Plotting the Course for Maritime and Infrastructure Federal Action

This edition of the Cozen O'Connor Maritime and Infrastructure Federal Update attempts to navigate the mixed messages of recent government actions including (i) Customs and Border Protection's letter ruling modification withdrawal, (ii) the Maritime Administration's shipyard funding availability, (iii) contradictory funding under the Consolidated Appropriations Act, 2017 and the president's Fiscal Year 2018 budget proposal, and (iv) recent Congressional maritime transportation hearings.

Regulatory

CBP Withdraws Proposed Changes to Letter Ruling – What's Next?

In a move that has evoked strong reactions by maritime as well as oil and gas industry stakeholders, Customs and Border Protection (CBP) announced on May 10 that was withdrawing its proposed modification and revocation of various Jones Act letter rulings. As previously reported, the proposed modification and revocation would have limited "vessel equipment" to "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," extending Jones Act coastwise trade requirements to many previously excluded items. If CBP had implemented the proposed modification the term "merchandise" under the Jones Act would have included, for example, repair materials, pipeline connectors, and damaged pipe removed from the seabed. When transporting these items between points in the United States, including on the U.S. Outer Continental Shelf, shippers would have been required to use coastwise-qualified U.S.-flag vessels. CBP stated that, based upon the many substantive comments received, the modification and revocation of the letter rulings required reconsideration.

This controversial issue, however, will surely persist. CBP's proposed modification and revocation had received strong bipartisan support, with 33 congressmen and 10 senators signing letters of support. Rep. Duncan Hunter (R-Calif.) and Rep. John Garamendi (D-Calif.), the respective chairman and ranking member of the House Committee on Transportation and Infrastructure's Subcommittee on Coast Guard and Maritime Transportation, were two vocal supporters. Whether Congress will take legislative action in light of CBP's withdrawal is yet to be seen.

MARAD Announces Small Shipyard Grant Funding Available

The Maritime Administration (MARAD) announced on May 24 the availability of $9,800,000 in grant funding for qualified small shipyard facilities. Grants are available to fund shipyard capital improvements and employee training programs. The funding was appropriated under the recently enacted Consolidated Appropriations Act, 2017, discussed in more detail below. Applications are due no later than July 5 and MARAD intends to award grants by September 5. The grants are open to small shipyards (with no more than 1200 production employees) that construct either commercial vessels (40 feet in length or greater) or recreational vessels (100 feet in length or greater). The addition of shipyards that construct large recreational vessels was a recent change that expands the potential applicant pool. As in past rounds, MARAD anticipates that grants will be awarded to approximately 10 to 12 applicants and will average about $1 million each. In general, MARAD will not fund more than 75 percent of the total project cost.

Legislative

Budget Highs and Lows

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The American Association of Port Authorities signaled support for the Fiscal Year (FY) 2017 omnibus appropriations bill, which passed both chambers of Congress and was signed by President Trump on May 5. The Consolidated Appropriations Act, 2017, Pub. L. 115-31, provided a $49 million funding increase for the U.S. Army Corps of Engineers and a scheduled 3 percent increase for the Harbor Maintenance Trust Fund. The Act also contained $100 million for Federal Emergency Management Agency (FEMA) Port Security Grants. The good news did not stop there for American ports as $500 million in funding was made available for National Infrastructure Investments, more commonly known as the Transportation Investment Generating Economic Recovery (TIGER) grant program. The funding bill specifically stated that "port infrastructure investments (including inland port infrastructure and land ports of entry)" are eligible to receive grant funding, consistent with TIGER's prior rounds. MARAD's Marine Highway Program also received $5 million, unchanged from the previous year, in addition to the Small Shipyard Grant funding described above.

In stark contrast to the Consolidated Appropriations Act, 2017, the president's FY 2018 Budget, "A New Foundation for American Greatness" raised significant questions about the future of federal infrastructure investment. The FY 2018 budget proposal confirms that no funding is being requested for the TIGER program and requests only $47,809,000 for Port Security Grants. Stakeholders anxiously await the president's infrastructure plan to counterbalance the proposed budget cuts. Transportation Secretary Elaine Chao testified before the Senate Environment and Public Works Committee on May 17, stating that the administration would reveal an outline of its proposed infrastructure plan in late May with a more detailed legislative proposal to be unveiled in third quarter 2017.

Operators in the Maritime Security Program (MSP) are feeling similar budgetary highs and lows as the Consolidated Appropriations Act, 2017, finally provided funding at the full authorized level of $300 million, or $5 million for each of the program's 60 vessels. In contrast, the president's budget proposes funding the MSP at $210 million and includes authorization language aimed to keep all 60 vessels at a lower $3.5 million rate. The reduced funding proposal is at odds with the May 2 testimony of General Darren McDew, Commander, U.S. Transportation Command, before the Senate Armed Service Committee. General McDew stated that the MSP is "essential to our wartime U.S. commercial sealift capability" providing "access to required commercial U.S. flag shipping assets, while also supporting the pool of Merchant Mariners needed to operate Military Sealift Command's Surge and Ready Reserve Fleet."

House and Senate Committees Take Action on Maritime Bills

The House Transportation and Infrastructure Committee approved the Coast Guard Authorization Act of 2017, H.R. 2518, on May 24. The two-year authorization bill provides a 3 percent funding increase for Coast Guard activities, includes funding for cutters, icebreakers, and shore-side infrastructure, and directs the Coast Guard to adopt a five-year vessel documentation process to replace the current annual documentation renewal requirement. The committee also approved the Federal Maritime Commission Authorization Act of 2017, H.R. 2593, authorizing Federal Maritime Commission (FMC) appropriations for FY 2018 and 2019. The bill would also amend the Shipping Act of 1984 to preclude common carriers from participating in both rate discussion agreements and vessel sharing agreements unless the parties have been granted an exemption by the FMC. The criteria for granting an exemption would have to be implemented by the FMC if the legislation passes.

On May 18, the Senate Committee on Commerce, Science, and Transportation approved authorization bills for the Coast Guard and MARAD. The Coast Guard Authorization Act of 2017, S. 1129, authorizes Coast Guard activities for FY 2018 and 2019 and includes an authorization for the acquisition of three cutters. The bill also includes a two-year FMC authorization. The Maritime Administration Authorization and Enhancement Act for Fiscal Year 2018, S. 1096, authorizes appropriations for FY 2018, including $36 million for the National Security Multi-Mission Vessel Program, and contains various provisions regarding the U.S. Merchant Marine Academy. We will continue to track these bills and provide updates to our readers as they progress through the legislative process.

House Holds Hearing on Maritime Transportation Regulatory Issues

On May 3, the House Committee on Transportation and Infrastructure's Subcommittee on Coast Guard and Maritime Transportation held a hearing to discuss maritime transportation regulatory issues. The panels consisted of representatives from the U.S. Coast Guard, the FMC, and various industry groups.

The hearing covered oil spill response, salvage, and marine firefighting, and the International Convention on Standards of Training, Certification, and Watchkeeping. Additional topics included commercial fishing vessel exams, towing vessel inspections, and maritime liens related to fishing permits.

Senate Commerce Discusses MSP, Carrier Consolidation

The Senate Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security convened a hearing on May 9 to discuss opportunities and challenges for MARAD and the FMC. While a large portion of the hearing was dedicated to addressing sexual assault reform at the U.S. Merchant Marine Academy, the subcommittee additionally covered issues related to carrier consolidation and the MSP.

Michael Khouri, acting chairman of the FMC, testified that the ocean liner industry is still relatively unconcentrated according to traditional antitrust standards. While he stated that carrier alliances benefit consumers, Khouri acknowledged concerns about industry consolidation and noted that the FMC has strengthened its review process for carrier alliance agreements.

MARAD Executive Director Joel Szabat offered three suggestions on how to increase the size of the U.S. flagged fleet. The first suggestion related to CBP's above-mentioned letter ruling modification, which was subsequently withdrawn. The second would be to amend certain cargo preference statutes, increasing the U.S.-flag requirement for food aid and civilian programs from the current level, requiring at least 50 percent of the gross tonnage of cargo transported under those programs to move on U.S.-flag vessels, up to 75 percent or 100 percent. MARAD estimates that this change would add between 10 and 14 vessels to the U.S.-flag fleet. The third option would be to expand the MSP and offer more stipends to commercial shippers. This option would be the most "blunt force" and costly of the three according to Szabat, and may not be supported by the administration outside of MARAD, as evidenced by the president's budget proposal.

Please contact Robert Freeman, Government Relations Principal of Cozen O'Connor Public Strategies or Jeff Vogel in the firm's Maritime Regulatory practice with any questions you may have regarding this update.