

## § 390.9

## 46 CFR Ch. II (10-1-11 Edition)

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.

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#### § 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