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April 18, 2017

Mr. Glen E. Vereb
Director, Border Security & Trade Compliance Division
Regulations and Rulings, Office of Trade
U.S. Customs and Border Protection
90 K St. NE., 10th Floor
Washington, DC 20229–1177

Re: Comments of the International Marine Contractors Association to U.S. Customs and Border Protection's January 18, 2017 Proposed Modification and Revocation of Ruling Letters Relating to Customs Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points (the "Notice")

Dear Mr. Vereb:

We write to submit these comments to U.S. Customs and Border Protection ("CBP") regarding the above-captioned Notice.

On January 18, 2017, CBP published a proposed modification and revocation of certain ruling letters previously issued by CBP, now subject to public comment following an extension that was granted by CBP, by April 18, 2017 (the "2017 Notice"). The 2017 Notice, if adopted, would largely reverse the holdings under numerous CBP letter rulings specifically enumerated in the 2017 Notice, in addition to *any other* letter ruling issued by CBP in respect of the issues addressed in the 2017 Notice, whether such letter ruling is mentioned in the 2017 Notice or not (collectively, the "Letter Rulings").

The Letter Rulings represent decades of discussion and cooperation and industry practice between industry and CBP in respect of the types of items that may be carried on vessels as "vessel equipment", which industry has relied on in planning, conducting and funding offshore oil and gas projects. The 2017 Notice, however, if implemented, does not provide industry with any clear guidance on how CBP intends to enforce the Jones Act for offshore projects going forward and leaves many questions unanswered. As discussed below, if the 2017 Notice is adopted, this development will undoubtedly lead to operational delays and increased operating costs where companies will be required to hire coastwise-qualified vessels for operations that previously did not require such vessels or where such vessels are not available. ***In some instances, oil and gas operations in the U.S. Gulf will likely cease entirely, costing U.S. citizens their jobs, and harming U.S. companies, U.S. economic security and U.S. energy independence***.

The idea that CBP would rush into place extraordinary new regulatory constraints on the U.S. energy sector without any study or concern for the impact on U.S. jobs and businesses appears dangerously misguided. Accordingly, we concur with the industry consensus that the Notice should be immediately withdrawn for reconsideration. Should CBP decide to continue with this initiative, any prospective policymaking in this area

should be undertaken through either notice-and-comment rulemaking under the Administrative Procedure Act ("APA").

We are also aware that the American Petroleum Institute ("API") and other related trade organizations are submitting joint comments. IMCA agrees with the analysis set forth in the Trades Letter and the intent of our letter is to supplement the Trades Letter to further highlight certain issues of particular interest and importance to IMCA as well as to provide additional analysis and justification.

I IMCA AND ITS INTERESTS

The International Marine Contractors Association ("IMCA") is the largest international trade association representing offshore, marine and underwater engineering companies supporting energy related projects worldwide. IMCA has approximately 1,000 member companies promoting good practice consistent with internationally accepted standards, particularly in the areas of health, safety, environment, quality, efficiency, and technology. In that regard, standardization of technical, commercial, and uniform regulatory approaches helps achieve efficiency in a global market. IMCA endeavors to monitor changes in legislation and regulations in order to keep its members informed. Moreover, our members include leading U.S. companies, and numerous businesses with a significant presence and large numbers of employees in the United States whose financial livelihood are placed at risk by CBP's proposal.

II BACKGROUND

The Jones Act, broadly speaking, prohibits a non-coastwise qualified vessel ("NCQV") from loading merchandise at a coastwise point and discharging that merchandise at another coastwise point. The Trades Letter addresses several different issues related to the coastwise laws, which IMCA agrees with and incorporates by reference herein and need not be repeated here. Instead, the focus of IMCA' s below comments focus on the terms "merchandise" and "equipment of the vessel" or "vessel equipment."

In the 1930s, the Treasury Department recognized that the term "merchandise" should not include items of equipment that a vessel needs to function, or more specifically, for navigation, operation or maintenance of the vessel as follows:

> The term 'equipment' … includes portable articles necessary and appropriate for the navigation, operation or maintenance of the vessel and for the comfort and safety of the persons on board. It does not comprehend consumable supplies either for the vessel and its appurtenances or for the passengers and the crew. The following articles, for example, have been held to constitute equipment: rope, sail, table linens, bedding, china, table silverware, cutlery, bolts and nuts.
>
> T.D. 49815(4) (March 13, 1939).

Since the 1970s, with the advent of major offshore oil and gas exploration and production, CBP and its predecessors have issued numerous letter rulings at the request of industry members, on a case-by-case basis, that clarify items that are considered vessel equipment for purposes of coastwise trade under the Jones Act. These letter rulings by and large focused on the term "operation" in T.D. 49815(4), and constructed a framework whereby the vessel's purpose or mission was determinative of what items would constitute "vessel equipment." It is primarily this aspect of the Letter Rulings that CBP specifically proposes to reverse through the 2017 Notice.

And we have been here before. CBP issued a proposed modification in 2009[1], highly similar to the 2017 Notice, in response to a complaint from the Offshore Marine Service Association ("OMSA") with respect to the so-called "Christmas Tree Ruling" (2009 Notice). In the 2009 Notice, CBP proposed to reverse many of the same letter rulings as appear in the 2017 Notice, focusing then, as now to a large degree, on the issue of what constitutes vessel equipment that a NCQV can transport between coastwise points notwithstanding the Jones Act. The response to the 2009 Notice from industry stakeholders opposed to the 2009 Notice was significant and wide-spread and CBP received comments to the 2009 Notice from every corner of the industry.

One of the primary arguments against CBP's action in 2009 was that the 2009 Notice was based on Section 625 of the Tariff Act of 1930 (19 U.S.C. § 1625), through which CBP can issue and clarify interpretations of law and regulation by way of letter rulings ("Section 625 Process"). This was an inappropriate and inadequate process for reversing (at that time) over 30 years of administrative precedent heavily relied upon by the offshore oil and gas industry on an ongoing basis for decades.

Indeed, in response to comments received regarding the 2009 Notice, the Secretary of Homeland Security decided that more time was needed in order to do a comprehensive review of the issue and to give industry more time to assess the impacts of the 2009 Notice on the industry. In fact, the Deputy Director of the Private Sector Office of the Department of Homeland Security ("DHS") explained the procedural shift as follows.

> We understand that significant confusion and concern remains within the maritime industry regarding the state of the law. Because of the level of confusion and potential scope of impact that a change in law could have on important maritime industries, DHS has decided to initiate a rulemaking action, subject to public notice and comment, to allow for a full consideration of the potential economic impact of any change in CBP's interpretation or application of the Jones Act and related laws as it pertains to the transportation by non-coastwise qualified vessels in U.S. waters of certain equipment and materials for use in the maintenance, repair, or operation of offshore, subsea energy extraction operations. We understand that a rulemaking action can be a lengthy process; however, notice and comment rulemaking provides us with the most information on the economic impact of any decision by DHS on this matter — including the impact on the U.S. energy industry and the U.S. maritime industry — and affords the maximum public transparency into the Department's decision-making process on this important issue.

Ultimately, the 2009 initiative was dropped entirely for many of the same reasons discussed in these comments. Nothing has changed since 2009 that should allow the 2017 Notice to proceed or that warrants reconsideration of CBP's previously flawed proposal. Indeed, the 2017 Notice is even more flawed than its earlier effort, as it proposes to revoke numerous rulings without providing any details as to the effect of the changes on other letter rulings, potential enforcement and impact on offshore operations overall going forward despite the undeniable and immense adverse impacts on the industry. In comparison, the 2009 effort at least CBP proposed a number of modified rulings so that industry had some idea of the ultimate impact if implemented. Here, the 2017 Notice would void numerous rulings representing decades of precedential guidance, while only modify one of those rulings, sowing extreme confusion regarding the many other impacted operations outside that single modified ruling.

Moreover, with regard to the facts, the only difference between the facts as they stand today and as they were in 2009 is that the owners of coastwise-qualified vessels ("CQVs") assert they now have vessels that can handle some offshore installation and other work that their vessels in 2009 could not handle. But, as we have heard

1 "Proposed Modification and Revocation of Ruling Letters Relating to the Customs Position on the Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points," 43 *Customs Bulletin* 28 at 54 (July 17, 2009) (the "2009 Notice").

over the years from these same owners, the scope of the Jones Act is not dependent on the availability of CQVs to do the work, except in emergency situations which do not apply here. And in any event, as the IMCA Fleet Study shows, the current state of CQVs is that there (1) is not enough U.S. tonnage to handle the backlog of projects that will undoubtedly be rekindled when commodity prices return to more economically viable levels; and (2) in some cases, no CQVs currently exist or are being built that can handle the work at all, or even specific offshore construction or heavy lift projects.

Moreover, IMCA is concerned that CBP's abrupt proposed reversal of decades of legal precedent is the result of intensive lobbying and closed-door discussions with special interest groups representing the Jones Act shipping industry, who represent only a small subsection of the U.S. companies, workers, and stakeholders in the offshore energy sector. IMCA has filed multiple FOIA requests for records of those communications, and has to date received back from one CBP office dozens of pages of exchanges between Jones Act representatives and CBP policymakers related to CBP's policy shift, however, those documents are almost entirely redacted under the pretense that they constitute "trade secrets" or "commercial/financial" information of the Jones Act special interests. Other FOIA requests to key CBP offices have gone unanswered and currently are under appeal, raising questions that CBP is relying on skewed and inaccurate non-public information from a narrow group of interested parties.

In addition, both CBP and the Department of Homeland Security ("DHS") have refused to meet with industry stakeholders on the other side of the Jones Act special interest groups to date. Given the one-sided nature of CBP's and DHS's communications with industry parties on this issue, we urge CBP and DHS to meet in person with IMCA and other interested persons on the other side following the end of the comment period to more fully understand to practical and operational impacts of the Notice. The precedent for such meetings clearly exists, as both CBP and DHS undertook similar outreach when considering its 2009 notice.

III THE FACTS AND WHY THEY MATTER

A. Multiple Studies Show Why NCQVs Are Critical to Offshore Oil and Gas Development

IMCA, API, as well as other industry stakeholders and organizations, can present to CBP multiple policy, legal, and administrative arguments as to why the 2017 Notice should be withdrawn. Because, however, the facts ultimately speak the loudest, we attach, two substantive and conclusive documents with this submission, each of which we urge CBP to and consider:

Appendix I: *Marine Construction Vessel Impacts of Proposed Modifications and Revocations of Jones Act Letters Related to Offshore Oil and Natural Gas Activities* (the "Fleet Analysis"). The Fleet Analysis brings a conclusion to the forefront that cannot be ignored: NCQVs not only provide the bulk of offshore service in the U.S. Gulf, but also they cannot be readily replaced with existing CQVs, as there are no equivalent CQVs nor are there CQVs under construction that can be expected to step into the breach. The disruption to the offshore oil and gas industry will therefore be immediate and significant. This appendix contains a case study of an ultra-deepwater Project in Gulf of Mexico (the "Case Study"). The Case Study is a summary of an actual deepwater oil and gas project, describing the types of specialized vessels required for each stage of the project. Most of these specialized vessels are NCQVs, and in some instances, could only have been NCQVs. The Case Study thus demonstrates the danger of attempting to cherry pick any particular aspect of the offshore oil and gas industry, as ultimately the offshore industry overall relies on NCQVs as they provide essential and unique services that are irreplaceable.

Appendix II: *Economic Impacts of Proposed Modification and Revocation of Jones Act Ruling Letters Related to Offshore Oil and Natural Gas Activities*, prepared for API by Calash (the "Economic Impact Study"). The Economic

Impact Study readily demonstrates that the impact of the 2017 Notice will be a net loss of U.S. jobs and cumulative loss of GDP of approximately $90 billion through 2030.

B. The 2017 Notice Is About More Than Just Transportation ("500m Safe Zone" and "Incidental Movement")

While the 2017 Notice purports to implicate only the transportation of items from one U.S. coastwise point to another, it will in fact have a much broader effect.

The owners and operators of NCQVs in the U.S. Gulf of Mexico have stated recently, similar to what was said in 2009, that the 2017 Notice could result in a serious disruption of work in the offshore U.S. oil and gas industry. CBP and supporters of the 2017 Notice may reply that the 2017 Notice does nothing other than require certain items to be transported to the worksite by a CQV, and if a NCQV will install those items, then they can be transshipped from the CQV to the NCQV at the installation site. According to those that support the 2017 CBP Notice, because some operators, including foreign flag vessel owners and operators, already use CQVs for this purpose, there should be no issue, aside from an increase in the cost of the work, which would eventually be absorbed by the industry.

CBP should by now be aware that this is simply not the full story. So long as the items defined by the Letter Rulings as "equipment of the vessel" remain so defined, the Jones Act is not implicated in their carriage at all; there is thus no discussion about the Jones Act and these items unless and until they become "merchandise." The 2017 Notice would accomplish that aim, and would thus require that these items be transported from the dock to the offshore block by a CQV, but this would only be the first step.

Importantly, the 2017 Notice fails to consider the other offshore movements after items are transported offshore by a CQV, discussed in more detail below, which if prohibited, will stall, if not terminate current offshore operations, thereby adversely impacting not only foreign NCQV, but also adversely affecting CQVs. Where offshore operations decrease or are eliminated, CQVs will no longer be needed to transport items offshore.

Often offshore projects require so-called "safe zone movement." A vessel that is to install equipment on the seabed is often doing this work in a location that has some seabed development/infrastructure already. Transshipment at sea from one vessel to another by way of a crane is a dangerous activity, and if the item being transshipped is dropped over the installation location, then it would sink to the sea floor and possibly damage existing infrastructure. If the transshipment occurs in an area where there is no existing infrastructure directly below the vessels, then the only loss from an accident in transshipment is the item being carried. For this reason, offshore operators require that any transshipment take place away from the installation area. In short, industry has for decades viewed movement associated with such heavy lift and installation operations as construction/deconstruction, and not transportation because the movement is conducted after the transportation is completed or before the transportation is started depending on the operation at issue.

If the item to be installed, which is currently considered "vessel equipment," becomes "merchandise," then the Jones Act is implicated and this safe zone movement, which is done for important safety reasons, will become subject to Jones Act review and restrictions under CBP's "incidental movement" concept. Although CBP has not specifically defined "incidental movement, it has long held that the use of a non-coastwise-qualified vessel to load and unload cargo or construct or dismantle a marine structure is not coastwise trade and does not violate the coastwise laws provided that any movement of merchandise is effected exclusively by the operation of the crane and not by movement of the vessel, except for necessary movement which is incidental to a lifting operation while it is taking place including pivoting 360 degrees on its central axis. Recently, CBP has applied this

restriction to operations involving heavy lifts under the so-called Koff rulings.[2] This has created great confusion and consternation and makes no practical sense because this incidental movement is clearly not a transportation movement that should be subject to the Jones Act.

This issue is possibly raised in the 2017 Notice involving the revocation of HQ 113838 (February 25, 1997).[3] Unfortunately, this "safe zone/incidental movement" issue remains unresolved at this time, has far reaching impacts on overall offshore operations, and should be resolved as soon as possible. Ultimately, to prohibit such movement would impose potentially serious safety hazards and shut down offshore operations almost completely. In other words, the combination of these developments will mean that an NCQVs cannot move *at all* with such items on board (except on its axis) without risking a Jones Act violation, assuming the items are unladen at some point.

Ultimately, OMSA's goal, and understandably so, is to secure not only the work of transporting the items currently defined in the Letter Rulings as "vessel equipment," but also the work of installing those items, all without the competition from NCQVs if at all possible. In reality, as amply demonstrated by the Fleet Analysis, there simply are few CQVs that can perform the tasks, and for many tasks, none at all.

Thus, it is critical that any action that CBP may take to revoke or modify rulings in the future, including any possible decision rendered by CBP pursuant to its Section 625 Process Customs should the 2017 Notice not be withdrawn, must include within the scope of such action a new definition of "incidental movement" which will modify/revoke the current rulings to clarify/confirm that "incidental movement" necessary for safety purposes during construction/deconstruction activities should be permissible after the transportation activity is completed and that this "incidental movement" is not transportation subject to the Jones Act.

In this regard, IMCA provides the following potentially workable solution to resolve this important issue. Our proposal would both protect Jones Act transportation, OMSA's big concern, while alleviating industry concerns over an offshore shut down due to the inadequate supply, or in many cases nonexistent CQV's (as delineated in IMCA's vessel study) to conduct the tasks needed to perform the installation work related to multi-billion dollar oil fields, which in turn enhances American independence from foreign oil.

As noted above, a 500 meter (m) (or 1,640 ft) safe zone is commonly used as a protected area around an offshore installation or worksite, and any vessel entering the 500m safe zone needs to seek permission from the installation to enter, thus controlling simultaneous operations and potentially alleviating ship to ship collisions. In addition, where possible lifting operations are conducted, this 500m safe zone is used to reduce the risk of a dropped object, some of which can range into hundreds of tons in weight, causing damage to the sub surface infrastructure or in a worst case, a substantial oil spill.

As previously mentioned, this "construction" concept should not be subject to the Jones Act because it occurs either before transportation begins or after it is completed. Another way to look at it is that it is reasonable to

2 Under what have become known recently as the Koff Rulings (HQ 225102, dated September 14, 2012; HQ H235242, dated November 15, 2012; and HQ H242466, dated July 3, 2013), CBP has taken the position that movement of a vessel, even a short distance, while a topside is suspended from its crane, off its central axis in order to avoid hitting the SPAR before unlading the topside onto the SPAR, is a violation of the Jones Act because this movement of the vessel is interpreted by CBP as providing part of the transportation of the topside between a point in the U.S. and the SPAR (*i.e.* a foreign flag vessel cannot be used for any part of the transportation between two coastwise points).

3 This ruling confirmed that use of a non-coastwise-qualified derrick barge to load and unload cargo or construct or dismantle a marine structure is not coastwise trade and does not violate the coastwise laws, provided, that any movement of the merchandise is effected exclusively by the operation of a crane aboard the derrick barge and not the movement of the vessel, except for necessary movement which is incidental to a lifting operation while it is taking place. While the apparent reason for the revocation of HQ 113838 is based the vessel equipment determination, in the event this ruling is revoked, it is unclear what, if any, impact such revocation will have on other rulings involving incidental movement.

separate oil and gas "transportation" from "construction," in the same way that a truck might deliver bricks to a building site in the United States, then a forklift offloading those bricks and moving them within the worksite would not be considered transportation.

Accordingly, many of the significant concerns with the Jones Act would be resolved if industry were able to agree that transportation related to the Jones Act ended upon arrival at the 500m safe zone, and that activities occurring within the 500m safety zone after the transportation were completed would be considered construction activities. Then all parties would be secured in their concerns - Jones Act transportation would be protected - and work necessary to safely conduct installation activities would also be protected.

C. Much More Than the Construction Market Will Be Affected

The analysis, however, does not stop with installation. The 2017 Notice specifically notes, for example, that chemicals and cement are possibly to be recategorized as merchandise. In that event, no NCQV drilling rig could move with these items on board, except by turning on its own axis. While some operations involve the transshipment of materials directly over the well, not all of them do for operational or safety reasons, and in addition, some rigs take on enough material to conduct multiple well projects, meaning they move from well to well without discharging these materials.

Further, no NCQV, whether a construction vessel or drilling rig, would be able, in an emergency situation, to move off a well or installation location with any item of merchandise on board without the risk of incurring a Jones Act violation. The 2017 Notice would therefore throw the drilling industry into confusion, as only coastwise qualified rigs could operate in the U.S. Gulf of Mexico with important operational materials on board without fear of violating the Jones Act. There are currently zero deepwater coastwise-qualified drilling rigs in the U.S. Gulf of Mexico. This will in turn require operators to rethink their investments in offshore leases.

As pointed out in the introduction, the Case Study demonstrates the need in any major offshore development for multiple vessels of varying capabilities. The project summarized in the Case Study required early stage exploration, for which a deepwater drilling rig or drillship was required. There are no CQV vessels meeting the technical qualifications. The product would have to be moved through an FPSO; there are no CQV's that can act as an FPSO. The FPSO has to be moored by a heavy lift vessel capable of making certain lifts in deep water. There are no CQV's currently available with this capability.

The deepwater wellhead assemblies have to be installed by a vessel with sufficient lifting capacity. While installation itself is not coastwise activity, the general offshore requirement of transshipping items to be installed on the seabed in an area away from the installation site for safety reasons means that the installing vessel will have to move a limited distance (*i.e.,* from the safe zone-where the assembly is unladen from transshipment vessel and laden onto the installation vessel - to the installation site) with the item on board. This is also the case for the artificial lift system and mudmats. The risk that this movement may be considered coastwise carriage by CBP is enough, however, to discourage the use of a larger, safer NCQV with the proper and necessary crane capacity. And in the case of items such as the subsea distribution hardware, there are no CQVs capable of handling the installation.

In addition, with regard to installation operations, even though no pipelaying ruling would be explicitly revoked by the 2017 Notice, the Notice creates great confusion regarding the legal status of pipelaying and installation of equipment integral to the lay operations, leaving open the possibility that transportation of reeled pipe and items such as PLETs and jumpers must be transported to offshore installation sites only by CQVs. This is because although CBP's Notice does not appear to target pipelaying, in particular, installation operations for cable/umbilical/flowline, which has for decades been seen and treated by CBP as akin to pipelaying, may be adversely impacted as the CBP Notice proposes to revoke a number of rulings in full that clearly target the transportation, and potentially the installation, of flowlines, umbilicals, and cable, but not pipe.

As is amply demonstrated in the Case Study, virtually every aspect of an offshore oil and gas development project involves the need for a vessel with specialized capabilities, which in the U.S. Gulf means NCQVs, as the fleet of CQVs simply cannot handle the work. Certain aspects of the work, as demonstrated in the Case Study, are as of today entirely outside of the capability of any existing CQV. Each one of these aspects is endangered by the scope of the 2017 Notice, in large part because of the practical issues surrounding transshipment of equipment and materials.

The Fleet Analysis points out one other issue of major importance (see Appendix I, Section 8): certain of the more highly specialized vessels used in offshore work cannot be supported by any single domestic market. This means that to support the investments needed for such vessels, they must be able to find work across the globe. Without the NCQVs for these niches, deepwater projects in the U.S. Gulf of Mexico will stop.

It would be an unrealistic leap of faith to assume that U.S. shipbuilders would be able to produce any time soon, if at all, the sort of vessels needed to replace the most highly specialized NCQVs necessary for deepwater construction and repair. Currently, U.S. shipyards lack the track record and facilities to produce the most highly specialized offshore construction vessels, and the development of such shipbuilding capability domestically would take many years to evolve. Even if U.S. shipbuilders developed such capacity, the pricing differential between U.S.-built ships and those from leading offshore shipbuilding nations is so substantial that those units likely would be economically uncompetitive for non-US projects. This is an important point, because highly advanced offshore vessels must compete to service projects on a global basis to offset their extraordinary cost. Therefore, it is doubtful that U.S.-made alternatives ever would be built. Proceeding with the Notice while such critical economic issues remain outstanding therefore puts the entire offshore sector at tremendous risk.

Another important factor to take into consideration is that if this Notice were implemented, the uncertainty created by a new Jones Act regime, and depending on the costs required to perform work offshore, would likely result in owners and operators of the foreign flag vessels moving their equipment out of the U.S. Gulf of Mexico and instead either work in other countries where there is more certainty, or for example, moving their base of operations to Mexico to avoid potential Jones Act issues. If this action was taken, the loss of U.S. jobs and adverse impacts to the U.S. economy would be drastically impacted because U.S. coastwise qualified vessels would no longer be needed to perform work and U.S. shipyards would suffer because topsides construction, currently accomplished in the United States, could then be performed in foreign shipyards.

D. The Economic Effects Will Be Dire

IMCA refers to the independent study prepared by Calash on behalf of API on the potential economic impacts that could result if 2017 Notice was implemented by CBP. In summary, some of the key impact include:

Specifically, according to a Calash economic report, the impacts of this notice could include:

- Loss of nearly 30,000 industry supported jobs in 2017 with as many as 125,000 jobs lost by 2030. The Gulf of Mexico states will be the most impacted by these job losses;
- Decrease in U.S. oil and natural gas production by 23% from 2017-2030;
- Decrease in government revenue by $1.9 billion per year from 2017-2030;
- Decrease of $5.4 billion per year on Gulf of Mexico offshore oil and natural gas spending and;
- Cumulative lost GDP of $91.5 billion from 2017-2030.

Accordingly, the API economic impact further supports reasons why the 2017 Notice should be withdrawn for further consideration. In the interest of sound policymaking, we would further urge the Administration to undertake its own independent expert economic analysis to better understand the risks to U.S. jobs, energy

production, revenue, economic activity and other critical issues raised by the Notice and highlighted by the API study before even considering taking further action on the CBP initiative.

IV THE LETTER RULINGS SHOULD NOT BE REVOKED

A. The 2017 Notice Relies on T.D. 49815(4) but Fails to Analyze it Properly

In the 2017 Notice, CBP states in essence that the scope of equipment that a NCQV may carry is defined by T.D. 49815(4). A NCQV may therefore carry any item if it is necessary for any one of navigation, operation or maintenance. T.D. 49815(4) did not define the term "operation"; however, its normal definition includes the performance of a function or carrying out of an action or mission. The Letter Rulings, in turn, in deciding that the test of whether a particular item is vessel equipment based on the vessel's operations, looked to whether the item was necessary for the vessel's function or mission. The Letter Rulings thus apply a definition for the term "operation" that is entirely consistent with a normal definition of the term.

The 2017 Notice does not expound on why this application of the plain meaning of the term "operation" is incorrect or misapplied, nor why it is in any way inconsistent with either prior rulings or existing law. The 2017 Notice only states that the definition used for decades by CBP is "less consistent with the more narrow meaning of 'vessel equipment' contemplated by T.D. 49815(4)" but does not detail any specific inconsistency.

Although pointed out in the Trades Letter already, it is worth repeating that CBP is suggesting that an item is "vessel equipment" only if it remains at all times with the vessel. But if there is no unlading of an item at a coastwise point, then there is no carriage for which the Jones Act is applicable and there would be no point in even discussing whether an item is exempt from the Jones Acts purview.

B. Reasoned Justification Is Not Supported by Amendments to OCSLA and Jones Act

With respect to its proposed substantial modification of HQ 101925, CBP indicates that it is changing the ruling "to make it more consistent with federal statutes that were amended after HQ 101925" -- which means after 1976. 2017 Notice at 2. CBP also states that "[m]any of the holdings in HQ 101925 are no longer applicable due to amendments made to 46 U.S.C. § 55102 . . ., the Outer Continental Shelf Lands Act, and 19 C.F.R. § 4.80b(a), resulting in less consistency with 46 U.S.C. § 55102." *Id.* at 3.

CBP does not make a serious attempt to provide any justification for the questions its statements raise – What changed in the OCSLA, CBP regulations, or the Jones Act since 1976 which requires reversing 26 rulings issued over 40 years?

Nothing in the 1978 amendments to OCSLA could possibly justify restricting the operations of foreign-flag vessel in the manner proposed in the 2017 Notice. The 1978 amendments, in pertinent part, struck the words "fixed structures" from section 4(a) of OCSLA (the jurisdictional section) and replaced those words with the "permanently or temporarily attached to the seabed" language. There is nothing in that amendment which derogates from CBP's views in HQ 101925 regarding incidental transportation, *de minimis* materials or unforeseen repairs. There is simply no connection between the two. Indeed, Congress indicated that the section 4(a) change was not meant to change law: "The intent of the managers in amending section 4(a) of the 1953 OCS Act is technical and perfecting and is meant to restate and clarify and not change existing law." H. Conf. Rep. 95-1474, 80, 1978 U.S.C.C.A.N. 1674, 1679.

With the Jones Act, the case for using a subsequent law change as a justification of the 2017 Notice is even weaker. The Jones Act change CBP relies upon in part is the 1998 statutory addition of "valueless material." The other Jones Act justification is that the Jones Act does not contain the words "'necessary for the accomplishment

of the mission of the vessel,' 'incidental to the vessel's operations,' or 'expended' during the course of repair." 2017 Notice at 14-17.

Although not stated plainly, CBP appears to suggest that if "valueless material" is "merchandise," then everything is "merchandise." 2017 Notice at 17-18. This is belied by the words of the statute – which provide that "the term 'merchandise' includes . . . valueless material." 46 U.S.C. §55102(a). The statute does not define "merchandise" as "valueless material" or even provide a definition at all – rather, it draws in to what might otherwise be "merchandise" "valueless material" to ensure that "valueless material" is not excluded. The statute *includes* "valueless material." The statute does not *define* "merchandise" as "valueless material."

We know this to be true because the 1988 statutory addition of "valueless material" was expressly added to solve a very narrow problem, *i.e.* the problem Congress perceived in the *106 Miles Transport* case. In that case, the court determined that sewage sludge is not "merchandise" because it is "valueless material." Expressly moving to change that result, Congress included the court's term -- "valueless material" – in the statute.

Also, had Congress sought to equate "merchandise" with "valueless material" in an all-encompassing way, then it would not have simultaneously in the same 1988 legislation used the phrase "dredged material" separately from "valueless material." Pub. L. No. 100-329 (1988). "Valueless material" cannot be all inclusive and meant to include anything and everything even if valueless if it is used alongside the separate term "dredged material."

In any event, tools, risers, pipeline connectors, pipe etc. are obviously not "valueless material." So, the inclusion of "valueless material" as "merchandise" is not relevant as to whether those and similar items are "merchandise" or "vessel equipment."

As to the words of the Jones Act otherwise, they have not changed in any relevant respect since 1976. The Jones Act then did not directly provide for "vessel equipment," "sea stores" or any number of other things CBP has adopted in its authority to interpret the statute. Just as the lack of those words in the Jones Act did not prevent CBP from adopting the "vessel equipment" exception in the first place, the same lack of those words in the statute cannot provide the justification for reversing 40 years of precedent. CBP's attempt simply do an about face on 26 precedents stretching over 40 years "constitutes an inexcusable departure from the essential requirement of reasoned decision making." *Jicarilla Apache Nation v. Dep't of the Interior*, 613 F.3d 1112, 1120 (D.C. Cir. 2010).

The weakness of CBP's rationale is also evident in the timing of the rulings and the statutes. CBP has had 39 years and 29 years, respectively, to react to the 1978 amendments to OCSLA and the 1988 "valueless material" amendment. And, the Jones Act has not changed in a material and relevant way other than by the 1988 amendment since 1976. CBP would have to offer an explanation why it ignored these statutes in terms of its "vessel equipment" rulings for decades (and the Trades believe, correctly so) and then recently determined that all those rulings are not consistent with those statutes. CBP's statement that the changes in the law "occurred after the issuance of" the 1976 Ruling, to explain its proposed radical departure, rings completely hollow. *See* 2017 Notice at 15.

In addition, CBP states that another basis for compelling the change in policy was the Jones Act provision relating to transportation of merchandise, 46 U.S.C. App. § 883 that was recodified in 2006 at 46 U.S.C. § 55102, requires a change in interpretation of the Jones Act. This is simply dead wrong. This is because the purpose of a recodification is to restate various versions of law for consistency purposes without changing the effect or scope of the law. In other words, these changes do not change the interpretation of the previous law, or impair the precedent value of earlier interpretations. Anyone interpreting the law after a recodification must assume that no change in result was intended. Title 46 Recodification, 2006, Section-by-Section Explanation, pages 23-24.

C. Jones Act Waivers are not a Workable Solution

Supporters of the Notice seem to be trying to downplay the economic harm caused by CBP's policy shift, in part by suggesting that even if the existing Jones Act Fleet cannot perform particular work performed by an NCQV, that the existing Jones Act waiver process can be used to allow an NCQV to perform work. This theory is simply inconsistent with the current law and operationally unworkable.

Jones Act waivers are only available if determined by the DHS Secretary to be "in the interest of national defense," a high standard that in recent history only has been triggered by natural disasters, certain Strategic Petroleum Reserve releases, or requests from the Secretary of Defense based on military necessity. 46 U.S.C § 501. It would indeed be naïve to think that a national defense waiver could be issued for commercial reasons. CBP not only currently lacks any sort of process to grant waivers by letter rulings or otherwise, it also has no waiver authority. Only the DHS Secretary or Secretary of Defense (by making a request to the DHS Secretary) can grant waivers under the National Defense standard. It is also absurd to assume that CBP cannot implement the Notice based simply on the "hope" that Congress might subsequently give CBP more administrative flexibility to mitigate the harm CBP caused to U.S. workers and businesses.

The only other path forward would be for Congress to issue broad waivers or on a case-by-case basis. Again, this is an unworkable solution because the likelihood, scope, and workability of any such legislative relief also creates great uncertainty. This is because offshore energy infrastructure projects require immense investment and years of planning and coordination, therefore energy companies and contractors need certainty and predictability regarding the eligibility of foreign flag assets to work in the United States, rather than having to navigate the vagaries of the legislative process for each project.

D. The 2017 Notice Fails to Clarify Important Other Aspects of the Letter Rulings that May Be Implicated

IMCA and its members are also very concerned that the sweeping proposal by CBP leaves many important questions unanswered, and without much to go on.

For example, the 2017 Notice proposes to revoke, among other Letter Rulings, HQ 105644 (June 7, 1982). Ostensibly, that revocation is limited to any suggestion in HQ 105644 that vessel equipment cannot be defined by reference to the vessel's mission or purpose (in the specific instance, the laying of cable). But HQ 105644 states another very important principle: "The use of the equipment between American ports will have broken the continuity of the transportation between American ports." This totally stands to reason; the use of an item between its port of loading and port of unlading means that its carriage on the vessel was not for purposes of transporting it.

Now consider this principle in light of how items like cement, chemicals, ROVs, transponders and any number of other items are actually used offshore. Chemicals and cement are injected or deposited in various levels of a well and some may be circulated back to the vessel, but CBP is silent on how the Notice would apply in the practical context of well intervention and other operations. Similarly, the implications of the revocation of rulings dealing on ROV operations, which are an indispensable element of any subsea infrastructure project, are left completely unexplained. Furthermore, the Notice raises many questions related to the transportation and installation of pipeline, umbilicals, flowlines, and cable.

Transponders are laid on the sea floor as guideposts for installation procedures. In this they are clearly being "used" for their intended purpose, even though they have been technically unladen at what CBP considers is a coastwise point. If CBP considers transponders to be "merchandise" and not "vessel equipment," it will have to grapple with this principle but the 2017 Notice fails to consider it.

V FATAL LEGAL FLAWS REQUIRE THE 2017 NOTICE TO BE WITHDRAWN

There are substantial legal flaws related to the 2017 Notice that require CBP to withdraw its proposal for reconsideration. In order to move forward with its proposal, CBP must proceed with publication of its proposal in the Federal Register under the Administrative Procedure Act ("APA") for the reasons discussed below.

A. Presidential Executive Orders Require the 2017 Notice to be Withdrawn Immediately

Regardless of the terms used by which CBP to describe the 2017 Notice, in essence it will ultimately have the force of law, ultimately designed to implement, interpret, or prescribe law and policy. Accordingly, the 2017 Notice is clearly subject to Executive Orders 12866 (Regulatory Planning and Review), 13771 (Reducing Regulation and Controlling Regulatory Costs), and 13783 (Promoting Energy Independence and Economic Growth), which set forth White House-led processes for evaluating the economic cost, safety, environmental, and other relevant impacts of new and existing agency rules. In issuing the last two of these orders, the White House underscored the paramount importance of reviewing and eliminating "job killing" regulatory measures that harm U.S. workers, businesses and economic activity. IMCA members include a number of leading U.S. companies, and many contractors with U.S. operations and U.S. workers. IMCA strongly endorses the principle that the CBP's Notice, and any new regulatory initiatives impacting the offshore sector, should not proceed without careful consideration of the impacts on U.S. workers, business, energy and the economic security of the United States

With regard to Executive Order 12866, Regulatory Planning and Review, given the broad economic impact of the Notice on the offshore energy sector as a whole, CBP's action clearly is a "significant regulatory action" under the Executive Order. As a result, CBP cannot lawfully implement its proposal until it completes the cost and benefit assessment required by Executive Order 12866. *See* Section 6(a)(3)(C) of Executive Order 12866. The Notice fails to address or even solicit comments on core issues delineated under this Executive Order.

Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, was signed on January 30, 2017 by President Trump as one of his initial actions after becoming President. Executive Order 13771 sets an even higher cost-savings barrier for agencies in promulgating new rules. Specifically, Executive Order 13771 requires:

1) unless prohibited by law, whenever an executive department or agency (agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed;

2) for fiscal year 2017, which is in progress, the heads of all agencies are directed that the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero, unless otherwise required by law or consistent with advice provided in writing by the Director of the Office of Management and Budget (Director); and

3) in furtherance of the requirement of subsection (a) of this section, any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations. Any agency eliminating existing costs associated with prior regulations under this subsection shall do so in accordance with the Administrative Procedure Act and other applicable law.

Indeed, the 2017 Notice is so ambiguous and confusing it is difficult to comprehend how CBP, the White House, or the regulated industry can fully assess the scope of the future economic costs and harm.

Furthermore, Executive Order 13771 applies to "*all* agency statements of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy" – not just those intended to have the

force and effect of law. It also applies to agency guidance documents, as well as rulemakings, on a case-by-case basis. *See* Memorandum: Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs" (www.whitehouse.gov/the-press-office/2017/02/02/interim-guidance-implementing-section-2-executive-order-january-30-2017). Accordingly, even if CBP asserts that the Notice is nonbinding or does not constitute a new "regulation," despite its profound regulatory effect, CBP cannot simply ignore or circumvent the requirements of Executive Order 13771.

Executive Order 13783, Promoting Energy Independence and Economic Growth, signed March 28, 2017, focuses explicitly on agency actions (which the Notice clearly is) that potentially burden the safe and efficient development of domestic energy resources. If implemented, the Notice would have a catastrophic effect on production of U.S. offshore energy; create significant obstacles and uncertainty for global companies, many with substantial U.S. offices; compromise safety; and immediately impact U.S. jobs and energy markets – all in contravention of Executive Order 13783.

It is well known that development of resources from U.S. offshore sources is a long-term process, requiring billions of dollars to explore, develop, produce, and transport oil and natural gas from offshore. As such, predictability and planning is imperative. It commonly takes a company from 7 to 10 years from the time it purchases a deep water lease to the time that there is first production from the lease. The disincentive and uncertainty that implementation of the Notice would create could lead to shutting down offshore oil and gas production.

Executive Order 13783 mandates that agencies, including CBP, "immediately review" agency actions potentially burdening energy production and prepare and submit a plan to the Director of the Office of Management and Budget within 45 days. Within 120 days, CBP must prepare a draft report detailing the agency actions covered by the Energy EO and make recommendations on how to alleviate of eliminate the burdens to domestic energy production. The report must be finalized in 180 days, with recommendations to suspend, revise, or rescind implemented agency actions as soon as practicable. Given the jarring impact that the Notice would have on domestic production and the economy, it is imperative that any further CBP action be terminated immediately and the Notice withdrawn. To allow this proposal to go forward would be contrary to this Executive Order.

B. CBP Must Follow the Administrative Procedure Act ("APA") Process Should it Decide to Move Forward with its Proposal

From a procedural perspective, should CBP determine that it is appropriate to propose significant changes to almost 40 years of precedent relied on by industry, it must be undertaken pursuant to publication in the Federal Register and the Informal Rulemaking procedures under the APA and not through publication of an interpretive rule in the Customs Bulletin.

CBP incorrectly published the 2017 Notice in accordance with the Interpretive Rulings and Decisions provisions of 19 U.S.C. § 1625. Due to the substantial implications to the offshore industry of any proposed action to modify or revoke sweeping CBP policy and revoke/modify a multitude of rulings under the Jones Act, the 2017 Notice must follow the Informal Rulemaking procedures (commonly referred to as "Notice and Comment" rulemaking) in accordance with 5 U.S.C. §553.[4] CBP previously acknowledged such substantial implications existed in 2009

4 Informal rulemaking must be distinguished from formal rulemaking under the APA. Most agency rulemaking is informal rulemaking published in the Federal Register which must comply with the following minimum procedural requirements: (1) notice of proposed rulemaking, (2) interested parties must be given an opportunity to provide comments, (3) a concise general statement of the basis and purpose must accompany the final rule which must be published at least 30 days before taking effect. *See* generally Jeffery S. Lubbers, A Guide to Federal Agency Rulemaking, 4th Ed. (2006).

and there is nothing that has happened since then to change the analysis of the importance of the potential effect of the 2017 Notice.

As CBP recognized in its revocation of the 2009 Notice, the revocation of a broad swath of ruling letters under its' Section 625 Process is not an appropriate procedure to create all-new forward-looking regulatory mandates for the application of the Jones Act to the offshore sector. Such action is clearly is subject to the *Federal Register* notice and comment rulemaking procedures of the APA.

CBP cannot evade mandatory restraints on agency rulemaking power by relying on its Section 625 Process, which clearly is designed to provide narrow, case-by-case guidance on specific individual Customs transactions.

In this case, the mass revocation of ruling letters is not intended to address a particular single prospective transaction or interested party, rather it is a vehicle for a broad expansion of regulatory prohibitions aimed at the public at large.

Furthermore, the timetable set forth under the *Customs Bulletin* process for the revocation and modification of individual/single rulings is completely inconsistent with the broad scope of CBP's proposed policy changes 19 C.F.R. § 177.12. This section mandates that, "[i]n the absence of extraordinary circumstances, within 30 calendar days after the close of the public comment period, any submitted comments will be considered and a final modifying or revoking notice or notice of other appropriate final action on the proposed modification or revocation will be published in the Customs Bulletin." Given the far-reaching impacts of CBP's proposal, and the breadth and complexity of the legal, economic, operational, safety, and environmental issues implicated by the Notice, a thirty-day agency review and decision making process is fundamentally flawed.

CBP knows how to do this right. As an example, in 2007 CBP proceeded to establish new criteria to determine whether non-coastwise qualified vessels are in violation of the Passenger Vessel Services Act ("PVSA"), which involves the coastwise transportation of passengers. In that case, CBP published its proposed interpretation and solicited comments in the Federal Register. 72 Fed. Reg. 224 (November 21, 2007).

In that APA *Federal Register* Notice, CBP specifically titled its action a "Proposed Interpretation" and stated it was a "Proposed Interpretive Rule." Thus, even though CBP called it an interpretive rule similar to the type of actions it takes under its *Customs Bulletin* procedures, it recognized that like here, the proposed changes were sweeping in nature and constituted broad policy changes which is why the proposal was published in the Federal Register under APA Notice and Comment procedures.

Indeed, CBP's regulatory procedures specifically envision following the APA's Notice and Comment procedures in applicable circumstances when use of the interpretive ruling and publication in the Customs Bulletin would not be appropriate. Specifically, the publication and issuance requirements in the Customs Bulletin are inapplicable to publications made pursuant to other legal authority, including Notice and Comment rulemaking in accordance with the APA under 5 U.S.C. § 553. 19 C.F.R. § 177.12(d).

Accordingly, CBP is well aware that any regulatory actions attempting to impose broad new regulatory requirements for the application of the coastwise laws should be published in the Federal Register, rather than through mass revocations of old rulings under its Section 1625 Process. CBP's attempt to abruptly reverse course on process and revert, with no explanation whatsoever, to a flawed policymaking procedure would clearly constitute arbitrary and capricious behavior under the APA.

In this regard, should CBP decide to move forward with the 2017 Notice under its Section 1625 Process it will face substantial legal impediments under the circumstances surrounding its proposal. Any decision it might render would be treated as an "interpretive rule" which lacks the force of law as outlined by the Supreme Court in 2015 as follows:

> Not all "rules" must be issued through the notice-and-comment process. Section 4(b)(A) of the APA provides that, unless another statute states otherwise, the notice-and-comment requirement "does not apply" to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). The term "interpretative rule," or "interpretive rule," is not further defined by the APA, and its precise meaning is the source of much scholarly and judicial debate. . . . For our purposes, it suffices to say that the critical feature of interpretive rules is that they are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99, 115 S.Ct. 1232, 131 L.Ed.2d 106 (1995) (internal quotation marks omitted). The absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules. <u>But that convenience comes at a price: Interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process."</u> *Ibid*.
>
> *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015):

Importantly, *Perez* confirms, that non-binding agency interpretations, such as the 2017 Notice, will be subject to judicial challenge and reversal, because this will be considered:

1) a new agency interpretation that rests upon factual findings that contradict those which underlay a long standing prior policy, and

2) the prior Jones Act policy engendered serious reliance interests that must be accounted for. citing *In FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

The Supreme Court has held that such statutory interpretations are particularly susceptible to judicial reversal and are not entitled to the same level of agency deference as Notice and Comment rulemaking. Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), courts in most cases have shown deference to agencies' interpretations of the statutes they administer, if the plain language of the statute is not clear and the agency's interpretation is reasonable enough to be permissible. However, in *United States v. Mead Corp*., 121 S. Ct. 2164, 2189 (2001), the Court made it clear that *Chevron* deference should only be applied when the agency has articulated its interpretation in a rule created through Notice and Comment rulemaking, an order arising from a formal adjudication, or some other relatively formal procedure arising out of a congressional intent to give the agency the power to speak with the force of law.

Clearly, as a non-binding interpretative rule, the Notice would not clear the bar necessary for CBP to enjoy *Chevron* deference in this case, potentially leaving the agency's proposed reinterpretation of the Jones Act open to nearly *de novo* review by a federal district judge. At best, CBP would enjoy "*Skidmore* deference," a far lower and more flexible standard of case-by-case deference that predated *Chevron*. Under the standard in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) deference varies based on thoroughness of the agency's consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and other factors which give it power to persuade.

Accordingly, should CBP decide to pursue this coastwise policy reversal through its Section 1625 Process, there are substantial legal hurdles that it will have to confront should legal challenges result and CBP will be highly susceptible to a court finding that its Notice action warrants little deference and was arbitrary and capricious.

C. <u>Failure to Comply with Informed Compliance Principles</u>

CBP is not meeting its obligation under the Customs Modernization Act to provide clear guidance to the regulated community regarding the Jones Act as related to offshore work. Specifically, Title VI (Customs Modernization

Act) of the North American Free Trade Agreement Implementation Act introduced the concept of informed compliance and shared responsibility. In order to comply with these requirements, the regulated community needs to "be clearly and completely informed of its legal obligations."

To meet its responsibilities, CBP should, for example, clarify what items constitute "equipment" versus "merchandise" in varying contexts, including with respect to multi-purpose vessels, and its legal reasoning therefor. In this regard, the Notice generates more questions than it answers with regard to the day-to-day operations of a NCQV which all raise unique legal and operational issues, which are critical to the offshore energy sector.

In summary, the Notice's approach of revoking longstanding precedent without providing any detailed explanation of the impact and/or interpretation of the changes resulting from such revocations is in direct contravention of its own legal mandates related to "informed compliance" and "shared responsibility." This alone makes its Notice fatally flawed.

D. The 2017 Proposal Raises Serious Conflicts with OCSLA

The 2017 Notice is in direct conflict with the statutory mandate under OCSLA. Specifically, OCSLA requires that operations conducted on the OCS be conducted in a safe manner to prevent or minimize the likelihood of damage or the endangerment of life or health and to protect the environment. 43 U.S.C. § 1332.

Accordingly, under OCSLA CBP is required to take into account safety procedures and environmental risks associated with offshore installation and repair operations and such changes must be implemented in a manner consistent with the Congressional intent and statutory language. Specifically in order to do this, CBP must coordinate with other involved agencies, including the U.S. Coast Guard and Bureau of Safety and Environmental Enforcement ("BSEE"), to consider safety concerns associated with offshore installation and construction operations due to the non-availability of capable Jones Act compliant vessels and the proposed restrictions on foreign-flag vessels, and to ensure the proposed policy is consistent with those offshore safety and environmental regulations already implemented by other federal agencies. *See* 43 U.S.C. § 1347(b) and (f).

Indeed, this constitutes another critical reason why the *Section 1625* process is legally flawed and should CBP decide to further purse this initiative it should purse it through Notice and Comment rulemaking to carry out OCSLA's mandate to take into account these safety and environmental considerations.

In addition, the 2017 Proposal raises the issue as to whether CBP has been interpreting the extension of the Jones Act to the OCS under OCSLA correctly from the very beginning. In this regard, the Jones Act prohibits transportation of merchandise "between points in the United States to which coastwise laws apply." Given the consequence of the determination of the coastwise points in a given scenario and their bearing upon whether these lead to a conclusion that a scenario will give rise to a violation it is of significance that the definition of a coastwise point in law has never been established by the courts.

If CBP now intends to assert that there has been some fundamental flaw in CBP's application of OCSLA over almost half a century, or as is more clearly stated in the General Notice that amendments to OCSLA have resulted in "less consistency" with 46 USC § 55102 it is of vital importance in terms of shared responsibility and informed compliance that the legislative intent of OCSLA be consistently applied to activities undertaken upon the OCS.

Importantly, the definition of a coastwise point has been based upon CBP's own interpretation of the application of OCSLA in over 40 years of rulings rather than a legal test developed in rulemaking or policy development. The 2017 Proposal now makes this ripe for a *de novo* legal challenge in court should CBP decide to move forward with this proposal. CBP has interpreted Section 4(a)(1) to apply to "points" on the U.S. OCS used for the exploration, development and production of seabed mineral resources.

For example, the Jones Act applies to the transportation of merchandise between points in the United States to which the coastwise laws apply. 46 U.S.C. § 55102. The term 'United States' as applied to the coastwise laws, when used in a geographical sense, means the States of the United States, the District of Columbia, Guam, Puerto Rico, the Virgin Islands, American Samoa, the Northern Mariana Islands, and any other territory or possession of the United States." Thus, it appears that for purposes of Title 46, an OCS facility is thus not "within the United States." Under 46 USC § 55101, "the coastwise laws apply to the United States, including the island territories and possessions of the United States…" An OCS facility is thus not a point [or port or place] to which the coastwise laws apply. Accordingly, it is quite possible that a court would find if CBP is challenged that the coastwise laws have not even been extended at all to the OCS by OCSLA.

Moreover, even if OCSLA extended the coastwise laws to the OCS it appears it was limited to platforms and other devices actually attached to the OCS. In this regard, OCSLA states that federal laws are to be applied to activities *on* OCS facilities, not transportation between such facilities. CBP reached a different conclusion only by misquoting this legislative history. In its rulings, CBP substituted the word "or" for the word "on" in interpreting OCSLA: "It is thus clear that Federal law is to be applicable to all activities *or* all devices in contact with the seabed for exploration, development, and production." *See, e.g.,* HQ 115185, (July 17, 2009); HQ 115218 (July 17, 2009). CBP has misquoted this language for decades and appears to have misinterpreted Congresses' intent to only extend federal law to "activities on OCS facilities and not "activities on the OCS" as it has done.

Beyond this, CBP has historically taken a novel approach, erroneously claiming that OCSLA applies the coastwise laws to "points" on the seabed in the "vicinity" of OCS facilities. Incredulously, CBP has relied on a Longshore and Harbor Workers' Compensation Act ("LHWCA") case, *Demette v. Falcon Drilling* 280 F.3d 492 (5th Cir. 2002), for the proposition that the Jones Act applies to points on the seabed in the vicinity of an OCS facility. It defies logic in addition to the statutory intent of OCSLA that CBP erroneously uses the long-discredited "situs" test cited in a body of 5th circuit decisions regarding the LHWCA to assert that the Jones Act applies to the seabed in the "vicinity" of active wells.[5]

In addition to the fact that *Demette* has nothing to do with coastwise trade, no independent support exists for applying the Jones Act to anything other than OCS facilities. Indeed, in the 1978 amendments to OCSLA as discussed above, there is no mention of applying the Jones Act to the subsoil and seabed of the United States. To the contrary, it is limited to artificial islands, and installations and other devices permanently or temporarily attached to the seabed. Moreover, the Supreme Court has overruled the 5th Circuit's use of the "situs test" in LHWCA cases on which the court in *Demette* based its reasoning. These factors should create significant pause when examining regulatory overreach that has resulted from CBP declaring areas of the OCS subject to the coastwise laws where Congress declined to apply them.

VI THE 2017 NOTICE RAISES SIGNIFICANT INTERNATIONAL LAW ISSUES UNDER WORLD TRADE ORGANIZATION ("WTO") AGREEMENTS

Key WTO agreements include certain provisions barring WTO member states' from adopting new measures in the maritime sector that discriminate against or otherwise disadvantage other WTO members. Because the Notice would significantly broaden the reach of the Jones Act, by redefining and reinterpreting key terms and concepts, a strong likelihood that adoption of the changes proposed in the 2017 Notice would be inconsistent with U.S. obligations under the WTO agreements.

5 The *Demette* case stands for the proposition that an injury on the OCS satisfies the *situs* requirements of the LHWCA. In this case, the court noted that the Supreme Court and the Fifth Circuit have held that OCSLA creates a "situs" requirement for the application of OCSLA because it applies to two primary sets of subjects: "to the subsoil and seabed of the [OCS]"; and "to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed."

Indeed, the potential for action by other WTO member states against the United States in WTO dispute settlement proceedings is an important factor for the Administration to review whether to proceed with the Notice. It is noteworthy that these same sort of WTO-related concerns were in fact a key consideration when CBP decided in 2010 to withdraw an advance notice of proposed rulemaking to make similar changes in the application of the Jones Act to the offshore sector after a similar 2009 CBP proposal was withdrawn in order to initiate a rulemaking under the APA. In addition, the federal courts are likely to look more skeptically on CBP's new, more aggressive reading of the Jones Act because CBP's position raises significant concerns under international law. For these reasons alone, the CBP Notice for should be withdrawn for review and reconsideration of the potential impacts on our international obligations under the WTO agreements.

A. Overview of WTO Agreements

As a brief overview, 1994 Agreement Establishing the World Trade Organization incorporates 60 component agreements and decisions, which together provide a framework of rules under which member countries establish and enforce trade commitments. These agreements include the General Agreement on Tariffs and Trade ("GATT") which was first signed in 1947 and updated in 1994, and the General Agreement on Trade in Services ("GATS"). GATT addresses the sale, movement and use of goods between member states, while GATS addresses trade in services.

A key principle underlying GATT, GATS, and other WTO agreements is nondiscrimination. Two core concepts apply in this area. First is "most-favored-nation" ("MFN") treatment, the principle of treating other members equally. Under the WTO agreements, countries cannot normally discriminate between WTO member trading partners. The second concept is "national treatment," i.e., treating foreigners and locals equally. Imported and locally-produced goods should be treated equally — at least after the foreign goods have entered the market. The same principles applies to foreign and domestic services.

B. GATT 1994 Agreement and its Jones Act Exception

A specially tailored provision excepting the Jones Act from key WTO commitments was added, at U.S. insistence, in Article 3(a) to create an exemption from Part II of the GATT[6]. Part II of the GATT addresses National Treatment, Freedom of Navigation, and other rights. Most importantly, Article III(a) of Part II addresses national treatment which essentially includes a restriction prohibiting a Member to use internal regulations to be applied to imported or domestic products so as to afford protection to domestic production. This Article is relevant to the Jones Act because the U.S.-build requirement in the coastwise laws has the effect of using internal regulations to restrict foreign-built goods (i.e., ships) in a way that affords protection to comparable domestic products. Accordingly, the U.S.-build requirement for coastwise vessels would raise national treatment issues under Article III, if it were not covered by an exception.

The Article 3(a) exception has a key restriction, however: it includes language that indicates that the exception will be lost if the Member's legislation is modified to become more restrictive. It states: "If such legislation is subsequently modified to decrease its conformity with Part II of GATT 1994, it will no longer qualify for coverage under this paragraph."

Accordingly, if CBP adopts the 2017 Notice, it would appear to constitute a modification to the Jones Act in a manner that decreases its conformity with GATT 1994, placing the coverage of the Jones Act exception in Article 3(a) at risk. The 2017 Notice would have the effect of modifying and expanding the definition of what constitutes "merchandise," and therefore what activities are restricted to U.S.-origin vessels under the Jones Act.

[6] This provision provides for the following: for "measures taken by a Member under specific mandatory legislation, enacted by that Member before it became a contracting party to GATT 1947, that prohibits the use, sale, or lease of foreign-built or foreign-reconstructed vessels in commercial applications between points in national waters or the waters of an exclusive economic zone."

For decades, foreign-built vessels have enjoyed national treatment for a broad range of offshore activities, insofar as they have long been allowed to move equipment and material that the vessel is utilizing for offshore maintenance, construction and repair activities in a nondiscriminatory manner. However, if the new proposed CBP policy is implemented, those vessels would no longer enjoy national treatment when moving equipment and supplies necessary to their offshore mission. Such a change therefore broadens internal regulations to protect domestic production of ships, and therefore decreases the Jones Act's conformity with GATT 1994. This would appear to result in a United States breach of its party obligations under the WTO Agreement.

C. GATS Maritime Services Negotiations and Standstill Clause

In addition, in 1994, Members agreed to convene a special "Negotiating Group on Maritime Transport Services" ("NGMTS") for two additional years to try to improve offers in the maritime area. The agreement to hold the NGMTS talks included a standstill provision barring member countries from imposing new restrictive measures affecting shipping until the negotiations were concluded and implemented[7]. A further standstill agreement was adopted in 1996, which extends to the end of the Doha round of negotiation; that provision remains in effect today.[8]

Accordingly, while there is little precedent on exactly how the standstill is to be interpreted, it is likely that the 2017 Notice, which has the effect of broadening the coastwise laws, would contravene the standstill and thus violate the WTO obligations of the United States.

Importantly, as a result, the Notice is subject to a challenge by other WTO members in a dispute resolution proceeding before the WTO in Geneva. The result of such a proceeding could be countermeasures against other U.S. economic sectors and interests, resulting in potential harm to U.S. business and workers that should be weighed carefully by the United States before finalizing the Notice. This is indeed a significant issue that must be taken into account before further action is taken on this Notice.

VII CONCLUSION

IMCA fully supports the Jones Act. However, there is no reasonable justification why CBP should, after having nine years to consider the authorities and arguments by industry arising from the 2009 Notice, and having admitted in 2009 that the process of interpretive decisions is inappropriate for making sweeping changes to the application of the Jones Act offshore, to once again propose to do the same thing two days before a change in Administrations, particularly during a down turn in activity in the U.S. Gulf of Mexico in a time when the price of oil is struggling, into a flurry of complete and unnecessary uncertainty by issuing the 2017 Notice.

In addition, under applicable Executive Orders, including those recently issued by President Trump, CBP is required to immediately withdraw the 2017 Notice for review and reconsideration.

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[7] That provision stated: Commencing immediately and continuing until the implementation date to be determined under paragraph 4, it is understood that participants shall not apply any measure affecting trade in maritime transport services except in response to measures applied by other countries and with a view to maintaining or improving the freedom of provision of maritime transport services, nor in such a manner as would improve their negotiating position and leverage. Decision on Negotiations on Maritime Transport Services, LT/UR/D-5/5, April 15, 1994.

[8] Section 7 of the Decision on Maritime Transport Services Adopted by the Council for Trade in Services on 28 June 1996, S/L/24, July 3, 1996 stated: 7. Commencing immediately and continuing until the conclusion of the negotiations referred to in paragraph 1 [i.e., the Doha round of comprehensive services negotiations], it is understood that Members shall not apply any measures affecting trade in maritime transport services except in response to measures applied by other countries and with a view to maintaining or improving the freedom of provision of maritime transport services, nor in such a manner as would improve their negotiating position and leverage.

Should CBP decide at some point to move forward with its proposal it should be published in the Federal Register through Notice and Comment rulemaking under the APA, consistent with our comments, and taking into account economic, safety, environmental, and other potential impacts to establish the necessary benchmarks to guide industry in the future. To do otherwise, would constitute arbitrary and capricious conduct, subject to legal challenge.

Yours sincerely

Allen Leatt
Chief Executive