Offshore Marine Service Association

Eight Years is Enough.

CBP Revocation Notice Will Fuel American Jobs and the American Economy

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Since 2009, Customs Border Patrol (CBP) has been attempting to revoke or modify Jones Act letter rulings that allow foreign vessels, using foreign labor, to operate in direct violation of the Jones Act (the 2009 Notice). Foreign interests, at the expense of U.S. workers, shipyards, and ship owners, stalled the 2009 Notice with CBP stating that it would issue a "new notice . . . in the near future."

Eight years later, on January 18, 2017, CBP issued its "new notice" (the "2017 Notice") of revocation and modification. In the interim, U.S. companies invested more than $2 billion to ensure that offshore oil and gas exploration and production would not be affected by proper enforcement of the Jones Act. As a result, 31 vessels have been built or retrofitted, ensuring capacity to safely perform the activities covered by the 2009 and 2017 Notice.

Further delay of the revocation of these letter rulings will only hurt American mariners and shipbuilders. These delays, including the incorrect consideration of moving the revocation process to the writing of regulations, will instead help foreign vessels, foreign shipbuilders, and foreign vessel crews who will continue to operate in the U.S.—contrary to U.S. law.

Foreign interests are seeking this prolonged and unnecessary delay after having already taken advantage of the U.S. government's non-enforcement over the past eight years. The CBP notice is the first lawful and essential step to ensure that U.S. workers and U.S. taxpaying companies perform domestic maritime operations as required by the Jones Act.

This correction will provide consistency and clarity for further investments into the domestic maritime industry. It is time to stand up for American mariners and shipbuilders by not allowing foreign interests to contort the proper enforcement of U.S. law. Now is not the time to put foreign workers first.

The Process for Revocation of "Letter Rulings" is Defined by Statute 19 USC Section 1625(c).

To modify or revoke a CBP letter ruling, Congress requires CBP to follow a specific and unique process. This process begins with a notice issued in the *Customs Bulletin* of intention to revoke or modify. What follows is a minimum 30-day opportunity for public comment, followed by a maximum 30-day consideration period before a final decision is published in the *Customs Bulletin*. The decision then becomes effective 60-days after publication.

On January 18, 2017, CBP issued its second notice to modify or revoke unlawful letter rulings according to this statutorily required process. An extension of 60-days for the comment period was issued following the new Administration's general guidance for pending matters. The open comment period will close April 18, 2017, allowing three times the statutorily defined period for public comment.

In contrast, letter rulings are issued in an opaque and private manner between the requesting party and CBP without any period for public comment or analysis by CBP to determine the impact to the U.S. marine community. The outcomes sought by those requesting letter rulings are always erosive to the Jones Act. U.S. mariners, shipyard workers, shipyards and ship-owners were given no opportunity for comment or dissent when CBP issued the damaging letters it now wants to revoke. The 1625(c) process is giving foreign interests substantially more "due process" than Americans received. Foreign interests are due no additional process.

The Jones Act is the Law of the Land.

The Jones Act requires U.S. built and owned ships, crewed by U.S. citizens, to be used for any part of the transportation of merchandise between two U.S. points. It is the law of the land. It has been supported by every modern president and is, and always has been, an effective "Buy American, Hire American" statute.

The Jones Act is grounded in a national defense policy of ensuring domestic shipbuilding and seafaring capacity while supporting a strong domestic maritime industry essential for U.S. economic security and job creation.

The letter rulings are not law but rather CBP issued responses to private letters seeking an interpretation. Over the past 30 years, a vicious cycle of (what CBP now acknowledges are) legally invalid letter rulings has created greater dependence on foreign flagged ships at the expense of U.S. mariners, ship owners, and shipyards. As concluded in *United States v. Mead* (2001), the Supreme Court does not consider CBP's letters to be "law making." They deserve little, if any, deference or reliance.

CBP is now correctly aligning the agency's interpretation of those letter rulings to be consistent with the Jones Act, the law of the land.

U.S. Companies have been Competing on an Uneven Playing Field that Allows the Jones Act to be Ignored.

Letter rulings from the past three decades have put foreign companies first, and American companies last. With the influx of cheap and foreign labor, U.S. companies have been forced to compete on an uneven playing field, stifling job growth and economic security.

Many of the foreign vessels deployed, primarily by Norwegian vessel operators, use cheap labor, not from Norway, but rather from low wage nations like Russia, the Philippines, Poland, Ukraine and elsewhere. These Norwegian companies pay little to no taxes in the United States or in Norway. Nor do their workers. In contrast, U.S. companies are taxed at a 36.5% tax rate and employ U.S. mariners at wages three times that of the cheap foreign labor used by foreign ship owners.

Implementation of CBP's revocation and modification will fuel American jobs and the American economy, creating over 3,200 new jobs, increasing wages for workers in the Gulf Coast region by over $155 million, and generating over $700 million in regional economic output.

Using Jones Act Qualified Vessels will Ensure Safe Operations on the OCS.

Ensuring that Jones Act qualified vessels are used for Outer Continental Shelf (OCS) operations that are targeted in the 2017 Notice eliminates the need for offshore vessel-to-vessel transfers. Only a Jones Act qualified ship can load merchandise shore-side and also install it on the seafloor. Delaying implementation will encourage use of foreign vessels, which to work compliantly, will require an offshore delivery and transfer from a Jones Act vessel to the foreign vessel.

Drilling Activities are not the Subject of the 2017 Notice.

The 2017 Notice does not directly address the activities of drilling vessels. Moreover, OMSA has raised no objection concerning the manner in which drilling operations occur from a Jones Act compliance point of view given the proper use of Jones Act qualified supply vessels to transport equipment and materials to and from drilling vessels. There is no coastwise law that prohibits a foreign flag vessel from drilling a well. In fact CBP has said so in a prior ruling that was unaffected by the CBP Notice (See HQ 109817). Given CBP's view in the 2017 Notice of what it considers to be vessel equipment in the context of repair and maintenance activities, there is no prohibition on a drilling vessel moving from one drilling location to another, while laden with drilling equipment. Of course, as has always been the case, deploying equipment to or from the drilling vessel from another coastwise point is transportation of merchandise, which must occur on a Jones Act supply vessel.

The 2017 Notice does not Address Pipelaying.

The CBP Notice does not address the so-called "paid out, not unladen" analysis that CBP has used to allow the transportation and subsea installation of pipelines, umbilical lines, and cables. Under this analysis, it is CBP's view that because a pipeline, umbilical or cable is "paid-out" (or installed in a continuous manner while the vessel continues to move forward), the vessel's activities do not constitute the transportation of merchandise between coastwise points. While the Jones Act community has questioned the validity of this analysis on the basis that transportation of the paid out materials has in fact occurred, CBP did not address the issue in the notice. However, the CBP Notice does clarify that several letter rulings that allowed transportation of pipelines, umbilicals and cables under an "equipment of the vessel" analysis are flawed and proposes their revocation on that basis. This view is correct. Under no stretch of the imagination are installed pipelines, umbilicals and cables equipment of a vessel. They are part of the permanent subsea architecture.

The 2017 Notice does not Address Heavy-Lift Operations.

The 2017 Notice does not address heavy-lift operations. Heavy-lift vessels are utilized to set platform jackets (bases) and top sides at an offshore installation site. During a lifting operation, a Jones Act qualified launch barge, or a foreign flag launch barge (operating under a waiver provided in statute) is used to transport the jacket or top side to the installation location. Once the jacket or top-side is on location, the heavy-lift vessel then utilizes its crane to lift the jacket or top-side off the barge and set it onto the seafloor or offshore structure.

The 2017 Notice does not address heavy lift operations. As recently as 2012, CBP reaffirmed several rulings that while the heavy lift vessel is allowed to install, it may not engage in any part, however minimal, of the transportation of the jacket or top-side. In 2016, OMSA offered to a coalition of the owners and users of heavy-lift vessels a statutory change that would allow the incidental movement of the heavy-lift vessel under a statutory waiver. The legislation providing this waiver would work in a manner that is similar to the above-mentioned launch barge waivers.