

Maritime Administration U.S.-Flag Shipping Guidance for Shipments Financed by the Export-Import Bank of the United States

Overview

This U.S.-Flag Shipping Guidance sets out the procedures used by the Maritime Administration (MarAd) in connection with shipments financed by the Export-Import Bank of the United States (Ex-Im Bank) to the extent those goods are to be shipped on U.S.-flag vessels.

The Ex-Im Bank is the official export credit agency of the United States, whose mission it is to assist in financing the export of U.S. goods and services to international markets. MarAd's mission is to improve and strengthen the U.S. marine transportation system to meet the economic, environmental, and security needs of the Nation. This guidance describes MarAd's standard procedures related to its facilitation of shipping on U.S.-flag vessels, certification of U.S.-flag vessel non-availability, and reconsideration of MarAd's determinations described in this guidance.¹ Shippers, U.S.-flag carriers, MarAd, or Ex-Im Bank may provide justification for alternative procedures or considerations in particular circumstances.

I. MarAd Facilitation

Advancing its mission to improve and strengthen the U.S. marine transportation system to meet the economic, environmental, and security needs of the Nation, MarAd provides facilitation services to assist shippers² with obtaining suitable shipping arrangements on U.S.-flag vessels. MarAd may (as part of the facilitation process) work with shippers and U.S.-flag carriers to identify any flexibility in schedules, rates, routes and capacity that would facilitate U.S.-flag vessel availability. As shippers proceed through the facilitation process, MarAd may identify and consider facts related to ship availability and rates for U.S.-flag carriage as described below.

Shippers who anticipate receiving a financing commitment from Ex-Im Bank are encouraged to reach out to U.S.-flag carriers as early as possible to obtain bids for transporting cargo, and to request MarAd's facilitation and assistance in identifying available U.S.-flag carriage. In order to assist shippers with obtaining carriage on a U.S.-flag vessel, MarAd requests that shippers provide as much information as possible about projected shipping needs, including, but not limited to:

- A description of the cargo to be shipped (quantity, dimensions, weight, value);
- A description of the shipping details (origin and destination, cargo readiness date, load and discharge dates, preferred load and discharge ports); and

¹ This guidance is intended to document procedures used by MarAd in its relationship, unique to Public Resolution 17, with the Ex-Im Bank. This guidance, which is not binding, sets forth the factors and criteria MarAd may consider in making determinations for use by the Ex-Im Bank and will not apply to cargo preference implementation by any other Federal agency or under any other statute. It also has no bearing on the application of the cargo preference requirements set forth in 46 U.S.C. Section 55305.

² The "shipper" is the party responsible for arranging for the goods to be shipped. In most Ex-Im Bank transactions, the shipper is the U.S. exporter, its agent or the foreign buyer.

- A description of any special handling considerations related to the cargo (critical path items, heavy-lift requirements, hazardous materials).³

MarAd provides contact information for U.S.-flag carriers on its website at <http://www.marad.dot.gov/documents/MAR730.US.Flag.Carriers.pdf>, and may encourage U.S.-flag carriers to reach out to the shipper directly with respect to the projected shipment(s). In the event that the shipper and the U.S.-flag carriers cannot reach agreement independently, if requested by the shipper, MarAd may facilitate a dialogue between the shipper and the U.S.-flag carrier(s) in order to achieve the goal of organizing shipping arrangements on U.S.-flag vessels.

In addition to the general facilitation process described above, MarAd has developed the following options that shippers can use to work with U.S.-flag carriers:

Booking Subject to Completion.

Where cargo is insufficient to obtain lower “full vessel rates,” carriers often offer a discounted rate if the cargo is firmly booked far enough in advance to allow the carrier to obtain added cargo. Should cargo not be found, the booking could be cancelled, and, assuming there is no other U.S.-flag carrier willing to honor the initial rate quote, MarAd may consider issuing a certification of vessel non-availability.

Advance Shipping Plan.

The shipper works with the U.S.-flag carrier(s) well in advance of the projected load date on the basis of the entire shipping need as best known at the time. Both the carrier and the shipper agree on tonnage to be shipped and the time frames for carriage. This benefits both the carrier and the shipper. The carrier is able to plan in advance and the shipper is able to obtain more cost-effective service. Where suitable U.S.-flag service is not available or in cases where cargo “falls out” of the plan and the remaining cargo cannot be served at the agreed rate, MarAd may consider issuing a certification of vessel non-availability.

Service Contract.

In addition to an Advance Shipping Plan, under certain circumstances, a shipper might enter into a service contract with a carrier to ship all cargo related to a particular project. This high volume commitment to a particular carrier would allow the carrier to offer reduced rates to the shipper.

By engaging potential carriers in negotiations as early as possible, shippers will be able to determine which factors might be helpful in reducing the cost of carriage on a U.S.-flag vessel. For example, through early engagement and flexibility on requirements, a shipper might be able to add cargo beyond the contemplated cargo, spreading fixed, overhead costs over a larger base in order to achieve a lower rate per ton. A shipper might also consider shifting production or delivery schedules to allow consolidation with other cargo. Early engagement and flexibility on

³ A Federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for all of the information collected under this guidance is 2133-0013. This information collection is contemplated by a notice published in the Federal Register on October 25, 2011, 76 FR 66127 (FR Doc. 2011-27615).

requirements will allow carriers to explore the option of adding other cargo to the proposed shipment(s) in order to reduce the overall cost per ton.

A shipper receiving Ex-Im Bank financing is expected to make its best effort to identify a suitable U.S.-flag service. If a shipper is unable to identify suitable U.S.-flag service, the shipper may request facilitation assistance from MarAd, as described above. If neither the shipper nor MarAd is able to identify an available U.S.-flag service through the facilitation process, or if the shipper is dissatisfied with the identified service, the shipper may request that MarAd certify vessel non-availability. In accordance with 46 U.S.C. § 55304, MarAd certifies that U.S.-flag carriage is not available when it determines, after investigation, that U.S.-flag vessels are not available “in sufficient number, in sufficient tonnage capacity, on necessary schedules, or at reasonable rates,” as further described in Section III, below. MarAd generally issues certifications of vessel non-availability with respect to a particular shipment, and informs Ex-Im Bank of the result of its inquiry.

II. MarAd Determinations for Use in Ex-Im Bank Financing Evaluation Process

Ex-Im Bank has a process for evaluation of eligibility for financing of projects involving foreign flag shipping. MarAd provides determinations (historically referred to as “waivers”) for use by Ex-Im Bank in its eligibility decisions for financing.

A. Documentation of Determinations

MarAd will provide written determinations made under Section II to Ex-Im Bank, including the basis for the determination, and stating that the determination is for use in the Ex-Im Bank financing evaluation process, and post these determinations on its website.

B. General

Ex-Im Bank may provide financing for cargo carried on vessels of the cargo purchaser’s nation for up to 50 percent of the total volume of cargo financed under a specific credit. Such an arrangement is based on the cargo purchaser’s nation having a merchant navy and not engaging in discriminatory treatment of U.S.-flag vessels in foreign trade. To allow adequate time for MarAd to make the necessary inquiries, shippers should contact MarAd as early in the process as possible.

In order to provide Ex-Im Bank with information for Ex-Im Bank’s financing eligibility decision, MarAd generally reviews:

- Whether the subject country has its own merchant navy; and, if so,
- Whether the subject country has a history of discriminatory treatment of U.S.-flag vessels.

C. Compensatory

Some projects are brought to the Ex-Im Bank for financing after some portion of the cargo has already been shipped on foreign-flag vessels. Before approving financing for such previously-shipped cargo, Ex-Im Bank may require assurance from MarAd that the shipper has committed to ship an equivalent amount of future cargo using U.S.-flag vessels (Commitment). A shipper seeking Ex-Im Bank financing for cargoes shipped on foreign flag vessels should consult with MarAd to enter into a Commitment. In accordance with Ex-Im Bank procedures, foreign-flag-shipped cargo may be eligible for Ex-Im Bank financing after Ex-Im Bank has received assurance of such a Commitment.

In order to provide Ex-Im Bank with information for Ex-Im Bank's financing eligibility decision, MarAd generally reviews the following:

- The timing of the foreign flag shipment in relation to the timing of the application for Ex-Im Bank financing;
- Whether the shipper has fulfilled its obligations under previously-issued Commitments in a timely manner; and
- Whether there is any indication that the foreign flag shipment at issue was part of a plan to circumvent U.S.-flag shipping requirements.

D. Reachback

A shipper may indicate it is unable or unwilling to enter into a Commitment as set forth in subsection C, above, but still desires Ex-Im Bank financing for some portion of the cargo. Where the foreign flag shipments have occurred within one year before the date of the Ex-Im Bank application, up to 10 percent of the value of the total cargo to be financed may be eligible for Ex-Im Bank financing – but at a lower rate (maximum 80 percent level of what Ex-Im Bank would ordinarily finance). Shippers may request use of both a subsection C Commitment and a Reachback determination made by MarAd to obtain Ex-Im Bank financing for previously shipped foreign-flag cargo.

In order to provide Ex-Im Bank with information for Ex-Im Bank's financing eligibility decision, MarAd generally reviews the following:

- The timing of the foreign flag shipment in relation to the timing of the application for Ex-Im Bank financing;
- Whether the shipper has fulfilled its obligations under previously-issued Commitments in a timely manner;
- Whether the shipper has fulfilled or will fulfill applicable requirements for U.S.-flag carriage; and
- Whether there is any indication that the foreign flag shipment at issue was part of a plan to circumvent U.S.-flag shipping requirements.

III. Certification of Vessel Non-Availability

Following the facilitation process described in Section I, above, or upon shipper request, the Supervisor, Civilian Agencies, of MarAd's Office of Cargo Preference and Domestic Trade (OCP), may certify U.S.-flag vessel non-availability. Pursuant to the provisions of 46 U.S.C. § 55304, MarAd certifies that a U.S.-flag vessel is not available when it determines, after investigation, that U.S.-flag vessels are not available "in sufficient number, in sufficient tonnage capacity, on necessary schedules, or at reasonable rates." This section sets forth the information requested and reviewed by MarAd in order to evaluate U.S.-flag vessel availability.

A. Requests for Certification of Vessel Non-Availability

In order to help reach a determination with respect to whether a U.S.-flag vessel is available, a shipper may provide MarAd with information related to its specific shipping needs for a particular cargo, including time and cost constraints, information about the cargo that might impact vessel capacity and availability, and information about the shipper's efforts to identify a U.S.-flag vessel on its own or through the facilitation process. MarAd may also request information from U.S.-flag carriers about schedules, rates, and capacity in order to determine ship availability based on the shipper's needs. MarAd uses all information provided to evaluate U.S.-flag availability, as further described below.

Shippers are requested to provide the following information⁴ to MarAd in connection with a request for certification of vessel non-availability:

- Request for Quotation (RFQ) or, if no RFQ is available, shipping details;
- A list of all carriers to whom the RFQ or shipping details were sent;
- Copies of any responses, including quotations, received from carriers in response to the RFQ or distribution of shipping details.

MarAd may also request the following information⁵ from the shipper for further background:

- Description of any advanced planning or advance notices issued by the shipper to identify an available U.S.-flag carrier;
- Letters of credit;
- Contracts (including liquidated damages provisions);
- Project plans and timelines;
- Any other supporting documentation.

B. Vessel Non-Availability – Supply/Scheduling/Capacity

In evaluating a shipper's request for certification of vessel non-availability with respect to supply, scheduling and capacity, MarAd may consider the factors listed below in conjunction with the information collected by MarAd and documentation provided by the shipper. A shipper may request that MarAd consider any other information the shipper believes affects vessel availability.

⁴ This information collection is contemplated by a notice published in the Federal Register on October 25, 2011, 76 FR 66127 (FR Doc. 2011-27615).

⁵ *Id.*

MarAd may certify vessel non-availability, taking into consideration the factors set forth below if:

- No U.S.-Flag vessels respond to the RFQ/shipping details distributed by the shipper or MarAd, or if all U.S.-flag carriers respond that they do not have ships available for the cargo described in the RFQ/shipping details;
- MarAd determines, based on the information collected by MarAd and documentation provided, that there are unresolvable discrepancies between the U.S.-flag vessel schedules and availability and the shipper's load and discharge dates;
- MarAd determines, based on the information collected by MarAd and documentation provided, that the U.S.-flag vessels' service and the shipper's routing requirements are incompatible;
- MarAd determines, based on the information collected by MarAd and documentation provided, that transshipment or relay service is not appropriate for the type of cargo or would result in unreasonable delivery delays; or
- MarAd determines, based on the information collected by MarAd and documentation provided, that requiring U.S.-flag shipping would result in an unreasonable length or cost of delay.

MarAd generally considers the following in the foregoing assessment:

- **U.S.-Flag Vessels.** Whether there is advertised or unadvertised/inducement-based service from any U.S.-flag carrier that did not receive or respond to the RFQ/shipping details sent by the shipper.
- **Service Schedule.** Whether there is a U.S.-flag service that matches the shipper's desired or required timeframe, although the shipper has demonstrated a willingness or ability to adjust timeframes to facilitate U.S.-flag availability within the parameters of its contractual obligations. In general, MarAd reviews the documentation received from the shipper related to contractual delivery dates, liquidated damages, or other economic impacts on the shipper as the consequence of failure to meet project schedules.
- **Routing.** Whether there is a transshipment or relay service appropriate for the type of cargo that combines a U.S.-flag vessel and a non-U.S.-flag vessel (also known as Priority 2 Service). In general, MarAd reviews the documentation received from the shipper related to a) the size of the cargo to be transported, including whether the cargo is heavy-lift cargo, b) special handling requirements for the cargo to be transported, and c) the routing for the possible transshipment or relay service.
- **Good Faith Effort.** Whether the shipper has made good faith efforts to identify U.S.-flag vessel service. Good faith efforts include evidence of advanced planning and advance notices by the shipper, and shipper's willingness and ability to adjust project logistic requirements to accommodate U.S.-flag availability within the parameters of its contractual obligations.

C. Vessel Non-Availability - Reasonable Rates

Even in circumstances when MarAd determines that a U.S.-flag vessel is available (*i.e.*, available service, route, capacity), MarAd may certify vessel non-availability based on the proposed rates.

In evaluating a shipper's request for certification of vessel non-availability with respect to rates, MarAd may consider the factors listed below in conjunction with the information collected by MarAd and the documentation provided by the shipper. A shipper may request that MarAd consider any other information the shipper believes affects vessel availability.

MarAd may certify vessel non-availability based on rates if:

- Rates obtained in response to the RFQ/shipping details are above the guideline rate produced by MarAd's Office of Finance and Rate Approvals (if available and applicable); or
- MarAd determines, based on the information and documentation provided by the shipper and any information obtained by MarAd from interviews with U.S.-flag carriers, that the rates offered by the U.S.-flag carriers are unreasonable. This determination may include an evaluation of one or more of the following:
 - Vessel costs
 - Supply and demand for vessels
 - Historic rate data
 - Rates obtained by MarAd from shipper
 - Rates obtained by MarAd from carriers

MarAd generally considers the following in the foregoing assessment:

- **U.S.-Flag Rates.** U.S.-flag rates offered for the carriage.
- **Commercial Rates.** Commercial rates being offered on the same trade route under similar circumstances taking into account (as available) all rates obtained by the shipper, information obtained from interviews with U.S.-flag carriers, historic rates, published rates, applicable index rates, etc).
- **Guideline Rate Calculation.** If available and applicable for specific cargoes and specific circumstances, MarAd's Office of Finance and Rate Approvals may determine an average rate per day based on established protocols and historic data.
- **Good Faith Effort.** Whether the shipper has made good faith efforts to identify U.S.-flag vessel service. Good faith efforts include evidence of advanced planning and advance notices by the shipper.

D. Documentation of Determinations of U.S.-Flag Vessel Availability

Upon the request of a shipper, MarAd⁶ may document and provide to the shipper in writing the basis for its finding regarding U.S.-flag vessel availability related to supply, scheduling, capacity, or cost, including the factors relevant to the finding and how they were evaluated. MarAd generally issues certifications of non-availability on a per-cargo/per-transaction basis; once issued, such certification is provided to Ex-Im Bank for its use in determining eligibility for financing.

IV. Request for Reconsideration

A shipper may request reconsideration of a determination (as described in Section II or Section III above) made by MarAd's Office of Cargo Preference and Domestic Trade (OCP). Requests for Reconsideration should be submitted to the Deputy Maritime Administrator within ten business days following the determination for which reconsideration is requested. If a shipper needs more than ten business days to submit a Request for Reconsideration, the shipper should contact MarAd OCP to indicate that more time is needed to submit the Request for Reconsideration. Generally, Requests for Reconsideration will only be considered if the cargo related to such Request for Reconsideration has not been firmly booked. Requests for Reconsideration should be directed as follows:

Associate Administrator for Business and Finance Development
Maritime Administration
1200 New Jersey Avenue, SE
Washington, DC 20590

Email: cargo.marad@dot.gov (Subject Line should read: "PR-17 Reconsideration Request")

A shipper requesting reconsideration should identify the specific findings for which reconsideration is sought. A shipper may also submit any other information it would like the Reconsideration Committee to review. Requests for Reconsideration will be acknowledged upon receipt and will be reviewed in a timely fashion by the Deputy Administrator with advice from a Reconsideration Committee. The Reconsideration Committee will review the information provided by the shipper, as well as any other information the Reconsideration Committee deems appropriate, and provide a recommendation to the Deputy Administrator with respect to the Request for Reconsideration. The Deputy Administrator will provide a written response to the shipper requesting reconsideration no later than ten (10) business days after receipt of the Request for Reconsideration.

The Reconsideration Committee consists of the following individuals, or their designee(s): the senior career official of the Maritime Administration (currently, the Executive Director), the Associate Administrator for Business and Finance Development, and the First Vice President of Ex-Im Bank (*ex officio*). The Chief of the Division of Maritime Programs, MarAd Office of Chief Counsel, will serve as counsel to the Reconsideration Committee.

⁶ As noted in Section III above, determinations are made by the Supervisor, Civilian Agencies, of MarAd's Office of Cargo Preference and Domestic Trade.