Thank you for your interest in the ***CARGO PREFERENCE ACT of 1954*** and related legislation. As a Contracting Officer employed by an Agency of the United States government or a government contractor (or sub-contractor) it is important to understand the requirements for shipping U.S. government impelled cargoes on U.S. flag commercial vessels. The cargo preference regulations in 46 CFR 381 govern the implementation of the Cargo Preference Act of 1954.

Reporting, as outlined in 46 CFR 381, is particularly important and requires ***shipping details of U.S. flag and foreign flag shipments to be furnished to the Office of Cargo and Commercial Sealift, 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 Maritime Administration recommends these details be furnished via email to cargo.marad@dot.gov ***in the form of a master freighted bill of lading***.

The following article "The Cargo Preference Act of 1954 and Related Legislation" is from the Journal of Maritime Law & Commerce (July 2008) and provides an overview of the legislative history. For more information, Cargo Preference Laws and Regulations are available on the Maritime Administration website.

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The Cargo Preference Act of 1954 and Related Legislation

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A. History

In 1954, Congress passed the Cargo Preference Act,[1] amending the Merchant Marine Act of 1936, to incorporate a new section 901(b), to ensure U.S.-flag vessel participation in the carriage of U.S. Government sponsored cargoes. The Merchant Marine Act of 1936 states the goal of the United States is to develop and maintain a merchant marine capable of transporting the waterborne domestic commerce and a substantial portion of the waterborne export and import commerce of the United States.[2] The '54 Act requires Government agencies that generate ocean shipping of cargo to take such steps as may be necessary and practicable to ensure that at least 50 percent (75 percent for certain agricultural export programs) of the gross tonnage of cargoes subject to the '54 Act (computed separately for dry bulk carriers, dry cargo liners, and tankers):

> . . . is transported on privately-owned commercial vessels of the United States, to the extent those vessels are available at fair and reasonable rates for commercial vessels of the United States, in a manner that will ensure a fair and reasonable participation of commercial vessels of the United States in those cargoes by geographic areas.

46 U.S.C. § 55305(b).[3]

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[1]The Cargo Preference Act of 1954, Public Law 83-664, will be referred to herein as the '54 Act or P.L. 664.

[2]See 46 U.S.C. § 50501.

[3]The '54 Act was originally placed in 46 App. U.S.C. § 1241(b). However, Public Law 109-304, approved October 6, 2006, codified Title 46 Appendix. The '54 Act is now located at 46 U.S.C. § 55305. The new version contains some language changes, but the expressed intent of Public Law 109-304 was "to conform to the understood policy, intent, and purpose of the Congress in the original enactments, with such amendments and corrections as will remove ambiguities, contradictions, and other imperfections, . . ." Id., sec. 2(b).

Congress evinced an intent that the '54 Act be interpreted broadly. Senate Report No. 1584, 83d Cong., 2d Sess. 5 (1954), states that the bill is intended to expand cargo preference requirements to programs that are "financed in any way by Federal funds" and to eliminate loopholes with respect to various programs. The statute has also been described as applicable "in the clearest and most unequivocal terms . . . in all cases where the normal channels of international trade are disrupted by virtue of United States Government controlled programs financed by Federal funds in whatever form they might take." H.R. Rep. No. 80, 84th Cong., 2d Sess. 4 (1955).

A Congressional report following oversight hearings in 1955 concluded that the Maritime Administration should provide guidance to and general surveillance over the other agencies on compliance with cargo preference requirements. Congress looked to the Maritime Administration for leadership in helping other agencies determine if U.S.-flag vessels were available at fair and reasonable rates. The House Committee on Merchant Marine and Fisheries made the following recommendation: "The Maritime Administration should exercise general surveillance over the administration and operation of the Cargo Preference Act and report to the Congress periodically with respect thereto." H. Rep. No. 80, 84th Cong., 1st Sess. 22 (1955).

In 1962, President Kennedy issued a Presidential Directive Regarding Cargo Preference that emphasized the importance of implementing the cargo preference laws "in a manner designed to achieve fully their purpose." The Directive also instructed that the 50 percent U.S.-flag requirement of the Cargo Preference Act of 1954, "is a minimum, and it shall be the objective of each agency to ship a maximum amount of such cargoes on U.S.-flag vessels."[4]

Notwithstanding the Presidential Directive, this arrangement of the Maritime Administration providing advice, without being able to compel compliance by other agencies, proved to be unsatisfactory in fully achieving the goals of the '54 Act. In 1970, dissatisfaction with the implementation of cargo preference prompted Congress to give the Secretary [then, of Commerce, now Secretary of Transportation][5] unprecedented authority over other agencies to achieve the results intended.

In the Merchant Marine Act of 1970 (Pub. L. 91-469), a major piece of maritime promotion legislation, Congress authorized DOT to issue regulations governing the administration of cargo preference by the other agencies. Section 27 of the Merchant Marine Act of 1970 added explicit cargo prefer-

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[4] The Presidential Directive is reprinted in Senate Report No. 2286, 87th Cong., 2d Sess., p. 43 (1962).

[5] The Maritime Administration was transferred from the Department of Commerce to the Department of Transportation by Public Law 97-31, approved August 6, 1981.

ence rulemaking authority, which presently reads: "An agency having responsbility under this section shall administer its programs with respect to this section under regulations prescribed by the Secretary of Transportation." 46 U.S.C. § 55305(d).

The legislative history of this provision reflected Congress's concern that the shipper agencies had adopted policies that were inimical to the interests of the U.S. merchant marine, and that it would be beneficial to have a uniform administration of the cargo preference program under the control of the Secretary of Transportation who has responsibility for the U.S. merchant marine. Congress gave the cargo preference regulation writing authority to the Secretary of Transportation in recognition that 'giving some control over the administration of laws designed to assist the merchant marine to the government official who has the primary responsibility for the merchant marine [is] an altogether logical and sound approach." See, also, S. Rep. No. 1080, 91st Cong., 2d Sess., 58-59 (1970), which noted that: "A lack of uniform and rational administration has worked to the disadvantage of shippers, carriers, and various geographic areas of our nation . . . ."

In conference, the House accepted the Senate amendment on granting the Secretary of Transportation authority to issue regulations. The Conference Report states:

> There is a clear need for a centralized control over the administration of preference cargoes. In the absence of such control, the various agencies charged with administration of cargo preference laws have adopted varying practices and policies, many of which are not American shipping oriented. Since these laws were designed by Congress to benefit American shipping, they should be administered to provide maximum benefits to the American merchant marine. Localizing responsibility in the Secretary of [then Commerce, now Transportation] to issue standards to administer these cargo preference laws gives the best assurance that the objectives of these laws will be realized.

H. Rep. No. 91-1555, 91st Cong., 2d Sess., at 6.

B. Applicability of Cargo Preference to Donation Programs

Over the years, the '54 Act has been applied to the ocean transportation of cargo where the cargo is moving due to a Government assistance program. For example, in 1963, the Attorney General, Robert Kennedy, ruled that Department of Agriculture long-term supply contracts with the private sector for the sale on credit of agricultural commodities, which contained interest and credit terms more favorable than those of normal private transactions, are subject to the '54 Act. 42 Op. Atty. Gen. 203 (1963).[6]

More specifically, the Attorney General's opinion provides:

> If your Department sells surplus agricultural commodities to a domestic exporter for export purposes under a program designed to dispose of the goods on the best possible terms and conditions, the resulting export is a purely commercial transaction in the language of the House Report and, hence, not subject to the Cargo Preference Act even if the United States advances credit to the exporter and the ultimate purchaser is a foreign government. On the other hand, if the sale is made pursuant to a program the purpose of which is in substantial part to assist the economy of the country to which the commodities are exported and where, consequently, the terms of the sale are more favorable to the purchaser than they would be in a normal business transaction, the sale cannot be regarded as a purely commercial transaction in the words of the House Committee; it would be a 'giveaway' in the sense in which the term apparently was used by Senator Butler . . . . Accordingly, if the United States advances credit or guarantees the convertibility of currencies in connection with such a sale, the commodities involved come within the scope of the Cargo Preference Act.[7]

A later U.S. District Court decision in *Transportation Institute v. Dole*,[8] since vacated as moot, upheld an even broader application of cargo preference than determined by the Attorney General and took issue with the Attorney General over whether a foreign assistance purpose is a *sine qua non* for coverage by cargo preference requirements. The court considered the application of the '54 Act to the Department of Agriculture's Blended Credit Program, pursuant to which the Commodity Credit Corporation (CCC) advanced funds to U.S. exporters of commodities and credits to the foreign importers. The court found that the Blended Credit Program was substantially concessionary and, therefore, that the '54 Act is applicable to that program.

The opinion in *Transportation Institute* also stated that the '54 Act is "not limited . . . merely to foreign aid programs, concessionary transactions, or government procurements."[9] Rather, the court concluded that the express terms of the statute, as well as the intent of its framers to broaden the scope of—and close the loopholes in—the cargo preference laws, exclude from the statute's scope only those "private transactions which [are] strictly commer-

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[6] The question whether the '54 Act should apply to foreign individuals as well as foreign nations was also the subject of this opinion. The Cargo Preference Act of 1954 speaks in terms of providing benefits to a "foreign nation". The Attorney General held that Congress did not intend to use the term "foreign nation" exclusively in the sense of "foreign government." 42 Op. Atty. Gen. 203, 209 (1963).

[7] 42 Op. A.G. 203, 214 (1963).

[8] 603 F. Supp. 888 (D.D.C. 1985).

[9] Id. at 896.

cial in nature without the participation of the United States Government or its money."[10]

In *Council of American Flag Shipowners v. United States*,[11] the court determined an additional criterion for inclusion under cargo preference requirements, namely, that the specific cargo be identifiable. There, the court ruled that the '54 Act was inapplicable to a cash transfer arrangement between the United States and Israel because the aid agreement lacked a reliable method of determining whether a given purchase was made with American funds.

C. Food Security Act of 1985

The Food Security Act of 1985, Subtitle C of Public Law 99-198, effected major changes to the Cargo Preference Act of 1954, by the addition of sections 901a through 901k[12] to the Merchant Marine Act of 1936.

Some of the major changes are the following:

1. Excluded Cargoes—The Food Security Act of 1985 excluded cargoes generated by certain market discount export programs entirely from cargo preference requirements.

2. Included Cargoes—The Food Security Act of 1985 increased the U.S.-flag share of cargo generated by other donation programs from 50% to 75%.

3. Vessel Requirements—The additional 25% of cargo mandated by the Food Security Act of 1985 must be carried under the same terms and conditions as apply to the 50%. However, the Food Security Act of 1985 placed a 25 year age limit and other requirements on vessels carrying the additional 25% cargo.

4. Calendar Year—The Food Security Act of 1985 changed the cargo preference year to the period from April 1 through March 31.[13]

5. Minimum Tonnage—The Food Security Act of 1985 mandated that a minimum tonnage of commodities be shipped under the programs subject to cargo preference.

6. Freight funding for the Additional 25%—The Food Security Act of 1985 increased the minimum U.S.-flag share of certain cargoes from 50 to 75 percent, but it also made the Department of Transportation responsible for funding the ocean freight differential incurred in compliance with the additional

[10] Id. at 899.

[11] 596 F. Supp. 160, aff'd. without opinion, 782 F. 2d 278 (D.C. Cir. 1986).

[12] Formerly, 46 App. U.S.C. §§ 1241e—1241o, subsequent to passage of Pub. L. 109-304, 46 U.S.C. §§ 55311—18.

[13] Subsequently, the cargo preference year was changed, by section 3514 of Public Law 108-136, to coincide with the fiscal year beginning each October 1st.

cargo reservation. In addition, if the overall cost of using U.S.-flag vessels exceeds a certain percentage of the cost of commodities and ocean transportation, the Department of Transportation is required to fund the excess cost. The funding is provided for in a permanent indefinite appropriation. If the funding terminates then the amendments effected by the Food Security Act terminate, and the original 50% cargo preference requirement would apply to the original array of export programs.

D. Great Lakes Food Aid Cargoes

Section 17 of the Maritime Security Act of 1996, Public Law 104-239,[14] mandates that the Commodity Credit Corporation (CCC) follow certain purchasing and transportation procedures for packaged commodities for the Title II[15] export program. The Title II program is administered by the U.S. Agency for International Development (AID), which donates commodities to foreign governments, intergovernmental organizations, or private relief agencies, commonly referred to as "cooperating sponsors," through agreements between AID and a cooperating sponsor. CCC has the responsibility to acquire and make available the agricultural commodities needed to carry out agreements under Title II.[16]

Section 17 requires that 100 percent of Title II cargo in a procurement be first allocated, without detriment to any port range, on the basis of lowest landed cost without regard to the country of registry of the vessel; and then there shall be allocated to the Great Lakes port range any cargoes for which it has the lowest landed cost under that calculation. Only cargoes that exceed 25 percent of the total tonnage of the procured commodities may be diverted or reallocated to another port range to meet cargo preference requirements. The statute provides that cargo preference does not apply for up to 25 percent of the cargo, if the cargo is allocated to the Great Lakes port range.

Accordingly, any Title II commodities allocated to the Great Lakes, pursuant to section 17, may be shipped on foreign-flag vessels for up to 25 per-

[14] Section 17 is codified in 46 U.S.C. 55314(c)(3).

[15] Title II of the Agricultural Trade Development and Assistance Act of 1954, as amended, Public Law 83-480.

[16] CCC procures packaged commodities requested for Title II through public solicitations for bids to sell commodities on an FAS (free along side) vessel or intermodal basis. When the terms of sale reflect FAS, the seller of the commodity has an obligation to deliver the commodity to the ocean carrier alongside the vessel on the quay at the named port of export. When the terms of sale reflect an intermodal basis, the seller has an obligation to deliver the commodity to the ocean carrier at the seller's place of business or some other place or point, and the ocean carrier is responsible for transporting the commodity to the port of embarkation. CCC considers the price it would pay for the commodity along with the anticipated freight cost to ship the commodity to the foreign destination to arrive at the "lowest landed cost," which determines the commodity offers (and the U.S. port of export) that CCC accepts.

cent of the total commodities. However, the amount of commodities shipped on foreign-flag vessels from the Great Lakes is not subtracted from the total pool of Title II cargo for purposes of determining compliance with cargo preference requirements.[17] Thus, if 25 percent of the Title II cargo is transported via Great Lakes ports on foreign-flag vessels, then 100 percent of the remaining cargo (i.e., 75% of the total procured) must be reallocated to the other port ranges for shipment on U.S.-flag vessels.

USDA has issued a regulation, 7 CFR § 1496.5(f), that allows cargo transshipped through Great Lakes port to be counted as meeting the section 17 requirements. The cargo must be delivered, typically by rail or road, to a marine cargo-handling facility located within a Great Lakes port that is capable of loading ocean-going vessels, as well as loading ocean going conveyances such as barges and container vans. The commodities must be transferred from one transportation conveyance to another at such a facility.

USDA's regulation was supported by Great Lakes interests who saw an advantage in getting work for dock workers in the Great Lakes during the winter months when the Seaway is closed. U.S.-flag carriers calling at Atlantic or Pacific Coast ports are able to offer attractive freight rates, because most containers traveling inland from the Coasts carry imports, but few containers traveling outbound for repositioning purposes carry exports. The result has been that significant amounts of Title II cargo are containerized at the Great Lakes ports and then shipped by rail from Great Lakes ports to Atlantic and Pacific Coast ports, where mixed U.S.-flag/foreign-flag or pure foreign-flag relay services carry the cargo to destination.[18]

E. Application of the '54 Act to Grants and Loan Guarantee Programs

Inasmuch as the '54 Act applies, by its terms, whenever the United States shall "obtain for its own account, or shall furnish to or for the account of any foreign nation, . . . any equipment, materials, or commodities, . .. or shall advance funds or credits . . . in connection with the furnishing of <u>such</u> equipment, material, or commodities . . ." it may be posited that the transportation

[17] See 46 U.S.C. § 55314(c)(5): "A determination of nonavailability of vessels of the United States resulting from the application of this subsection [55314(c)] may not reduce the gross tonnage of commodities required by this section [55314] and section 55305 of this title [46] to be transported on vessels of the United States."

[18] Such cargo carried by a mixed U.S.-flag/foreign-flag service is counted as foreign-flag cargo because any part of a voyage performed by a foreign-flag vessel makes the entire voyage a foreign voyage. The Maritime Administration's Priority Rule, discussed infra, allows mixed U.S.-flag/foreign-flag services to count as U.S.-flag service only if there is no all-U.S.-flag service available. However, all-U.S.-flag service generally is available in Gulf Coast ports, thereby negating use of the Maritime Administration's Priority Rule in the Great Lakes.

of any cargoes in connection with which U.S. funds or credits have been advanced is subject to the U.S.-flag requirement, regardless of the recipient. (Underscoring supplied) The basis for this reading is the apparent independence of the phrase "such equipment, material, or commodities" from the described recipients. This independence is, to some extent, supported by the legislative choice of verbiage. Congress could have selected the phrase "advances funds or credits . . . in connection with such furnishing of equipment, supplies, or commodities," if it desired to more clearly restrict the effect of the statute to situations in which the cargoes would be obtained by the U.S. explicitly for the account of the federal government or furnished to a foreign nation. (Underscoring supplied)

Further, the House Report pertaining to this legislation describes the situations in which the legislation would apply:

> The bill applies in four kinds of situations: (1) Where the United States procures, contracts, or otherwise obtains for its own account, equipment, materials, or commodities; (2) furnishes equipment, materials, or commodities to or for the account of any foreign nation without provision for reimbursement; (3) advances funds or credits; or (4) guarantees the convertibility of foreign currencies in connection with the furnishing of such equipment, materials, or commodities. It has no application to purely commercial transactions where a broker or exporter sells to a firm abroad without the participation of the U.S. Government.

H.R. Rep. No. 2329, 83d Cong., 2d Sess. 1-2 (1954). By thus categorizing the situation in which the preference is to be given effect, Congress did imply that these provisions might be treated as severable.

The '54 Act does not mention "loan guarantees" instead referring to "extension of credit." The Maritime Administration's cargo preference regulation, at 46 CFR § 381.7, however, explicitly applies cargo preference requirements to government guarantee programs (and grants): it reads:

> 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 procured, contracted for or otherwise obtained by or on behalf of the grantee, borrower, or any of their contractors or subcontractors.

This regulation would apply cargo preference requirements to ocean shipments impelled by U.S. Government grants, loans or loan guarantees, including those generated by the Maritime Administration's own ship financing loan guarantee program. However, a decision by the Office of Legal Counsel (OLC) has clarified application of this regulation.

In a memorandum of February 2, 1988, to Wendy Gramm, Administrator for Information and Regulatory Affairs, Office of Management and Budget, Assistant Attorney General, Charles Cooper, opined on the application of the '54 Act to imported cement and clinker used in Federal aid highway projects. In that memorandum, the Office of Legal Counsel parsed the language of the '54 Act, and found that the requirements apply only to items procured for the account of the U.S. Government or the account of a foreign nation.[19] With regard to the cargo preference regulations at 46 C.F.R. § 381, Assistant Attorney General Cooper found that the Maritime Administration's interpretation could not be squared with the plain language of the Cargo Preference Act of 1954, and the Maritime Administration's interpretation was not entitled to deference.

OLC reasoned that, as the statute expressly applied cargo preference requirements "[w]henever the United States . . . shall furnish [items] to <u>or for the account of</u> any foreign nation . . . or shall advance funds or credits. . . in connection with the furnishing of such [items]," Congress did not mean to apply cargo preference requirements to the advancement of funds or credits in connection with the furnishing of items to domestic recipients (such as state agencies). OLC viewed the remarks in the legislative history as referring to foreign aid transactions, in view of PL 664's purpose in "plugging existing loopholes"[20] and to "make permanent and all-inclusive the principles embodied in the various foreign aid bills that would insure to the United States-flag vessels at least fifty percent of cargoes financed in any way by Federal Funds."[21] OLC reviewed the Maritime Administration's Cargo Preference regulations, at 46 CFR 381.7(a)(1), which applies cargo preference requirements to all goods that are obtained with funds "granted, guaranteed, loaned, or advanced by the federal government, and that may be shipped by vessel." OLC held that the regulations did not apply to materials imported for the account of a State.

The result, as regards vessels financed by the Maritime Administration's loan guarantees, is that cargo preference requirements need not apply to the ocean transportation of components imported to the U.S. for inclusion in the

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[19] Note that Attorney General, Robert Kennedy, found in his 1963 decision that the term, "foreign nations," include foreign nationals and organizations.

[20] Senate Comm. On Interstate and Foreign Commerce, Permanent Cargo Preference Legislation, S. Rep. No. 1584, 83d Cong., 2d Sess. 5 (1954).

[21] Cargo Preference Bill (50-50 Cargo): Hearings Before a Subcomm. Of the Senate Comm. On Interstate and Foreign Commerce, 83rd Cong., 2d Sess. 31 (1954)(statement by Senator Butler).

vessel where the vessel is destined for domestic shipowners, but should apply when vessels are exported to foreign owners. It is noted that Maritime Administration approval is required under 46 C.F.R. § 298.13, for inclusion of any imported components, and such approval may be granted under conditions that include requirements to ship all imported components on U.S.-flag vessels. Such requirements have been imposed on a case-by-case basis, where feasible.

F. Fair and Reasonable Rates

The Cargo Preference Act of 1954 requires government agencies to contract with U.S.-flag vessels as long as those vessels are "available at fair and reasonable rates for United States-flag commercial vessels." The fair and reasonable calculation, as interpreted by the Comptroller General in a letter of February 17, 1955 (B-95832), is based on the carrier's capital and operating costs with a reasonable addition for overhead.[22]

The cost of using U.S.–flag vessels for compliance with cargo preference requirements is contained by several factors. If the cost of the lowest-offered U.S.-flag vessel exceeds a level deemed "fair and reasonable," the shipper agency is free to use a foreign-flag vessel instead.

The Maritime Administration's regulations for determining fair and reasonable costs, 46 C.F.R. § 382, rein in high cost carriers by basing the cost structure for certain items of expense on an average, not an individual, cost basis. Moreover, the fair and reasonable rate guideline is a ceiling; it does not guarantee a profit. U.S.-flag carriers compete for cargoes by bidding below the fair and reasonable rate, sometimes below fully distributed costs.[23] On the other hand, shipper agencies are not precluded from paying U.S.-flag vessels a rate exceeding the fair and reasonable rate, when, for example, the U.S.-flag rate is lower than the foreign-flag rate.

G. Determinations of Non-availability of U.S.-flag vessels

Shipper agencies are required to fix U.S.-flag vessels prior to fixing foreign-flag vessels whenever needed to maintain shipper agency compliance

[22] See, generally, Rainbow Nav. Inc. v. Dept. of Navy, 783 F2d 1072, 1986 AMC 2061; (D.C. Cir. 1986), Aeron Marine Shipping Co. v. United States, 695 F.2d 567, 1984 AMC 607; (D.D.C. 1982). See, also American Maritime Assn. v. United States of America, 766 F.2d 545, 549 (D.C. Cir.1985). The Merchant Marine Act of 1970, among other things, provided for direct operating and construction subsidies for U.S.-flag bulk vessels, with the intent that the premium cargo preference rates would be phased out and such vessels would carry preference cargoes at world rates. See, S. Rep. No. 91-1080, at 58.

[23] U.S.-flag vessels are not entitled to payment at the "fair and reasonable" for carriage of preference cargoes; the shipper agencies may pay less if the carrier agrees to the rate. See United States of America v. Bloomfield Steamship Co., 359 F.2d 506, 1966 AMC 2307 (5th Cir. 1966).

with the applicable cargo preference U.S.-flag percentage. See 46 C.F.R. § 381.5. Shipper agencies may determine that U.S.-flag vessels are not available for full shipload lots only with Maritime Administration concurrence.[24] The Maritime Administration defines a "full shipload lot" as that amount of cargo which induces the specific voyage. While the cargo lot may take up the majority of the vessel's space, a full shipload lot does not necessarily require a vessel's volume or weight capacity to be fully utilized.

As a general rule, if a U.S.-flag vessel is available anywhere in the U.S. where the cargo can be shipped, it is available under cargo preference requirements. Several court cases reinforce this principle.

In *City of Milwaukee v. Yeutter*,[25] a challenge was made to the Government's interpretation and application of the availability clause of the Cargo Preference Act to the Agricultural Trade Development and Assistance Act. The port of Milwaukee argued that if U.S.-flag vessels are not available where a particular cargo is offered, then the cargo should go on a foreign-flag vessel, and if the exports on U.S.-flag vessels are less than 75 percent of the total, as Milwaukee saw things, that was "simply a consequence of the requirement that U.S.-flag vessels be available at reasonable prices where the cargo is." Milwaukee argued that "cargo arriving at ports not frequented by U.S.-flag carriers must be carved out of the total to which the 75% preference applies. Id. at 544. However, the court squarely rejected Milwaukee's argument, stating ". . . the year-long accounting period means that the statutory preference is *not* limited to vessels on hand. U.S.-flag ships are entitled to 75% of a *year's* worth of cargo (if available at reasonable prices)." Ibid. (Emphasis in original). In other words, the Court of Appeals held that the requirement that 75 percent of gross tonnage of food appropriated for disbursement under food for peace program be shipped by privately owned United States-flagged commercial vessels was properly calculated on nationwide basis rather than on port-by-port basis.

Maritime Administration primacy in determining "non-availability" was further confirmed in *Farrell Lines Incorporated v. United States Dept. of Agriculture*.[26] In *Farrell*, the U.S. District Court for the District of Columbia

[24] See America Cargo Transport, Inc. v. United States, No. CO5-393JLR, (W.D. Wash. Nov. 5, 2007). That case involved a challenge by a U.S.-flag vessel to a decision by AID to reject its bid for carriage of a full shipload lot of cargo without the Maritime Administration's concurrence, under 46 C.F.R. § 381.5. During its defense of the lawsuit, the Department of Justice, through its Civil Division determined that AID had acted incorrectly and that going forward AID is required to defer to the Maritime Administration's decision on whether vessels bidding for full shipload lots of cargo are available. The lawsuit itself was dismissed as moot, inasmuch as the original cargo had long been shipped and there was no longer any controversy, in that the Government's position is now consistent with plaintiff's position.

[25] 877 F.2d 540, 1989 AMC 2433 (7th Cir. 1989).

[26] civ. no. 1:98CV02046 (D.D.C. Sept. 17, 1998).

issued an order that still affects the way the Department of Agriculture (USDA) applies cargo preference to the Food for Progress and Section 416(b) programs. USDA had made a cargo freight selection that was in disregard of Maritime Administration advice that a U.S.-flag vessel bidding to carry cargo from the U.S. Gulf by rail shipment to the vessel at an East Coast port was "available" for purposes of the Cargo Preference Act of 1954. The U.S.-flag carrier sued both USDA and the Maritime Administration. The Justice Department agreed with the Maritime Administration's position and would not defend USDA's position. The court's order, agreed to by DOJ, still requires USDA to "defer to the cargo preference priority policy of the Maritime Administration as now constituted, . . . or as it may be duly revised by the Maritime Administration; . . .." Slip Op. at 2.

Yet another case, *Osprey Shipholding Corp., LLC v. Rumsfeld,*[27] further confirmed the Maritime Administration's authority to determine "non-availability." This case involved the Military Traffic Management Command (MTMC), subsequently renamed the Military Surface Deployment and Distribution Command (SDDC), and the shipment of cargoes sponsored by its subordinate command, the Defense Security Cooperation Agency (DSCA), which was subject to cargo preference requirements under the '54 Act. A U.S.-flag carrier lost out on a cargo to a foreign-flag carrier as a result of MTMC finding a U.S.-flag vessel to be not available. MTMC claimed that the cargo needed to be shipped on an emergency basis due to diplomatic concerns, and that the U.S.-flag vessel would miss the lay days specified in a reissued cargo tender. The carrier filed suit against both the Defense Department and the Maritime Administration. A hearing was held by District Court Judge, Gladys Kessler, who, at oral argument, expressed doubt as to the validity of the "non-availability" waiver MTMC granted itself. Before the judge could render a formal decision in the case, the Justice Department entered into a settlement with the U.S.-flag carrier, whereby the case was resolved upon MTMC agreeing to enter into a memorandum of understanding (MOU) with the Maritime Administration to govern procedures for shipping cargo.

That MOU provides in relevant part:

> [The Maritime Administration] shall be contacted for assistance in cases of nonavailability of U.S.-flag vessels when Excess Defense Articles (EDA) and Foreign Military Finance(FMF) cargo sponsored by Defense Security Cooperation Agency (DSCA) is to be shipped. In the event a waiver is needed for DSCA cargo, the request shall be submitted to [the Maritime Administration] for approval. Cargo shall not be shipped without a waiver.

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[27] civ. no. 99-2841, 2001 AMC 2168 (D.D.C. Apr. 13, 2001).

H. Computed Separately

The '54 Act requires that shipper agency compliance with the U.S.-flag percentage be tallied by three vessel types, "dry bulk carriers, dry cargo liners, and tankers." In other words, carriage of preference cargo by each of these type vessels must each meet the applicable U.S.-flag percentage.

It is noted that the term, "dry cargo liner," does not signify a vessel type, rather it is a type of service. The definition of vessel types is not explained in either of the reports accompanying the bill that became the Cargo Preference Act of 1954, House Report (H. Rep. No. 2329, 83d Cong., 2d Sess. (July 20, 1954)) nor the Senate Report (S. Rep. No. 1584, 83d Cong., 2d (June 11, 1954)).

In his decision of August 28, 1959, B-136530, the Comptroller General addressed the issue and stated:

> . . . it is our opinion that the Congress intended the 'computed separately' provision to apply to the type of vessels rather than the type of cargoes. Therefore, and since the language of the provision itself clearly supports this opinion, we must conclude that the statute should be construed literally; otherwise, as contended by the American Tramp Shipowners Association, if the statute did not require a separate computation for each type of vessel, the computed separately clause would add nothing to the statute as it stood before the amendment, and the amendment would be meaningless.

(Emphasis added)

The Comptroller General's views were called into question by post-enactment views expressed in a letter of September 22, 1959, to the Secretary of Agriculture by Senator Magnuson and Congressman Bonner who were responsible for passage of the Cargo Preference Act of 1954. Subsequently, on October 14, 1959, the Comptroller General advised the Secretary of Agriculture that he would "not insist upon adherence to [the Comptroller General's] opinion dated August 28, 1959, until such time as the Congress has had an opportunity to reconsider the provisions of the Cargo Preference Act." On June 28, 1960, Senator Magnuson wrote the Comptroller General stating that the matter needed extensive study.

The question of what is meant by the "computed separately" language in the '54 Act was central in three consolidated cases, *Victory Maritime Inc. v. Pressley, et al.*,[28] *Liberty Shipping Group Limited Partnership v. Carlton*,[29]

[28]No. 01cv00381 RWR (D.D.C. filed Feb. 16, 2001).

[29]No. 01cv00739 RWR (D.D.C. filed May 5, 2001).

and *Gulfcoast Transit Company v. Carlton*.[30] These cases concerned application of the '54 Act to shipments of export food aid cargo sponsored by the USDA and AID. The Department of Justice, which represented each of the agencies in this litigation, reviewed the matters at issue and determined a uniform government position. On May 2, 2002, DOJ submitted the following status report to the United States District Court for the District of Columbia.

> 1. The Cargo Preference Act, at 46 [App.] U.S.C. § 1241(b)(1), requires that at least 75% of the agricultural commodities shipped by AID be shipped by U.S. flag vessel 'computed separately for dry bulk carriers, dry cargo liners, and tankers.' The 75% minimum must be computed separately for each category of vessel.
>
> 2. In defining the terms 'dry bulk carrier' and 'dry cargo liner,' the government believes that at the time of the adoption of this provision of the Cargo Preference Act these terms did not refer to the type of vessel but rather to the service of the vessel. 'Dry bulk carrier' refers to irregular service and 'dry cargo liner' refers to regularly scheduled service.
>
> 3. AID is mandated to comply with the Cargo Preference Act 'in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels . . . by geographic areas.' 46 [App.]U.S.C. § 1241(b)(1). AID must, of course, comply with 46 C.F.R. §§ 381.4 and 381.5.

I. Foreign Build and Rebuild Prohibition

Public Law 87-266, approved September 21, 1961, amended section 1241(b)[now section 55305(a)] to prohibit foreign vessels from acquiring U.S. registry in order to participate immediately in the carriage of cargo preference cargoes. Instead, such vessels must wait three years while under U.S. registry before they are eligible for carriage of preference cargoes. A Senate report accompanying the bill explained that Congress sought to prevent foreign-built, foreign-rebuilt and foreign documented vessels (then recently excluded from carrying cargoes reserved to U.S. coastwise qualified vessels) from sharing preference cargoes and destabilizing the market to the detriment of the U.S. merchant marine.

> In the past few years an increasing number of foreign-flag vessels and vessels built or rebuilt in foreign shipyards have been documented under American registry. The purpose of or at least one purpose, of so registering was to qualify these vessels for participation as American-flag ships under section [55305(a)] and thus permit them to carry those cargoes restricted by law to American-flag vessels. Foreign markets have been quiet, and the ships in question could operate more profitably under U.S. registry because of these

[30] No. 01cv 00768 RWR (D.D.C. filed May 10, 2001).

> 50-50 cargoes, so they have been transferred to American registry. No duty is paid on such foreign-built or foreign-rebuilt ships.
>
> * * *
>
> Unless the present bill is enacted, it is unlikely that there will be any building, or rebuilding, of American unsubsidized vessels in American shipyards for a long time to come, with the result that a substantial portion of the work which should normally be available to this country's skilled shipyard craftsmen would be done by foreign shipyard labor. To encourage and maintain an American-built merchant marine, the laws of the United States have long provided that only American-built ships shall have the right to engage in the domestic trades (46 U.S.C. 883). When the Congress was advised that vessels were being reconstructed in the United States with midbodies built in foreign yards, legislation was enacted which denied coastwise privileges to such ships . . . . It was believed that American shipyards, American shipowners, and American labor were thus somewhat protected from foreign-built and foreign-rebuilt ships, but now it appears that the legislation cited has not deterred these ships from being documented under our flag in order to compete with American-flag vessels for 50-50 cargoes. Enactment of the proposed bill would close this loophole and thus make more effective the long and often expressed policy of maintaining an American-built as well as American-owned merchant marine.

S. Rep. No. 667, 87th Cong., 1st Sess. 2-3 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2806-2808.

The "three-year wait" provision is not a complete bar to foreign-built vessels carrying preference cargo. The "three-year wait" provision does not apply to the 60 vessels enrolled in the Maritime Security Fleet[31] for any day that the vessel is receiving operating payments under that program. Foreign-built vessels are eligible to carry military preference cargo[32] as well as PR-17[33] Export-

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[31]See 46 U.S.C. § 53108(b). The Maritime Security Fleet, established under 46 U.S.C. § 53102, consists of active, commercially viable, militarily useful, privately-owned U.S.-flag vessels needed to meet national defense and other security requirements and to maintain a United States presence in international commercial shipping. Such vessels receive an operating payment from the Maritime Administration. Vessels in the Maritime Security Fleet are required to enter in a voluntary intermodal sealift agreement, by which means the vessels and associated shore-side equipment and facilities are committed for use by the military to support the emergency deployment and sustainment of U.S. military forces. In return, the vessels receive a preference in competing for peacetime military cargo. See 72 Fed. Reg. 62898-02 (Nov. 7, 2007).

[32]Under the Military Cargo Preference Act of 1904, 10 U.S.C. § 2631: "Only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps. However, if the President finds that the freight charged by those vessels is excessive or otherwise unreasonable, contracts for transportation may be made as otherwise provided by law. Charges made for the transportation of those supplies by those vessels may not be higher than the charges made for transporting like goods for private persons."

[33]Public Resolution No. 17 (PR-17) of the 73rd Congress presently reads: "It is the sense of Congress that any loans made by an instrumentality of the United States Government to foster the exporting of agricultural or other products shall provide that the products may be transported only on vessels of the United

Import Bank financed cargo immediately upon registering under the U.S. flag. However, the "three-year wait" provision does act as a deterrent to vessel owners bringing foreign-built vessels into the U.S. registry, or rebuilding older U.S. built vessels in foreign shipyards, because, absent participation in the Maritime Security Fleet, they generally can't afford to have a vessel sit idle for three years. Second, to build a vessel in the U.S. requires an assured return that would be sufficient to retire the debt associated with the higher U.S. construction costs. The international cargo preference trade is not lucrative enough to support that kind of investment, particularly if the vessel is idle for three years before entering the cargo preference trade. Someone building a vessel in a U.S. shipyard would be doing so in order to enter into the domestic coastwise (or "Jones Act")[34] trade where they could earn a sufficient return on investment.

While a provision was added to the Jones Act in 1960, by Public Law No. 86-583, § 1, precluding "rebuilding" in a foreign shipyard, the term need not be interpreted congruently with the term, "rebuilding" in the cargo preference statute. See *Aquarius Marine Co. v. Peña,*[35] wherein the court found that the Maritime Administration's ruling that the conversion of the GOLDEN MONARCH in a Korean shipyard from a tanker to a dry bulk carrier constituted a "rebuilding" was permissible, notwithstanding that the Coast Guard had ruled that the vessel was not rebuilt for Jones Act purposes. The conversion of the vessel consisted mainly of putting in deck hatches and hatch comings, work that did not add up to a change in steel weight significant enough to trigger a rebuild determination under the Coast Guard regulations. However, the Maritime Administration based its finding that the vessel had been rebuilt on the change in type of vessel resulting from the conversion.

In the *Aquarius* case, the vessel owner had also argued that the vessel was immediately eligible to carry preference cargo under the 25 percent incre-

States unless, as to any or all of those products, the Secretary of Transportation, after investigation, certifies to the instrumentality that vessels of the United States are not available in sufficient number, in sufficient tonnage capacity, on necessary schedules, or at reasonable rates." 46 U.S.C. § 55304.

[34]The "Jones Act" refers to section 27 of the Shipping Act of 1916, now codified at 46 U.S.C. § 55101 et seq. That statute requires vessels operating in the coastwise trade of the United States to be U.S. citizen owned and to have a certificate of documentation with a coastwise endorsement (or if exempt from documentation to be otherwise eligible for such a certificate and endorsement). Under 46 U.S.C. § 12112, a coastwise endorsement may be issued only for vessels that are built in the United States, or if not built in the United States, captured as a war prize, forfeited to the United States or qualified as a wrecked vessel under 46 U.S.C. § 12107. Section 12132 of Title 46, United States Code, adds that a vessel of more than 200 gross tons eligible to engage in the coastwise trade, loses that eligibility if the vessel is sold foreign in whole or in part or placed under foreign registry. In addition, that section excludes from participation in the coastwise trade, vessels that have been rebuilt outside the United States.

[35]64 F.3d 82, 1995 AMC 2829 (2d Cir. 1995).

mental reservation provided in the Food Security Act, 46 App. U.S.C. § 1241f. Aquarius contended that the criteria for carriage under this provision are set forth exclusively in section § 1241o , which requires only that a vessel be (1) U.S.-flagged, (2) "necessary for national security," and (3) under 25 years old (unless specially certified by the Secretary of Transportation). Aquarius argued that the Maritime Administration erroneously applied the foreign rebuild exclusion of § 901(b) to cargoes allocated under § 1241f.

The court found this claim to be without merit. Subsection 1241f(c)(1) specifies that the requirements for transporting agricultural goods under the Food Security Act are "subject to the same terms and conditions as provided in section 1241(b) [§ 901(b)] of this title." The court read the three requirements set forth in § 1241o as supplementing, rather than supplanting, this language, which otherwise would be rendered inoperative.

In 2005, the Maritime Administration followed the precedent it set with the GOLDEN MONARCH by holding that the Barge CONNOR was ineligible to carry preference cargoes. A decision rendered in Docket No. A-198 (Oct. 26, 2005), found that the Barge CONNOR had been converted in a foreign shipyard from a tanker into a vessel capable of carrying dry bulk cargo.

There have been some statutory exceptions to the three-year wait provision. Section 615 of the Merchant Marine Act of 1936, 46 App. U.S.C. § 1185, provided a one year "window" for operators to apply for authorization to build vessels abroad that would "be deemed to have been United States built" for purposes of the Operating-Differential Subsidy program then in effect, and for purposes of the Cargo Preference Act of 1954. Section 615 expired by its own terms on the last day of fiscal year 1982, however, the vessels approved under that statute retained the right to participate in the cargo preference trade (unless the vessel is rebuilt or redocumented abroad). As noted above, 46 U.S.C. § 53108(b) provides that the three-year wait period does not apply for any day that a vessel is receiving payments under a Maritime Security Program agreement.

J. Wrecked Vessels

The vessel documentation statutes allow for granting a coastwise endorsement to a vessel that qualifies as a "wrecked vessel." See 46 U.S.C. § 12112(a)(2)(B)(iii). Under 46 U.S.C. § 12107, a wrecked vessel is a vessel that:

(1) was wrecked on a coast of the United States or adjacent waters; and

(2) has undergone repairs in a shipyard in the United States equal to at least 3 times the appraised salvage value of the vessel.

A vessel must undergo so much work in a U.S. shipyard to qualify as a "wrecked vessel," that it is viewed essentially as a new vessel built in the United States,[36] and therefore wrecked vessels are treated as new U.S. built vessels for cargo preference purposes. This principle was first announced in a Maritime Administration legal opinion of August 26, 1981, that found the foreign-flag vessel, POINT VAIL (ex-MARY ELLEN) eligible, as a rebuilt wrecked vessel, to carry cargo subject to the Cargo Preference Act of 1954, without having to be documented under U.S. registry for three years.

K. Forfeited Vessels

The vessel documentation statutes also allow for granting a coastwise endorsement to a vessel that "was adjudged to be forfeited for a breach of the laws of the United States." See 46 U.S.C. § 12112(a)(2)(B)(ii). However, a forfeited foreign-built or foreign-flag vessel is not eligible for the carriage of cargo subject to the Cargo Preference Act of 1954 without meeting the three-year waiting period requirement. As explained in a Maritime Administration Opinion and Order, in Docket No. A-197, issued April 29, 2002, forfeited vessels are not required to undergo any U.S. shipyard work to qualify as a "forfeited vessel," and consequently are not considered to be vessels built within the United States, as are "wrecked vessels."

L. Use of Combination U.S./Foreign-Flag Service

The Comptroller General has held that when preference cargo is transported on a service involving transshipment to a relay or feeder vessel, both segments of the voyage must be made on U.S.-flag vessels for the voyage to count as a U.S.-flag voyage. See 49 Comp. Gen. 755, B-145455 (May 5, 1970); B-136530 (May 12, 1976). The only exception is that foreign-flag vessels may be used to transship or lighter cargo solely within the territorial waters of the receiving country.

On June 16, 1986, the Maritime Administration issued a policy letter advising that the agency would, in certain circumstances, consider a mixed U.S.-flag/foreign-flag voyage acceptable in the absence of an all-U.S.-flag service. That letter set out the prioritization of U.S.-flag shipping service for compliance with cargo preference requirements:

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[36] See Atlantic Richfield Co. v. United States, 774 F.2d 1193 (D.C. Cir. 1985), "these [wrecked] vessels have been long regarded as vessels built in the United States for purposes [of the Jones Act]." Id. at 1204, n. 47, (citing 36 Op. Atty. Gen. 302, 309-311).

(1) The following all U.S.-flag vessel services have equal status in the selection by shippers of preference cargoes:

(a) U.S.-flag vessel service (U.S.-flag vessel with relay/transshipment to another U.S.-flag vessel to final discharge port);

(b) Direct U.S.-flag vessel service;

(c) Intermodal services to the final destination or from the point or port of origin utilizing only U.S.-flag vessels for any waterborne portion.

(2) In the event that all U.S.-flag vessel service as described in Paragraph (1) above is not available, foreign-flag vessels to final discharge port is the acceptable and required U.S.-flag service under the statute.

Federal agencies and/or their program participants may not make determinations of non-availability without the Maritime Administration's concurrence of the criteria utilized.

M. Government-wide Regulations.

The policy and procedures with respect to compliance with the '54 Act by agencies other than DOD appear in the Federal Acquisition Regulation (FAR), at 48 C.F.R. Subpart 47.5, Ocean Transportation by U.S.-flag Vessels. These regulations are implemented by the department or agency shipping the preference cargo. Subpart 47.507(a), of 48 C.F.R., requires the contracting officers of all such departments and agencies to insert the U.S.-flag shipping provisions contained in 48 C.F.R. 52.247-64, in solicitations and contracts which may involve ocean transportation of equipment, materials and commodities, generated by the Federal contract. These shipping provisions require that from 50 percent to 100 percent of all supplies, materials, or equipment be transported on U.S.-flag vessels, dependent on the governing U.S. cargo preference law or agency policy required to ensure that the agency meets its compliance requirement.

Department of Defense preference cargoes are subject to the requirements set forth in the Defense Federal Acquisition Regulation Supplement (DFARS), 48 C.F.R. Subpart 247.5—Ocean Transportation by U.S.-Flag vessels. These regulations provide for the DOD policies and procedures for compliance with the Cargo Preference Acts of 1904 and 1954. Cargo subject to the Military Cargo Preference Act of 1904 must be transported in "vessels of the United States or belonging to the United States," which do not have to be privately-owned, but may be government-owned vessels. The Cargo Preference Act of 1954 overrides the Military Cargo Preference Act of 1904, codified at 10 U.S.C. § 2631, so that at least 50 percent of the military cargoes transported by sea must be shipped on "privately-owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates."[37] Notwithstanding this, only 48 CFR, Subpart 247.5 applies to these military cargoes. These regulations are implemented solely by DOD. The DOD regulations state that by meeting the 100% U.S.-flag requirement in the Military Cargo Preference Act of 1904, it is expected that DOD will meet the 50 percent requirement in the Cargo Preference Act of 1954.

N. Federal Acquisition Streamlining

The Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) provided authority to streamline the government acquisition process and minimize burdensome government-unique requirements. Amendments were made to the FAR and DFARS which waive the provisions requiring preference for U.S.-flag vessels when ocean transportation is required for supplies purchased under a government contract.

After vigorous protests by maritime industry groups and the Maritime Administration, the Director, Office of Federal Procurement Policy, Steven Kelman, issued a memorandum on May 1, 1996, clarifying the policy and intent of the amendments resulting from the Federal Acquisition Streamlining Act of 1994. As stated in the memorandum:

> The purpose of the rule is to provide flexibility for contractors and subcontractors which require ocean transportation to supply the same manufactured goods both in the commercial market place and to the United States Government (hereinafter "Government"). The primary intent is to avoid interference with established commercial practices of contractors which subcontract for commercial component parts and which possess established commercial delivery systems relating to the supply of those commercial component parts. Where the contractor and subcontractor have an established system to supply commercial component parts for both commercial and Government sales, the rule grants the subcontractor relief from the continuing requirement to segregate that portion of the commercial component parts attributable to the Government contract.
>
> This rule is intended, however, to have a limited impact on the carriage of Government cargoes by U.S. flag carriers. Government contracting officers should encourage the use of U.S.-flag carriers for Government contracts in

[37] See Maritime Administration legal opinion, dated October 26, 1967 (150 Op. G.C. 76). Under the so-called Wilson-Weeks agreement, a memorandum of agreement, dated July 1, 1954, entered into by then-Secretary of Defense, Charles E. Wilson, and then-Secretary of Commerce, Sinclair Weeks, the Department of Defense committed to use privately-owned United States-flag vessels before using government-owned vessels, to the extent "consistent with military requirements and prudent management."

furtherance of the Government's policy supporting the U.S.-flag merchant marine. While the rule is intended to avoid disruption of commercial relationships and delivery systems for the procurement of commercial items, it is not intended to waive compliance with the Cargo Preference Laws for ocean cargoes clearly destined for eventual military or Government use.

The policy and intent expressed in the Kelman memorandum were incorporated into the FAR, as follows:

48 CFR 47.504 Exceptions.

The policy and procedures in this subpart do not apply to the following:

* * *

(d) Subcontracts for the acquisition of commercial items or commercial components (see 12.504(a)(1) and (a)(11)). This exception does not apply to –

(1) Grants-in-aid shipments, such as agricultural and food-aid shipments;

(2) Shipments covered under *46 U.S.C. Appx 1241-1*, such as those generated by Export-Import Bank loans or guarantees;

(3) Subcontracts under –

(i) Government contracts or agreements for ocean transportation services; or

(ii) Construction contracts; or

(4) Shipments of commercial items that are –

(i) Items the contractor is reselling or distributing to the Government without adding value (see *FAR 12.501(b)*). Generally, the contractor does not add value to the items when it subcontracts items for f.o.b. destination shipment; or

(ii) Shipped in direct support of U.S. military –

(A) Contingency operations;

(B) Exercises; or

(C) Forces deployed in connection with United Nations or North Atlantic Treaty Organization humanitarian or peacekeeping operations.

O. Commercially Available Off-the-Shelf Items

Section 4203 of the National Defense Authorization Act for FY 1996, Pub. L. 104-106, amended 41 U.S.C. § 431 to authorize the waiving of laws otherwise applicable to contracts and subcontracts for the acquisition of commercially available off-the-shelf (COTS) items. The definition of a COTS item is located in 48 CFR 2.101. The term "commercially available off-the-shelf item" does not include bulk cargo, as defined in section 40102 of Title 46, such as agricultural products and petroleum products.

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council issued a notice of proposed rulemaking on January 15, 2004 (69 Fed. Reg. 2448) proposing to include the Cargo Preference Act of 1954 and the Military Cargo Preference Act of 1904 on the list of laws that could be determined inapplicable to COTS. The proposed amendments have not been promulgated, and it is unclear what will be the outcome of this regulatory proposal.

P. Cargo Preference Rulemaking Authority

The United States Court of Appeals for the District of Columbia Circuit found the Secretary of Transportation's general grant of rulemaking authority under the Merchant Marine Act of 1936[38] to be a broad one:

> We agree . . . that under this grant of authority [Sec. 204(b)] the Secretary . . . , has broad discretionary authority to deal with the everchanging technological and economic conditions of the commercial shipping industry, as long as its actions are reasonable and consistent with the 1936 Act.[39]

The court also quoted the following passage from a Report of the Senate Committee on Commerce on a bill which eventually became the 1936 Act:

> [The Secretary of Transportation] is given a considerable amount of discretion in the solution of its problems. This discretion is necessary since many questions will require prompt treatment. Shipping is a business of a highly competitive and changing nature, and its government contact must be given the power to prompt decision in dealing with situations as they arise.[40]

The Supreme Court has recognized the Secretary's broad authority to "oversee administration of the '36 Act." *See Seatrain Shipbuilding Corp. v. Shell Oil Co.*[41] The Supreme Court expressly noted that the Secretary is authorized by Section 212 of the '36 Act, "to devise means of encouraging use of American flag vessels . . . ." Id.

The Secretary of Transportation was given an additional and specific grant of rulemaking authority in section 901(b)(2) of the Merchant Marine

[38]The general rulemaking authority located in section 204(b) of the Merchant Marine Act of 1936, 46 App. U.S.C. § 1149(b), was deleted as obsolete by Pub. L. 109-304, in view of the rulemaking authority contained in 49 U.S.C. § 322(a). Pub. L. 109-304 was intended to effect a codification of title 46, United States Code, but not to change any understood policy, intent and purpose of the Congress in the original enactments. Id. Sec. 2.

[39]States Marine Intl., Inc. v. Peterson, 18 F. 2d 1070, 1079 (D.C. Cir. 1975).

[40]S. Rep. No. 713, 74th Cong., 1st Sess. at 4 (1935).

[41]444 U.S. 572, 585 (1980).

Act to enforce cargo preference requirements. As codified by Pub. L. 109-304, it now reads:

> An agency having responsibility under [the '54 Act] shall administer its programs with respect to [the '54 Act] under regulations prescribed by the Secretary of Transportation . . . .[42]

The Maritime Administration's Cargo Preference regulations, issued pursuant to the statutory authority, are located at 46 C.F.R. § 381.

Q. Charter Terms

A dispute was resolved in 1994 by the Office of Legal Counsel, Department of Justice, between the Maritime Administration and AID as to the scope of the Maritime Administration's rulemaking authority. Specifically at issue was whether the Maritime Administration could issue a regulation that governs the charter terms used by AID when engaging U.S.-flag vessels for transportation under the Cargo Preference Act of 1954.

In a memorandum of April 19, 1994, to the General Counsel of the Department of Transportation, Stephan Kaplan, Assistant Attorney General Walter Dellinger held that ". . . [the Maritime Administration] may regulate the administration of cargo preference programs with a view to achieving recognized goals of the [Merchant Marine Act of 1936] and the [Cargo Preference Act of 1954], developing a merchant fleet that is at 'parity with foreign competitors,' . . . reducing cost of the cargo preference program, . . . and eradicating divergent agency practices in the preference trade that are 'not American shipping oriented, ..." As further stated in the memorandum:

> [The Maritime Administration] has explicit authority to issue regulations governing federal agencies in the 'administration' of their cargo preference programs, and there is persuasive historical evidence that such program administration, as understood by Congress, encompasses the promulgation of charter party terms."

17-18 OLC Opinions 78 (April 19, 1994)[43]

R. Statutory Exceptions

Certain statutory provisions override cargo preference requirements in some situations:

[42] 46 U.S.C. § 55305(d).

[43] Available on the Office of Legal Counsel website at http://www.usdoj/olc/1994opinions.htm

1. Section 202 of Agricultural Trade Development and Assistance Act, 7 U.S.C. § 1722, authorizes the donation of food aid in emergencies, without application of cargo preference requirements:

> Notwithstanding any other provision of law, the Administrator [of AID] may provide agricultural commodities to meet emergency food needs under this subchapter through governments and public or private agencies, including intergovernmental organizations such as the World Food Program and other multilateral organizations, in such manner and on such terms and conditions as the Administrator determines appropriate to respond to the emergency.

2. Section 491 of the Foreign Assistance Act, 22 U.S.C. § 2292(b), exempts donations of non-food aid materials from cargo preference requirements:

> Subject to the limitations in section 2292a of this title, and notwithstanding any other provision of this chapter or any other Act, the President is authorized to furnish assistance to any foreign country, international organization, or private voluntary organization, on such terms and conditions as he may determine, for international disaster relief and rehabilitation, including assistance relating to disaster preparedness, and to the prediction of, and contingency planning for, natural disasters abroad.

3. 22 U.S.C. § 2353, exempts commodities and defense articles purchased with foreign currency and fresh fruit and products thereof from cargo preference requirements:

> The ocean transportation between foreign countries of commodities and defense articles purchased with foreign currencies made available or derived from funds made available under this chapter or the Agricultural Trade Development and Assistance Act of 1954, as amended [7 U.S.C.A. § 1691 et seq.], and transfers of fresh fruit and products thereof under this chapter, shall not be governed by the provisions of section 55305 of Title 46 or any other law relating to the ocean transportation of commodities on United States flag vessels.

4. The donation of certain defense articles to NATO countries, under Section 301 of the Conventional Forces in Europe Treaty Implementation Act, 1991, Public Law 102-228, 22 U.S.C.A. § 2799b, which otherwise involves the application of cargo preference requirements under the Cargo Preference Act of 1954, may be accomplished using the vessels of a NATO country.

> In order to facilitate United States compliance with the CFE [Conventional Forces in Europe] Treaty-mandated obligations for destruction of conventional armaments and equipment limited by the CFE Treaty, the United States may utilize services or funds provided by NATO or any NATO/CFE country.
>
> 22 U.S.C. § 2799b(c)

The use in these provisions of the term, "notwithstanding any other provision of law," exempts application of cargo preference requirements. Several court cases affirmed the principle.

In *Crowley Caribbean Transp., Inc. v. United States*,[44] Crowley Caribbean Transport, Inc. (Crowley), an owner of American-flag vessels, bid on transporting supplies to El Salvador as part of the disaster relief for the 1986 earthquake there. AID invoked the "notwithstanding" provision under Section 491 of the Foreign Assistance Act and rejected Crowley's proposal, giving the job to four foreign-flag vessels and two American-flag vessels. Crowley sued, seeking declaratory judgment that Section 491's exemption only applied to situations where using U.S.-flag vessels would cause significant delay in providing disaster relief. The U.S. Appeals Court for the District of Columbia Circuit rejected this argument and held that the broad language of Section 491 allowed AID complete discretion in choosing vessels to deliver disaster relief, notwithstanding the requirements under the Cargo Preference Act or any other requirements.

The same court has interpreted similar "notwithstanding" language in other cases to supersede all other laws. See, e.g., *Liberty Maritime Corp. v. U.S.*,[45] which found the "notwithstanding any other provision of law" clause in section 1105(c) of the Merchant Marine Act of 1936, authorized the Maritime Administration to dispose of vessels acquired as remitted collateral under the Title XI loan guarantee program without consideration of other provisions in the Merchant Marine Act. The court, citing *Crowley*, stated that "[a] clearer statement is difficult to imagine."

In *American Cargo Transport, Inc. v. Natsios*,[46] American Cargo Transport, Inc. (ACT) challenged an AID rejection of ACT's bid as being a violation of the Cargo Preference Act of 1954. AID claimed the cargo was emergency cargo and exempt under 7 U.S.C. § 1722(a). The court found that, because 7 U.S.C. § 1722(a) has a "notwithstanding any other provision of law" clause materially identical to the one [22 U.S.C. § 2292(b)] examined in *Crowley*, that case squarely foreclosed ACT's claim here. The lower court found that even invoking the "notwithstanding" exemption was not subject to review. The Appeals Court affirmed the District Court's grant of summary judgment.[47]

[44] 865 F. 2d 1281, 1990 AMC 912 (D.C. Cir. 1989).
[45] 928 F.2d 413 (D.C. Cir. 1991).
[46] 429 F.Supp.2d 139 (D.D.C. 2006).
[47] American Cargo Transport, Inc. v. Tobias, No. 06-5147, 222 F. Appx. 2 (D.C. Cir. 2007).