

Statement of  
**USA MARITIME**

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Before the  
Maritime Administration  
U.S. Department of Transportation

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Public Meeting on Existing Cargo Preference Regulations

Docket Number MARAD 2011-0121

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September 30, 2011

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**I. Introduction**

USA Maritime is a coalition of ship owning companies, maritime labor organizations and maritime trade associations which directly or indirectly represent virtually every one of the privately owned U.S.-flag oceangoing commercial vessels operating regularly in the U.S. foreign trade which depend on cargo preference. USA Maritime is pleased to provide a statement for the record in connection with the U.S. Maritime Administration's review of its existing civilian cargo preference regulations.

**II. Summary**

USA Maritime strongly supports existing cargo preference laws and existing cargo preference regulations. Cargo preference is a necessary and cost-efficient way to sustain the privately owned U.S.-flag commercial fleet, which is a critical national defense asset. Without cargo preference, the U.S. Government would have to spend far in excess of the cost of cargo preference in direct spending to replicate the national security capabilities of the privately owned U.S.-flag commercial fleet. The history of cargo preference administration indicates that cargo reservation requirements are often not self-enforcing and strict MARAD oversight is necessary to ensure that the law is followed and its purposes fulfilled across the U.S. Government. Now, more than ever, rigorous enforcement of cargo preference requirements is needed to preserve and grow

the existing fleet of militarily useful U.S.-flag oceangoing vessels. Through this regulatory review, MARAD has an opportunity to improve its oversight of cargo preference requirements and thereby achieve its mission of promoting the U.S. merchant marine by increasing the amount of U.S. Government-impelled cargo carried by U.S.-flag vessels.

### **III. Cargo Preference is a Necessary and Cost-Efficient Way to Sustain the Privately Owned U.S.-Flag Commercial Fleet – a Critical National Defense Asset**

#### **A. The Private U.S. Merchant Marine is Critical to National Defense**

Throughout its history, the United States has depended upon a viable U.S.-flag merchant marine for its economic and military national security. In his second annual address to Congress on December 8, 1790, President George Washington encouraged Congress to “render our commerce and agriculture less dependent on foreign bottoms.”<sup>1</sup> This proscription remains just as relevant 220 years later.

The maintenance of a strong privately owned U.S.-flag merchant marine is an essential part of our Nation’s official national security strategy. According to National Security Directive 28, which was signed by President Bush in 1989, and which still governs sealift policy:

Sealift is essential both to executing this country’s forward defense strategy and to maintaining a wartime economy. The United States’ national sealift objective is to ensure that sufficient military and civil maritime resources will be available to meet defense deployment, and essential economic requirements in support of our national security strategy.<sup>2</sup>

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<sup>1</sup> Second Annual Address of George Washington (Dec. 8, 1790), in Edwin Williams, *The Statesman’s Manual* 37 (1854).

<sup>2</sup> National Security Directive 28 (Oct. 5, 1989).

This policy is reflected in current pronouncements. For example, the Department of the Navy's fiscal year 2012 budget request provides that:

This budget supports maintaining a robust strategic sealift capability to rapidly concentrate and sustain forces and to enable joint and/or combined campaigns. This capability relies on maintaining a strong U.S. commercial maritime transportation industry and its critical intermodal assets.

As stated succinctly by General John W. Handy (then Commander, U.S. Transportation Command) in 2002 – “We simply cannot, as a nation fight the fight without the partnership of the commercial maritime industry.”<sup>3</sup>

The fleet of privately owned U.S.-flag vessels supported by cargo preference laws has proven in recent years to be instrumental to the supply and support of our troops abroad. The privately owned U.S. merchant fleet has transported over 90 percent of the equipment and supplies used in the conflicts in Iraq and Afghanistan at a fraction of the cost of other alternatives.<sup>4</sup> As General Duncan J. McNabb, Commander, U.S. Transportation Command recently informed the U.S. Congress – “USTRANSCOM's partnership with the U.S. commercial sealift industry and the Department of Transportation has been vitally important in developing new routes for

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<sup>3</sup> Statement of General John W. Handy, Commander, U.S. Transportation Command before the House Armed Services Committee, Merchant Marine Panel on the Maritime Security Program (MSP) (Oct. 8, 2002). Similarly, the Navy League of the United States has recently indicated that “[t]he ability to access this maritime capability of ships [the U.S.-flag commercial fleet] and seafarers is essential to our national and economic security.” Navy League of the United States, Maritime Policy 2011-12 at 17.

<sup>4</sup> Senate Armed Services Committee, Hearing on the Defense Authorization Proposed Budget Request for Fiscal Year 2012 and Future Years, U.S. Transportation Command and U.S. Africa Command (April 7, 2011) (Statement of General Duncan J. McNabb) at 14.

conveying cargo around the globe – particularly to regions with undeveloped infrastructure.”<sup>5</sup>

The fleet of privately owned U.S.-flag vessels also employs the pool of trained U.S. citizen merchant mariners essential to support the U.S. Government’s sealift objectives. As recently indicated by the Navy League of the United States – “Skilled Mariners are more critical than ever to ensuring our ability to sustain U.S. national and global security interests.”<sup>6</sup> As MARAD is well aware, the U.S. Government cannot mobilize its fleet of reserve vessels held in inactive and active status without that pool of mariners actively employed by the privately owned U.S.-flag fleet.

#### **B. The U.S.-Flag Fleet Depends on Cargo Preference**

The cargo preference laws are essential to maintaining a commercial U.S. -flag merchant marine. Virtually every privately owned U.S.-flag vessel engaged in the foreign trade depends to some degree on cargo preference to remain economically viable.<sup>7</sup> Indeed, absent cargo preference, it is no exaggeration at all to say that the U.S.-flag fleet in foreign commerce would disappear and the U.S. Government would have to duplicate that sealift capability at enormous expense with government-owned vessels. As then Senator Barack Obama indicated in 2008 – “A strong U.S.-flag commercial fleet needs our nation’s cargo preference laws.”<sup>8</sup>

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<sup>5</sup> Id. at 15.

<sup>6</sup> Navy League of the United States, Maritime Policy 2011-12 at 17.

<sup>7</sup> E.g. Econometrica, Inc., “Maritime Security Program Impact Evaluation,” Submitted to the U.S. Department of Transportation, Maritime Administration (July 2009) at 26-27, 45.

<sup>8</sup> Letter from Sen. Barack Obama to Presidents of Maritime Unions, available at <http://www.maritimetrades.or/article.php?sid=18&pid=992>.

As stated by General Duncan J. McNabb, Commander, U.S. Transportation Command, on April 7, 2011 to the Senate Armed Services Committee (emphasis added) –

We have a commercial-first if we can use commercial. It's the cheapest way to do it. It keeps our U.S.-flag fleet strong. It's good for jobs. All of those things are positive and that's what we do. They have done superbly.

. . . so what happens to the U.S.-flag fleet as we come down perhaps on some of the requirements that we're depending on them now, and we are working closely with them to make sure that we maintain the robustness. *They do depend absolutely on cargo preference. They absolutely do depend on our maritime security program, MSP. And those two programs are really valuable so that we keep a very, very strong U.S.-flag fleet, which is in the interest of the taxpayer and in the interest of the warfighter.*<sup>9</sup>

Similarly, in a May 4, 2011 letter to Rep. Steven C. LaTourette, Gen. McNabb stated that –

The movement of U.S. international food aid has been a major contributor to the cargo we have moved under the cargo preference law that our U.S. commercial sealift industry depends on. Any reductions will have to be offset in other ways to maintain current DoD sealift readiness.

**C. Cargo Preference is a Cost-Efficient Way to Support a Privately Owned U.S.-Flag Fleet**

Cargo preference rests on the common sense idea that the U.S. Government should reserve a portion of the ocean cargo it generates, either directly or indirectly, to U.S. companies, just as it generally makes its other purchases within the United States. U.S.-flag vessels fly the American flag, are owned by American companies and employ civilian American officers and crews.

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<sup>9</sup> Senate Armed Services Committee, Hearing on the Defense Authorization Proposed Budget Request for Fiscal Year 2012 and Future Years on the U.S. Transportation Command and U.S. Africa Command (April 7, 2011) (testimony of General Duncan J. McNabb).

Cargo preference is a highly cost efficient way to support a privately owned U.S.-flag commercial fleet. Cargo preference leverages the cost of shipping goods and commodities to provide a national security benefit. Specifically, the cost of shipping -- which if spent on foreign vessels would provide the U.S. no national security benefit and virtually no U.S.- economic activity -- is used under cargo preference to obtain a national security capability (a fleet of militarily useful U.S.-flag vessels), support U.S. jobs, stimulate U.S. economic activity *and* obtain the needed ocean transportation services. In fact, a July 2009 study for MARAD determined that it would cost approximately \$13 billion in capital cost just to duplicate a portion of the commercial sealift capability provided by the commercial fleet of U.S.-flag vessels supported by cargo preference and the Maritime Security Program.<sup>10</sup> The U.S. Transportation Command estimates that it would cost an additional \$52 billion to replicate the intermodal systems developed by U.S.-flag carriers and their affiliates operating in the foreign trade.<sup>11</sup>

Even if U.S.-flag transportation costs more, it is more than offset by the direct purchases made by U.S. ship owners and crews throughout the United States and the Federal, state and local taxes paid by ship owners and their crews. A 1995 study determined that every dollar spent by the federal government on U.S.-flag transportation

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<sup>10</sup> Econometrica, Inc., "Maritime Security Program Impact Evaluation," Submitted to the U.S. Department of Transportation, Maritime Administration (July 2009) at 2.

<sup>11</sup> *Id.* at 29.

led to \$1.26 in federal income tax revenue when all of the economic impact was considered.<sup>12</sup>

#### **IV. Cargo Preference Cannot Achieve Its Purpose Without Effective MARAD Enforcement**

##### **A. The Purpose of Cargo Preference is to Support a Private U.S. Merchant Marine**

As an amendment to the Merchant Marine Act, 1936, the Cargo Preference Act of 1954 became part and parcel of the overall statutory purposes driving U.S. maritime policy contained in the 1936 Act. As codified in 2006, these purposes remain the guide for all policies affecting the U.S. merchant marine. Thus, one purpose of cargo preference, like other U.S. Government maritime programs is to promote having “a merchant marine . . . capable of serving as a naval and military auxiliary in time of war or national emergency . . . owned and operated as vessels of the United States by citizens of the United States . . . manned with a trained and efficient citizen personnel.”

In the words of a Presidential Directive issued by President John F. Kennedy in 1962—

The policy of the United States is to have a modern, privately owned, merchant marine sufficient to carry a substantial portion of the waterborne export and import foreign commerce of the United States and capable of serving as a naval and military auxiliary in time of war or national emergency. The achievement of this national policy is even more essential now because of the worldwide economic and defense burdens facing the United States. For these reasons, I stated in my message on transportation to the Congress of the United States, on April 4, 1962, that I was

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<sup>12</sup> Nathan Associates Inc., “Economic Analysis of Federal Support for the Private Merchant Marine” (Jan. 1995).



directing all executive agencies to comply fully with the purpose of our various cargo preference laws.<sup>13</sup>

In the words of President Obama’s fiscal year 2012 budget request and MARAD’s fiscal year 2012 budget request – “Cargo preference provides a revenue source to help sustain a privately-owned U.S. flag merchant marine . . . .”<sup>14</sup>

**B. MARAD is Responsible for Promoting the Merchant Marine Through Cargo Preference**

MARAD is chiefly responsible for promoting the maritime objectives of the U.S. Government. According to MARAD’s 2008 Annual Report to Congress – “The Maritime Administration is at the forefront in maintaining a strong and visible U.S.-flag fleet through a number of statutory programs, including the reservation for transportation on U.S.-flag vessels of certain government-impelled, ocean-borne cargo in international trade.”<sup>15</sup>

MARAD’s responsibilities are reflected in the Cargo Preference Act of 1954. From 1970 to 2008 that Act provided that any “agency having responsibility under this section shall administer its programs with respect to this section under regulations prescribed by the Secretary of Transportation.” In 2008, Congress made it even clearer that it was MARAD’s responsibility to enforce the Cargo Preference Act of 1954 by adding language as follows—

Each department or agency that has responsibility for a

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<sup>13</sup> Senate Committee on Commerce, Report on Implementation of the Cargo Preference Laws by the Administrative Departments and Agencies,” 87<sup>th</sup> Cong., 2d Sess. (Report No. 2286) (Oct. 8, 1962) at 43.

<sup>14</sup> Office of Management and Budget, Fiscal Year 2012, Appendix, Budget of the U.S. Government at 962; Maritime Administration, Budget Estimates, Fiscal Year 2012 at 80.

<sup>15</sup> The Maritime Administration Annual Report to Congress 2008 at 15.

program under this section shall administer that program with respect to this section under regulations and guidance issued by the Secretary of Transportation. The Secretary, after consulting with the department or agency or organization or person involved, *shall have the sole responsibility* for determining if a program is subject to the requirements of this section.<sup>16</sup>

The Congressional conference report accompanying the enactment of MARAD's cargo preference authority states clearly that Congress placed these responsibilities on MARAD for two reasons – (1) to ensure uniform administration of cargo preference agency-by-agency; and (2) to ensure that the purpose of promoting the U.S. merchant marine via cargo preference was fulfilled. Specifically, the conference report provided that—

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 to issue standards to administer these cargo preference laws gives the best assurance that the objectives of these laws will be realized.<sup>17</sup>

USA Maritime believes strongly that these MARAD responsibilities remain as important today, if not more important, than they have been in the last 40 years.

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<sup>16</sup> Pub. L. No. 110-417, § 3511, 122 Stat. 4356, 4769-70 (2008) (emphasis added).

<sup>17</sup> Conf. Report No. 91-1555 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4260 (emphasis added).

### **C. Cargo Preference Compliance Has Not Always Been Automatic**

All too often, cargo preference is either not complied with at all or applied in a way as to make it ineffective. This is not a new phenomenon. For example, the U.S. Senate Commerce Committee found in 1962 that –

[T]here has been evidenced in at least several of the administrative departments an apparent desire on the part of those responsible for shipping arrangements to evade the cargo preference requirement whenever opportunity offered.

And, unfortunately, the 1962 Senate Commerce Committee Report could have been written today. In that report, the Committee found, among other things, that agencies shipping international food aid “had revised certain procedures [charter terms] for the handling of Government-financed cargoes, to the detriment of U.S.-flag vessel owners,” that petroleum had been purchased on a “destination delivered basis” which excluded U.S.-flag carriers and that U.S.-flag ship owners were not given sufficient opportunity to bid for the carriage of materials sent overseas by the U.S. Government for overseas construction of aid projects.

For example, the U.S. Agency for International Development has undertaken procurements in the billions of dollars in Iraq, Afghanistan and Pakistan and has routinely avoided cargo preference when ocean transportation was involved. Numerous cargo preference waivers have been granted by USAID for shipments without USAID involving MARAD in the waiver process or canvassing the U.S.-flag carriers to validate assumptions that no U.S.-flag service was available. Had either MARAD or the carriers been involved, they would have had the opportunity offer service for the shipments.

In another instance, the U.S. Department of Energy issued billions of dollars of loan guarantees and avoided cargo preference throughout until the industry prompted

MARAD to take a stand on the application of cargo preference. Although the application of cargo preference to those guarantees should not have been in doubt, it took months to persuade DOE to alter its position and even then U.S.-flag carriers have carried virtually none of the cargoes shipped under that program.

These and many other instances show that if any changes are required to MARAD's cargo preference regulations, those changes should be designed to improve the ability of MARAD to oversee other agencies to ensure cargo preference compliance.

#### **V. MARAD Should Improve Its Oversight of Cargo Preference Requirements**

The need to improve oversight of cargo preference is greater than ever. Over time, the U.S. Department of Defense has increased reliance on the privately owned U.S.-flag commercial fleet. Yet, the cargo base that supports the U.S.-flag fleet is in decline. The United States has closed many bases around the world. The conflict in Iraq has drawn down, and the conflict in Afghanistan is likely to draw down. Moreover, the U.S. Government has already reduced significantly its spending on international food aid and further cuts are possible.

The need, therefore, is great for MARAD to undertake rigorous enforcement of the existing cargo preference laws to ensure that the requirements apply where, by law, they should apply and to ensure that agencies and contracting officers follow the letter and spirit of the requirements. President Kennedy's direction to federal agencies not to treat cargo preference as a minimum but rather a proscription that U.S.-flag vessels should be used as much as possible should be followed.

Specifically, USA Maritime requests that MARAD take the following steps as soon as possible –

- 1) MARAD should amend its regulations to implement the 2008 cargo preference amendment enacted by Congress. The law provided MARAD critical new authority that cannot be fully implemented and enforced until MARAD promulgates implementing regulations.
- 2) MARAD should undertake a process of amending the Federal Acquisition Regulation at section 52.247-64 “Preference for Privately Owned U.S.-Flag Commercial Vessels” to bring it up to date and account for the 2008 cargo preference amendment. The current version has not been amended since 2006 and does not accurately reflect the law. For example, the current FAR provision does not indicate that cargo preference applies to shipments “financed in any way” by the U.S. Government which was added in 2008. As a result, a contracting officer anywhere in the federal government reviewing that language could misapply cargo preference and arrange for foreign-flag transportation when that would be contrary to the law.
- 3) MARAD should fill open senior cargo preference positions as soon as possible. Both the Director of the Office of Cargo Preference and Domestic Trade and Associate Administrator for Business and Finance Development positions are vacant and have been vacant for months. These are key positions with regard to cargo preference and the lack of qualified personnel in those positions inhibits effective MARAD cargo preference oversight.
- 4) MARAD should improve significantly its cargo preference information collection and dissemination efforts. MARAD currently does not maintain up-to-date publicly available information on cargo preference compliance. For

example, MARAD's international food aid transportation numbers have not been updated since 2009. In line with its other efforts to improve cargo preference oversight, MARAD should improve its information related activities significantly including with respect to non-U.S. origin cargoes to non-U.S. origin destinations to which cargo preference may apply.

- 5) MARAD should step up its efforts substantially in enforcing cargo preference in general. MARAD is the agency charged by law with promotion of the U.S. merchant marine. MARAD is the agency charged by law with overseeing other agencies' compliance with cargo preference. Only MARAD can ensure that the cargo preference laws are adequately enforced and that the purpose of those laws is fulfilled.

## **VI. Conclusion**

Perhaps nothing is more important to the viability of the privately owned U.S.-flag commercial fleet than adequate cargo preference enforcement. MARAD must substantially improve its cargo preference efforts to prevent a significant decrease in the number of vessels under U.S.-flag.

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