph (b) of § 390.5;

(iii) Have a program which furthers the purposes of the Act (see § 390.3 relating to policy considerations) and provides for the acquisition, construction or reconstruction of a qualified vessel, as defined in 46 U.S.C. 53501(5). Such provisions state that the vessel will be operated in the United States foreign, Great Lakes, noncontiguous domestic, or short sea transportation trade as defined in 46 U.S.C. 53501 and 46 U.S.C. 109(b); and

(iv) Demonstrate the financial capabilities to accomplish the program.

(b) *Information which may be required in conjunction with the application.* An applicant must provide such facts, documents and materials as the Maritime Administrator may require in considering whether to enter into an agreement. An applicant should be ready to make available such applicable materials, including, but not limited to: Design plans, data concerning the reasonableness of the cost of the program, construction contracts, financial statements, certificates of incorporation, bylaws, articles of partnership, stock ownership data and other information including judgments and pending litigation which would affect the proposed program. The specific information required is set forth in the instructions.

(Approved by the Office of Management and Budget under control number 2133–0027)

[41 FR 4265, Jan. 29, 1976, as amended at 47 FR 25530, June 14, 1982; 68 FR 62539, Nov. 5, 2003; 69 FR 61452, Oct. 19, 2004; 73 FR 56740, Sept. 30, 2008]

### § 390.3 Policy considerations.

(a) *In general.* It is the policy of the United States, as set forth in 46 U.S.C. 50501, that for the national defense and the development of its foreign and domestic commerce, the United States shall have a merchant marine: sufficient to carry a substantial portion of its water-borne export and import foreign commerce and to provide shipping service essential for maintaining the flow of such commerce at all times; capable of serving as auxiliaries in time of war or national emergency; owned and operated by United States citizens insofar as practicable and composed of the best equipped, safest and most suitable types of vessels, constructed and documented in the United States and manned with United States citizens.

(b) *Unacceptable programs*—(1) *In general.* The Maritime Administrator will not enter into an agreement where the proposed program is not, in his opinion, in consonance with the policies of the Act.

(2) *Specific unacceptable programs.* The Maritime Administrator will not enter into an agreement where the proposed program is merely to accomplish the following:

(i) Reconstruction of an existing vessel, unless such reconstruction will exceed $1,000,000 in cost, will be capitalized under the Internal Revenue Code of 1986, as amended, and the regulations thereunder and will result in a vessel which is significantly more competitive;

(ii) Acquisition of an existing vessel; or

(iii) Payment of the principal on existing indebtedness.

(3) *Waiver.* The Maritime Administrator may, for good cause shown, waive the provisions of paragraph (b)(2) of this section. For example, the Maritime Administrator may waive the monetary limit in paragraph (b)(2)(i) of

this section where the applicant proposes to reconstruct a small vessel.

[41 FR 4265, Jan. 29, 1976, as amended at 73 FR 56740, Sept. 30, 2008]

### § 390.4 Description of the agreement.

(a) *In general.* The agreement consists of a standard part and appended schedules. The standard part of the agreement contains recitals, covenants and warranties which apply to all parties. The appended schedules set forth the particular program of the party and contain other information unique to each agreement. See § 390.6 (relating to administration of the agreement) for procedures and criteria for the modification of schedules.

(b) *Schedule A—Eligible agreement vessels.* Schedule A lists the names of eligible agreement vessels (as defined in § 390.5), whether owned or leased, and the allowable percentage of the depreciation ceiling, if any, available for deposit purposes by the party. See § 390.7 (relating to deposits) for allowable depreciation in the case of leased vessels.

(c) *Schedule B—Program*—(1) *In general.* Schedule B sets forth the program of the party including the cost of the program and the time in which the program shall be accomplished.

(2) *Items in Schedule B.* Schedule B shall contain:

(i) A statement describing each qualified agreement vessel (as defined in § 390.5) to be acquired, constructed or reconstructed. In the case of reconstruction, the statement will include a general description of the work to be performed;

(ii) The anticipated date on which the acquisition, construction or reconstruction of each qualified agreement vessel will commence;

(iii) The anticipated total cost, including any costs which will not be paid from the fund, of the acquisition, construction or reconstruction of each qualified agreement vessel; and

(iv) The amount to be withdrawn from the fund with respect to the acquisition, construction or reconstruction of each qualified agreement vessel.

(3) *Submission of contracts.* When a contract is executed for any acquisition, construction or reconstruction relating to the agreement, such contract shall be submitted within 30 days after execution to the Maritime Administrator who shall then determine whether such undertaking is in accordance with the program set forth in Schedule B.

(d) *Schedule C—Depositories.* Schedule C lists, by name and address, the depositories of the fund. See § 390.7 (relating to deposits).

(e) *Schedule D—Minimum deposits.* Schedule D sets forth the minimum deposits which must be made into the fund. See § 390.7 (relating to deposits) for the procedure in setting minimum deposits.

(f) *Submission of proposed schedules.* An applicant shall submit proposed schedules with his application. The specific information required in such schedules is set forth in the application instructions referred to in paragraph (a)(1) of § 390.2. A sample agreement (standard part and appended schedules) is contained in appendix II to this part.

### § 390.5 Agreement vessels.

(a) *In general.* 46 U.S.C. 53501 states the requirements for eligible, qualified and agreement vessels. The rules in this section further define such terms and state how vessels must be listed on Schedules A and B in the agreement.

(b) *Eligible agreement vessels*—(1) *Definition.* An eligible agreement vessel, which may be used to establish ceilings for deposit purposes, is any vessel:

(i) Constructed in the United States, and if reconstructed, reconstructed in the United States; the term *constructed or reconstructed in the United States* includes any vessel which was constructed or reconstructed outside of the United States but documented under the laws of the United States on April 15, 1970, or constructed or reconstructed outside of the United States for use in the United States foreign commerce pursuant to a contract entered into before April 15, 1970;

(ii) Documented under the laws of the United States;

(iii) Operated in the foreign or domestic commerce of the United States;

(iv) Engaged primarily in the waterborne carriage of men, materials, goods or wares; and

(v) Designated in the agreement as an "eligible agreement vessel."

(2) *Scope of the term "eligible agreement vessel.*" For purposes of generating ceilings for deposits under 46 U.S.C. 53505 and the joint regulations the term *eligible agreement vessel* includes any:

(i) Tug or barge;

(ii) Vessels which have been contracted for or are in the process of construction; and

(iii) Share interest in a vessel; the party is considered to have a share interest in an eligible agreement vessel if the party has the right to use the vessel to generate income or a right to the proceeds or a portion of the proceeds from its use even if the party does not have a proprietary interest in the vessel for purposes of State or Federal law.

(3) *Foreign or domestic commerce.* For the purpose of paragraph (b)(1)(iii) of this section the term *foreign or domestic commerce* means the water-borne carriage of men, materials, goods or wares between:

(i) Two points in the United States;

(ii) A point in the United States and a point in a foreign country; or

(iii) Two points in the same foreign country or points in two different foreign countries.

(c) *Qualified agreement vessels*—(1) *Definition.* A qualified agreement vessel which may be acquired, constructed or reconstructed with the aid of qualified withdrawals, is any vessel:

(i) Constructed in the United States, and if reconstructed, reconstructed in the United States; the term *constructed or reconstructed in the United States* includes any vessel which was constructed or reconstructed outside of the United States but documented under the laws of the United States on April 15, 1970, or constructed or reconstructed outside of the United States for use in the United States foreign commerce pursuant to a contract entered into before April 15, 1970;

(ii) Documented under the laws of the United States;

(iii) Operated in the United States foreign, Great Lakes, noncontiguous domestic, or short sea transportation trade.

(iv) Engaged primarily in the water-borne carriage of men, materials, goods or wares; and

(v) Designated in the agreement as a "qualified agreement vessel."

(2) *Scope of the term "qualified agreement vessel.*" For purposes of making qualified withdrawals under 46 U.S.C. 53509 and the joint regulations the term *qualified agreement vessel* includes any:

(i) Cargo handling equipment which the Maritime Administrator determines will be used primarily on a qualified agreement vessel. Normally any auxiliary equipment which is ordinarily carried from port to port, excluding equipment that needs frequent replacement due to normal wear and tear, and is used in conjunction with the loading or unloading of the vessel is deemed to be cargo handling equipment;

(ii) Ocean-going towing vessel or barge which the Maritime Administrator determines is suitable for the trade in which the party intends to operate such vessel or barge, or any comparable vessel or barge operated on the Great Lakes which is suitable for its intended trade; and

(iii) Proprietary interest in a qualified agreement vessel as, for example, that which may result from a joint venture or partnership.

(3) *Foreign trade.* Foreign trade shall mean the water-borne carriage of men, materials, goods or wares between:

(i) A point in the United States and a point in a foreign country;

(ii) Two points in the domestic trade permitted under the first sentence of 46 U.S.C. 53101 note; or

(iii) Two points in the same foreign country or points in two different foreign countries in the case of liquid and dry bulk cargo carrying services provided the party demonstrates that such operating flexibility is needed to compete with foreign flag vessels in its operations or in competing for charters.

(4) *Great Lakes trade.* Great Lakes trade shall mean the waterborne carriage of men, materials, goods or wares between points on the Great Lakes and their connecting and tributary waterways in the immediate environs of the Great Lakes.

(5) *Noncontiguous domestic trade.* Noncontinguous domestic trade shall mean the water-borne carriage of men, materials, goods or wares between:

(i) The contiguous 48 States on the one hand and Alaska, Hawaii, Puerto Rico and the insular territories and possessions of the United States on the other hand; and

(ii) Any point in Alaska, Hawaii, Puerto Rico and the insular territories and possessions of the United States, and any other point in Alaska, Hawaii, Puerto Rico and such territories and possessions.

(6) Short Sea Transportation Trade. The term short sea transportation trade means the carriage by vessel of cargo—

(i) That is:

(A) Contained in intermodal cargo containers and loaded by crane on the vessel; or

(B) Loaded on the vessel by means of wheeled technology; and

(ii) That is:

(A) Loaded at a port in the United States and unloaded either at another port in the United States or at a port in Canada located in the Great Lakes Saint Lawrence Seaway System; or

(B) Loaded at a port in Canada located in the Great Lakes Saint Lawrence Seaway System and unloaded at a port in the United States."

(7) *Nonqualified operations.* Nonqualified operations for qualified agreement vessels include:

(i) Positioning vessels in support of domestic operations prohibited by Chapter 535;

(ii) Use of barges as docks and ramps;

(iii) Except as provided in (c)(8) (i) and (ii) of this section:

(A) Foreign-to-foreign trade, consisting of voyages originating and ending in foreign ports, with no intermediate domestic cargo operation, and

(B) Trade from foreign ports to and form U.S. oil rigs in international waters; and

(iv) Bunkering in support of nonqualified trade operations.

(8) *Permissible operations.* Permissible operations for qualified agreement vessels include:

(i) Foreign-to-foreign trade in the case of vessels operating as part of U.S.-flag service and carrying cargo originating in or destined for U.S. ports, i.e., U.S.-flag feeder vessels;

(ii) Foreign-to-foreign trade, including the lightering of foreign-flag vessels, in the case of vessels carrying liquid or dry bulk cargoes when the carrier has demonstrated to the Administrator:

(A) The need for such foreign-to-foreign shipments (as required by 46 U.S.C. 109 and paragraph (c)(iii) of this section), and

(B) That the proposed cargo would qualify as liquid or dry bulk cargo;

(iii) Ship assist work, including lightering or shifting of a vessel at the end or beginning of a noncontiguous domestic, short sea transportation trade, Great Lakes or U.S. foreign trade voyage. In addition, the lightering of foreign-flag vessels in U.S. ports is permitted.

(9) *United States construction.* An agreement vessel is considered to be of United States construction if:

(i) It is built entirely in a shipyard or shipyards within any of the United States and the Commonwealth of Puerto Rico;

(ii) All components of the hull and superstructure are fabricated in the United States; and

(iii) The vessel is assembled entirely in the United States.

(d) *Agreement vessels*—(1) *Definition.* The term *agreement vessel* means any eligible or qualified vessel which is subject to an agreement.

(2) *Scope of the term "agreement vessel."* For purposes of generating ceilings and making qualified withdrawals the term *agreement vessel* includes containers, trailers or barges which are part of the complement of an agreement vessel. The complement is limited to three times the container, trailer or barge capacity of the vessel, unless the Maritime Administrator shall agree to a different complement.

[41 FR 4265, Jan. 29, 1976, as amended at 55 FR 34928, Aug. 27, 1990; 73 FR 56740, Sept. 30, 2008; 74 FR 17097, Apr. 14, 2009]

### § 390.6 Administration of the agreement.

(a) *In general.* The Maritime Administrator will administer and enforce the agreement in a manner which will insure that the fund is properly established, that the assets in the fund are used to accomplish the program and that the party fully complies with all obligations and responsibilities. This

section specifies the reports which must be submitted to the Maritime Administrator and sets forth the procedures for administering the agreement.

(b) *Reporting requirements*—(1) *In general.* This paragraph describes the reports required to be submitted to the Maritime Administrator by the party.

(2) *Submission dates.* Reports must be submitted annually, in triplicate, for the party's taxable year not later than 90 days after the close of each reporting period. An affidavit regarding the operation of qualified agreement vessels as required by paragraph (b)(7) of this section shall be submitted concurrently with each annual report.

(3) *Cumulation.* The annual report submitted following the close of the party's taxable year shall be cumulative for the party's entire taxable year.

(4) *Certification.* The annual report shall be accompanied by an opinion of an independent certified public accountant to the effect that exhibits (see paragraph (b)(5) of this section) composing the accounting have been prepared in accordance with all published orders, rules, regulations and instructions issued or adopted by the Maritime Administrator.

(5) *Format.* The reports shall consist of the following exhibits:

(i) "Exhibit A"—a summary of cash, securities and stock on deposit (showing the adjusted basis for securities and stock), including a subtotal of cash, securities and stock on deposit, net amount of accrued deposits to and accrued withdrawals from the fund and the fund total at the end of the period, and if applicable, a summary of the portion of the fund which represents a "CCF: Security Amount" pursuant to an Agreement Covering the Dual Use of a Capital Construction Fund;

(ii) "Exhibit A–1"—a summary of balances in all cash accounts within the fund at the end of the period;

(iii) "Exhibit A–2"—a summary of the securities and stock within the fund at the end of the period (showing both the adjusted basis and fair market value of each item);

(iv) "Exhibit A–3"—a summary of the accrued deposits to and accrued withdrawals from the fund at the end of the period;

(v) "Exhibit B"—a transcript of transactions occurring within the fund during the period by date;

(vi) "Exhibit C"—a summary showing the opening balance, additions thereto due to deposits to the fund, subtractions therefrom due to withdrawals from the fund, and the closing balance for the period for each of the three separate accounts: ordinary income account, capital gains account and capital account; and

(vii) "Exhibit D"—a summary, by vessel, of the qualified withdrawals made from the fund during the period.

(6) *Sample report.* A sample report is contained in appendix III of this part.

(7) *Affidavit.* An official of the party who is knowledgeable about the operation of the party's qualified agreement vessels shall submit an affidavit for each taxable year indicating that the party's qualified agreement vessels operated only in qualified trades during such taxable year, or if any such vessel operated in a trade other than a qualified trade, the details of such operation. See §390.5(c) of this part for a description of what constitutes a qualified trade. A sample affidavit is contained in appendix V of this part.

(8) *Failure to submit reports.* The failure by a party to make the timely submission of any report or affidavit required by this section shall constitute a material breach of the agreement unless the Maritime Administrator shall determine that such failure was excusable. See §390.13 (relating to the failure to fulfill a substantial obligation under the agreement).

(c) *Review in the event of changed circumstances.* Each agreement provides that the party shall promptly inform the Maritime Administrator of any change in circumstances which affects its agreement. Such changes may be mere form, such as a change of the party's name, or substantive such as the sale of an eligible agreement vessel. The Maritime Administrator may require a full review of the agreement if in his opinion the changed circumstances materially affect the agreement.

(d) *Modification of agreement*—(1) *In general.* The agreement is subject to

modification and amendment by mutual consent. However, except in special circumstances, the Maritime Administrator will not consent to modification or amendment of the standard part of the agreement unless such modification or amendment is of uniform application to similarly situated parties. The Maritime Administrator will normally agree to modification or amendment of the schedules subject to the restriction in paragraph (d)(2) of this section.

(2) *Limitations on modification of schedules.* The Maritime Administrator will not agree to modification or amendment of the schedules (as described in § 390.4) when, in his opinion, such modification or amendment delays imposition of Federal Income Tax in a manner not contemplated or authorized by the Act, or if the proposed modification or amendment would not be in consonance with the policies of the Act, these rules and regulations or the joint regulations.

(e) *Fund adjustment upon modification.* Upon application by a party for modification or amendment of the agreement, the Maritime Administrator will determine whether the requested modification or amendment would result in an amount held in the fund in excess of an amount determined to be necessary or appropriate to carry out the program. If such an excess is created in the fund by such modification or amendment, the Maritime Administrator will require a nonqualified withdrawal (as defined in § 390.10) of such excess as a condition to the modification or amendment.

[41 FR 4265, Jan. 29, 1976, as amended at 41 FR 39751, Sept. 16, 1976; 55 FR 34928, Aug. 27, 1990]

### § 390.7 Deposits into the fund.

(a) *In general*—(1) *Source of deposits.* 46 U.S.C. 53505 provides ceilings within which fund deposits may be made. This section provides rules for the qualification of depositories, timing of deposits, the type of property which may be deposited and the level of deposits.

(2) *Tax aspects of deposits.* For the Federal Income Tax aspects of deposits into a fund, see 46 U.S.C. 53507 and § 3.3 of the joint regulations (§ 391.3 of this chapter).

(b) *Depositories*—(1) *In general.* 46 U.S.C. 53506 provides that amounts in a fund must be kept in the depository or depositories specified in the agreement and be subject to such trustee or other fiduciary requirements as the Maritime Administrator may specify.

(2) *Qualifications.* The Maritime Administrator has established general qualifications for depositories for all maritime programs authorized under the Act, including the capital construction fund program. The general qualifications are published in Part 351 of this title.

(3) *Fiduciary requirements.* Except in unusual circumstances, the Maritime Administrator will not impose special trustee or other fiduciary requirements upon depositories of a fund. For rules relating to a fund held in trust for investment purposes, see paragraph (h) of this section.

(4) *Type and name of accounts.* Unless otherwise specified in the agreement, the party may select the type or types of accounts in which assets of the fund may be deposited. For example, the party may select a savings account for cash and a trust account for intangible property which is held in the fund. Each account shall be in the name of the party and identified as a capital construction fund account.

(5) *Compensating balances.* The obligation of the assets in the fund as a compensating balance shall constitute a material breach of the agreement.

(c) *Timing of deposits*—(1) *In general.* 46 U.S.C. 53507(b) provides that deposits shall not be taxable only when they are made in accordance with the agreement and not later than the time provided in the joint regulations.

(2) *Deposits prior to the time provided in joint regulations.* The party may make deposits for any taxable year prior to the time provided in joint regulations in accordance with the following rules:

(i) Amounts representing taxable income attributable to the operation of agreement vessels for a taxable year may be deposited at any time during such taxable year, and thereafter within the time provided for in the joint regulations, based upon the party's estimated Federal taxable income for such vessels for the entire taxable year;

(ii) Amounts representing net proceeds from the sale or other disposition (including mortgaging) with respect to agreement vessels may be deposited when accrued and thereafter within the time provided for in the joint regulations;

(iii) Amounts representing receipts from the investment or reinvestment of amounts held in a fund may be deposited when accrued and thereafter within the time provided for in the joint regulations; and

(iv) Amounts representing depreciation with respect to agreement vessels for a taxable year may be deposited at any time during such taxable year, and thereafter within the time provided for in the joint regulations.

(3) *Deposits required prior to the time provided in joint regulations.* The Maritime Administrator may require that deposits be made earlier than the latest time provided for in the joint regulations. Generally, the Maritime Administrator will require early deposits only when necessary for the party to meet its agreed upon obligations.

(d) *Types of property which may be deposited into a fund*—(1) *Form of deposits.* Deposits may be made into a fund only in the form of money or intangible property of the type in which assets of the fund may be invested pursuant to 46 U.S.C. 53506, the Agreement, and these regulations, other than the securities or common and preferred stock of the party or a company related to the party within the meaning of paragraph (d)(2) of this section, except that in the case of deposits representing net proceeds from the sale or other disposition of any agreement vessel to other than a purchaser or transferee related to the party (within the meaning of paragraph (d)(2) of this section) or deposits representing receipts from the investment or reinvestment of amounts held in a fund, any intangible property received may be deposited.

(2) *Related purchaser.* For purposes of this paragraph a purchaser or transferee is a related person to the party if—

(i) The relationship between purchaser or transferee and the party would result in disallowance of losses under section 267 or 707 of the Code, or

(ii) The purchaser or transferee and the party are members of the same controlled group of corporations (as defined in section 1563(a) of the Code, except that "more than 50 percent" shall be substituted for "at least 80 percent" each place it appears therein).

(e) *Level of deposits*—(1) *In general.* 46 U.S.C. 53504 states that the agreement must provide for the deposit in the fund of amounts agreed upon but only to the extent necessary or appropriate to provide for qualified withdrawals to accomplish the program set forth in the agreement.

(2) *Maximum level of deposits.* The party shall not be permitted to deposit more than is necessary to complete its program. See §390.4 (relating to description of the agreement).

(3) *Minimum level of deposits.* Each agreement shall contain an agreed upon minimum deposit schedule applicable to each three-year period under the agreement. The minimum deposit shall be calculated taking into consideration the scheduling of the anticipated qualified withdrawals. The purpose of the minimum deposit is to insure that the party has made a sufficient commitment to accomplish its program. See §390.13 (relating to failure to fulfill a substantial obligation under the agreement).

(4) *Determination of minimum deposits.* The minimum deposit shall be set by the Maritime Administrator. In determining the minimum deposit, the Maritime Administrator shall give consideration to the anticipated ceilings, financial history, current conditions and future business expectations of the party.

(5) *Waiver of minimum deposit.* The Maritime Administrator shall waive a failure to meet the minimum deposit schedule when the party has deposited all allowable taxable income as specified in Article 5(c) of this agreement attributable to the operation of agreement vessels, net proceeds from all sales or other dispositions of agreement vessels, all receipts from the investment or reinvestment of amounts held in the fund and all earned depreciation on agreement vessels. The Maritime Administrator may also waive the minimum deposit schedule in any case where the party can demonstrate

that such deposits will adversely affect its ability to operate its agreement vessels. In the event of a waiver, the Maritime Administrator may require modification of the schedules. See § 390.6 (relating to administration of the agreement).

(6) *Selection of ceiling.* Except as may be otherwise provided in the agreement or these rules and regulations, the party may choose the ceilings with respect to which deposits are made.

(f) *Allocation of depreciation deposits*—(1) *In general.* 46 U.S.C. 53505(b) provides that in the case of a lessee of an eligible agreement vessel the maximum amount which may be deposited with respect to such vessel, under the depreciation ceiling, shall be reduced by any amount which the owner is required or permitted to deposit with respect to such vessel under its depreciation ceiling.

(2) *Method of allocation.* When an agreement vessel is leased, the party's agreement shall fix a percentage of the annual depreciation which the party may deposit. The percentage shall be that agreed upon between the lessors and the lessees unless the Maritime Administrator determines that the agreed upon percentage will result in an accumulation of assets in the fund or funds which is greater than or less than an amount necessary or appropriate to carry out the party's program. See paragraph (e) of this section (relating to level of deposits).

(g) [Reserved]

(h) *Funds held in trust for investment purposes.* A fund may be transferred in whole or in part to the control of an unrelated trustee for investment purposes with the prior written permission of the Maritime Administrator. The Maritime Administrator shall approve such a transfer when:

(1) The trustee meets the requirements for a depository under paragraph (b) of this section;

(2) The trust instrument provides that all investment restrictions stated in 46 U.S.C. 53506 and § 390.8 of these regulations will be observed;

(3) The trust instrument provides that the trustee will give consideration to the party's withdrawal requirements under the agreement when investing the fund;

(4) The trustee agrees to be bound by all rules and regulations which have been or will be promulgated governing the investment or management of the fund.

(i) *Federal ship mortgage guarantee or insurance.* A fund may serve in lieu of a Restricted Fund required in connection with Federal Ship Mortgage Guarantee or Insurance under 46 U.S.C. Chapter 537 and the regulations thereunder upon approval by the Maritime Administrator. Approval by the Maritime Administrator shall be conditioned upon the execution by the party of an agreement, satisfactory in form and substance to the Maritime Administrator, governing the dual use of the fund. Applications for permission to use the fund in this dual capacity should be made in writing to the Secretary, Maritime Administration.

[41 FR 4265, Jan. 29, 1976, as amended at 73 FR 56740, Sept. 30, 2008]

### § 390.8 Investment of the fund.

(a) *In general.* 46 U.S.C. 53506 provides that assets in the fund must be invested in accordance with certain restrictions. The rules in this section provide for the quality of securities, restrictions on the type of stock in which a fund may invest, related company investments and miscellaneous prohibited activities.

(b) *Permissible investments*—(1) *In general.* The party, at its discretion, or the party's trustee, if established pursuant to paragraph (h) of § 390.7, may invest in the types of securities specified in this paragraph.

(2) *Interest bearing securities.* The party or the party's trustee may invest in any obligation of the United States Government, including any agency or instrumentality thereof, and in the interest bearing securities listed below:

(i) Any obligation of a state or local government, including any agency or instrumentality thereof, or any domestic obligation, which is rated by Moody's Investors Service, Inc., as "Baa" or better or by Standard and Poor's Corporations as "BBB" or better;

(ii) Bankers' acceptances, certificates of deposit, repurchase agreements, and short-term commercial obligations,

provided that the latter must be readily marketable and rated not lower than "Prime" by Moody's Investors Services, Inc. or "B" by Standard & Poor's Corp.; and

(iii) Any unsubordinated obligation of an issuer that has any unsecured securities with a credit rating of "Baa" or better if rated by Moddy's Investors Services, Inc., or "BBB" or better if rated by Standard and Poor's Corporation, or by an issuer that has a commercial paper rating not lower than "Prime" by Moody's Investors Service, Inc. or "B" by Standard and Poor's Corporation.

(3) *Guaranteed interest bearing securities.* The party or the party's trustee may invest in interest bearing securities which do not meet the investment criteria set forth in this paragraph (b) *Provided,* That:

(i) The types of interest bearing securities and their terms and conditions are acceptable to the Maritime Administration;

(ii) All principal and interest of the interest bearing securities are unconditionally guaranteed in a form satisfactory to the Maritime Administration and neither the securities nor the obligation to pay interest on the securities is that of a party or a company related to the party within the meaning of section 482 of the Internal Revenue Code of 1986, as amended, and the regulations thereunder; and

(iii) The guarantor, which may be an affiliate of the party, must be either a person that has any unsecured securities with a credit rating of "Baa" or better if rated by Moody's Investors Services, Inc., or "BBB" or better if rated by Standard & Poor's Corporations, or a person whose commercial paper rated not lower than "Prime" by Moody's Investors Services, Inc. or "B" junior securities are rated in the highest grade by Moody's Commercial Paper Service or in one of the two highest grades by Standard & Poor's Corporations, and is otherwise acceptable to the Maritime Administration.

(4) *Common and preferred stocks.* The party or the party's trustee may invest in the following common and preferred stocks:

(i) Stock of domestic corporations which is fully listed and registered at the time of purchase on an exchange registered with the Securities and Exchange Commission as a national securities exchange and which would be acquired by prudent men of discretion and intelligence in such matters who are seeking a reasonable income and the preservation of their capital; and

(ii) Preferred stock of a corporation if the common stock of that corporation meets the requirements of this paragraph and if the preferred stock of such corporation would meet such requirements but for the fact that such preferred stock cannot be listed and registered as required because it is nonvoting stock.

(c) *Limitations on investments*—(1) *Interest bearing securities.* The value of securities of any one issuer held in the Fund compared to the value of the total assets of the fund shall not exceed 10 percent in the case of nongovernmental securities referred to in paragraph (b)(2)(i) of this section.

(2) *Common and preferred stock.* The value of common and preferred stock of any one issuer held in the fund shall not exceed 25 percent of the value of the total assets of the fund. In no case may more than 60 percent of the value of the total assets of the fund be invested in common or preferred stock.

(3) *Margin or short sale.* No interest bearing securities or common and preferred stock shall be purchased on margin or be sold short for the account of a fund.

(4) *Related company investments.* Funds shall not be invested in the interest bearing securities or common and preferred stock of the party or of a company related to the party within the meaning of section 482 of the Internal Revenue Code of 1986, as amended, and the regulations thereunder.

(5) *Subsequent investments.* If at any time the fair market value of the interest bearing securities or common and preferred stock in the fund is more than the limitations stated in this paragraph (c), any subsequent deposit to or withdrawal from the fund or investment made within the fund shall be made in such a way as tends to restore the fund to a posture in which the fair market values of such securities or stock do not exceed such limitations. Values of such securities and stocks

shall be the fair market values as determined by the party on the last day of each semi-annual and annual reporting period.

[41 FR 4265, Jan. 29, 1976, as amended at 42 FR 34882, July 7, 1977; 43 FR 51636, Nov. 6, 1978; 55 FR 34928, Aug. 27, 1990; 73 FR 56740, Sept. 30, 2008]

### § 390.9 Qualified withdrawals.

(a) *In general*—(1) *Defined.* In accordance with 46 U.S.C. 53509, qualified withdrawals are those made from a fund in accordance with the agreement, but only if they are for:

(i) The acquisition, construction or reconstruction of a qualified agreement vessel;

(ii) The acquisition, construction or reconstruction of barges or containers which are part of the complement of a qualified agreement vessel; or

(iii) The payment of the principal on indebtedness incurred in connection with the acquisition, construction or reconstruction of a qualified agreement vessel or a barge or container which is part of the complement of a qualified agreement vessel.

(2) *Tax aspects of a qualified withdrawal.* For the tax aspects of a qualified withdrawal, see 46 U.S.C. 50510 and § 3.6 of the joint regulations (§ 391.6 of this chapter).

(b) *Purpose of qualified withdrawals*—(1) *Acquisition of qualified agreement vessels.* (i) The term *acquisition of a qualified agreement vessel* shall mean any transaction, including a corporate merger, where the party obtains a proprietary interest in an existing vessel and such a proprietary interest will, in the opinion of the Maritime Administrator, further the purposes and policies of the Act. See § 390.3 (relating to policy considerations).

(ii) Qualified withdrawals for the acquisition of a qualified agreement vessel shall only be allowed for amounts determined by independent appraisal to be the fair market value of the vessel, at the time of the acquisition, or the actual cost directly allocable to acquiring only the vessel, whichever is less.

(2) *Construction of qualified agreement vessels.* The term *construction of a qualified agreement vessel* shall mean the construction of a vessel with the aid of qualified withdrawals.

(3) *Reconstruction of qualified agreement vessels.* Once an agreement has been entered into, the term *reconstruction of a qualified agreement vessel* shall mean any improvement to an existing vessel which increases the vessel's competitiveness and involves an aggregate sum in excess of $100,000. The Maritime Administrator may waive the monetary limit in this subparagraph in the case of small vessels.

(4) *Payment of principal on indebtedness.* 46 U.S.C. 53509(a)(2) provides that any indebtedness which the party proposes to pay through qualified withdrawals must be shown to the satisfaction of the Maritime Administrator to have been incurred in direct connection with the acquisition, construction or reconstruction of a qualified agreement vessel. The fact that indebtedness is secured by an interest in a qualified agreement vessel is insufficient by itself to demonstrate the direct connection. It is not necessary that the lien or mortgage securing the indebtedness be on the vessel. For example, if the party mortgages an office building in order to finance the construction of a vessel, payments of principal on the mortgage may be made with qualified withdrawals.

(c) *Limitations on qualified withdrawals*—(1) *Capitalized costs requirement.* All qualified withdrawals must be for costs which are capitalized under the Internal Revenue Code of 1986, as amended, and the regulations thereunder and so reported on the party's Federal Income Tax return.

(2) *Executed contract requirement and reimbursement of general funds.* Qualified withdrawals may be made for the purpose of reimbursing general funds subject to the following limitations:

(i) Qualified withdrawals may not be made until a construction, reconstruction or acquisition contract is executed. However, the party may reimburse its general funds for expenditures applicable to the construction, reconstruction or acquisition contract which occurred prior to the date of contracting if such reimbursements are made within 120 days from the date of such contracting.

(ii) The party may also reimburse its general funds for expenditures which could have been paid initially by a qualified withdrawal, if such reimbursements are made within 120 days of such expenditure.

(iii) The party may reimburse its general funds for expenditures made prior to the time an agreement or amendment is entered into, but after the party has made application therefor, if such expenditures would otherwise qualify for reimbursement pursuant to paragraphs (c)(3) (i) and (ii) of this section but for the fact that an agreement or amendment has not been executed, and if such reimbursement is effected within 120 days of the execution of an agreement or amendment.

(3) *Prepayment of indebtedness.* The party shall not prepay principal on indebtedness with qualified withdrawals without the prior written consent of the Maritime Administrator.

(4) *Qualified withdrawals paid to related persons.* A withdrawal, including payments for indebtedness, paid to a related person, within the meaning of section 482 of the Internal Revenue Code of 1986, as amended, and the regulations thereunder, shall not constitute a qualified withdrawal unless the Maritime Administrator determines that no portion of such payment constitutes a dividend, a return of capital or a contribution of capital under the Internal Revenue Code. Transactions which include payments to a related person, will be approved if the cost of the item to be acquired, constructed or reconstructed through qualified withdrawals is or was at the time of the acquisition, construction or reconstruction its fair market value. The party must obtain the prior written permission of the Maritime Administrator before any qualified withdrawals may be paid to a related person. Any such withdrawal prior to approval shall be a nonqualified withdrawal.

(d) *Permission to make qualified withdrawals.* Once a program has been approved, prior approval of the Maritime Administrator is not required for specific qualified withdrawals except as provided in paragraphs (c)(4) and (c)(5) of this section. However, the Maritime Administrator will give prior approval to qualified withdrawals upon written request.

[41 FR 4265, Jan. 29, 1976, as amended at 55 FR 34929, Aug. 27, 1990; 73 FR 56740, Sept. 30, 2008]

### § 390.10 Nonqualified withdrawals.

(a) *In general*—(1) *Defined.* Any withdrawal from a fund which is not a qualified withdrawal is a nonqualified withdrawal.

(2) *Tax aspects of a nonqualified withdrawal.* For the tax aspects of a nonqualified withdrawal, see 46 U.S.C. 53511 and § 3.7 of the joint regulations (§ 391.7 of this chapter).

(b) *Permission required*—(1) *In general.* The prior written permission of the Maritime Administrator is required before a nonqualified withdrawal may be made.

(2) *Failure to secure permission.* A nonqualified withdrawal made without the prior written permission of the Maritime Administrator shall constitute a material breach of the agreement unless the Maritime Administrator shall determine that failure to obtain prior written consent was excusable. See § 390.13 (relating to failure to fulfill a substantial obligation under the agreement).

(3) *Types of nonqualified withdrawals which will be permitted.* Generally, the Maritime Administrator will give permission to make nonqualified withdrawals when:

(i) The party has incurred operating losses from the operations of agreement vessels which have impaired his working capital and it becomes necessary to reimburse its general funds to the extent of such losses;

(ii) The party desires to make an expenditure for research, development or design and such an expenditure is incident to new and advanced ship design, machinery and equipment;

(iii) The withdrawal would be a qualified withdrawal except for the fact that there is no tax basis left that can be reduced; or

(iv) The party demonstrates, to the satisfaction of the Maritime Administrator, that it cannot fulfill its program due to circumstances beyond its

control or due to a change in circumstances which makes the completion of its program economically unfeasible.

[41 FR 4265, Jan. 29, 1976, as amended at 73 FR 56740, Sept. 30, 2008]

### § 390.11 Sale or other disposition of agreement vessels.

(a) *Eligible agreement vessels.* The sale or other disposition (including mortgages) of eligible agreement vessels shall not require prior approval of the Maritime Administrator, but shall require written notification within 10 days after the sale or other disposition. Such notification shall include a description of the transaction, the identity of the transferee, the proceeds to be realized, the date of the transaction and whether the proceeds will be deposited into the fund.

(b) *Qualified agreement vessels*—(1) *In general.* If a qualified agreement vessel whose basis has been reduced through the application of qualified withdrawals is sold or disposed of (including mortgaged) within one year, interest on the amount of gain attributable to the basis reduction shall attach if the Maritime Administrator determines that the disposition was contrary to the policies of the Act, the joint regulations or these regulations. See § 390.13 (relating to failure to fulfill a substantial obligation under the agreement).

(2) *Period of one year defined.* The one-year period shall mean 365 days from the date of final delivery from the shipyard in the case of construction or reconstruction and 365 days from the date of first loading of the vessel in the case of an acquisition.

(3) *Prior approval.* The party shall obtain the written approval of the Maritime Administrator prior to the sale or other disposition (including mortgage) of a qualified agreement vessel.

(4) *Deposit requirement.* The Maritime Administrator will not normally require the deposit of the net proceeds from the sale of a qualified agreement vessel but shall require the deposit of the net proceeds from the mortgage of a qualified agreement vessel for which qualified withdrawals from the fund have been made.

(c) *Sale or other disposition of agreement vessels to related persons*—(1) *In general.* Section 3.2(c)(4) of the joint regulations (§ 391.2(c)(4) of this chapter) requires that the net proceeds from the sale or other disposition of an agreement vessel shall be the fair market value of the vessel when the party and the purchaser are owned or controlled directly or indirectly by the same interests within the meaning of section 482 of the Internal Revenue Code of 1986, as amended, and the regulations thereunder. In such case, the party shall furnish data to establish that the amount realized or to be realized is the fair market value.

(2) *Data to be submitted.* Sufficient data must be submitted to support a determination by the Maritime Administrator of the fair market value including the original cost of the vessel, dates of original delivery, acquisition and reconstruction, as applicable, cost of improvements, sales price, costs of sale and any other information which would assist in making such determination.

[41 FR 4265, Jan. 29, 1976, as amended at 73 FR 56740, Sept. 30, 2008]

### § 390.12 Liquidated damages.

(a) *Liquidated damages*—(1) *In general.* Each agreement entered into under Chapter 535 shall contain a liquidated damages provision for the purpose of placing the party into its prefund position for each day a qualified agreement vessel is operated in violation of the geographic trading restrictions contained in the Act and § 390.5. The liquidated damages provision requires that the party repay the time value of the deferral of Federal Income Tax which the party has received.

(2) *Calculation of liquidated damages.* The liquidated damages specified in this paragraph shall be calculated as follows:

(i) With respect to each vessel operated in violation of the applicable trading restrictions, add (A) the sum of qualified withdrawals for the vessel which have been made from the ordinary income and capital gain accounts to the date of breach, and (B) the amount of any unpaid principal on indebtedness for the vessel which may be paid from the fund less any portion of such amount which by operation of law

must be withdrawn from the capital account balance on deposit in the fund on the date of the breach.

(ii) Multiply the total derived in paragraph (a)(2)(i) of this section by an assumed effective Federal Income Tax rate of 30 percent;

(iii) Compound the product derived in paragraph (a)(2)(ii) of this section at 8 percent annually (A) for 20 years, if the duration of the trading restrictions applicable to the vessel is 20 years in accordance with paragraph (b)(1)(i) of this section; (B) for 10 years, if the duration of the trading restrictions applicable to the vessel is 10 years in accordance with paragraphs (b)(1) (ii), (iii) or (iv) of this section; or (C) for 5 years, if the duration of the trading restrictions applicable to the vessel is 5 years in accordance with paragraph (b)(1)(iv) of this section.

(iv) Subtract the amount calculated in paragraph (a)(2)(ii) of this section from the product derived in paragraph (a)(2)(iii) of this section;

(v) Divide the result derived in paragraph (a)(2)(iv) of this section by 2; and

(vi) Divide the result derived in paragraph (a)(2)(v) of this section (A) by 7300 (days) if the duration of the trading restrictions applicable to the vessel is 20 years; (B) by 3650 (days) if the duration of the trading restrictions applicable to the vessel is 10 years; or (C) by 1825 (days) if the duration of the trading restrictions applicable to the vessel is 5 years.

(3) *Formula.* The calculation of the daily rate of liquidated damages may be reduced to the following formula:

$$X = [I(QT) - S]/2D$$

Where:

$X$ = Daily rate in dollars.

$Q$ = Summation of qualified withdrawals, other than withdrawals from the capital account, permitted from the fund.

$T$ = Assumed effective tax rate of 30 pct.

$S$ = Tax savings=($Q$)($T$).

$I$ = Discount factor to be applied for vessels subject to 20-yr trading restriction = 4.660957; for vessels subject to 10-yr trading restriction = 2.158925; for vessels subject to 5-yr trading restriction = 1.469328 (value of $1 compounded at 8 pct for 20, 10, and 5 yr respectively).

$D$ = 7,300 d for vessels subject to 20-yr trading restriction; 3,650 d for vessels subject to 10-yr trading restriction; 1,825 d for vessel subject to 5-yr trading restriction.

The formula may be further reduced to:

$$X = 0.5491436Q/7{,}300$$

for vessels subject to 20 year trading restriction,

$$X = 0.1738388Q/3{,}650$$

for vessels subject to 10 year trading restriction,

$$X = 0.0703992Q/1{,}825$$

for vessels subject to 5 year trading restriction.

(4) *Example.* The provisions of paragraphs (c)(2) and (c)(3) of this section may be illustrated by the following example:

Assume that a qualified agreement vessel has been constructed with qualified withdrawals from a fund. The total cost was $20 million of which $6 million was withdrawn from the fund for a downpayment. Pursuant to the agreement, an additional $4 million may be withdrawn from the fund to pay principal on indebtedness. Thus, $10 million has been or may be withdrawn from the fund with respect to this vessel. The daily rate of liquidated damages would be:

$X = 0.5491436\ (10{,}000{,}000)/7300$ or $X = \$752.25$

(5) *Payment of liquidated damages.* The amount derived in paragraph (a)(2) of this section shall be the daily rate of liquidated damages and shall be paid to the Maritime Administrator, for deposit in the Treasury of the United States, within 30 days from the date the qualified agreement vessel first entered the prohibited geographic trade and shall be for all amounts owing from such date thereafter until the date payment is due. Payments, for continuing breaches, shall be made at 30 day intervals.

(6) *Other remedies.* Nothing in this paragraph shall diminish the Maritime Administrator's other remedies for breach under the Act, the rules and regulations or the agreement.

(b) *Duration of restrictions*—(1) *In general.* The geographic trading restrictions in the Act and § 390.5 and the liquidated damages provision shall apply for:

(i) 20 years from the date of final delivery on qualified agreement vessels constructed or acquired within one year of final delivery from the shipyard with the aid of qualified withdrawals;

(ii) 10 years from the date of completion of reconstruction for qualified agreement vessels reconstructed with the aid of qualified withdrawals;

(iii) 10 years from the date of acquisition of qualified agreement vessels acquired with the aid of qualified withdrawals more than one year after final delivery of the vessel from the shipyard;

(iv) 10 years from the date of the first qualified withdrawal from the fund to pay the existing indebtedness on a qualified agreement vessel which was included in Schedule B for that purpose unless the qualified vessel was more than fifteen years old on the date of the first qualified withdrawal in which case the period shall be five years.

(2) *Transfer of qualified agreement vessel.* In the event a qualified agreement vessel is sold or transferred to another person (see paragraph (b)(3) of § 390.11 requiring prior permission), the transferor shall require in the bill of sale that the transferee agree with the Maritime Administrator to comply with the geographic trading restrictions and to pay liquidated damages for any breach of such agreement that occurs after the transfer. The transferor shall remain liable for any violations that occurred prior to the approved transfer. However, in the case of a like kind exchange which is governed by section 1031 of the Internal Revenue Code of 1986, as amended, if the vessel acquired by the party has an economic life equal to or greater than the length of the geographic trading restrictions that remain applicable to the transferred vessel, the acquired vessel shall be deemed to be a qualified agreement vessel and the geographic trading restrictions of the transferred vessel shall attach to the acquired vessel.

[41 FR 4265, Jan. 29, 1976 as amended at 42 FR 34283, July 5, 1977; 73 FR 56740, Sept. 30, 2008]

### § 390.13 Failure to fulfill a substantial obligation under the agreement.

(a) *In general.* 46 U.S.C. 53509(c) requires the Maritime Administrator to determine whether there has been a failure to fulfill a substantial obligation under an agreement.

(b) *Contracting Officer's tentative conclusion*—(1) *Notice.* If the Contracting Officer tentatively concludes that any substantial obligation under the agreement, the joint regulations or these regulations is not being fulfilled by the party he shall serve written notice of his tentative conclusion upon the party by certified mail with return receipt requested. The notice shall contain the following information:

(i) A statement of the grounds upon which the tentative conclusion is based;

(ii) The amount the Contracting Officer tentatively concludes should be withdrawn as a nonqualified withdrawal; and

(iii) A statement that the tentative conclusion shall become a final decision unless the party requests, within 30 days, an opportunity either to cure its breach or to be heard and offer evidence in opposition to the tentative conclusion.

(2) *Effect of notice.* The notice of the tentative conclusion shall become a final decision as described in paragraph (d)(1) of this section, unless within 30 days of receipt of such a written notice the party by personal delivery or by certified mail, requests the opportunity either to cure its breach or to be heard and offer evidence in opposition to the tentative conclusion, in which case no further withdrawals from the fund, without the written prior approval of the Contracting Officer, shall be made by the party until a binding final decision is reached by the Maritime Administration.

(c) *Basis for Contracting Officer's tentative conclusion.* In determining whether a party has not fulfilled a substantial obligation under its agreement, the Contracting Officer shall consider among other things:

(1) The effect of the party's action or omission upon its ability to either carry out the purpose of the fund, accomplish its Schedule B program (see § 390.4(c)) or satisfy its minimum level of deposits in Schedule D (see § 390.4(e)).

(2) Whether the party has made material misrepresentations in connection with its application, agreement or any modification or amendment thereto or has failed to disclose material information that may affect its agreement or the purpose of the fund.

(d) *Contracting Officer's decision and appeals to the Maritime Administrator*—(1) *Where there has not been a request to cure or to be heard.* If the Contracting Officer issues a written notice under paragraph (b) of this section and the party does not request within 30 days an opportunity either to cure its breach or to be heard and offer evidence in opposition to the tentative conclusion, the Contracting Officer's tentative conclusion shall become the final decision, which decision shall be final, conclusive and binding upon the party, and no appeal therefrom shall be taken to the Maritime Administrator.

(2) *Where there has been a request to cure or to be heard.* If the Contracting Officer issues a written notice under paragraph (b) of this section and the party requests within 30 days an opportunity either to cure its breach or to be heard and offer evidence in opposition to the tentative conclusion, the party shall be offered such an opportunity. Request to cure must include a proposal to cure the breach. If the Contracting Officer accepts the party's proposal to cure its breach, then such determination shall be final. A party requesting to be heard and offer evidence in opposition to the Contracting Officer's tentative conclusion shall be permitted to submit, in writing, any information, evidence or argument within a period set by the Contracting Officer after considering the wishes of the party. The Contracting Officer shall reduce his final decision to writing and furnish the party a copy, by certified mail—return receipt requested, which decision shall be final and conclusive and shall bind the party unless within 30 days of receipt of the decision the party appeals from said decision by personal delivery or by certified mail to the Maritime Administrator with notice to the Contracting Officer.

(e) *Appeals to the Maritime Administrator.* Appeals with a request for a hearing on the record, if desired, are to be transmitted pursuant to paragraph (d) of this section and are to be addressed to the Maritime Administrator. Upon the filing of an appeal, the Contracting Officer shall transmit the entire record and a copy of his final decision to the Maritime Administrator. If a request for a hearing on the record is granted, the Maritime Administrator shall proceed pursuant to the Rules of Practice and Procedure in Part 201 of this title. The decision of the Maritime Administrator on any question of fact shall be final, conclusive and binding upon the party unless determined by a court of competent jurisdiction to be fraudulent, capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence.

[41 FR 4265, Jan. 29, 1976, as amended at 73 FR 56740, Sept. 30, 2008]

### § 390.14 Departmental reports and certification.

(a) *In general.* For each calendar year, the Secretary of Transportation shall provide the Secretary of the Treasury, within 120 days after the close of such calendar year, a written report with respect to those capital construction funds under the Secretary of Transportation's jurisdiction.

(b) *Content of reports.* Each report shall set forth the name and taxpayer identification number of each person:

(1) Establishing a capital construction fund during such calendar year;

(2) Maintaining a capital construction fund as of the last day of such calendar year;

(3) Terminating a capital construction fund during such calendar year;

(4) Making any withdrawal from or deposit into (and the amounts thereof) a capital construction fund during such calendar year; or

(5) With respect to which a determination has been made during such calendar year that such person has failed to fulfill a substantial obligation under any capital construction fund agreement to which such person is a party.

[55 FR 34929, Aug. 27, 1990]

## APPENDIX I TO PART 390—U.S. DEPARTMENT OF TRANSPORTATION, MARITIME ADMINISTRATION—APPLICATION INSTRUCTIONS

### INSTRUCTION REGARDING APPLICATION FOR A CAPITAL CONSTRUCTION FUND

An application for a capital construction fund under 46 U.S.C. 53501 *et seq.*, the Rules and Regulations prescribed jointly by the

Secretary of the Treasury and the Secretary of Transportation (26 CFR Part 3 and reprinted in 46 CFR Part 391, the "Joint Regulations") and individually by the Secretary of Transportation (46 CFR Part 390, the "SOC Regulations") shall be prepared and submitted in the form specified by these instructions.

The application must be legible and shall be submitted in six (6) complete sets, including the required Schedules and Exhibits. The application shall be filed with the Secretary, Maritime Administration, Washington, DC 20590. Three of these sets must be duly executed and certified by the Applicant. The name of the Applicant shall be shown on all accompanying papers for identification.

All questions contained in the application must be responded to; if a question is not applicable the respondent should so state. Additional information may be requested if such information is necessary to aid the Contracting Officer in making a determination to enter into a Capital Construction Fund Agreement.

U.S. DEPARTMENT OF TRANSPORTATION,
MARITIME ADMINISTRATION

APPLICATION FOR ESTABLISHMENT OF A CAPITAL CONSTRUCTION FUND UNDER SECTION 607, MERCHANT MARINE ACT, 1936, AS AMENDED

The undersigned _____ ("Applicant"), a citizen of the United States within the meaning of 46 U.S.C. 50501, as amended, hereby applies under section 607 of the Merchant Marine Act, 1936, as amended ("Act"), the Rules and Regulations jointly prescribed by the Secretary of the Treasury and the Secretary of Transportation ("Joint Regulations") and individually by the Secretary of Transportation ("SOC Regulations") to establish a Capital Construction Fund to aid in the acquisition, construction or reconstruction of a qualified vessel, the acquisition, construction or reconstruction of barges, containers or trailers which are part of the complement of a qualified vessel and the payment of the principal on indebtedness incurred in connection with the acquisition, construction or reconstruction of a qualified vessel or a barge, container or trailer which is part of the complement of a qualified vessel. The fund hereby applied for will be effective for deposits relating to the taxable year beginning _____, 20___ and ending _____, 20___, and for subsequent taxable years. In support of this application, the Applicant submits the following information:

I. *As to the identity of and other General Information of the Applicant* (the following data is required to prove the Applicant's citizenship to the satisfaction of the Secretary; also see 46 CFR Part 355):

A. *Natural Persons.* If the Applicant is a natural person, the following identifying information should be submitted:

1. Name.
2. Address.
3. Date of birth.
4. Place of birth.
5. Citizenship.
6. Principal place of business.
7. Trade name under which business is conducted.

B. *Partnerships, Associations, Unincorporated Companies.* If the Applicant is a partnership, association, or unincorporated company, the following identifying information should be submitted:

1. Name of partnership, association, or unincorporated company.
2. Business address.
3. Date and place of organization.
4. Name of all partners (general, limited and special) of the partnership or trustees and holders of beneficial interests in the association or company.
5. Share owned by each partner, trustee, or beneficial owner.
6. Date of birth of each.
7. Place of birth of each.
8. Citizenship of each.

C. *Incorporated Companies.* If the Applicant is an incorporated company, the following identifying information should be submitted:

1. Exact name of Applicant.
2. State in which incorporated and date of incorporation.
3. Address of principal executive offices, and of important branch offices, if any.
4. The following information with respect to each officer and director of the corporation:
   a. Name and address.
   b. Office.
   c. Citizenship.
   d. Capital shares owned (specify type, whether voting or non-voting and percentage of total of each type issued if five percent (5%) or more).
5. The name, address and citizenship of and number of capital shares owned by each person not named in answer to item 4, owning of record, or beneficially if known, five percent (5%) or more of the issued capital shares of any class stock of the Applicant.
6. A brief statement of the general effect of each voting agreement, voting trust, or other arrangement whereby the voting rights in any shares of the Applicant are owned, controlled, or exercised, or whereby the control of the Applicant is in any way held or exercised by any person not the holder of legal title to such shares. (Give the name, address, citizenship, and business of any such person, and, if not an individual, include the form of organization.)

II. *As to the Business and Affiliations of the Applicant.* A. A brief description of the principal business activities during the past five

years of the Applicant and of any predecessor or predecessors of the Applicant; if any change is presently contemplated, a brief statement of the nature and circumstances thereof.

B. A list of all companies or persons that are related within the meaning of section 482 of the Internal Revenue Code of 1954, as amended, and the regulations thereunder ("related companies") or that directly or indirectly through one or more intermediaries, control, are controlled by, or are under common control with the Applicant, together with an indication of the nature of the business transacted by each, the relationships between the companies named, and the nature and extent of the control. This information may be furnished in the form of a chart.

C. A statement whether during the past 5 years the Applicant or any predecessor or related company has been in bankruptcy or in reorganization under II-B of the Bankruptcy Act or in any other insolvency or reorganization proceedings, and whether any substantial property of the Applicant or any predecessor or related company has been acquired in any such proceeding or has been subject to foreclosure or receivership during such period. If so, give details.

D. A statement of whether the Applicant or any predecessor or related company is now or during the past 5 years was involved in any litigation or subject to any outstanding judgments. If so, give details.

E. Describe any contemplated plan of reorganization or recapitalization involving new capital, the consolidation or mergers of the Applicant with related or other companies, debt elimination, or other changes or modifications in the corporate or individual structure, and indicate by appropriate financial statements the anticipated results thereof.

III. *As to the Management of the Applicant.* A. A brief description of the principal business activities during the past 5 years of each director and each principal executive officer of the Applicant.

B. The name and address of each other organization engaged in business activities related to those carried on or to be carried on by the Applicant with which any person named in the answer to the preceding item has any present business connection; the name of each such person, and briefly the nature of such connection.

IV. *Description of Vessels, Barges, Containers or Trailers which Applicant Proposes to be Incorporated in Capital Construction Fund Agreement for the Purpose of Making Deposits.* Vessels must be eligible vessels as that term is defined in 46 U.S.C. 53501 and §390.5(b) of the SOC Regulations. Undocumented barges, containers or trailers must be part of the complement of an eligible vessel as that term is defined in section 607(b) of the Act and §390.5(d) of the SOC Regulations:

A. *Vessels.* Provide in a tabular form headed "Schedule A" (see prescribed format in appendix II) the vessels owned or leased by the Applicant which the Applicant proposes to be designated as "Eligible Agreement Vessels" for the purposes of making deposits into a Capital Construction Fund pursuant to the provisions of 46 U.S.C. 53501 *et seq*, giving:

a. Name and official number.

b. Specific type.

c. Capacity (tons of cargo, number of containers, barges, etc.).

d. Whether owned or leased, and if leased the owner and the owner's address.

e. Date and place of construction.

f. If reconstructed, date of redelivery and place of reconstruction.

g. Date documented under laws of the United States.

h. Area of operation.

i. Full details concerning the service in which the Applicant operates or will operate each vessel; if the vessel is used for multiple purposes indicate the percentage of time in which the vessel is engaged in each service.

B. *Barges, Containers, and Trailers.* Provide in a tabular form headed "Schedule A" (see prescribed format in appendix II) the barges, containers, and trailers owned or leased by the Applicant which the Applicant proposes to be incorporated in an Agreement for purposes of making deposits into a Capital Construction Fund pursuant to the provisions of 46 U.S.C. 53501 *et seq*, giving:

a. Number of barges, containers or trailers which are part of the complement of an eligible vessel; name and official number of barges which are not a part of the complement of an eligible vessel.

b. Specific type.

c. Size or capacity.

d. Whether owned or leased, and if leased the owner and the owner's address.

e. Date and place of construction.

f. If reconstructed, date of redelivery and place of reconstruction.

g. Date documented under the laws of the United States.

h. Area of operation.

i. The vessel or vessels for which the barges, containers and trailers are part of the complement; full details concerning the service in which the Applicant operates or will operate each barge which is not a part of a complement.

V. *Purposes for which Qualified Withdrawals are Proposed.* Applicant is advised that information furnished in response to sections A, B, C and D of this item is for the purpose of inducing the United States to enter into an agreement to establish a Capital Construction Fund pursuant to 46 U.S.C. 53501 *et seq.* In connection therewith attention is directed to 46 U.S.C. 53509(c) which states, "Under joint regulations, if the Secretary of Transportation determines that any substantial

obligation under any agreement is not being fulfilled, he may, after notice and opportunity for hearing to the person maintaining the fund, treat the entire fund or any portion thereof as an amount withdrawn from the fund in a nonqualified withdrawal." Also see §390.13 of the SOC Regulations.

A. *Acquisition or Construction of Vessels.* Provide in form headed "Schedule B" (see prescribed format in appendix II) the proposed program for the acquisition or construction of vessels, giving:

a. Number, type and commercial characteristics of vessels to be acquired or constructed.

b. Whether vessels will be replacements or additions, and if replacements identify vessels to be replaced.

c. Projected date of acquisition or award of construction contract.

d. Projected date of commencing operations.

e. Estimated total cost.

f. Method by which estimated total cost of project was determined.

g. Estimated amount of Capital Construction Fund monies to be used as down payment by the Applicant.

h. Estimated amount of borrowings and the amount of such borrowings to be retired by qualified withdrawals from the Capital Construction Fund, including anticipated terms of such financing.

i. Intended area of operation.

j. Full details concerning the use of the proposed vessel; if the vessel is to be used for multiple purposes indicate the approximate percentage of time in which the vessel will be engaged in each service.

B. *Acquisition or Construction of Barges, Containers and Trailers.* Provide in a form headed "SCHEDULE B" (see prescribed format in appendix II) the proposed program for acquisition or construction of barges, containers and trailers giving:

a. Number, type and size of barges, containers and trailers.

b. Whether barges, containers and trailers will be replacements or additions, if replacements, identify barges, containers or trailers to be replaced.

c. Projected date of acquisition or award of construction contract.

d. Projected date of introduction into service.

e. Estimated total cost.

f. Method by which estimated total cost of project was determined.

g. Estimated amount of Capital Construction Fund monies to be used as down payment by the Applicant.

h. Estimated amount of borrowings and the amount of such borrowings to be retired by qualified withdrawals from the Capital Construction Fund including anticipated terms of such financing.

i. Identification of vessels for which the barges, containers and trailers will be part of the complement, and the vessel's area of operation. In the case of barges which are not a part of the complement of a vessel provide the barges' intended area of operation.

j. Full details concerning the use of the proposed barge; if the barge is to be used for multiple purposes indicate the approximate percentage of time in which the barge will be engaged in each service.

C. *Reconstruction of Vessels.* Provide in a form headed "SCHEDULE B" (see prescribed format in appendix II) the proposed program for reconstruction of vessels, giving:

a. Identification of vessels to be reconstructed.

b. Nature and extent of proposed reconstruction.

c. Projected date of award of reconstruction contract.

d. Projected date of commencing operations with reconstructed vessels.

e. Estimated total cost.

f. Method by which estimated total cost of project was determined.

g. Estimated amount of Capital Construction Fund monies to be used as down payment by the Applicant.

h. Estimated amount of borrowings and amount of such borrowings to be retired by qualified withdrawals from the Capital Construction Fund, including anticipated terms of such financing.

i. Intended area of operation.

j. Full details concerning the use of the proposed vessel; if the vessel is to be used for multiple purposes indicate the approximate percentage of time in which the vessel will be engaged in each service.

D. *Reconstruction of Barges, Containers and Trailers.* Provide in a form headed "SCHEDULE B" (see prescribed format in appendix II) the proposed program for reconstruction of barges, containers and trailers, giving:

a. Number, type and size of barges, containers and trailers.

b. Nature and extent of proposed reconstruction work.

c. Projected date of award of reconstruction contract.

d. Projected date of completion of reconstruction work.

e. Estimated total cost.

f. Method by which estimated total cost of project was determined.

g. Estimated amount of Capital Construction Fund monies to be used as down payment by the Applicant.

h. Estimated amount of borrowings and amount of such borrowings to be retired by qualified withdrawal from the Capital Construction Fund including anticipated terms of such financing.

i. Identification of vessels for which the barges, containers, and trailers will be part of the complement, and the vessel's area of

operations. In the case of barges which are not a part of the complement of a vessel provide the barges' area of operation.

j. Full details concerning the use of the proposed barge; if the barge is to be used for multiple purposes indicate approximate percentage of time in which the barge will be engaged in each service.

E. *Payment of Principal on Existing Indebtedness Incurred in Connection with the Acquisition, Construction or Reconstruction of a Qualified Vessel or a Barge, Container or Trailer which is Part of the Complement of a Qualified Vessel.* Provide in a form headed "Schedule B" (see prescribed format in appendix II) the proposed program for payments of principal on existing indebtedness incurred in connection with the acquisition, construction, or reconstruction of qualified vessels, barges, containers, or trailers, giving:

a. Name, official number or other identifying information for the vessel, barge, container, or trailer.

b. Whether the debt was incurred for acquisition, construction or reconstruction, demonstrating evidence of a direct connection between the qualified vessel and the debt which was incurred.

c. The aggregate principal balance of such indebtedness as of the date of this application.

d. The dates and amounts of payments of principal to liquidate the outstanding debt in accordance with the applicable loan agreements or other documents.

VI. *As to the Depository to be Used for the Capital Construction Fund.* Provide in a tabular form headed "Schedule C" (see prescribed format in appendix II) the full name and complete address of the financial institution which will act as depository. Indicate the type of account, i.e., checking, savings, trust, in which the fund will be held.

VII. *Proposed Schedule of Minimum Amounts Available for Deposit into the Capital Construction Fund.* Provide in a tabular form headed "Schedule D" (see prescribed format in appendix II) a proposed program for deposits into the Capital Construction Fund commencing with the beginning of the first taxable year for which the Agreement applies. The applicant is advised that the purpose of Schedule D is to insure that a sufficient commitment has been made to accomplish the objectives contained in Schedule B. Minimum annual deposits are not required, but a minimum amount must be deposited for each 3 year period under the Agreement. For each such 3 year period of the proposed Schedule D the Applicant will indicate not only the minimum amount to be deposited, but also the source of such deposit, giving amounts expected to be derived from:

a. Ordinary income attributable to the operation of agreement vessels.

b. Net proceeds from the sale or other disposition of agreement vessels.

c. Receipts from the investment or reinvestment of amounts held in the fund.

d. Earned depreciation on agreement vessels.

VIII. *Financial Statements and Reports of the Applicant Including Predecessors.* A. *Financial Statements.* For each of the past three fiscal years provide:

1. Statements of Financial Conditions.
2. Statements of Operations.
3. Statements of Retained Earnings.

B. *Reports.* If the books of the Applicant were audited by an independent certified public accountant copies of the public accountant's reports shall be submitted for each of the past three fiscal years.

IX. *As to Exhibits Furnished.* At the time of original filing, the following exhibits, properly identified, shall be furnished:

Exhibit I—A copy of the Certificate of Incorporation of the Applicant or other organization papers including all amendments thereto presently in effect.

Exhibit II—A copy of the By-Laws or other governing instruments of the Applicant, including all amendments thereto presently in effect.

Exhibit III—Such other financial statements, copies of contracts, schedules and other required data which the Applicant desires to incorporate by reference.

X. A statement of any additional information which, in the opinion of the Applicant, is necessary to make the application and attached exhibits true and complete.

XI. A specific written request, pursuant to 5 U.S.C. 552(b)(4), must accompany the application if the Applicant wishes certain trade secrets, financial and commercial information contained in this application to be withheld from disclosure. The Maritime Administrator, Department of Transportation will endeavor to respect such a request, acting within the limits of the applicable provisions of the Freedom of Information Act.

State of _____ County of _____ ss.:

Dated _____, 20____

Name of Applicant

_____

By _____ Name and Title

I, _____, do certify that I am the (Title of Office) of (Exact Name of Applicant), the Applicant on whose behalf I have executed the foregoing application; that the Applicant is a citizen of the United States within the meaning of 46 U.S.C. 50501; that this application is made for the purpose of inducing the United States of America to permit the Applicant, pursuant to section 607 of the Merchant Marine Act, 1936, as amended, the Joint Regulations and the SOC Regulations to establish a Capital Construction Fund for the purposes set forth in 46 U.S.C. 53501; that I have carefully examined the application and all documents submitted in connection

therewith and, to the best of my knowledge, information and belief, the statements and representations contained in said application and related documents are full, complete, accurate, and true.

Subscribed and sworn to before me, a _____ in and for the State and County above named, this _____ day of _____, 20____.

My Commission expires _____.

NOTE: The United States Criminal Code makes it a criminal offense to knowingly and willfully falsify, conceal or cover up by any trick, scheme, or device, a material fact from, or make any false, fictitious or fraudulent statements or representations or make or use any false writing or document knowing the same to contain any false, fictitious or fraudulent statement to, any department or government agency of the United States as to any matter within its jurisdiction (18 U.S.C. 1001).

[41 FR 4265, Jan. 29, 1976, as amended at 73 FR 56740, Sept. 30, 2008; 74 FR 17097, Apr. 14, 2009]

## APPENDIX II TO PART 390—SAMPLE CAPITAL CONSTRUCTION FUND AGREEMENT

[Contract No. MA/CCF—]

CAPITAL CONSTRUCTION FUND AGREEMENT WITH

This Capital Construction Fund Agreement ("Agreement"), made on the date hereinafter set forth, by and between the United States of America, represented by the Maritime Administrator, Department of Transportation ("Maritime Administrator"), and _____, a corporation organized and existing under the laws of the State of _____ ("Party"), a citizen of the United States of America.

*Whereas:* 1. The Party has applied for the establishment of a Capital Construction Fund ("Fund") under section 607 of the Merchant Marine Act, 1936, as amended ("Act");

2. The Party is the owner or lessee or has contracted for the construction of one or more eligible vessels as defined in 46 U.S.C. 53501, which vessels are listed in Schedule A hereof;

3. The Party has a program for the construction or acquisition of qualified agreement vessels as defined in 46 U.S.C. 53501, which program is described in Schedule B hereof;

4. The Maritime Administrator and the Party desire to enter into an Agreement for the purpose of providing replacement vessels, additional vessels, or reconstruction vessels, built in the United States and documented under the laws of the United States for operation in the United States foreign, Great Lakes, or noncontiguous domestic trade;

5. The Maritime Administrator has determined that the Party qualifies for an Agreement under the Act; and

6. The Maritime Administrator has authorized the award of an Agreement upon the terms and conditions set forth herein subject to the Act, as it may be amended from time to time, and such rules and regulations as shall be prescribed by the Secretary of Transportation or his delegate, either alone or jointly with the Secretary of the Treasury, as necessary to carry out the powers, duties, and functions vested in them by the Act ("rules and regulations").

Now, therefore in consideration of the premises the Maritime Administrator and the Party hereby agree as follows:

1. *Establishment of a Fund:* (A) A Fund is hereby established for the purposes set forth in Article 2 hereof, pursuant to such terms and conditions as shall be prescribed in this Agreement, the Act, or the rules and regulations.

(B) The Fund shall be established in the depositories listed in Schedule C hereof.

2. *Purpose of the Fund:* The Fund established hereunder shall be utilized to provide for replacement vessels, additional vessels, or reconstructed vessels, built in the United States and documented under the laws of the United States for operation in the United States foreign, Great Lakes, or noncontiguous domestic trade, and to provide for qualified withdrawals to achieve the program set forth in Schedule B hereof.

3. *Term of the Agreement:* This Agreement shall be effective on the date of execution by the Maritime Administrator and shall continue until terminated under Article 4.

4. *Termination of Agreement:* (A) This Agreement may be terminated at any time under any of the following circumstances:

(1) Upon written mutual agreement by the parties;

(2) Upon written notice by the Party that a change has been made in the rules and regulations which would have a substantial effect upon the rights or obligations of the Party.

(B) This Agreement shall terminate upon completion of the program as set forth in Schedule B hereof.

(C) Upon termination of this Agreement pursuant to paragraphs (A) and/or (B) hereof all amounts remaining in the Fund shall be treated as if withdrawn in a nonqualified withdrawal (as that term is defined in the Act and the rules and regulations) on the date of termination of this Agreement.

5. *Deposits to be made into the Fund:* (A) Subject to any restrictions contained in the Act, the rules and regulations, or this Agreement, the Party may deposit, for each taxable year to which this Agreement applies, amounts representing:

(1) Taxable income attributable to the operation of the vessels listed in Schedule A or B hereof;

(2) The depreciation allowable under section 167 of the Internal Revenue Code of 1986, on the vessels listed in Schedule A or B hereof;

(3) The net proceeds from the sale or other disposition of any of the vessels listed in Schedule A or B hereof; and

(4) The net proceeds from insurance or indemnity attributable to the vessels listed in Schedule A or B hereof.

(B) The Party shall deposit for each taxable year to which this Agreement applies:

(1) All receipts from the investment or reinvestment of amounts held in the Fund, except that the Party shall not be permitted to deposit more than is necessary to complete its program set out in Schedule B hereof; and

(2) The net proceeds from the mortgage of any vessel listed in Schedule B hereof for which qualified withdrawals from the Fund have been made.

(C) Notwithstanding anything in paragraph (A) or (B) hereof to the contrary, the Party shall make the minimum deposits set forth in Schedule D hereof at the time and in such amounts as may be set forth therein. The Party specifically agrees to deposit up to one hundred percent of allowable taxable income attributable to the operation of agreement vessels in order to meet its obligations under this paragraph.

(D) In the event that any leased vessel listed in Schedule A hereof is included in another capital construction fund agreement, the maximum amount of depreciation which the Party may deposit in respect to that vessel shall be calculated by using the allowable percentage of the depreciation ceiling listed for that vessel in Schedule A hereof.

6. *Withdrawals from the Fund:* (A) The Party may make such qualified withdrawals (as that term is defined in the Act and the rules and regulations) as shall be necessary to fulfill the obligations set forth in Schedule B hereof. Any such qualified withdrawal may be made without the consent of the Maritime Administrator, except as required by the rules and regulations.

(B) Any other withdrawal from the Fund shall be made only upon the prior written consent of the Maritime Administrator, as required by the rules and regulations.

7. *Investment of the Fund:* (A) The Party, at its discretion, may invest assets held in the Fund in accordance with the Act and the rules and regulations.

(B) The Party agrees that when investing assets held in the Fund to make such investments as will insure that sufficient cash is available at the time qualified withdrawals are required in accordance with the program described in Schedule B hereof.

8. *Pledges, Assignments and Transfers:* (A) The Party agrees not to assign, pledge or otherwise encumber, either directly or indirectly or through any reorganization, merger, or consolidation, all or any part of this Agreement, the Fund, or any assets in the Fund without the prior written consent of the Maritime Administrator; *Provided, however,* The Party may transfer the assets of the Fund, in whole or in part, to an investment trustee, as provided in the rules and regulations.

(B) The Party shall not obligate any assets in the Fund as a compensating balance.

(C) The Party may not sell, transfer or otherwise dispose of any vessel, or part thereof, described in Schedule B hereof without the prior written consent of the Maritime Administrator.

9. *Records and Reports:* (A) The Party and each affiliate, domestic agent, subsidiary or holding company connected with, or directly or indirectly controlling or controlled by the Party shall keep its books, records, and accounts relating to the maintenance, operation, servicing of the vessel(s) and/or service(s) covered by this Agreement in such form as may be prescribed by the Maritime Administrator under the rules and regulations.

(B) The Maritime Administrator agrees not to require the duplication of books, records and accounts required to be kept in some other form by the Interstate Commerce Commission or the Secretary of the Treasury, so long as the information required in paragraph (A) hereof is made available to the Maritime Administrator.

(C) The Party agrees to file, upon notice from the Maritime Administrator, balance sheets, profit and loss statements, and such other statements of financial operations, special reports, charters, ships' logs, memoranda of facts and transactions, as in the opinion of the Maritime Administrator may affect the Party's performance under this Agreement.

(D) The Maritime Administrator may require by regulation that any of such statements, reports and memoranda shall be certified by independent certified public accountants acceptable to the Maritime Administrator.

(E) The Maritime Administrator may require the Party to establish and maintain systems of control of expenses and revenues in connection with the operation of the agreement vessel(s).

(F) The Party agrees to submit promptly to the Maritime Administrator any contract executed in connection with the program described in Schedule B hereof.

(G) The Maritime Administrator is hereby authorized to examine and audit the books, records, and accounts of all persons referred to in this Article whenever he may deem it necessary or desirable.

10. *Modification and Amendment:* This Agreement may be modified or amended at any time by mutual written consent.

11. *Incorporation of Schedules:* The attached Schedules A, B, C, and D are incorporated into and made a part of this Agreement.

12. *Liquidated Damages:* (A) In the event that the Party operates any qualified agreement vessel described in Schedule B hereof in geographic trades other than those permitted by 46 U.S.C. 53501 *et seq*, this Agreement, and/or the rules and regulations, the Party shall pay to the United States an amount of liquidated damages for each day of such impermissible geographic trading which shall constitute the time value of the deferral of Federal income tax which the Party has received. The amount shall be calculated in accordance with the rules and regulations.

(B) The Party agrees to pay the daily rate of liquidated damages to the Maritime Administrator, for deposit in the Treasury of the United States, within the time limits provided for in the rules and regulations.

(C) Nothing in this Article shall in any way be construed to diminish or waive any of the Maritime Administrator's other remedies for breach under the Act, the Agreement, or the rules and regulations.

(D) Notwithstanding the fact that the Agreement may be terminated pursuant to the provisions of Article 4 hereof, or otherwise, the provisions of this Article 12 shall continue in effect as follows:

(1) In the case of a vessel constructed or acquired within one year of final delivery from the shipyard after construction with the aid of qualified withdrawals, for a period of twenty (20) years from the date of such vessel's final delivery;

(2) In the case of a vessel reconstructed or acquired more than one year after final delivery from the shipyard after construction with the aid of qualified withdrawals, for a period of ten (10) years from the date of such vessel's final delivery from the shipyard after reconstruction or the date of such vessel's acquisition; and

(3) In the case of a vessel included in Schedule B hereof as a qualified agreement vessel in regard to which qualified withdrawals from the Fund have been made to pay existing indebtedness, for a period of ten (10) years from the date of the first qualified withdrawal in regard to such vessel, *Provided, however,* That if such vessel was more than fifteen (15) years old on the date of the first qualified withdrawal in regard thereto, such conditions shall continue for a period of five (5) years in regard to such vessel.

13. *Warranties and Representations by the Party:* The Party hereby warrants and represents that:

(A) The Party is a citizen of the United States within the meaning of section 2 of the Shipping Act, 1916, as amended, and will continue to be so for the term of this Agreement. The Party agrees that, each year, within thirty (30) days after the annual meeting of its stockholders, it shall file a supplemental affidavit as evidence of its continuing United States citizenship, provided that any changes in data last furnished with respect to officers, directors, and stockholders holding five percent or more of the issued and outstanding stock of each class or series which would result in a loss of the Party's status as a United States citizen shall be promptly reported to the Maritime Administrator.

(B) The Party owns, is the lessee, or has contracted for the construction of one or more eligible vessels (within the meaning of 46 U.S.C. 53501) as listed in Schedule A hereof.

(C) The qualified vessels described in Schedule B hereof: (1) Were or will be constructed or reconstructed in the United States, except as provided in the Act and the rules and regulations;

(2) Are or will be documented under the laws of the United States and will continue to remain so documented; and

(3) Will be operated in the foreign, Great Lakes or noncontiguous domestic trade of the United States within the meaning of the Act and the rules and regulations

(D) The Party will meet its deposit obligations as agreed upon in Article 5 of this Agreement.

(E) The Party will promptly inform the Maritime Administrator, in writing, of any change in circumstances which would tend to adversely affect the ability of the Party to carry out its obligations under the Agreement.

(F) The Party will faithfully conform to all rules and regulations governing the Agreement and the Fund.

(G) Nothing of monetary value has been improperly given, promised, or implied for entering into this Agreement. The Party further warrants that no improper personal, political or other activities have been used or attempted in an effort to influence the outcome of the discussions or negotiations leading to the award of this Agreement. Breach of this warranty shall constitute an event of default for which the Maritime Administrator shall have the right, notwithstanding Article 4, to terminate this Agreement without liability to the United States.

14. *Default in Obligations:* (A) If the Maritime Administrator determines that any substantial obligation under this Agreement is not being fulfilled by the Party, he may, under the rules and regulations and after the Party has been given notice and an opportunity to be heard, declare a breach and treat the entire Fund, or any portion thereof, as an amount withdrawn in a nonqualified withdrawal.

(B) The Maritime Administrator shall provide an opportunity for the Party to cure a breach declared pursuant to Paragraph (A) of this Article 14.

(C) Events of breach by the Party shall include, but shall not be limited to: (1) Failure in any respect to use due diligence in performing the program set forth in Schedule B hereof;

(2) Obligating the assets in the Fund as a compensating balance;

(3) Failure to make deposits required in Schedule D hereof;

(4) Failure to secure written permission from the Maritime Administrator when such permission is required by the rules and regulations;

(5) Failure to submit reports and/or records on a timely basis as provided in Article 9 hereof;

(6) Any material misrepresentation made by the Party or any failure by the Party to disclose material information in connection with this Agreement whether before or after execution hereof and whether made in an application, report, affidavit, or otherwise; or

(7) Failure by the Party to comply with any provisions of 46 U.S.C. 53501 *et seq*, the rules and regulations, or this Agreement.

15. *Extension of Federal Income Tax Benefits:* The Maritime Administrator agrees that the Federal income tax benefits provided in the Act and the rules and regulations shall be available to the Party if the Party shall carry out its obligations under this Agreement.

UNITED STATES OF AMERICA, MARITIME ADMINISTRATOR, DEPARTMENT OF TRANSPORTATION

(SEAL)
Attest:
By _____
(Secretary)

(SEAL)
By _____
(Secretary)
Attest:

By _____
(Contracting Officer)

_____
(Secretary)

Approved as to form: (Date of Execution)
_____ By _____
(Assistant General Counsel, Maritime Administration) (President)

XYZ CO—SCHEDULE A—ELIGIBLE AGREEMENT VESSELS

| (a) | (b) | (c) | (d) | (e) |
|---|---|---|---|---|
| Name of vessel | Specific type | Capacity | Owned or leased and owner is leased | Date and place constructed |
| SS *Smith,* official No. 236425.. | Tanker | 56,000 dwt | Leased: ABC Ships, Inc., San Diego, Calif., 50 percent of depreciation ceiling. | 1962, American Steel, San Francisco, Calif. |
| SS *Brown,* official No. 325111. | .....do | 265,000 dwt | Owned | 1974, Southern Shipyards, Mobile, Ala. |
| SS *Jones,* official No. 190528.. | Container ship | 30,000 dwt, 500 400-ft containers. | .....do | 1954, Bond Shipyard, New York, N.Y. |
| *Hercules,* official No. 256,125. | Oceangoing tugboat | 105 ft 2,000 hp | .....do | 1968, Washington Iron Works, Seattle, Wash. |
| *XYZ–1,* official No. 257,164. | Roll-on, roll-off barge | 1,200 gr ton, 45 40-ft containers. | .....do | 1968, Washington Iron Works, Seattle, Wash. |
| *XYZ–2,* official No. 260,138. | .....do | .....do | .....do | 1969, Washington Iron Works, Seattle, Wash. |
| *OTC–35,* official No. 262,170. | .....do | 1,500 gr ton, 60 40-ft containers. | Leased; Oregon Towing Co., Portland, Oreg., 100 percent of depreciation ceiling. | 1969, J. & J. Shipyard, Portland, Oreg. |
| 200 trailers, Nos. 111032–A–10677B–1M through 11032–A–10877B–1M. | Dry cargo | 40 ft | Leased; International Leasing Co., New York, N.Y. 0 percent of depreciation ceiling. | 1968, Acme Container Corp., New York, N.Y. |
| 1,500 containers, Nos. 312 A through 1312 A.. | Refrigerated dry cargo. | .....do | Owned | 1969, Aluminum Products, Inc., Dallas, Tex. |

XYZ CO—SCHEDULE A—ELIGIBLE AGREEMENT VESSELS (CONTINUED)

| | (f) | (g) | (h) | (i) |
|---|---|---|---|---|
| | Date and place reconstructed | Date documented | Area of operation | Details of service |
| SS *Smith,* official No. 236425. | Not available | 1962 | Noncontiguous domestic trade. | Carriage of crude oil from Valdez, Alaska, to west coast of the continental United States. |
| SS *Brown,* official No. 325111. | .....do | 1974 | U.S. foreign trade | Worldwide carriage of crude oil. |
| SS *Jones,* official No. 190528. | 1970, Litton Systems, Mississippi. | 1954 | U.S. foreign and noncontiguous trade. | Container service between Japan and California via Hawaii. |
| *Hercules,* official No. 256,125. | Not available | 1968 | Domestic | Towing roll-on, roll-off barges from Puget Sound to San Francisco. |
| *XYZ–1,* official No. 257,164. | .....do | 1968 | .....do | Carriage of trailer type containers between Puget Sound and San Francisco. |
| *XYZ–2,* official No. 260,138. | .....do | 1969 | .....do | Do. |
| *OTC–35,* official No. 262,170. | .....do | 1969 | .....do | Do. |
| 200 trailers, Nos. 111032–A–10677B–1M through 11032–A–10877B–1M. | .....do | NA | .....do | For use on Barges *XYZ–1, XYZ–2,* and *OTC–35.* |
| 1,500 containers, Nos. 312 A through 1312 A.. | .....do | NA | U.S. foreign noncontiguous domestic trade. | For use as complement of SS *Jones.* |

XYZ CO., PROGRAM OBJECTIVES—I. ACQUISITION OR CONSTRUCTION OF VESSELS

| Vessel name, and official number | General characteristics | Approximate cost | Amount to be withdrawn from fund | Approximate date of— | | Anticipated area of operation |
|---|---|---|---|---|---|---|
| | | | | Contract | Delivery | |
| | | | | | | |

XYZ CO., PROGRAM OBJECTIVES—II. RECONSTRUCTION OF VESSELS

| Vessel name, and official number | General characteristics | Approximate cost | Amount to be withdrawn from fund | Approximate date of— | | Anticipated area of operation |
|---|---|---|---|---|---|---|
| | | | | Contract | Delivery | |
| | | | | | | |

XYZ CO., PROGRAM OBJECTIVES—III. PAYMENT OF PRINCIPAL ON EXISTING INDEBTEDNESS

| Vessel name and official number | Purpose of indebtedness | Amount to be paid from fund |
|---|---|---|
| | | |

XYZ CO., SCHEDULE C—DEPOSITORIES FOR CAPITAL CONSTRUCTION FUND

| *Name* | *Address* |
|---|---|
| 1. First American Bank checking account | 2001 Park Ave., San Francisco, Calif. 94109. |
| 2. Southern California National Bank investment trustee established pursuant to sec. 390.7 of the SOC regulations. | 1 Waterfront Place, San Francisco, Calif. 94101. |

XYZ CO. SCHEDULE D—MINIMUM DEPOSITS

[In thousands]

| Taxable year | Ordinary income | Net proceeds | Fund interest | Depreciation | Total |
|---|---|---|---|---|---|
| 1973 to 1975 | $3,150 | [1] $2,400 | $250 | ..... | $5,800 |
| 1976 to 1978 | 2,900 | [2] 1,500 | 325 | ..... | 4,725 |
| 1979 to 1981 | 3,000 | ..... | 350 | 85 | 3,435 |

XYZ CO. SCHEDULE D—MINIMUM DEPOSITS—Continued

[In thousands]

| Taxable year | Ordinary income | Net proceeds | Fund interest | Depreciation | Total |
|---|---|---|---|---|---|
| 1982 to 1984 | 2,800 | | 74 | 125 | 3,000 |
| 1985 to 1987 | 2,850 | | 90 | 60 | 3,000 |
| 1988 to 1990 | 2,900 | | 100 | | 3,000 |
| 1991 to 1993 | 3,000 | | 100 | | 3,100 |
| 1994 to 1996 | 3,100 | | 110 | | 3,210 |
| 1997 to 1999 | 3,250 | | 120 | | 3,370 |
| 2000 | 3,200 | | 120 | | 3,320 |
| Total | | | | | 35,960 |

[1] Net proceeds from sale of barges *XYZ–1* and *XYZ–2* for $1,200,000 each.
[2] Net proceeds from sale of tug *Hercules.*

[41 FR 4265, Jan. 29, 1976, as amended at 42 FR 43632, Aug. 30, 1977; 74 FR 17097, Apr. 14, 2009]

EDITORIAL NOTE: At 73 FR 56741, Sept. 30, 2008, appendix II to part 390 was amended; however, the amendment could not be incorporated due to inaccurate amendatory instruction.

## APPENDIX III TO PART 390—U.S. DEPARTMENT OF TRANSPORTATION, MARITIME ADMINISTRATION—SAMPLE SEMIANNUAL REPORT

[Illustrative sample of the report required by the Maritime Administration pursuant to 46 CFR part 390 prescribing the capital construction fund reporting requirements to be followed by those companies which are party to a capital construction fund agreement]

### EXHIBIT A—XYZ CO., SUMMARY OF CASH, SECURITIES, AND STOCK ON DEPOSIT AND NET ACCRUED DEPOSITS TO AND ACCRUED WITHDRAWALS FROM THE CAPITAL CONSTRUCTION FUND AS OF JUNE 30, 19____

| | *Thousands* |
|---|---|
| Cash (exhibit A–1 and B) | $1,025 |
| Securities and stock—adjusted basis (exhibit A–2 and B) | 2,560 |
| Fund total for tax purposes on deposit (exhibit C) | 3,585 |
| Net accrued deposits and withdrawals (exhibit A–3) | 450 |

### EXHIBIT A—XYZ CO., SUMMARY OF CASH, SECURITIES, AND STOCK ON DEPOSIT AND NET ACCRUED DEPOSITS TO AND ACCRUED WITHDRAWALS FROM THE CAPITAL CONSTRUCTION FUND AS OF JUNE 30, 19____—Continued

| | *Thousands* |
|---|---|
| Fund total (agrees with balance sheet submitted at this date) on deposit for book purposes—June 30, 19____ | 4,035 |
| Portion of fund total for tax purposes as of June 30, 19____, which represents a "CCF: Security amount" pursuant to an agreement covering the dual use of a capital construction fund | *Thousands* |
| Balance brought forward | $403 |
| Deposits | 82 |
| Total "CCF: Security Amount" | 485 |

### EXHIBIT A–1—XYZ COMPANY

SUMMARY OF CASH ON DEPOSIT IN CAPITAL CONSTRUCTION FUND AS OF JUNE 30, 19____

| | *Thousands* |
|---|---|
| First American Bank, San Francisco, Calif., checking account No. 654–0876–211 | $1,025 |
| Total cash in capital construction fund at June 30, 19____ | 1,025 |

### EXHIBIT A–2—XYZ CO., SUMMARY OF SECURITIES AND STOCK (ADJUSTED BASIS AND FAIR MARKET VALUE) IN CAPITAL CONSTRUCTION FUND AS OF JUNE 30, 19____(IN THOUSANDS)

| | Adjusted basis | Fair market value |
|---|---|---|
| Treasury notes—due July 4, 19____, $800,000 face value, 1st American Bank, San Francisco, Calif., trust account No. 610–2135 | $760 | $760 |
| Negotiable certificate of deposit—due July 31, 19____, $500,000 at 8 percent, 1st American Bank, San Francisco, Calif., CD No. 186007 | 500 | 500 |
| U.S.A. Motors, Inc.—class A common stock, 5,000 shares, Southern California National Bank, trust account No. 358–21 | 625 | 725 |
| Energy Co., Inc.—1st preferred, 4,100 shares, Southern California National Bank, trust account No. 358–21 | 205 | 255 |

EXHIBIT A–2—XYZ CO., SUMMARY OF SECURITIES AND STOCK (ADJUSTED BASIS AND FAIR MARKET VALUE) IN CAPITAL CONSTRUCTION FUND AS OF JUNE 30, 19____(IN THOUSANDS)—Continued

| | Adjusted basis | Fair market value |
|---|---|---|
| Boon Corp.—class A common stock, 10,000 shares, Southern California National Bank, San Francisco, Calif., trust account No. 358–21 | 470 | 520 |
| Total securities and stock in capital construction fund at June 30, 19____ | 2,560 | 2,760 |

EXHIBIT A–3—XYZ CO., SUMMARY OF NET ACCRUED DEPOSITS AND WITHDRAWALS IN CAPITAL CONSTRUCTION FUND AS OF JUNE 19____

| | *Thousands* |
|---|---|
| Accrued deposits: | |
| 19____ income (6 mos. ended June 30, 19_____ | $500 |
| Depreciation | 200 |
| Total | 700 |
| Accrued withdrawals: Progress payment made from general fund—hull 210 | 250 |
| Net accrued deposits and withdrawals in capital construction fund at June 30, 19____ | 450 |

EXHIBIT B—XYZ CO., TRANSCRIPT OF TRANSACTIONS IN THE CAPITAL CONSTRUCTION FUND FOR THE 6 MOS. ENDED JUNE 30, 19____

| Date | Description of transaction | Cash | | Securities and stock (at adjusted basis) | | Detail |
|---|---|---|---|---|---|---|
| | | Debit | Credit | Debit | Credit | |
| Jan. 1, 19____ | Balances brought forward | $1,500,000 | | $2,000,000 | | |
| Jan. 1, 19____ | Bond debt payment—SS *Smith.* | | $250,000 | | | |
| Jan. 3, 19____ | Deposit 19____ depreciation | 300,000 | | | | |
| Jan. 4, 19____ | Purchased Treasury notes—90 days at 6-percent discount.. | | 752,000 | 752,000 | | $800,000 at 6-percent discount. |
| Feb. 29, 19____ | Dividends earned | 4,500 | | | | $0.45 per share on 10,000 shares Boon Corp. |
| Mar. 15, 19____ | Progress payment No. 3 hull 210.. | | 172,500 | | | |
| Apr. 4, 19____ | Sale of Treasury notes—cost | 752,000 | | | 752,000 | |
| | Income from sale | 48,000 | | | | |
| Apr. 4, 19____ | Purchased Treasury notes 90 days at 5-percent discount. | | 760,000 | 760,000 | | $800,000 at 5-percent discount. |
| Apr. 15, 19____ | Deposit from 19____ earnings | 310,000 | | | | |
| May 15, 19____ | Progress payment No. 4—hull 210.. | | 180,000 | | | |
| June 15, 19____ | Sale of stock—cost | 200,000 | | | 200,000 | 4,000 shares at $56.25 per share. |
| | Gain on sale of stock | 25,000 | | | | Energy Co., Inc. |
| | Balances carried forward | 1,025,000 | | 2,560,000 | | |

EXHIBIT C—XYZ CO., SUMMARY OF TOTAL TRANSACTION AFFECTING THE TAX ACCOUNT BALANCES IN THE CAPITAL CONSTRUCTION FUND FOR THE 6 MOS. ENDED JUNE 30, 19____

| | Ordinary income | Capital gain | Capital | Total |
|---|---|---|---|---|
| Opening balance, Jan. 1, 19____ | $1,000,000 | $1,000,000 | $1,500,000 | $3,500,000 |
| Deposits, income, transfers in, etc | 362,500 | 25,000 | 300,000 | 687,500 |
| Total | 1,362,500 | 1,025,000 | 1,800,000 | 4,187,500 |
| Withdrawals, losses, transfers out, etc | | | 602,500 | |
| Balance at June 30, 19____ | 1,362,500 | 1,025,000 | 1,197,500 | 3,585,000 |

EXHIBIT D—XYZ COMPANY

SUMMARY BY VESSEL OF QUALIFIED WITHDRAWALS FROM THE FUND FOR THE SIX MONTHS ENDING JUNE 30, 19____

*A. Acquisition or Construction of Vessels*

(1) 80,000 dwt tanker: No qualified withdrawals have been made to date; construction is presently scheduled to commence in mid-1977.

(2) 130-foot ocean tug hull No. 210:

| | |
|---|---|
| Balance brought forward | $700,000 |
| Qualified withdrawals during period | 352,500 |
| Total qualified withdrawals to date | 1,052,500 |

130-foot ocean tug hull No. 211: No withdrawals have been made to date; construction is presently scheduled to commence in November 1975

*B. Acquisition or Construction of Barges, Containers and Trailers*

250-foot tank barge: No qualified withdrawals have been made to date; construction presently scheduled to commence in November 1975.

*C. Reconstruction of Vessels*

None.

*D. Reconstruction of Barges, Containers, and Trailers*

None.

*E. Payment of Principal on Existing Indebtedness*

SS *Smith*—Official No. 236425:

| | |
|---|---|
| Balance brought forward | $500,000 |
| Qualified withdrawals during period | 250,000 |
| Total qualified withdrawals to date | 750,000 |

## APPENDIX IV TO PART 390—SAMPLE ADDENDUM TO MARITIME ADMINISTRATION CAPITAL CONSTRUCTION FUND AGREEMENT

This Agreement, made by the Maritime Administrator, Department of Transportation ("Maritime Administrator") and _____ ("Party"), a citizen of the United States of America, as an Addendum to that certain agreement, Contract No. MA/CCF—

Whereas: 1. On _____, the parties hereto entered into a Capital Construction Fund Agreement ("Agreement") under 46 U.S.C. 53501 *et seq*;

2. The parties hereto desire to modify that Agreement in the manner hereinafter set forth;

3. The parties hereto have agreed to said amendment and desire to incorporate the same into the Agreement.

Now, therefore, in consideration of the premises the Maritime Administrator and the Party agree as follows:

Notwithstanding the provisions of Article 4(A)(2) of the Agreement, the Party may, within sixty (60) days after notice appears in the FEDERAL REGISTER that the Regulations jointly prescribed by the Secretary of the Treasury and the Secretary of Transportation have been finalized, terminate the Agreement, if such Regulations have a substantial effect on the rights or obligations of the Party. Upon termination of the Agreement pursuant to this Addendum No. ____ the provisions of the Internal Revenue Code of 1986, the Act, and the rules and regulations shall apply to all funds remaining in the Fund as if such funds were withdrawn in a non-qualified, withdrawal, as that term is defined in the Act and the rules and regulations.

In witness whereof, the Secretary and the Party have executed this addendum, in quadruplicate, effective as of the date indicated below.

UNITED STATES OF AMERICA,
*Secretary of Transportation,*
*Maritime Administrator,*

*Department of Transportation*

| | |
|---|---|
| By ..... (Contracting Officer) | By..... |
| Date ..... | Title..... |
| Attest: | Attest: |
| By ..... (Secretary) | By..... |
| ..... | Title..... |
| (SEAL) | (SEAL) |
| Approved as to form: ..... (Assistant Chief Counsel Maritime Administration) | |

[G.O. 109, Rev., Amdt. 6, 42 FR 43634, Aug. 30, 1977, as amended at 73 FR 56741, Sept. 30, 2008; 74 FR 17097, Apr. 14, 2009]

EDITORIAL NOTE: At 73 FR 56741, Sept. 30, 2008, appendix IV to part 390 was amended; however, a portion of the amendment could not be incorporated due to inaccurate amendatory instruction.

## APPENDIX V TO PART 390—SAMPLE QUALIFIED TRADE AFFIDAVIT

AFFIDAVIT

State of _____
County of _____

I, _____, (Name) being duly sworn, depose and say:

1. That I am the _____ (Title) of _____. (Name of party)

2. That I am fully acquainted with and have knowledge of the operations of all qualified agreement vessels owned or operated by my company and identified in Capital Construction Fund Agreement, MA/CCF _____.

3. That I have full knowledge of the trading restrictions and liquidated damages provisions pertaining to qualified agreement vessels, as stipulated in46 U.S.C. 53501 *et seq*, and in the rules and regulations of 46 CFR Part 390.

4. That based on my inspection of Company records and to the best of my knowledge and belief, except as noted below in statement 5 of this affidavit, during the period _____ (Beginning of taxable year) through _____ (End of taxable year) my company operated its qualified agreement vessels only in the United States, foreign, Great Lakes, and noncontiguous domestic trade in accordance with Capital Construction Fund Agreement, MA/CCF _____.

5. Exceptions to statement 4 of this Affidavit are as follows (indicate exceptions below or attach a supplemental statement if additional space is needed; if there are no exceptions, write "none"):

(Affiant)

Subscribed and sworn to before me, a Notary Public in and for the State, City and County above named, this _____ day of _____, 19___.

(Notary Public)

My commission expires _____, 19___

[41 FR 39751, Sept. 16, 1976; 74 FR 17097, Apr. 14, 2009]

# PART 391—FEDERAL INCOME TAX ASPECTS OF THE CAPITAL CONSTRUCTION FUND

Sec.
391.0 Statutory provisions; section 607, Merchant Marine Act, 1936, as amended.
391.1 Scope of section 607 of the Act and the regulations in this part.
391.2 Ceiling on deposits.
391.3 Nontaxability of deposits.
391.4 Establishment of accounts.
391.5 Qualified withdrawals.
391.6 Tax treatment of qualified withdrawals.
391.7 Tax treatment of nonqualified withdrawals.
391.8 Certain corporate reorganizations and changes in partnerships, and certain transfers on death. [Reserved]
391.9 Consolidated returns. [Reserved]
391.10 Transitional rules for existing funds.
391.11 Definitions.

AUTHORITY: Secs. 204(b) and 607(l), Merchant Marine Act, 1936, as amended (46 U.S.C. 1114, 1177), Reorganization Plans No. 21 of 1950 (64 Stat. 1273) and No. 7 of 1961 (75 Stat. 840) as amended by Pub. L. 91–469 (84 Stat. 1036), Dept. of Commerce Organization Order 10–8 (38 FR 19707), July 23, 1973.

SOURCE: 41 FR 23960, June 14, 1976, unless otherwise noted.

## § 391.0 Statutory provisions; section 607, Merchant Marine Act, 1936, as amended.

SEC. 607 (a) Agreement Rules.

Any citizen of the United States owning or leasing one or more eligible vessels (as defined in subsection (k)(1)) may enter into an agreement with the Secretary of Transportation under, and as provided in, this section to establish a capital construction fund (hereinafter in this section referred to as the "fund") with respect to any or all of such vessels. Any agreement entered into under this section shall be for the purpose of providing replacement vessels, additional vessels, or reconstructed vessels, built in the United States and documented under the laws of the United States for operation in the United States foreign, Great Lakes, or noncontiguous domestic trade or in the fisheries of the United States and shall provide for the deposit in the fund of the amounts agreed upon as necessary or appropriate to provide for qualified withdrawals under subsection (f). The deposits in the fund, and all withdrawals from the fund, whether qualified or nonqualified, shall be subject to such conditions and requirements as the Secretary of Transportation may by regulations prescribe or are set forth in such agreement; except that the Secretary of Transportation may not require any person to deposit in the fund for any taxable year more than 50 percent of that portion of such person's taxable income for such year (computed in the manner provided in subsection (b)(1)(A)) which is attributable to the operation of the agreement vessels.

(b) Ceiling on Deposits.

(1) The amount deposited under subsection (a) in the fund for any taxable year shall not exceed the sum of:

(A) That portion of the taxable income of the owner or lessee for such year (computed as provided in chapter 1 of the Internal Revenue Code of 1954 but without regard to the carryback of any net operating loss or net capital loss and without regard to this section) which is attributable to the operation of the agreement vessels in the foreign or domestic commerce of the United States or in the fisheries of the United States.

(B) The amount allowable as a deduction under section 167 of the Internal Revenue Code of 1954 for such year with respect to the agreement vessels.

(C) If the transaction is not taken into account for purposes of subparagraph (A), the net proceeds (as defined in joint regulations) from (i) the sale or other disposition of any

agreement vessel, or (ii) insurance or indemnity attributable to any agreement vessel, and

(D) The receipts from the investment or reinvestment of amounts held in such fund.

(2) In the case of a lessee, the maximum amount which may be deposited with respect to an agreement vessel by reason of paragraph (1)(B) for any period shall be reduced by any amount which, under an agreement entered into under this section, the owner is required or permitted to deposit for such period with respect to such vessel by reason of paragraph (1)(B).

(3) For purposes of paragraph (1), the term *agreement vessel* includes barges and containers which are part of the complement of such vessel and which are provided for in the agreement.

(c) Requirements as to Investments.

Amounts in any fund established under this section shall be kept in the depository or depositories specified in the agreement and shall be subject to such trustee and other fiduciary requirements as may be specified by the Secretary of Transportation. They may be invested only in interest-bearing securities approved by the Secretary of Transportation; except that, if the Secretary of Transportation consents thereto, an agreed percentage (not in excess of 60 percent) of the assets of the fund may be invested in the stock of domestic corporations. Such stock must be currently fully listed and registered on an exchange registered with the Securities and Exchange Commission as a national securities exchange, and must be stock which would be acquired by prudent men of discretion and intelligence in such matters who are seeking a reasonable income and the preservation of their capital. If at any time the fair market value of the stock in the fund is more than the agreed percentage of the assets in the fund, any subsequent investment of amounts deposited in the fund, and any subsequent withdrawal from the fund, shall be made in such a way as to tend to restore the fund to a situation in which the fair market value of the stock does not exceed such agreed percentage. For purposes of this subsection, if the common stock of a corporation meets the requirements of this subsection, and if the preferred stock of such corporation would meet such requirements but for the fact that it cannot be listed and registered as required because it is nonvoting stock, such preferred stock shall be treated as meeting the requirements of this subsection.

(d) Nontaxability for Deposits.

(1) For purposes of the Internal Revenue Code of 1954—

(A) Taxable income (determined without regard to this section) for the taxable year shall be reduced by an amount equal to the amount deposited for the taxable year out of amounts referred to in subsection (b)(1)(A).

(B) Gain from a transaction referred to in subsection (b)(1)(C) shall not be taken into account if an amount equal to the net proceeds (as defined in joint regulations) from such transaction is deposited in the fund.

(C) The earnings (including gains and losses) from the investment and reinvestment of amounts held in the fund shall not be taken into account,

(D) The earnings and profits of any corporation (within the meaning of section 316 of such Code) shall be determined without regard to this section, and

(E) In applying the tax imposed by section 531 of such Code (relating to the accumulated earnings tax), amounts while held in the fund shall not be taken into account.

(2) Paragraph (1) shall apply with respect to any amount only if such amount is deposited in the fund pursuant to the agreement and not later than the time provided in joint regulations.

(e) Establishment of Accounts.

For purposes of this section—

(1) Within the fund established pursuant to this section three accounts shall be maintained:

(A) The capital account,

(B) The capital gain account, and

(C) The ordinary income account.

(2) The capital account shall consist of—

(A) Amounts referred to in subsection (b)(1)(B),

(B) Amounts referred to in subsection (b)(1)(C) other than that portion thereof which represents gain not taken into account by reason of subsection (d)(1)(B),

(C) 85 percent of any dividend received by the fund with respect to which the person maintaining the fund would (but for subsection (d)(1)(C)) be allowed a deduction under section 243 of the Internal Revenue Code of 1954, and

(D) Interest income exempt from taxation under section 103 of such Code.

(3) The capital gain account shall consist of—

(A) Amounts representing capital gains on assets held for more than 6 months and referred to in subsection (b)(1)(C) or (b)(1)(D), reduced by—

(B) Amounts representing capital losses on assets held in the fund for more than 6 months.

(4) The ordinary income account shall consist of—

(A) Amounts referred to in subsection (b)(1)(A),

(B)(i) Amounts representing capital gains on assets held for 6 months or less and referred to in subsection (b)(1)(C) or (b)(1)(D), reduced by—

(ii) Amounts representing capital losses on assets held in the fund for 6 months or less,

(C) Interest (not including any tax-exempt interest referred to in paragraph (2)(D)) and other ordinary income (not including any

dividend referred to in subparagraph (E)) received on assets held in the fund,

(D) Ordinary income from a transaction described in subsection (b)(1)(C), and

(E) 15 percent of any dividend referred to in paragraph (2)(C).

(5) Except on termination of a fund, capital losses referred to in paragraph (3)(B) or in paragraph (4)(B)(ii) shall be allowed only as an offset to gains referred to in paragraph (3)(A) or (4)(B)(i), respectively.

(f) Purposes of Qualified Withdrawals.

(1) A qualified withdrawal from the fund is one made in accordance with the terms of the agreement but only if it is for:

(A) The acquisition, construction, or reconstruction of a qualified vessel,

(B) The acquisition, construction, or reconstruction of barges and containers which are part of the complement of a qualified vessel, or

(C) The payment of the principal on indebtedness incurred in connection with the acquisition, construction or reconstruction of a qualified vessel or a barge or container which is part of the complement of a qualified vessel.

Except to the extent provided in regulations prescribed by the Secretary of Transportation, subparagraph (B), and so much of subparagraph (C) as relates only to barges and containers, shall apply only with respect to barges and containers constructed in the United States.

(2) Under joint regulations, if the Secretary of Transportation determines that any substantial obligation under any agreement is not being fulfilled, he may, after notice and opportunity for hearing to the person maintaining the fund, treat the entire fund or any portion thereof as an amount withdrawn from the fund in a nonqualified withdrawal.

(g) Tax Treatment of Qualified Withdrawals.

(1) Any qualified withdrawal from a fund shall be treated—

(A) First as made out of the capital account.

(B) Second as made out of the capital gain account, and

(C) Third as made out of the ordinary income account.

(2) If any portion of a qualified withdrawal for a vessel, barge, or container is made out of the ordinary income account, the basis of such vessel, barge, or container shall be reduced by an amount equal to such portion.

(3) If any portion of a qualified withdrawal for a vessel, barge, or container is made out of the capital gain account, the basis of such vessel, barge, or container shall be reduced by an amount equal to—

(A) Five-eighths of such portion, in the case of a corporation (other than an electing small business corporation, as defined in section 1371 of the Internal Revenue Code of 1954), or

(B) One-half of such portion, in the case of any other person.

(4) If any portion of a qualified withdrawal to pay the principal on any indebtedness is made out of the ordinary income account or the capital gain account, then an amount equal to the aggregate reduction which would be required by paragraphs (2) and (3) if this were a qualified withdrawal for a purpose described in such paragraphs shall be applied, in the order provided in joint regulations, to reduce the basis of vessels, barges, and containers owned by the person maintaining the fund. Any amount of a withdrawal remaining after the application of the preceding sentence shall be treated as a nonqualified withdrawal.

(5) If any property the basis of which was reduced under paragraph (2), (3), or (4) is disposed of, any gain realized on such disposition, to the extent it does not exceed the aggregate reduction in the basis of such property under such paragraphs, shall be treated as an amount referred to in subsection (h)(3)(A) which was withdrawn on the date of such disposition. Subject to such conditions and requirements as may be provided in joint regulations, the preceding sentence shall not apply to a disposition where there is a redeposit in an amount determined under joint regulations which will insofar as practicable, restore the fund to the position it was in before the withdrawal.

(h) Tax Treatment of Nonqualified Withdrawals.

(1) Except as provided in subsection (i), any withdrawal from a fund which is not a qualified withdrawal shall be treated as a nonqualified withdrawal.

(2) Any nonqualified withdrawal from a fund shall be treated—

(A) First as be made out of the ordinary income account,

(B) Second as made out of the capital gain account, and

(C) Third as made out of the capital account.

For purposes of this section, items withdrawn from any account shall be treated as withdrawn on a first-in-first-out basis; except that (i) any nonqualified withdrawal for research, development, and design expenses incident to new and advanced ship design, machinery and equipment, and (ii) any amount treated as a nonqualified withdrawal under the second sentence of subsection (g)(4), shall be treated as withdrawn on a last-in-first-out basis.

(3) For purposes of the Internal Revenue Code of 1954—

(A) Any amount referred to in paragraph (2)(A) shall be included in income as an item of ordinary income for the taxable year in which the withdrawal is made.

(B) Any amount referred to in paragraph (2)(B) shall be included in income for the taxable year in which the withdrawal is made as an item of gain realized during such year from the disposition of an asset held for more than 6 months, and

(C) For the period on or before the last date prescribed for payment of tax for the taxable year in which this withdrawal is made—

(i) No interest shall be payable under section 6601 f such Code and no addition to the tax shall be payable under section 6651 of such Code.

(ii) Interest on the amount of the additional tax attributable to any item referred to in subparagraph (A) or (B) shall be paid at the applicable rate (as defined in paragraph (4)) from the last date prescribed for payment of the tax for the taxable year for which such item was deposited in the fund, and

(iii) No interest shall be payable on amounts referred to in clauses (i) and (ii) of paragraph (2) or in the case of any nonqualified withdrawal arising from the application of the recapture provision of section 606(5) of the Merchant Marine Act of 1936 as in effect on December 31, 1969.

(4) For purposes of paragraph (3)(C)(ii), the applicable rate of interest for any nonqualified withdrawal—

(A) Made in a taxable year beginning in 1970 or 1971 is 8 percent, or

(B) Made in a taxable year beginning after 1971, shall be determined and published jointly by the Secretary of the Treasury and the Secretary of Transportation and shall bear a relationship to 8 percent which the Secretaries determine under joint regulations to be comparable to the relationship which the money rates and investment yields for the calendar year immediately preceding the beginning of the taxable year bear to the money rates and investment yields for the calendar year 1970.

(i) Certain Corporate Reorganizations and Changes in Partnerships.

Under joint regulations—

(1) A transfer of a fund from one person to another person in a transaction to which section 381 of the Internal Revenue Code of 1954 applies may be treated as if such transaction did not constitute a nonqualified withdrawal, and

(2) A similar rule shall be applied in the case of a continuation of a partnership (within the meaning of subchapter K of such Code).

(j) Treatment of Existing Funds.

(1) Any person who was maintaining a fund or funds (hereinafter in this subsection referred to as "old fund") under this section (as in effect before the enactment of this subsection) may elect to continue such old fund but—

(A) May not hold moneys in the old fund beyond the expiration date provided in the agreement under which such old fund is maintained (determined without regard to any extension or renewal entered into after April 14, 1970),

(B) May not simultaneously maintain such old fund and a new fund established under this section, and

(C) If he enters into an agreement under this section to establish a new fund, may agree to the extension of such agreement to some or all of the amounts in the old fund.

(2) In the case of any extension of an agreement pursuant to paragraph (1)(C), each item in the old fund to be transferred shall be transferred in a nontaxable transaction to the appropriate account in the new fund established under this section. For purposes of subsection (h)(3)(C), the date of the deposit of any item so transferred shall be July 1, 1971, or the date of the deposit in the old fund, whichever is the later.

(k) Definitions.

For purposes of this section—

(1) The term *eligible vessel* means any vessel—

(A) Constructed in the United States and, if reconstructed, reconstructed in the United States,

(B) Documented under the laws of the United States, and

(C) Operated in the foreign or domestic commerce of the United States or in the fisheries of the United States.

Any vessel which (i) was constructed outside of the United States but documented under the laws of the United States on April 15, 1970, or (ii) constructed outside the United States for use in the United States foreign trade pursuant to a contract entered into before April 15, 1970, shall be treated as satisfying the requirements of subparagraph (A) of this paragraph and the requirements of subparagraph (A) of paragraph (2).

(2) The term *qualified vessel* means any vessel—

(A) Constructed in the United States and, if reconstructed, reconstructed in the United States,

(B) Documented under the laws of the United States, and

(C) Which the person maintaining the fund agrees with the Secretary of Transportation will be operated in the United States foreign, Great Lakes, or noncontiguous domestic trade or in the fisheries of the United States.

(3) The term *agreement vessel* means any eligible vessel or qualified vessel which is subject to an agreement entered into under this section.

(4) The term *United States,* when used in a geographical sense, means the continental United States including Alaska, Hawaii, and Puerto Rico.

(5) The term *United States foreign trade* includes (but is not limited to) those areas in

domestic trade in which a vessel built with construction-differential subsidy is permitted to operate under the first sentence of section 506 of the Act.

(6) The term *joint regulations* means regulations prescribed under subsection (1).

(7) The term *vessel* includes cargo handling equipment which the Secretary of Transportation determines is intended for use primarily on the vessel. The term *vessel* also includes an ocean-going towing vessel or an ocean-going barge or comparable towing vessel or barge operated on the Great Lakes.

(8) The term *noncontiguous trade* means (i) trade between the contiguous forty-eight States on the one hand and Alaska, Hawaii, Puerto Rico and the insular territories and possessions of the United States on the other hand, and (ii) trade from any point in Alaska, Hawaii, Puerto Rico, and such territories and possessions to any other point in Alaska, Hawaii, Puerto Rico, and such territories and possessions.

(l) Records; Reports; Changes in Regulations.

Each person maintaining a fund under this section shall keep such records and shall make such reports as the Secretary of Transportation or the Secretary of the Treasury shall require. The Secretary of the Treasury and the Secretary of Transportation shall jointly prescribe all rules and regulations, not inconsistent with the foregoing provisions of this section, as may be necessary or appropriate to the determination of tax liability under this section. If, after an agreement has been entered into under this section, a change is made either in the joint regulations or in the regulations prescribed by the Secretary of Transportation under this section which could have a substantial effect on the rights or obligations of any person maintaining a fund under this section, such person may terminate such agreement.

## § 391.1 Scope of section 607 of the Act and the regulations in this part.

(a) *In general.* The regulations prescribed in this part provide rules for determining the income tax liability of any person a party to an agreement with the Secretary of Transportation establishing a capital construction fund (for purposes of this part referred to as the "fund") authorized by section 607 of the Merchant Marine Act, 1936, as amended (for purposes of this part referred to as the "Act"). With respect to such parties, section 607 of the Act in general provides for the nontaxability of certain deposits of money or other property into the fund out of earnings or gains realized from the operation of vessels covered in an agreement, gains realized from the sale or other disposition of agreement vessels or proceeds from insurance for indemnification for loss of agreement vessels, earnings from the investment or reinvestment of amounts held in a fund, and gains with respect to amounts or deposits in the fund. Transitional rules are also provided for the treatment of "old funds" existing on or before the effective date of the Merchant Marine Act of 1970 (see § 391.10).

(b) *Cross references.* For rules relating to eligibility for a fund, deposits, and withdrawals and other aspects, see the regulations prescribed by the Secretary of Transportation in title 46 (Merchant Marine) and by the Secretary of Commerce in title 50 (Fisheries) of the Code of Federal Regulations.

(c) *Code.* For purposes of this part, the term *Code* means the Internal Revenue Code of 1954, as amended.

## § 391.2 Ceiling on deposits.

(a) *In general*—(1) *Total ceiling.* Section 607(b) of the Act provides a ceiling on the amount which may be deposited by a party for a taxable year pursuant to an agreement. The amount which a party may deposit into a fund may not exceed the sum of the following subceilings:

(i) The lower of (*a*) the taxable income (if any) of the party for such year (computed as provided in chapter 1 of the Code but without regard to the carryback of any net operating loss or net capital loss and without regard to section 607 of the Act) or (*b*) taxable income (if any) of such party for such year attributable under paragraph (b) of this section to the operation of agreement vessels (as defined in paragraph (f) of this section) in the foreign or domestic commerce of the United States or in the fisheries of the United States (see section 607(b)(1)(A) of the Act),

(ii) Amounts allowable as a deduction under section 167 of the Code for such year with respect to the agreement vessels (see section 607(b)(1)(B) of the Act),

(iii) The net proceeds (if not included in paragraph (a)(i) of this section) from (*a*) the sale or other disposition of any agreement vessels or (*b*) insurance or

indemnity attributable to any agreement vessels (see section 607(b)(1)(C) of the Act and paragraph (c) of this section), and

(iv) Earnings and gains from the investment or reinvestment of amounts held in such fund (see section 607 (b)(1)(D) of the Act and paragraphs (d) and (g) of this section).

(2) *Overdeposits.* (i) If for any taxable year an amount is deposited into the fund under a subceiling computed under paragraph (a)(1) of this section which is in excess of the amount of such subceiling for such year, then at the party's option such excess (or any portion thereof) may—

(*a*) Be treated as a deposit into the fund for that taxable year under another available subceiling, or

(*b*) Be treated as not having been deposited for the taxable year and thus, at the party's option, may be disposed of either by it being—

(*1*) Treated as a deposit into the fund under any subceiling available in the first subsequent taxable year in which a subceiling is available, in which case such amount shall be deemed to have been deposited on the first day of such subsequent taxable year, or

(*2*) Repaid to the party from the fund.

(ii)(*a*) When a correction is made for an overdeposit, proper adjustment shall be made with respect to all items for all taxable years affected by the overdeposit, such as, for example, amounts in each account described in §391.4, treatment of nonqualified withdrawals, the consequences of qualified withdrawals and the treatment of losses realized or treated as realized by the fund. Thus, for example, if the party chooses to have the fund repay to him the amount of an overdeposit, amounts in each account, basis of assets, and any affected item will be determined as though no deposit and repayment had been made. Accordingly, in such a case, if there are insufficient amounts in an account to cover a repayment of an overdeposit (as determined before correcting the overdeposit), and the party had applied the proceeds of a qualified withdrawal from such account towards the purchase of a qualified vessel (within the meaning of §391.11(a)(2)), then such account and the basis of the vessel shall be adjusted as of the time such withdrawal was made and proceeds were applied, and repayment shall be made from such account as adjusted. If a party chooses to treat the amount of an overdeposit as a deposit under a subceiling for a subsequent year, similar adjustments to affected items shall be made. If the amount of a withdrawal would have exceeded the amount in the fund (determined after adjusting all affected amounts by reason of correcting the overdeposit), the withdrawal to the extent of such excess shall be treated as a repayment made at the time the withdrawal was made.

(*b*) If the accounts (as defined in §391.4) that were increased by reason of excessive deposits contain sufficient amounts at the time the overdeposit is discovered to repay the party, the party may, at his option, demand repayment of such excessive deposits from such accounts in lieu of making the adjustments required by paragraph (a)(2)(ii)(*a*) of this section.

(iii) During the period beginning with the day after the date an overdeposit was actually made and ending with the date it was disposed of in accordance with paragraph (a)(2)(i)(*b*) of this section, there shall be included in the party's gross income for each taxable year the earnings attributed to any amount of overdeposit on hand during such a year. The earnings attributable to any amount of overdeposit on hand during a taxable year shall be an amount equal to the product of—

(*a*) The average daily earnings for each one dollar in the fund (as determined in paragraph (a)(2)(iv) of this section),

(*b*) The amount of overdeposit (as determined in paragraph (a)(2)(vi) of this section), and

(*c*) The number of days during the taxable year the overdeposit existed.

(iv) For purposes of paragraph (a)(2)(iii)(*a*) of this section, the average daily earnings for each dollar in the fund shall be determined by dividing the total earnings of the fund for the taxable year by the sum of the products of—

(*a*) Any amount on hand during the taxable year (determined under paragraph (a)(2)(v) of this section), and

(*b*) The number of days during the taxable year such amount was on hand in the fund.

(v) For purposes of this paragraph—

(*a*) An amount on hand in the fund or an overdeposit shall not be treated as on hand on the day deposited but shall be treated as on hand on the day withdrawn, and

(*b*) The fair market value of such amounts on hand for purposes of this subparagraph shall be determined as provided in § 20.2031–2 of the Estate Tax Regulations of this chapter but without applying the blockage and other special rules contained in paragraph (e) thereof.

(vi) For purposes of paragraph (a)(2)(iii)(*b*) of this section, the amount of overdeposit on hand at any time is an amount equal to—

(*a*) The amount deposited into the fund under a subceiling computed under paragraph (a)(1) of this section which is in excess of the amount of such subceiling, less

(*b*) The sum of—

(*1*) Amounts described in paragraph (a)(2)(vi)(*a*) of this section treated as a deposit under another subceiling for the taxable year pursuant to paragraph (a)(2)(i) of this section,

(*2*) Amounts described in paragraph (a)(2)(vi)(*a*) of this section disposed of (or treated as disposed of) in accordance with paragraphs (a)(2) (i) or (ii) of this section prior to such time.

(vii) To the extent earnings attributed under paragraph (a)(2)(iii) of this section represent a deposit for any taxable year in excess of the subceiling described in paragraph (a)(1)(iv) of this section for receipts from the investment or reinvestment of amounts held in the fund, such attributed earnings shall be subject to the rules of this paragraph for overdeposits.

(3) *Underdeposit caused by audit adjustment.* [Reserved]

(4) *Requirements for deficiency deposits.* [Reserved]

(b) *Taxable income attributable to the operation of an agreement vessel*—(1) *In general.* For purposes of this section, taxable income attributable to the operation of an agreement vessel means the amount, if any, by which the gross income of a party for the taxable year from the operation of an agreement vessel (as defined in paragraph (f) of this section) exceeds the allowable deductions allocable to such operation (as determined under paragraph (b)(3) of this section). The term *taxable income attributable to the operation of the agreement vessels* means the sum of the amounts described in the preceding sentence separately computed with respect to each agreement vessel (or share therein) or, at the party's option, computed in the aggregate.

(2) *Gross income.* (i) Gross income from the operation of agreement vessels means the sum of the revenues which are derived during the taxable year from the following:

(*a*) Revenues derived from the transportation of passengers, freight, or mail in such vessels, including amounts from contracts for the charter of such vessels to others, from operating differential subsidies, from collections in accordance with pooling agreements and from insurance or indemnity net proceeds relating to the loss of income attributable to such agreement vessels.

(*b*) Revenues derived from the operation of agreement vessels relating to commercial fishing activities, including the transportation of fish, support activities for fishing vessels, charters for commercial fishing, and insurance or indemnity net proceeds relating to the loss of income attributable to such agreement vessels.

(*c*) Revenues from the rental lease, or use by others of terminal facilities, revenues from cargo handling operations and tug and lighter operations, and revenues from other services or operations which are incidental and directly related to the operation of an agreement vessel. Thus, for example, agency fees, commissions, and brokerage fees derived by the party at his place of business for effecting transactions for services incidental and directly related to shipping for the accounts of other persons are includible in gross income from the operation of agreement vessels where the transaction is of a kind customarily consummated by the party for his own account at such place of business.

(*d*) Dividends, interest, and gains derived from assets set aside and reasonably retained to meet regularly occurring obligations relating to the shipping or fishing business directly connected with the agreement vessel which obligations cannot at all times be met from the current revenues of the business because of layups or repairs, special surveys, fluctuations in the business, and reasonably forseeable strikes (whether or not a strike actually occurs), and security amounts retained by reason of participation in conferences, pooling agreements, or similar agreements.

(ii) The items of gross income described in paragraphs (b)(2)(i) (*c*) and (*d*) of this section shall be considered to be derived from the operations of a particular agreement vessel in the same proportion that the sum of the items of gross income described in paragraphs (b)(2)(i) (*a*) and (*b*) of this section which are derived from the operations of such agreement vessel bears to the party's total gross income for the taxable year from operations described in paragraphs (b)(2)(i) (*a*) and (*b*) of this section.

(iii) In the case of a party who uses his own or leased agreement vessels to transport his own products, the gross income attributable to such vessel operations is an amount determined to be an arm's length charge for such transportation. The arm's length charge shall be determined by applying the principles of section 482 of the Code and the regulations thereunder as if the party transporting the product and the owner of the product were not the same person but were controlled taxpayers within the meaning of §1.482–1(a)(4) of the Income Tax Regulations of this chapter. Gross income attributable to the operation of agreement vessels does not include amounts for which the party is allowed a deduction for percentage depletion under sections 611 and 613 of the Code.

(3) *Deductions.* From the gross income attributable to the operation of an agreement vessel or vessels as determined under paragraph (b)(2) of this section, there shall be deducted in accordance with the principles of §1.861–8 of the Income Tax Regulations of this chapter, the expenses, losses, and other deductions definitely related and therefore allocated and apportioned thereto and a ratable part of any expenses, losses, or other deductions which are not definitely related to any gross income of the party. Thus, for example, if a party has gross income attributable to the operation of an agreement vessel and other gross income and has a particular deduction definitely related to both types of gross income, such deductions must be apportioned between the two types of gross income on a reasonable basis in determining the taxable income attributable to the operation of the agreement vessel.

(4) *Net operating and capital loss deductions.* The taxable income of a party attributable to the operation of agreement vessels shall be computed without regard to the carryback of any net operating loss deduction allowed by section 172 of the Code, the carryback of any net capital loss deduction allowed by section 165(f) of the Code, or any reduction in taxable income allowed by section 607 of the Act.

(5) *Method of accounting.* Taxable income must be computed under the method of accounting which the party uses for Federal income tax purposes. Such method may include a method of reporting whereby items of revenue and expense properly allocable to voyages in progress at the end of any accounting period are eliminated from the computation of taxable income for such accounting period and taken into account in the accounting period in which the voyage is completed.

(c) *Net proceeds from transactions with respect to agreement vessels.* [Reserved]

(d) *Earnings and gains from the investment or reinvestment of amounts held in a fund*—(1) *In general.* (i) Earnings and gains received or accrued by a party from the investment or reinvestment of assets in a fund is the total amount of any interest or dividends received or accrued, and gains realized, by the party with respect to assets deposited in, or purchased with amounts deposited in, such fund. Such earnings and gains are therefore required to be included in the gross income of the party unless such amount, or a portion thereof, is not taken into account under section 607(d)(1)(C) of the Act and

§ 391.3(b)(2)(ii) by reason of a deposit or deemed deposit into the fund. For rules relating to receipts from the sale or other disposition of nonmoney deposits into the fund, see paragraph (g) of this section.

(ii) Earnings received or accrued by a party from investment or reinvestment of assets in a fund include the ratable monthly portion of original issue discount included in gross income pursuant to section 1232(a)(3) of the Code. Such ratable monthly portion shall be deemed to be deposited into the ordinary income account of the fund, but an actual deposit representing such ratable monthly portion shall not be made. For basis of a bond or other evidence of indebtedness issued at a discount, see § 391.3(b)(2)(ii)(b).

(2) *Gain realized.* (i) The gain realized with respect to assets in the fund is the excess of the amount realized (as defined in section 1001(b) of the Code and the regulations thereunder) by the fund on the sale or other disposition of a fund asset over its adjusted basis (as defined in section 1011 of the Code) to the fund. For the adjusted basis of nonmoney deposits, see paragraph (g) of this section.

(ii) Property purchased by the fund (including property considered under paragraph (g)(1)(iii) of this section as purchased by the fund) which is withdrawn from the fund in a qualified withdrawal (as defined in § 391.5) is treated as a disposition to which subdivision (i) of this subparagraph applies. For purposes of determining the amount by which the balance within a particular account will be reduced in the manner provided in § 391.6(b) (relating to order of application of qualified withdrawals against accounts) and for purposes of determining the reduction in basis of a vessel, barge, or container (or share therein) pursuant to § 391.6(c), the value of the property is its fair market value on the day of the qualified withdrawal.

(3) *Holding Period.* Except as provided in paragraph (g) of this section, the holding period of fund assets shall be determined under section 1223 of the Code.

(e) *Leased vessels.* In the case of a party who is a lessee of an agreement vessel, the maximum amount which such lessee may deposit with respect to any agreement vessel by reason of section 607(b)(1)(B) of the Act and paragraph (a)(1)(ii) of this section (relating to depreciation allowable) for any period shall be reduced by the amount (if any) which, under an agreement entered into under section 607 of the Act, the owner is required or permitted to deposit for such period with respect to such vessel by reason of section 607(b)(1)(B) of the Act and paragraph (a)(1)(ii) of this section. The amount of depreciation depositable by the lessee under this paragraph is the amount of depreciation deductible by the lessor on its income tax return, reduced by the amount described in the preceding sentence or the amount set forth in the agreement, whichever is lower.

(f) *Definition of agreement vessel.* For purposes of this section, the term *agreement vessel* (as defined in § 391.11 (a)(3) and 46 CFR 390.6) includes barges and containers which are the complement of an agreement vessel and which are provided for in the agreements, agreement vessels which have been contracted for or are in the process of construction, and any shares in an agreement vessel. Solely for purposes of this section, a party is considered to have a "share" in an agreement vessel if he has a right to use the vessel to generate income from its use whether or not the party would be considered as having a proprietary interest in the vessel for purposes of State or Federal law. Thus, a partner may enter into an agreement with respect to his share of the vessel owned by the partnership and he may make deposits of his distributive share of the sum of the four subceilings described in paragraph (a)(1) of this section. Notwithstanding the provisions of Subchapter K of the Code (relating to the taxation of partners and partnerships), the Internal Revenue Service will recognize, solely for the purposes of applying this part, an agreement by an owner of a share in an agreement vessel even though the "share" arrangement is a partnership for purposes of the Code.

(g) *Special rules for nonmoney deposits and withdrawals*—(1) *In general.* (i) Deposits may be made in the form of

money or property of the type permitted to be deposited under the agreement. (For rules relating to the types of property which may be deposited into the fund, see 46 CFR 390.7(d), and 50 CFR Part 259.) For purposes of this paragraph, the term *property* does not include money.

(ii) Whether or not the election provided for in paragraph (g)(2) of this section is made—

(*a*) The amount of any property deposit, and the fund's basis for property deposited in the fund, is the fair market value of the property at the time deposited, and

(*b*) The fund's holding period for the property begins on the day after the deposit is made.

(iii) Unless such an election is made, deposits of property into a fund are considered to be a sale at fair market value of the property, a deposit of cash equal to such fair market value, and a purchase by the fund of such property for cash. Thus, in the absence of the election, the difference between the fair market value of such property deposited and its adjusted basis shall be taken into account as gain or loss for purposes of computing the party's income tax liability for the year of deposit.

(iv) For fund's basis and holding period of assets purchased by the fund, see paragraphs (d) (2) and (3) of this section.

(2) *Election not to treat deposits of property other than money as a sale or exchange at the time of deposit.* A party may elect to treat a deposit of property as if no sale or other taxable event had occurred on the date of deposit. If such election is made, in the taxable year the fund disposes of the property, the party shall recognize as gain or loss the amount he would have recognized on the day the property was deposited into the fund had the election not been made. The party's holding period with respect to such property shall not include the period of time such property was held by the fund. The election shall be made by a statement to that effect, attached to the party's Federal income tax return for the taxable year to which the deposit relates, or, if such return is filed before such deposit is made, attached to the party's return for the taxable year during which the deposit is actually made.

(3) *Effect of qualified withdrawal of property deposited pursuant to election.* If property deposited into a fund, with respect to which an election under paragraph (g)(2) of this section is made, is withdrawn from the fund in a qualified withdrawal (as defined in §391.5) such withdrawal is treated as a disposition of such property resulting in recognition by the party of gain or loss (if any) as provided in paragraph (g)(2) of this section with respect to nonfund property. In addition, such withdrawal is treated as a disposition of such property by the fund resulting in recognition of gain or loss by the party with respect to fund property to the extent the fair market value of the property on the date of withdrawal is greater or less (as the case may be) than the adjusted basis of the property to the fund on such date. For purposes of determining the amount by which the balance within a particular account will be reduced in the manner provided in §391.6(b) (relating to order of application of qualified withdrawals against accounts and for purposes of determining the reduction in basis of a vessel, barge, or container (or share therein) pursuant to §391.6(c), the value of the property is its fair market value on the day of the qualified withdrawal. For rules relating to the effect of a qualified withdrawal of property purchased by the fund (including deposited property considered under paragraph (g)(1)(iii) of this section as purchased by the fund), see paragraph (d)(2)(ii) of this section.

(4) *Effect of nonqualified withdrawal of property deposited pursuant to election.* If property deposited into a fund with respect to which an election under paragraph (g)(2) of this section is made, is withdrawn from the fund in a nonqualified withdrawal (as defined in §391.7(b)), no gain or loss is to be recognized by the party with respect to fund property or nonfund property but an amount equal to the adjusted basis of the property to the fund is to be treated as a nonqualified withdrawal. Thus, such amount is to be applied against the various accounts in the manner provided in §391.7(c), such amount is to be taken into account in computing

the party's taxable income as provided in § 391.7(d), and such amount is to be subject to interest to the extent provided for in § 391.7(e). In the case of withdrawals to which this subparagraph applies, the adjusted basis of the property in the hands of the party is the adjusted basis on the date of deposit, increased or decreased by the adjustments made to such property while held in the fund, and in determining the period for which the party has held the property there shall be included, in addition to the period the fund held the property, the period for which the party held the property before the date of deposit of the property into the fund. For rules relating to the basis and holding period of property purchased by the fund (including deposited property considered under paragraph (g)(1)(ii) of this section as purchased by the fund) and withdrawn in a nonqualified withdrawal see § 391.7(f).

(5) *Examples.* The provisions of this paragraph are illustrated by the following examples:

*Example (1).* X Corporation, which uses the calendar year as its taxable year, maintains a fund described in § 391.1 X's taxable income (determined without regard to section 607 of the Act) is $100,000, of which $80,000 is taxable income attributable to the operation of agreement vessels (as determined under paragraph (b)(1) of this section). Under the agreement, X is required to deposit into the fund all earnings and gains received from the investment or reinvestment of amounts held in the fund, an amount equal to the net proceeds from transactions referred to in § 391.2(c), and an amount equal to 50 percent of its earnings attributable to the operation of agreement vessels provided that such 50 percent does not exceed X's taxable income from all sources for the year of deposit. The agreement permits X to make voluntary deposits of amounts equal to 100 percent of its earnings attributable to the operation of agreement vessels, subject to the limitation with respect to taxable income from all sources. The agreement also provides that deposits attributable to such earnings may be in the form of cash or other property. On March 15, 1973, X deposits, with respect to its 1972 earnings attributable to the operation of agreement vessels, stock with a fair market value at the time of deposit of $80,000 and an adjusted basis to X of $10,000. Such deposit represents agreement vessel income of $80,000. At the time of deposit, such stock had been held by X for a period exceeding 6 months. X does not elect under subparagraph (2) of this paragraph to defer recognition of the gain. Accordingly, under subparagraph (1)(iii) of this paragraph, the deposit is treated as a deposit of $80,000 and X realizes a long-term capital gain of $70,000 on March 15, 1973.

*Example (2).* The facts are the same as in example (1), except that X elects in accordance with subparagraph (2) of this paragraph not to treat the deposit as a sale or exchange. On July 1, 1974, the fund sells the stock for $85,000. The basis to the fund of the stock is $80,000 (see subparagraph (1)(ii)(*a*) of this paragraph). With respect to non fund property, X recognizes $70,000 of long-term capital gain on the sale includible in its gross income for 1974. With respect to fund property, X realizes $5,000 of long-term capital gain (the difference between the amount received by the fund on the sale of the stock, $85,000, and the basis to the fund of the stock, $80,000), an amount equal to which is required to be deposited into the fund with respect to 1974, as a gain from the investment or reinvestment of amounts held in the fund. Since the fund held the stock for a period exceeding 6 months, the $5,000 is allocated to the fund's capital gain account under § 391.4(c).

*Example (3).* The facts are the same as in example (2), except that the fund sells the stock on July 1, 1974, for $75,000. As the basis to the fund of the stock is $80,000 with respect to fund property, X realizes a long-term capital loss on the sale (the difference between the amount received by the fund on the sale of the stock, $75,000, and the basis to the fund of the stock, $80,000), of $5,000, an amount equal to which is required to be charged against the fund's capital gain account under § 391.4(e). Under subparagraph (2) of this paragraph, X recognizes $70,000 of long-term capital gain with respect to nonfund property on the sale which is includible in its gross income for 1974.

*Example (4).* The facts are the same as in example (2), except that on July 1, 1974, X makes a qualified withdrawal (as defined in § 391.5(a)) of the stock and uses it to pay indebtedness pursuant to § 391.5(b). On the disposition by X considered to occur under subparagraph (3) of this paragraph on the qualified withdrawal, X recognizes $70,000 of long-term capital gain with respect to nonfund property, which is includible in its gross income for 1974, and a long-term capital gain of $5,000 with respect to fund property, an amount equal to which is allocated to the fund's capital gain account under § 391.4(c). The fund is treated as having a qualified withdrawal of an amount equal to the fair market value of the stock on the day of withdrawal, $85,000 (see subparagraph (3) of this paragraph). In addition, $85,000 is applied against the various accounts in the order provided in § 391.6(b). The basis of the

vessel with respect to which the indebtedness was incurred is to be reduced as provided in §391.6(c).

*Example (5).* The facts are the same as in example (2), except that X withdraws the stock from the fund in a nonqualified withdrawal (as defined in §391.7(b)). Under subparagraph (4) of this paragraph, X recognizes no gain or loss with respect to fund or nonfund property on such withdrawal. An amount equal to the basis of the stock to the fund ($80,000) is applied against the various accounts in the order provided in §391.7(c), and is taken into account in computing X's taxable income for 1974 as provided in §391.7(d). In addition, X must pay interest on the withdrawal as provided in §391.7(e). The basis to X of the stock is $10,000 notwithstanding the fact that the fair market value of such stock was $85,000 on the day of withdrawal (see paragraph (g)(4) of this section).

### §391.3 Nontaxability of deposits.

(a) *In general.* Section 607(d) of the Act sets forth the rules concerning the income tax effects of deposits made with respect to ceilings described in section 607(b) and §391.2. The specific treatment of deposits with respect to each of the subceilings is set forth in paragraph (b) of this section.

(b) *Treatment of deposits*—(1) *Earnings of agreement vessels.* Section 607 (d)(1)(A) of the Act provides that taxable income of the party (determined without regard to section 607 of the Act) shall be reduced by an amount equal to the amount deposited for the taxable year out of amounts referred to in section 607(b)(1)(A) of the Act and §391.2(a)(1)(i). For computation of the foreign tax credit, see paragraph (i) of this section.

(2) *Net proceeds from agreement vessels and fund earnings.* (i)(*a*) Section 607(d)(1)(B) provides that gain from a transaction referred to in section 607(b)(1)(C) of the Act and §391.2(a)(1)(iii) (relating to ceilings on deposits of net proceeds from the sale or other disposition of agreement vessels) is not to be taken into account for purposes of the Code if an amount equal to the net proceeds from transactions referred to in such sections is deposited in the fund. Such gain is to be excluded from gross income of the party for the taxable year to which such deposit relates. Thus, the gain will not be taken into account in applying section 1231 of the Code for the year to which the deposit relates.

(*b*) [Reserved]

(ii)(*a*) Section 607(d)(1)(C) of the Act provides that the earnings (including gains and losses) from the investment and reinvestment of amounts held in the fund and referred to in section 607(b)(1)(D) of the Act and §391.2(a)(1)(iv) shall not be taken into account for purposes of the Code if an amount equal to such earnings is deposited into the fund. Such earnings are to be excluded from the gross income of the party for the taxable year to which such deposit relates.

(*b*) However, for purposes of the basis adjustment under section 1232(a)(3)(E) of the Code, the ratable monthly portion of original issue discount included in gross income shall be determined without regard to section 607(d)(1)(C) of the Act.

(iii) In determining the tax liability of a party to whom paragraph (b)(1) of this section applies, taxable income, determined after application of paragraph (b)(1) of this section, is in effect reduced by the portion of deposits which represent gain or earnings respectively referred to in paragraph (b)(2) (i) or (ii) of this section. The excess, if any, of such portion over taxable income determined after application of paragraph (b)(1) of this section is taken into account in computing the net operating loss (under section 172 of the Code) for the taxable year to which such deposits relate.

(3) *Time for making deposits.* (i) This section applies with respect to an amount only if such amount is deposited in the fund pursuant to the agreement and not later than the time provided in paragraph (b)(2) (ii), (iii), or (iv) of this section for the making of such deposit or the date the Secretary of Transportation provides, whichever is earlier.

(ii) Except as provided in paragraph (b)(2) (iii) or (iv) of this section, a deposit may be made not later than the last day prescribed by law (including extensions thereof) for filing the party's Federal income tax return for the taxable year to which such deposit relates.

(iii) If the party is a subsidized operator under an operating-differential

subsidy contract, and does not receive on or before the 59th day preceding such last day, payment of all or part of the accrued operating-differential subsidy payable for the taxable year, the party may deposit an amount equivalent to the unpaid accrued operating-differential subsidy on or before the 60th day after receipt of payment of the accrued operating-differential subsidy.

(iv) A deposit pursuant to § 391.2(a)(3)(i) (relating to underdeposits caused by audit adjustments) must be made on or before the date prescribed for such a deposit in § 391.2(a)(4).

(4) *Date of deposits.* (i) Except as otherwise provided in paragraphs (b)(4) (ii) and (iii) of this section (with respect to taxable years beginning after December 31, 1969, and prior to January 1, 1972), in § 391.2(a)(2)(i), or in § 391.10(b), deposits made in a fund within the time specified in paragraph (b)(3) of this section are deemed to have been made on the date of actual deposit.

(ii)(*a*) For taxable years beginning after December 31, 1969, and prior to January 1, 1971, where an application for a fund is filed by a taxpayer prior to January 1, 1972, and an agreement is executed and entered into by the taxpayer prior to March 1, 1972,

(*b*) For taxable years beginning after December 31, 1970, and prior to January 1, 1972, where an application for a fund is filed by a taxpayer prior to January 1, 1973, and an agreement is executed and entered into by the taxpayer prior to March 1, 1973, and

(*c*) For taxable years beginning after December 31, 1971, and prior to January 1, 1975, where an agreement is executed and entered into by the taxpayer on or prior to the due date, with extensions, for the filing of his Federal income tax return for such taxable year, deposits in a fund which are made within 60 days after the date of execution of the agreement, or on or before the due date, with extensions thereof, for the filing of his Federal income tax return for such taxable year or years, whichever date shall be later, shall be deemed to have been made on the date of the actual deposit or as of the close of business of the last regular business day of each such taxable year or years to which such deposits relate, whichever day is earlier.

(iii) Notwithstanding paragraph (b)(4)(ii) of this section, for taxable years beginning after December 31, 1970, and ending prior to January 1, 1972, deposits made later than the last date permitted under paragraph (b)(4)(ii) but on or before January 9, 1973, in a fund pursuant to an agreement with the Secretary of Transportation acting by and through the Administrator of the National Oceanic and Atmospheric Administration, shall be deemed to have been made on the date of the actual deposit or as of the close of business of the last regular business day of such taxable year, whichever is earlier.

(c) *Determination of earnings and profits.* [Reserved]

(d) *Accumulated earnings tax.* As provided in section 607(d)(1)(E) of the Act amounts, while held in the fund, are not to be taken into account in computing the "accumulated taxable income" of the party within the meaning of section 531 of the Code. Amounts while held in the fund are considered held for the purpose of acquiring, constructing, or reconstructing a qualified vessel or barges and containers which are part of the complement of a qualified vessel or the payment of the principal on indebtedness incurred in connection with any such acquisition, construction, or reconstruction. Thus, for example, if the reasonable needs of the business (within the meaning of section 537 of the Code) justify a greater amount of accumulation for providing replacement vessels than can be satisfied out of the fund, such greater amount accumulated outside of the fund shall be considered to be accumulated for the reasonable needs of the business. For a further example, although amounts in the fund are not taken into account in applying the tax imposed by section 531 of the Code, to the extent there are amounts in a fund to provide for replacing a vessel, amounts accumulated outside of the fund to replace the same vessel are not considered to be accumulated for the reasonable needs of the business.

(e) *Nonapplicability of section 1231.* If an amount equivalent to gain from a transaction referred to in section

607(b)(1)(C) of the Act and §391.2(c) (1) and (5) is deposited into the fund and, therefore, such gain is not taken into account in computing gross income under the provisions of paragraph (b)(2) of this section, then such gain will not be taken into account for purposes of the computations under section 1231 of the Code.

(f) *Deposits of capital gains.* In respect of capital gains which are not included in the gross income of the party by virtue of a deposit to which section 607(d) of the Act and this section apply, the following provisions of the Code do not apply; the minimum tax for tax preferences imposed by section 56 of the Code; the alternative tax imposed by section 1201 of the Code on the excess of the party's net long-term capital gain over his net short-term capital loss; and, in the case of a taxpayer other than a corporation, the deduction provided by section 1202 of the Code of 50 percent of the amount of such excess. However, section 56 may apply upon a nonqualified withdrawal with respect to amounts treated under §391.7(d)(2) as being made out of the capital gain account.

(g) *Deposits of dividends.* The deduction provided by section 243 of the Code (relating to the deductions for dividends from a domestic corporation received by a corporation) shall not apply in respect of dividends (earned on assets held in the fund) which are deposited into a fund, and which, by virtue of such deposits and the provisions of section 607(d) of the Act and this section, are not included in the gross income of the party.

(h) *Presumption of validity of deposit.* All amounts deposited in the fund shall be presumed to have been deposited pursuant to an agreement unless, after an examination of the facts upon the request of the Commissioner of Internal Revenue or his delegate, the Secretary of Transportation determines otherwise. The Commissioner or his delegate will request such a determination where there is a substantial question as to whether a deposit is made in accordance with an agreement.

(i) *Special rules for application of the foreign tax credit*—(1) *In general.* For purposes of computing the limitation under section 904 of the Code on the amount of the credit provided by section 901 of the Code (relating to the foreign tax credit), the party's taxable income from any source without the United States and the party's entire taxable income are to be determined after application of section 607(d) of the Act. Thus, amounts deposited for the taxable year with respect to amounts referred to in section 607(b)(1)(A) of the Act and §391.2(a)(1)(i) (relating to taxable income attributable to the operation of agreement vessels) shall be treated as a deduction in arriving at the party's taxable income from sources without the United States (subject to the apportionment rules and paragraph (i)(2) of this section) and the party's entire taxable income for the taxable year. Amounts deposited with respect to gain described in section 607(d)(1)(B) of the Act and §391.2(c) (relating to net proceeds from the sale or other disposition of an agreement vessel and net proceeds from insurance or indemnity) and amounts deposited with respect to earnings described in section 607(d)(1)(C) of the Act and paragraph (b)(2)(ii) (relating to earnings from the investment and reinvestment of amounts held in a fund) of this section are not taken into account for purposes of the Code and hence are not included in the party's taxable income from sources without the United States or in the party's entire taxable income for purposes of this paragraph.

(2) *Apportionment of taxable income attributable to agreement vessels.* For purposes of computing the overall limitation under section 904(a)(2) of the Code the amount of the deposit made with respect to taxable income attributable to agreement vessels pursuant to §391.2(a)(1)(i) which is allocable to sources without the United States is the total amount of such deposit multiplied by a fraction the numerator of which is the gross income from sources without the United States from the operation of agreement vessels and the denominator of which is the total gross income from the operation of agreement vessels computed as provided in §391.2(b)(2). For purposes of this paragraph, gross income from sources without the United States attributable to the operation of agreement vessels is

to be determined under sections 61 through 863 of the Code and under the taxpayer's usual method of accounting provided such method is reasonable and in keeping with sound accounting practice. Any computation under the per-country limitation of section 904(a)(1) shall be made in the manner consistent with the provisions of the preceding sentences of this paragraph.

**§ 391.4 Establishment of accounts.**

(a) *In general.* Section 607(e)(1) of the Act requires that three bookkeeping or memorandum accounts are to be established and maintained within the fund: The capital account, the capital gain account, and the ordinary income account. Deposits of the amounts under the subceilings in section 607(b) of the Act and § 391.2 are allocated among the accounts under section 607(e) of the Act and this section.

(b) *Capital account.* The capital account shall consist of:

(1) Amounts referred to in section 607(b)(1)(B) of the Act and § 391.2 (a)(1)(ii) (relating to deposits for depreciation),

(2) Amounts referred to in section 607(b)(1)(C) of the Act and § 391.2(a)(1)(iii) (relating to deposits of net proceeds from the sale or other disposition of agreement vessels) other than that portion thereof which represents gain not taken into account for purposes of computing gross income by reason of section 607(d)(1)(B) of the Act and § 391.3(b)(2) (relating to nontaxability of gain from the sale or other disposition of an agreement vessel),

(3) Amounts representing 85 percent of any dividend received by the fund with respect to which the party would, but for section 607(d)(1)(C) of the Act and § 391.3(b)(2)(ii) (relating to nontaxability of deposits of earnings from investment and reinvestment of amounts held in a fund), be allowed a deduction under section 243 of the Code, and

(4) Amounts received by the fund representing interest income which is exempt from taxation under section 103 of the Code.

(c) *Capital gain account.* The capital gain account shall consist of amounts which represent the excess of (1) deposits of long-term capital gains on property referred to in section 607(b)(1) (C) and (D) of the Act and § 391.2(a)(1) (iii) and (iv) (relating respectively to certain agreement vessels and fund assets), over (2) amounts representing losses from the sale or exchange of assets held in the fund for more than 6 months (for purposes of this section referred to as "long-term capital losses"). For purposes of this paragraph and paragraph (d)(2) of this section, an agreement vessel disposed of at a gain shall be treated as a capital asset to the extent that gain thereon is not treated as ordinary income, including gain which is ordinary income under section 607(g)(5) of the Act (relating to treatment of gain on disposition of a vessel with a reduced basis) and § 391.6(e) or under section 1245 of the Code (relating to gain from disposition of certain depreciable property). For provisions relating to the treatment of short-term capital gains on certain transactions involving agreement vessels or realized by the fund, see paragraph (d) of this section. For rules relating to the treatment of capital losses on assets held in the fund, see paragraph (e) of this section.

(d) *Ordinary income account.* The ordinary income account shall consist of:

(1) Amounts referred to in section 607(b)(1)(A) of the Act and § 391.2(a)(1)(i) (relating to taxable income attributable to the operation of an agreement vessel),

(2) Amounts representing (i) deposits of gains from the sale or exchange of capital assets held for 6 months or less (for purposes of this section referred to as "short-term capital gains") referred to in section 607(b)(1) (C) or (D) of the Act and § 391.2(a)(1) (iii) and (iv) (relating respectively to certain agreement vessels and fund assets), reduced by (ii) amounts representing losses from the sale or exchange of capital assets held in the fund for 6 months or less (for purposes of this section referred to as "short-term capital losses"). For rules relating to the treatment of certain agreement vessels as capital assets, see paragraph (c) of this section,

(3) Amounts representing interest (not including any tax-exempt interest referred to in section 607(e)(2)(D) of the Act and paragraph (b)(4) of this section) and other ordinary income received on assets held in the fund (not

including any dividend referred to in section 607(e)(2)(C) of the Act and paragraph (d)(5) of this section),

(4) Amounts representing ordinary income from a transaction (involving certain net proceeds with respect to an agreement vessel) described in section 607(b)(1)(C) of the Act and §391.2(a)(1)(iii), including gain which is ordinary income under section 607(g)(5) of the Act and §391.6(e) (relating to treatment of gain on the disposition of a vessel with a reduced basis) or under section 1245 of the Code (relating to gain from disposition of certain depreciable property), and

(5) Fifteen percent of any dividend referred to in section 607(e)(2)(C) of the Act and paragraph (b)(3) of this section received on any assets held in the fund.

(e) *Limitation on deduction for capital losses on assets held in a fund.* Except on termination of a fund, long-term (and short-term) capital losses on assets held in a fund shall be allowed only as an offset to long-term (and short-term) capital gains on assets held in the fund, but only if such gains are deposited into the fund, and shall not be allowed as an offset to any capital gains on assets not held in the fund. The net long-term capital loss of the fund for the taxable year shall reduce the earliest long-term capital gains in the capital gain account at the beginning of the taxable year and the next short-term capital loss for the taxable year shall reduce the earliest short-term capital gains remaining in the ordinary income account at the beginning of the taxable year. Any such losses that are in excess of the capital gains in the respective accounts shall reduce capital gains deposited into the respective accounts in subsequent years (without regard to section 1212, relating to capital loss carrybacks and carryovers). On termination of a fund, any net long-term capital loss in the capital gain account and any net short-term capital loss remaining in the ordinary income accounts is to be taken into account for purposes of computing the party's taxable income for the year of termination as a long-term or short-term (as the case may be) capital loss recognized in the year the fund is terminated. With respect to the determination of the basis to a fund of assets held in such fund, see §391.2(g).

### §391.5 Qualified withdrawals.

(a) *In general.* (1) A qualified withdrawal is one made from the fund during the taxable year which is in accordance with section 670(f)(1) of the Act, the agreement, and with regulations prescribed by the Secretary of Transportation and which is for the acquisition, construction, or reconstruction of a qualified vessel (as defined in §391.11(a)(2)) or barges and containers which are part of the complement of a qualified vessel (or shares in such vessels, barges, and containers), or for the payment of the principal of indebtedness incurred in connection with the acquisition construction, or reconstruction of such qualified vessel (or a barge or container which is part of the complement of a qualified vessel).

(2) For purposes of this section the term *share* is used to reflect an interest in a vessel and means a proprietary interest in a vessel such as, for example, that which results from joint ownership. Accordingly, a share within the meaning of §391.2(f) (relating to the definition of "agreement vessel" for the purpose of making deposits) will not necessarily be sufficient to be treated as a share within the meaning of this section.

(3) For purposes of this section, the term *acquisition* means any of the following:

(i) Any acquisition, but only to the extent the basis of the property acquired in the hands of the transferee is its cost. Thus, for example, if a party transfers a vessel and $1 million in an exchange for another vessel which qualifies for nonrecognition of gain or loss under section 1031(a) of the Code (relating to like-kind exchange), there is an acquisition to the extent of $1 million.

(ii) With respect to a lessee's interest in a vessel, expenditures which result in increasing the amounts with respect to which a deduction for depreciation (or amortization in lieu thereof) is allowable.

(b) *Payments on indebtedness.* Payments on indebtedness may constitute qualified withdrawals only if the party

shows to the satisfaction of the Secretary of Transportation a direct connection between incurring the indebtedness and the acquisition, construction, or reconstruction of a qualified vessel or its complement of barges and containers whether or not the indebtedness is secured by the vessel or its complement of barges and containers. The fact that an indebtedness is secured by an interest in a qualified vessel, barge, or container is insufficient by itself to demonstrate the necessary connection.

(c) *Payments to related persons.* Notwithstanding paragraph (a) of this section, payments from a fund to a person owned or controlled directly or indirectly by the same interests as the party within the meaning of section 482 of the Code and the regulations thereunder are not to be treated as qualified withdrawals unless the party demonstrates to the satisfaction of the Secretary of Transportation that no part of such payment constitutes a dividend, a return of capital, or a contribution to capital under the Code.

(d) *Treatment of fund upon failure to fulfill obligations.* Section 607(f)(2) of the Act provides that if the Secretary of Transportation determines that any substantial obligation under the agreement is not being fulfilled, he may, after notice and opportunity for hearing to the party, treat the entire fund, or any portion thereof, as having been withdrawn as a nonqualified withdrawal. In determining whether a party has breached a substantial obligation under the agreement, the Secretary will consider among other things, (1) the effect of the party's action or omission upon his ability to carry out the purposes of the fund and for which qualified withdrawals are permitted under section 607(f)(1) of the Act, and (2) whether the party has made material misrepresentations in connection with the agreement or has failed to disclose material information. For the income tax treatment of nonqualified withdrawals, see § 391.7.

### § 391.6 Tax treatment of qualified withdrawals.

(a) *In general.* Section 607(g) of the Act and this section provide rules for the income tax treatment of qualified withdrawals including the income tax treatment on the disposition of assets acquired with fund amounts.

(b) *Order of application of qualified withdrawals against accounts.* A qualified withdrawal from a fund shall be treated as being made: First, out of the capital account; second, out of the capital gain account; and third, out of the ordinary income account. Such withdrawals will reduce the balance within a particular account on a first-in-first-out basis, the earliest qualified withdrawals reducing the items within an account in the order in which they were actually deposited or deemed deposited in accordance with this part. The date funds are actually withdrawn from the fund determines the time at which withdrawals are considered to be made.

(c) *Reduction of basis.* (1) If any portion of a qualified withdrawal for the acquisition, construction, or reconstruction of a vessel, barge, or container (or share therein) is made out of the ordinary income account, the basis of such vessel, barge, or container (or share therein) shall be reduced by an amount equal to such portion.

(2) If any portion of a qualified withdrawal for the acquisition, construction or reconstruction of a vessel, barge, or container (or share therein) is made out of the capital gain account, the basis of such vessel, barge, or container (or share therein) shall be reduced by an amount equal to—

(i) Five-eights of such portion, in the case of a corporation (other than an electing small business corporation, as defined in section 1371 of the Code), or

(ii) One-half of such portion, in the case of any other person.

(3) If any portion of a qualified withdrawal to pay the principal of an indebtedness is made out of the ordinary income account or the capital gain account, then the basis of the vessel, barge, or container (or share therein) with respect to which such indebtedness was incurred is reduced in the manner provided by paragraphs (c) (1) and (2) of this section. If the aggregate amount of such withdrawal from the ordinary income account and capital gain account would cause a basis reduction in excess of the party's basis in such vessel, barge, or container (or

share therein), the excess is applied against the basis of other vessels, barges, or containers (or shares therein) owned by the party at the time of withdrawal in the following order: (i) Vessels, barges, or containers (or shares therein) which were the subject of qualified withdrawals in the order in which they were acquired, constructed, or reconstructed; (ii) agreement vessels (as defined in section 607(k)(3) of the Act and §391.11(a)(3)) and barges and containers which are part of the complement of an agreement vessel (or shares therein) which were not the subject of qualified withdrawals, in the order in which such vessels, barges, or containers (or shares therein) were acquired by the party; and (iii) other vessels, barges, and containers (or shares therein), in the order in which they were acquired by the party. Any amount of a withdrawal remaining after the application of this paragraph is to be treated as a nonqualified withdrawal. If the indebtedness was incurred to acquire two or more vessels, barges, or containers (or shares therein), then the basis reduction in such vessels, barges, or containers (or shares therein) is to be made pro rata in proportion to the adjusted basis of such vessels, barges, or containers (or shares therein) computed, however, without regard to this section and adjustments under section 1016(a) (2) and (3) of the Code for depreciation or amortization.

(d) *Basis for depreciation.* For purposes of determining the allowance for depreciation under section 167 of the Code in respect of any property which has been acquired, constructed, or reconstructed from qualified withdrawals, the adjusted basis for determining gain on such property is determined after applying paragraph (c) of this section. In the case of reductions in the basis of any property resulting from the application of paragraph (c)(3) of this section, the party may adopt a method of accounting whereby (1) payments shall reduce the basis of the property on the day such payments are actually made, or (2) payments made at any time during the first half of the party's taxable year shall reduce the basis of the property on the first day of the taxable year, and payments made at any time during the second half of the party's taxable year shall reduce the basis of the property on the first day of the succeeding taxable year. For requirements respecting the change of methods of accounting, see §1.446–1(e)(3) of the Income Tax Regulations of this chapter.

(e) *Ordinary income treatment of gain from disposition of property acquired with qualified withdrawals.* [Reserved]

### §391.7 Tax treatment of nonqualified withdrawals.

(a) *In general.* Section 607(h) of the Act provides rules for the tax treatment of nonqualified withdrawals, including rules for adjustments to the various accounts of the fund, the inclusion of amounts in income, and the payment of interest with respect to such amounts.

(b) *Nonqualified withdrawals defined.* Except as provided in section 607 of the Act and §391.8 (relating to certain corporate reorganizations, changes in partnerships, and transfers by reason of death), any withdrawal from a fund which is not a qualified withdrawal shall be treated as a nonqualified withdrawal which is subject to tax in accordance with section 607(h) of the Act and the provisions of this section. Examples of nonqualified withdrawals are amounts remaining in a fund upon termination of the fund, and withdrawals which are treated as nonqualified withdrawals under section 607(f)(2) of the Act and §391.5(d) (relating to failure by a party to fulfill substantial obligation under agreement) or under the second sentence of section 607(g)(4) of the Act and §391.6(c)(3) (relating to payments against indebtedness in excess of basis).

(c) *Order of application of nonqualified withdrawals against deposits.* A nonqualified withdrawal from a fund shall be treated as being made: First, out of the ordinary income account; second, out of the capital gain account; and third, out of the capital account. Such withdrawals will reduce the balance within a particular account on a first-in-first-out basis, the earliest nonqualified withdrawals reducing the items within an account in the order in which they were actually deposited or deemed deposited in accordance with this part. Nonqualified withdrawals for

research, development, and design expenses incident to new and advanced ship design, machinery, and equipment, and any amount treated as a nonqualified withdrawal under the second sentence of section 607(g)(4) of the Act and § 391.6(c)(3), shall be applied against the deposits within a particular account on a last-in-first-out basis. The date funds are actually withdrawn from the fund determines the time at which withdrawals are considered to be made. For special rules concerning the withdrawal of contingent deposits of net proceeds from the installment sale of an agreement vessel, see § 391.2(c)(6).

(d) *Inclusion in income.* (1) Any portion of a nonqualified withdrawal which, under paragraph (c) of this section, is treated as being made out of the ordinary income account is to be included in gross income as an item of ordinary income for the taxable year in which the withdrawal is made.

(2) Any portion of a nonqualified withdrawal which, under paragraph (c) of this section, is treated as being made out of the capital gain account is to be included in income as an item of long-term capital gain recognized during the taxable year in which the withdrawal is made.

(3) For effect upon a party's taxable income of capital losses remaining in a fund upon the termination of a fund (which, under paragraph (b) of this section, is treated as a nonqualified withdrawal of amounts remaining in the fund), see § 391.4(e).

(e) *Interest.* (1) For the period on or before the last date prescribed by law, including extensions thereof, for filing the party's Federal income tax return for the taxable year during which a nonqualified withdrawal is made, no interest shall be payable under section 6601 of the Code in respect of the tax on any item which is included in gross income under paragraph (d) of this section, and no addition to such tax for such period shall be payable under section 6651 of the Code. In lieu of the interest and additions to tax under such sections, simple interest on the amount of the tax attributable to any item included in gross income under paragraph (d) of this section is to be paid at the rate of interest determined for the year of withdrawal under paragraph (e)(2) of this section. Such interest is to be charged for the period from the last date prescribed for payment of tax for the taxable year for which such item was deposited in the fund to the last date for payment of tax for the taxable year in which the withdrawal is made. Both dates are to be determined without regard to any extensions of time for payment. Interest determined under this paragraph which is paid within the taxable year shall be allowed as a deduction for such year under section 163 of the Code. However, such interest is to be treated as part of the party's tax for the year of withdrawal for purposes of collection and in determining any interest or additions to tax for the year of withdrawal under section 6601 or 6651, respectively, of the Code.

(2) For purposes of section 607(h)(3)(C)(ii) of the Act, and for purposes of certain dispositions of vessels constructed, reconstructed, or acquired with qualified withdrawals described in § 391.6(e), the applicable rate of interest for any nonqualified withdrawal—

(i) Made in a taxable year beginning in 1970 and 1971 is 8 percent.

(ii) Made in a taxable year beginning after 1971, the rate for such year as determined and published jointly by the Secretary of the Treasury or his delegate and the Secretary of Transportation. Such rate shall bear a relationship to 8 percent which the Secretaries determine to be comparable to the relationship which the money rates and investment yields for the calendar year immediately preceding the beginning of the taxable year bear to the money rates and investment yields for the calendar year 1970. The determination of the applicable rate for any such taxable year will be computed by multiplying 8 percent by the ratio which (*a*) the average yield on 5-year Treasury securities for the calendar year immediately preceding the beginning of such taxable year, bears to (*b*) the average yield on 5-year Treasury securities for the calendar year 1970. The applicable rate so determined shall be computed to the nearest one-hundredth of 1 percent. If such a determination and publication is made, the latest published percentage shall apply for any taxable year beginning in the calendar year

with respect to which publication is made.

(3) No interest shall be payable in respect of taxes on amounts referred to in section 607(h)(2) (i) and (ii) of the Act (relating to withdrawals for research and development and payments against indebtedness in excess of basis) or in the case of any nonqualified withdrawal arising from the application of the recapture provision of section 606(5) of the Merchant Marine Act, 1936, as in effect on December 31, 1969.

(f) *Basis and holding period in the case of property purchased by the fund or considered purchased by the fund.* In the case of a nonqualified withdrawal of property other than money which was purchased by the fund (including deposited property considered under § 391.2 (g)(1)(ii) as purchased by the fund), the adjusted basis of the property in the hands of the party is its adjusted basis to the fund on the day of the withdrawal. In determining the period for which the taxpayer has held the property withdrawn in a nonqualified withdrawal, there shall be included only the period beginning with the date on which the withdrawal occurred. For basis and holding period in the case of nonqualified withdrawals of property other than money deposited into the fund, see § 391.2(g)(4).

### § 391.8 Certain corporate reorganizations and changes in partnerships, and certain transfers on death. [Reserved]

### § 391.9 Consolidated returns. [Reserved]

### § 391.10 Transitional rules for existing funds.

(a) *In general.* Section 607(j) of the Act provides that any person who was maintaining a fund or funds under section 607 of the Merchant Marine Act, 1936, prior to its amendment by the Merchant Marine Act of 1970 (for purposes of this part referred to as "old fund") may continue to maintain such old fund in the same manner as under prior law subject to the limitations contained in section 607(j) of the Act. Thus, a party may not simultaneously maintain such old fund and a new fund established under the Act.

(b) *Extension of agreement to new fund.* If a person enters into an agreement under the Act to establish a new fund, he may agree to the extension of such agreement to some or all of the amounts in the old fund and transfer the amounts in the old fund to which the agreement is to apply from the old fund to the new fund. If an agreement to establish a new fund is extended to amounts from an old fund, each item in the old fund to which such agreement applies shall be considered to be transferred to the appropriate account in the manner provided for in § 391.8(d) in the new fund in a nontaxable transaction which is in accordance with the provisions of the agreement under which such old fund was maintained. For purposes of determining the amount of interest under section 607(h)(3)(C) of the Act and § 391.7(e), the date of deposit of any item so transferred shall be deemed to be July 1, 1971, or the date of the deposit in the old fund, whichever is the later.

### § 391.11 Definitions.

(a) As used in the regulations in this part and as defined in section 607(k) of the Act—

(1) The term *eligible vessel* means any vessel—

(i) Constructed in the United States, and if reconstructed, reconstructed in the United States,

(ii) Documented under the laws of the United States, and

(iii) Operated in the foreign or domestic commerce of the United States or in the fisheries of the United States. Any vessel which was constructed outside of the United States but documented under the laws of the United States on April 15, 1970, or constructed outside the United States for use in the U.S. foreign trade pursuant to a contract entered into before April 15, 1970, shall be treated as satisfying the requirements of paragraph (a)(1) of this section and the requirements of paragraph (a)(2)(i) of this section.

(2) The term *qualified vessel* means any vessel—

(i) Constructed in the United States and, if reconstructed, reconstructed in the United States,

(ii) Documented under the laws of the United States, and

(iii) Which the person maintaining the fund agrees with the Secretary of Transportation will be operated in the U.S. foreign, Great Lakes, or noncontiguous domestic trade or in the fisheries of the United States.

(3) The term *agreement vessel* means any eligible vessel or qualified vessel which is subject to an agreement entered into under section 607 of the Act.

(4) The term *vessel* includes cargo handling equipment which the Secretary of Transportation determines is intended for use primarily on the vessel. The term *vessel* also includes an ocean-going towing vessel or an ocean-going barge or comparable towing vessel or barge operated in the Great Lakes.

(b) Insofar as the computation and collection of taxes are concerned, other terms used in the regulation in this part, except as otherwise provided in the Act or this part, have the same meaning as in the Code and the regulations thereunder.

[29 FR 10464, July 28, 1964]

## PART 392 [RESERVED]

## PART 393—AMERICA'S MARINE HIGHWAY PROGRAM

Sec.
393.1 Purpose.
393.2 Definitions.
393.3 Marine Highway Corridors.
393.4 Marine Highway Projects.
393.5 Incentives, Impediments and Solutions.
393.6 Research on Marine Highway Transportation.

AUTHORITY: Energy Independence and Security Act of 2007, Sections 1121, 1122, and 1123 of Public Law 110–140, enacted into law on December 19, 2007 (121 Stat. 1492).

SOURCE: 75 FR 18101, Apr. 9, 2010, unless otherwise noted.

### § 393.1 Purpose.

(a) This part prescribes final regulations establishing a short sea transportation program as set forth in Sections 1121, 1122, and 1123 of the Energy Independence and Security Act of 2007, enacted into law on December 19, 2007.

(b) The purpose of America's Marine Highway Program is described in Section 1121. Section 1121 states that "[t]he Secretary shall designate short sea transportation routes as extensions of the surface transportation system to focus public and private efforts to use the waterways to relieve landside congestion along coastal corridors." America's Marine Highway Program consists of four primary components:

*(1) Marine Highway Corridor Designations.* This regulation establishes the goals and methods by which specific Marine Highway Corridors (including Connectors and Crossings) will be identified and designated by the Secretary of Transportation. The purpose of designating Marine Highway Corridors is to integrate America's Marine Highway into the surface transportation system. The Marine Highway Corridors will serve as extensions of the surface transportation system. They are commercial coastal, inland, and intracoastal waters of the United States, described in terms of the specific landside transportation routes (road or rail line) that they supplement. They support the movement of passengers and cargo along these specified routes and mitigate the effects of landside congestion, such as increased emissions and energy inefficiencies. In addition to corridors, the Secretary may designate Marine Highway "Connectors" and "Crossings" as described in paragraphs (h)(1) and (h)(2) of § 393.2. Through America's Marine Highway Program, the Department will encourage the development of multi-jurisdictional coalitions and focus public and private efforts and investment on shifting freight and passengers from at- or near capacity landside routes to more effectively utilize Marine Highway Corridors.

*(2) Marine Highway Project Designations.* This regulation establishes the goals and methods by which specific Marine Highway Projects will be identified and designated by the Secretary of Transportation. The purpose is to designate projects that, if successfully implemented, expanded, or otherwise enhanced, would reduce external costs and provide the greatest benefit to the public. Closely linked to congestion relief, public benefits can include, but are not limited to, reduced emissions, including greenhouse gases, reduced energy consumption, reduced costs associated with landside transportation

infrastructure maintenance savings, improved safety and transportation system resiliency and redundancy. Additional consideration will be given to Marine Highway Projects that represent the most cost-effective option among other modal improvements. Designated Marine Highway Projects may receive direct support from the Department as described in this section.

*(3) Incentives, Impediments and Solutions.* This section outlines how the Department, in partnership with public and private entities, will identify potential incentives, seek solutions to impediments to encourage utilization of America's Marine Highway and incorporate it, including ferries, in State, regional, local, and Tribal government transportation planning.

*(4) Research.* This section describes the research that the Department, working with the Environmental Protection Agency, will conduct to support America's Marine Highway, within the limitations of available resources, and to encourage multi-State planning. Research would include environmental and transportation impacts (benefits and costs), technology, vessel design, and solutions to impediments to the Marine Highway.

(c) In addition, vessels engaged in Marine Highway operations may apply for Capital Construction Fund (CCF) benefits. This program was created to assist owners and operators of U.S.-flag vessels in accumulating the capital necessary for the modernization and expansion of the U.S. merchant marine by encouraging construction, reconstruction, or acquisition of vessels through the deferment of Federal income taxes on certain deposits of money placed into a CCF.

## § 393.2 Definitions.

For the purposes of this part:

(a) *Administrator.* The Maritime Administrator, Maritime Administration, U.S. DOT, who has been authorized by the Secretary of Transportation to administer America's Marine Highway Program.

(b) *Applicant.* An entity that applies for designation of a Marine Highway Corridor or Project under this regulation.

(c) *Coastwise Shipping Laws.* Laws, including the Jones Act, as set forth in Chapter 551 of Title 46, United States Code.

(d) *Corridor Sponsor.* An entity that recommends a Corridor (including a Connector or Crossing, as described below) for designation as a Marine Highway Corridor. Corridor sponsors must be public entities, including but not limited to, Metropolitan Planning Organizations, State governments (including Departments of Transportation), port authorities and Tribal governments, who may submit recommendations for designation as a Marine Highway Corridor.

(e) *Department.* The U.S. Department of Transportation (DOT).

(f) *Domestic Trade.* Trade between points in the United States.

(g) *Lift-on/Lift-off (LO/LO) Vessel.* A vessel of which the loading and discharging operations are carried out by cranes and derricks.

(h) *Marine Highway Corridor.* A water transportation route that serves as an extension of the surface transportation system that can help mitigate congestion-related impacts along a specified land transportation route. It is identified and described in terms of the land transportation route that it supplements, and must, by transporting freight or passengers, provide measurable benefits to the surface transportation route in the form of traffic reductions, reduced emissions, energy savings, improved safety, system resiliency, and/or reduced infrastructure costs. Routes that cannot relieve landside congestion (*i.e.*; those to/from islands) are not eligible for designation under this program. In addition to "Corridors," prospective sponsors can recommend Marine Highway "Connectors" and "Crossings" for designation as described in paragraphs (h)(1) and (h)(2) of this section:

*(1) Marine Highway Connectors* are routes that will provide substantial linkages to or between the larger corridors, and serve, in conjunction with a corridor, to move freight and/or passengers into, out of or within a region.

*(2) Marine Highway Crossings* are routes that provide relief to congested border crossings, bridges, and tunnels or offer a shorter route than the

landside alternative. Although they may not parallel a corridor or connector, crossings may provide relief to a corridor or connector, or to local or regional passenger and freight transportation systems. Crossings may include cross-harbor and inter-terminal passenger and/or freight services.

(i) *Marine Highway Project.* A new Marine Highway service, or expansion of an existing service, that receives support from the Department and provides public benefit by transporting passengers and/or freight (container or wheeled) in support of all or a portion of a Marine Highway Corridor, Connector or Crossing. Projects are proposed by a project sponsor and designated by the Secretary under this program.

(j) *Marine Highway (or Short Sea Transportation):* The carriage by vessel of passengers and/or cargo (intermodal containers, trailers, car floats, rail ferries and other cargoes loaded by wheeled technology) that is loaded at a port in the United States and unloaded either at another port in the United States, or that is loaded at a port in the United States and unloaded at a port in Canada located in the Great Lakes-Saint Lawrence Seaway System, or loaded at a port in Canada located in the Great Lakes-Saint Lawrence Seaway System and unloaded at a port in the United States. For the purposes of this specific program, routes and services that do not offer potential relief to a landside transportation route (*i.e.*; to/from islands) do not fall within this definition.

(k) *Project sponsor.* Project sponsors must be public entities, including but not limited to, Metropolitan Planning Organizations, State governments (including State Departments of Transportation), port authorities and Tribal governments, who may submit applications for designation as a Marine Highway Project.

(l) *Roll-on/Roll-off (RO/RO) Vessel.* Any vessel that has ramps allowing cargo to be loaded and discharged by means of wheeled vehicles so that cranes are not required. This includes, but is not limited to trailers, car floats and ferries, including rail ferries.

(m) *Secretary.* The Secretary of Transportation.

(n) *United States Documented Vessel.* A vessel documented under 46 U.S.C. Chapter 121.

### § 393.3 Marine Highway Corridors.

(a) *Summary.* The purpose of this section is to designate specific routes as Marine Highway Corridors (including Connectors and Crossings). Corridors will be designated by the Secretary. The goal of this designation process is to accelerate the development of multi-State and multi-jurisdictional Marine Highway Corridors to relieve landside congestion. Designation will encourage public/private partnerships, and help focus investment on those Marine Highway Corridors that offer the maximum potential public benefit in congestion-related emissions reduction, energy efficiency, safety and other areas. Corridors already designated as "Corridors of the Future" under DOT's National Strategy to Reduce Congestion that have commercial waterways that parallel or can otherwise benefit them will be fast-tracked for designation as Marine Highway Corridors.

(b) *Objectives.* The primary objectives of the designation of Marine Highway Corridors are to:

(1) Establish Marine Highway Corridors as "extensions of the surface transportation system" as provided by Section 1121 of the Energy Independence and Security Act of 2007.

(2) Develop multi-jurisdictional coalitions that focus public and private efforts to use the waterways to relieve congestion-related impacts along land transportation routes for freight and passengers.

(3) Obtain public benefit by shifting freight and passengers in measurable terms from land transportation routes to Marine Highway Corridors. In addition, public benefits can include, but are not limited to, reduced emissions, including greenhouse gases, reduced energy consumption, landside infrastructure maintenance savings, improved safety, and added system resiliency. Additional consideration will be given to Marine Highway Projects that represent the most cost-effective option among other modal improvements and projects that reduce border delays.

(4) Identify potential savings that could be realized by providing an alternative to land transportation infrastructure construction and maintenance.

(c) *Designation of Marine Highway Corridors.* The Department will continue to accept Marine Highway Corridor recommendations from prospective Corridor sponsors. Corridor sponsors must be public entities, including but not limited to, Metropolitan Planning Organizations, State governments (including State Departments of Transportation), port authorities and Tribal governments. In addition to "Corridors," prospective sponsors may recommend Marine Highway "Connectors" and "Crossings" for designation by the Secretary (*see* definitions). The Secretary will make Marine Highway Corridor designations. In certain cases the Secretary of Transportation may designate a Marine Highway Corridor, Connector or Crossing without receipt of a recommendation. The Department will publish all Marine Highway Corridors that receive designation by the Secretary on the Maritime Administration's Web site. Interested parties are encouraged to visit *http://www.marad.dot.gov/ships_shipping_landing_page/mhi_home/mhi_home.htm* for the current list of Designated Corridors. When responding to specific solicitations for Marine Highway Corridors, Connectors and Crossings by the Secretary of Transportation, the sponsors should provide the following information in the recommendation:

(1) *Physical Description of Proposed Marine Highway Corridor.* Describe the proposed Marine Highway Corridor (including Connector or Crossing), and its connection to existing or planned transportation infrastructure and intermodal facilities. Include key navigational factors such as available draft, channel width, bridge or lock clearance and identify if they could limit service.

(2) *Surface Transportation Corridor Served.* Provide a summary of the land transportation route that the Marine Highway would benefit. Include a description of the route, its primary users, the nature, locations and occurrence of travel delays, urban areas affected, and other geographic or jurisdictional issues that impact its overall operation and performance.

(3) *Involved Parties.* Provide the organizational structure of the parties recommending the Corridor designation including business affiliations, and private sector stakeholders. Multi-jurisdictional coalitions may include State Departments of Transportation, Metropolitan Planning Organizations, municipalities and other governmental entities (including Tribal) that have been engaged. Include the extent to which they support the corridor designation. Provide any affiliations with environmental groups or civic associations.

(4) *Passengers and Freight.* Identify the number of likely passengers and/or quantity of freight that are candidates for shifting to water transportation on the proposed Marine Highway Corridor. If known, include specific shippers, manufacturers, distributors or other entities that could benefit from a Marine Highway alternative, and the extent to which these entities have been engaged.

(5) *Congestion Reduction.* Describe the extent to which the proposed Corridor could relieve landside congestion in measurable terms. Include any known offsetting land transportation infrastructure savings (either construction or maintenance) that would result from the project.

(6) *Public benefits.* Provide, if known, the savings over status quo in emissions, including greenhouse gases, energy consumption, landside infrastructure maintenance costs, safety and system resiliency. Specify if the Marine Highway Corridor represents the most cost-effective option among other modal improvements. Include consideration of the implications future growth may have on the proposal.

(7) *Impediments.* Describe known or anticipated obstacles to shifting capacity to the proposed Marine Highway Corridor. Include any strategies, either in place or proposed, to deal with the impediments.

(d) *Scope of Department Support.* Marine Highway Corridors, Connectors and Crossings that receive designation will be posted on a Web site maintained by the Maritime Administration. The

Department of Transportation will coordinate with Corridor sponsors to identify the most appropriate actions to support the Corridors. Support could include any of the following, as appropriate and within agency resources:

(1) Promote the Corridor with appropriate governmental, State, local and Tribal government transportation planners, private sector entities or other decision-makers.

(2) Coordinate with ports, State Departments of Transportation, Metropolitan Planning Organizations, localities, other public agencies (including Tribal governments) and the private sector to support the designated corridor. Efforts can be aimed at obtaining access to land or terminals, developing landside facilities and infrastructure, and working with Federal, regional, State, local, and Tribal governmental entities to remove barriers to self-supporting operations.

(3) Pursue memorandums of agreement with other Federal entities to transport Federally owned or generated cargo using waterborne transportation along the Marine Highway Corridor, when practical or available.

(4) Assist with collection and dissemination of data for the designation and delineation of Marine Highway Corridors as available resources permit.

(5) Work with Federal entities and regional, State, local and Tribal governments to include designated Corridors in transportation planning.

(6) Bring specific impediments to the attention of the advisory board chartered to address such barriers.

(7) Conduct research on issues specific to designated Corridors as available resources permit.

(8) Utilize current or future Federal funding mechanisms, as appropriate, to support the Corridor.

(9) Communicate with designated Corridor coalitions to provide ongoing support and identify lessons learned and best practices for the overall Marine Highway program.

### § 393.4 Marine Highway Projects.

(a) *Summary*. The purpose of this section is to designate projects that, if successfully implemented, expanded, or otherwise enhanced, would reduce external costs and provide the greatest benefit to the public. In addition to congestion relief, public benefits can include, but are not limited to, reduced emissions, including greenhouse gases, reduced energy consumption, landside infrastructure maintenance savings, and improved safety. The Department will give additional consideration to Marine Highway Projects that represent the most cost-effective option among other modal improvements or reduce border crossing delays. Some Marine Highway Projects can also provide public benefit by offering routes that are more resilient to natural or human incidents that interrupt surface transportation, or provide additional, redundant surface transportation options. Designation can help focus public and private investment on pre-identified projects that offer the maximum potential public benefit. Designated Marine Highway Projects may receive support from the Department as described in this section.

(b) *Objectives*. The primary objectives of the designation of Marine Highway Projects are to:

(1) Reduce landside congestion-related impacts.

(2) Identify proposed water transportation services that represent the greatest public benefit as measured in reduced emissions, including greenhouse gases, reduced energy consumption, landside infrastructure maintenance savings and improved safety.

(3) Identify potential savings with water transportation projects that represent the most cost-effective option among other modal improvements or reduce border crossing delays.

(4) Improve surface transportation system resiliency and provide additional options.

(5) Focus resources on those projects that offer the greatest likelihood of successful operation.

(6) Develop best practices for the Marine Highway Program.

(7) Provide specific examples, with performance measures and quantifiable outcomes, of successful Marine Highway Projects for demonstration of the benefits of water transportation.

(c) *Designation of Marine Highway Projects*. The Department will solicit applications for designation as specific

Marine Highway Projects. Applications will be accepted from a Project sponsor. Project sponsors must be public entities, including but not limited to, Metropolitan Planning Organizations, State governments (including State Departments of Transportation), port authorities and Tribal governments. Project sponsors are encouraged to develop coalitions and public/private partnerships with the common objective of developing the specific Marine Highway Project. Potential partners can include vessel owners and operators, third party logistics providers, trucking companies, shippers, railroads, port authorities, State, regional, local and Tribal government transportation planners, environmental interests or any combination of entities working in collaboration under a single application. Candidate Projects can start a new operation or be an existing Marine Highway operation where expansion or improvements present maximum public benefit. Applications must meet the requirements of coastwise shipping laws and all applicable Federal, State and local laws.

(d) *Action by the Department of Transportation.* The Department will evaluate and select Projects based on an analysis and technical review of the information provided by the applicant. The Department will also evaluate projects based on the results of an environmental analysis. Projects that support a designated Marine Highway Corridor (or Connector or Crossing), receive a favorable technical review, and meet other criteria as defined in 46 CFR 393.4(e), may be nominated by the Maritime Administrator for selection by the Secretary. Upon designation as a Marine Highway Project, the Department will coordinate with the Project sponsor to identify the most appropriate Departmental actions to support the project. Department support could include any of the following, as appropriate and within agency resources:

(1) Promote the service with appropriate governmental, regional, State, local or Tribal government transportation planners, private sector entities or other decision makers.

(2) Coordinate with ports, State Departments of Transportation, Metropolitan Planning Organizations, localities, other public agencies and the private sector to support the designated service. Efforts can be aimed at identifying resources, obtaining access to land or terminals, developing landside facilities and infrastructure, and working with Federal, regional, State, local or Tribal governmental entities to remove barriers to success.

(3) Pursue memorandums of agreement with other Federal entities to transport Federally owned or generated cargo using the services of the designated project, when practical or available.

(4) In cases where transportation infrastructure is needed, Project sponsors may request to be included on the Secretary of Transportation's list of high-priority transportation infrastructure projects under Executive Order 13274, "Environmental Stewardship and Transportation Infrastructure Project Review." For these projects, Executive Order 13274 provides that Federal agencies shall, to the maximum extent practicable, expedite their reviews for relevant permits or other approvals and take related actions as necessary, consistent with available resources and applicable laws.

(5) Assist with developing individual performance measures for Marine Highway Projects.

(6) Work with Federal entities and regional, State, local and Tribal governments to include designated Projects in transportation planning.

(7) Bring specific impediments to the attention of the advisory board chartered to address these barriers.

(8) Conduct research on issues specific to Marine Highway Projects.

(9) Utilize current or future Federal funding mechanisms, as appropriate, to support the Projects.

(10) Maintain liaison with sponsors and representatives of designated Projects to provide ongoing support and identify lessons learned and best practices for other projects and the overall Marine Highway program.

(e) *Application for Designation as a Marine Highway Project.* This section specifies the criteria that the Department will use to evaluate Marine Highway Project applications. Applicants should provide the following:

(1) *Applications for Proposed Projects.* When responding to specific solicitations for Marine Highway Projects by the Department, describe the overall operation of the proposed project, including which ports and terminals will be served, number and type of vessels, size, quantity and type of cargo and/or passengers, routes, frequency, and other relevant information. Applicants should also include the following information in their project applications:

(i) *Marine Highway Corridor(s).* Identify which, if known, designated Marine Highway Corridors, Connectors or Crossings will be utilized.

(ii) *Organization.* Provide the organizational structure of the proposed project, including business affiliations, environmental, non-profit organizations and governmental or private sector stakeholders.

(iii) *Partnerships.*

(A) *Private Sector participation.* Identify private sector partners and describe their levels of commitment. Private sector partners can include terminals, vessel operators, shipyards, shippers, trucking companies, railroads, third party logistics providers, shipping lines, labor, workforce and other entities deemed appropriate by the Secretary.

(B) *Public Sector partners:* Identify State Departments of Transportation, Metropolitan Planning Organizations, municipalities and other governmental entities (including Tribal) that have been engaged and the extent to which they support the service. Include any affiliations with environmental groups or civic associations.

(C) *Documentation.* Provide documents affirming commitment or support from entities involved in the project.

(iv) *External cost savings and public benefit.*

(A) *Potential relief to surface transportation travel delays.* Describe the extent to which the proposed project will relieve landside congestion in measurable terms now and in the future, such as reductions in vehicle miles traveled. Include the landside routes that stand to benefit from the water transportation operation.

(B) *Emissions benefits.* Address the savings, in quantifiable terms, now and in the future over the current practice in emissions, including greenhouse gas emissions, criteria air pollutants or other environmental benefits the project offers.

(C) *Energy savings.* Provide an analysis of potential reductions in energy consumption, in quantifiable terms, now and in the future over the current practice.

(D) *Landside transportation infrastructure maintenance savings.* To the extent the data is available, indicate, in dollars per year, the projected savings of public funds that would result from a proposed project in road or railroad maintenance or repair, including pavement, bridges, tunnels or related transportation infrastructure. Include the impacts of accelerated infrastructure deterioration caused by vehicles currently using the route, especially in cases of oversize or overweight vehicles.

(E) *Safety improvements.* Describe, in measurable terms, the projected safety improvements that would result from the proposed operation.

(F) *System resiliency and redundancy.* To the extent data is available describe, if applicable, how a proposed Marine Highway Project offers a resilient route or service that can benefit the public. Where land transportation routes serving a locale or region are limited, describe how a proposed project offers an alternative and the benefit this could offer when other routes are interrupted as a result of natural or man-made incidents.

(v) *Capacity Alternatives.* In cases where a Marine Highway Project is proposed as an alternative to constructing new land transportation capacity, indicate, in quantifiable terms, whether the proposed project represents the most cost-beneficial option among other modal improvements. Include in the comparison an analysis of the full range of benefits expected from the project. Include the projected savings in life-cycle costs of publicly maintained infrastructure.

(vi) *Business Planning.* Indicate the degree to which the proposed project is associated with a service that is self-supporting:

(A) *Financial plan.* Provide the project's financial plan and provide

projected revenues and expenses. Include labor and operating costs, drayage, fixed and recurring infrastructure and maintenance costs, vessel or equipment acquisition or construction costs, *etc.* Include any anticipated changes in local or regional freight or passenger transportation, policy or regulations, ports, industry, corridors, or other developments affecting the project.

(B) *Demand for services.* Identify shippers that have indicated an interest in and level of commitment to the proposed service, or describe the specific commodities, market, and shippers the service will attract, and the extent to which these entities have been engaged. In the case of services involving passengers, provide indicators of demand for the service, anticipated volumes and other factors that indicate likely utilization of the service. Include a marketing strategy, if one is in place.

(C) *Analysis.* Provide, (or reference, if publicly available) market or transportation system research, data, and analysis used to develop or support the business model.

(vii) *Proposed Project Timeline.* Include a proposed project timeline with estimated start dates and key milestones. Include the point in the timeline at which the enterprise is anticipated to attain self-sufficiency (if applicable).

(viii) *Support.* Describe any known or anticipated obstacles to either implementation or long-term success of the project. Include any strategies, either in place or proposed, to mitigate impediments. In the event that public sector financial support is being sought, describe the amount, form and duration of public investment required.

(ix) *Environmental Considerations.* Applicants must provide all information on hand that would assist the Department in conducting environmental analysis of the proposed project under the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*)

(2) *Cost and Benefits.* The Department believes that benefit-cost analysis (BCA), including the monetization and discounting of costs and benefits to a common unit of measurement in present-day dollars, is important. The systematic process of comparing expected benefits and costs helps decision-makers organize information about, and evaluate trade-offs between alternative transportation investments. However, we also recognize that development of a thorough BCA can be prohibitively costly to applicants, especially in cases where Federal funding is not currently available. Applicants should provide a BCA, if one is available. At a minimum, applicants should provide estimates of the project's expected benefits in external cost savings and public benefit and costs of capacity alternatives [sections 393.4(e)(1)(iv) and 393.4(e)(1)(v)].

(3) *Standards and Measures.* The Department will post, on the Maritime Administration's Web site, (*http://www.marad.dot.gov*) proposed standards (*i.e.:* the definition and use of ton-miles, measures of landside congestion, *etc.*) and measures that, lacking more specific or technically supported applicant-provided data, will be used by the Department to evaluate applications. Some examples of measures are the use of a standard cargo tonnage per container, fuel consumption rates, vehicle emissions and safety data for various transportation options, and baseline maintenance, repair and construction costs for surface transportation infrastructure. While we recognize that these standards and measures may not be ideal, the intent is to establish a minimal baseline by which to evaluate external costs and public benefits of transportation options. In the event applicants provide more specific and supported measures, they will be used in evaluating the potential benefits and costs of a project.

(4) *Protection of Confidential Business Information.* All information submitted as part of or in support of an application shall use publicly available data or data that can be made public and methodologies that are accepted by industry practice and standards, to the extent possible. If your application includes information that you consider to be trade secret or confidential commercial or financial information, please do the following:

(i) Note on the front cover that the submission "Contains Confidential Business Information (CBI);"

(ii) Mark each affected page "CBI;" and

(iii) Clearly highlight or otherwise denote the CBI portions. The Department protects such information from disclosure to the extent allowed under applicable law. In the event the Department receives a Freedom of Information Act (FOIA) request for the information, the Department will follow the procedures described in its FOIA regulations at 49 CFR §7.17. Only information that is ultimately determined to be confidential under that procedure will be exempt from disclosure under FOIA.

(5) *Contents of Application.* When responding to specific solicitations for Marine Highway Projects by the Department, applicants should include all of the information requested by Section 393.4(e)(1) and (2) above organized in a manner consistent with the elements set forth in that section. The Department reserves the right to ask any applicant to supplement the data in its application, but expects applications to be complete upon submission. The narrative portion of an application should not exceed 20 pages in length. The narrative should address all relevant information contained in paragraphs (e)(1)(i) through (ix) of §393.4. Documentation supporting the assertions made in the narrative portion may also be provided in the form of appendices, but limited to relevant information. Applications may be submitted electronically via the FEDERAL REGISTER (*http://www.regulations.gov*). Applications submitted in writing must include the original and three copies and must be on 8.5″ x 11″ single spaced paper, excluding maps, Geographic Information Systems (GIS) representations, *etc.* In the event that the sponsor of a Marine Highway Project that has already been designated by the Secretary seeks a modification to the designation because of a change in project scope, an expansion of the project, or other significant change to the project, the project sponsor should request the change in writing to the Secretary via the Administrator of the Maritime Administration. The request should contain any changed or new information that is relevant to the project.

(6) *Evaluation Process.* Upon receipt by the Maritime Administrator, the application will be evaluated using the criteria outlined above during a technical review and an environmental analysis. The review will assess factors such as project scope, impact, public benefit, environmental effect, offsetting costs, cost to the Government (if any), the likelihood of long-term self-supporting operations, and its relationship with Marine Highway Corridors once designated (*See* section 393.3 Marine Highway Corridors). Additional factors may be considered during the evaluation process. Upon completion of the technical review, applications will be forwarded to an inter-agency review team as described below. The Department will establish an inter-agency team to review each application received during the solicitation period (solicitation periods will be established via a future FEDERAL REGISTER Notice). The evaluation team will be led by the Office of the Secretary and will include members of the Maritime Administration, other Department of Transportation Operating Administrations, and as appropriate, representation from other Federal agencies and other representatives, as needed. The inter-agency team will evaluate applications using criteria that establishes the degree to which a proposed project can; reduce external cost and provide public benefit; offer a lower-cost alternative to increasing capacity in the Corridor, and; demonstrate the likelihood the service associated with the project will become self-supporting in a specified and reasonable timeframe. The Department will assign ratings of "highly recommended," "recommended," or "not recommended" for each application based on the criteria set forth in section 393.4(e)(1) and (2) of this rule. Specific numerical scores will not be assigned. Within the overall criteria of External Cost Savings and Public Benefit, elements paragraphs (e)(1)(iv)(A) through (e)(1)(iv)(D) of this section will receive greater weight than will paragraphs (e)(1)(iv)(E) and (e)(1)(iv)(F) of this section. For the Business Planning elements, only paragraphs (e)(1)(vi)(A) and (e)(1)(vi)(B) of this section will be weighted; paragraph (e)(1)(vi)(C) of this section will

be reviewed to assess the degree to which future projections such as operating costs and freight/passenger demand are accurate and reliable. Projects that have been deemed "highly recommended" and "recommended" will be placed on a preliminary list of projects for designation. The Secretary will make final designations in a manner that provides a balance between geographic regions and business models (*i.e.* among freight and passenger, expansion and new service, and existing vessel/terminal and new construction) to the degree this can be achieved. Prospective project sponsors will be notified as to the status of their application in writing once a determination has been made.

(7) *Performance Monitoring.* (i) Once designated projects enter the operational phase (either start of a new service, or expansion of existing service), the Department will evaluate them regularly to determine if the project's objectives are being achieved.

(ii) Overall project performance will be in one of three categories—exceeds, meets, or does not meet original projections in each of the three areas defined below:

*Public benefit.* Does the project meet the stated goals in shifting specific numbers of vehicles (number of trucks, rail cars or automobiles) off the designated landside routes? Other public benefits, including energy savings, reduced emissions, and safety improvements will be assumed to be a direct derivative of either numbers of vehicles shifted, or vehicle/ton miles avoided, unless specific factors change (such as a change in vessel fuel or emissions).

*Public cost.* Is the overall cost to the Federal government (if any) on track with estimates at the time of designation? The overall cost to the Federal government represents the amount of Federal investment (*i.e.* direct funding, loan guarantees or similar mechanisms) reduced by the offsetting savings the project represents (road/bridge wear and tear avoided, infrastructure construction or expansion deferred).

*Timeliness factor.* Is the project on track for the point at which the enterprise is projected to attain self-sufficiency? For example, if the project was anticipated to attain self-sufficiency after 36 months of operation, is it on track at the point of evaluation to meet that objective? This can be determined by assessing revenues, freight and passenger trends, expenses and other factors established in the application review process.

### § 393.5 Incentives, Impediments and Solutions.

(a) *Summary.* The purpose of this section is to identify short term incentives and solutions to impediments in order to encourage use of the Marine Highway for freight and passengers.

(b) *Objectives.* This section is aimed at increasing the use of the Marine Highways through the following primary objectives:

(1) Encourage the integration of Marine Highways in transportation plans at the State, regional, local and Tribal levels.

(2) Develop short term incentives aimed at expanding existing or starting new Marine Highway operations.

(3) Identify and seek solutions to impediments to the Marine Highway.

(c) *Federal, State, Local, Regional and Tribal Transportation Planning.* The Department will coordinate with Federal, State, local and Tribal governments and Metropolitan Planning Organizations to develop strategies to encourage the use of America's Marine Highways for transportation of passengers and cargo. The Department will:

(1) Work with these entities to assess plans and develop strategies, where appropriate, to incorporate Marine Highway transportation, including ferries, and other marine transportation solutions for regional and interstate transport of freight and passengers in their statewide and metropolitan transportation plans.

(2) Facilitate groups of States and multi-State transportation entities to determine how Marine Highway transportation can address traffic delays, bottlenecks, and other interstate transportation challenges to their mutual benefit.

(3) Identify other Federal agencies that have jurisdiction over the project, or which currently provide funding for components of the project, in order to determine the extent to which those agencies should be consulted with and

invited to assist in the coordination process.

(4) Consult with Federal Highway Administration, Federal Motor Carrier Safety Administration, Federal Railroad Administration, Federal Transit Administration and other entities within DOT, as appropriate, for support and to evaluate costs and benefits of proposed Marine Highway Corridors and Projects.

(d) *Short-Term Incentives.* The Department will develop proposed short-term incentives to encourage the use, initiation, or expansion of Marine Highway services in consultation with shippers and other participants in transportation logistics, and government entities, as appropriate.

(e) *Impediments and Solutions.* The Department will either establish a board, or modify an existing body, in accordance with the Federal Advisory Committee Act (FACA), whose role is to identify impediments that hinder effective use of the Marine Highways and recommend solutions. The Board will meet regularly and report its findings and recommended solutions to the Maritime Administrator. Board membership will include, among others, representation by Federal Departments and Agencies, State Departments of Transportation, Metropolitan Planning Organizations and other local public entities including Tribal governments and private sector stakeholders. The Department will take actions, as appropriate, to address impediments to the Marine Highways.

### § 393.6 Research on Marine Highway Transportation.

(a) *Summary.* The Department will work in consultation with the Environmental Protection Agency and other entities as appropriate, within the limits of available resources, to conduct research in support of America's Marine Highway or in direct support of designated Marine Highway Corridors and Projects.

(b) *Objectives.* The primary objectives of selected research Projects are to:

(1) Identify and quantify environmental and transportation-related benefits that can be derived from utilization of the Marine Highways as compared to other modes of surface transportation.

(2) Identify existing or emerging technology, vessel design, and other improvements that would reduce emissions, increase fuel economy, and lower costs of Marine Highway transportation and increase the efficiency of intermodal transfers.

## PARTS 394–399 [RESERVED]