



Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

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September 12, 2022

SUMMARY OF SUBJECT MATTER

TO: Members, Subcommittee on Coast Guard and Maritime Transportation
FROM: Staff, Subcommittee on Coast Guard and Maritime Transportation
RE: Subcommittee Hearing on “Cargo Preference: Compliance with and Enforcement of Maritime’s Buy American Laws”

PURPOSE

The Subcommittee on Coast Guard and Maritime Transportation will hold a hearing on Wednesday, September 14, 2022, at 10:00 a.m. ET in 2167 Rayburn House Office Building and via Zoom to examine the current state of cargo preference compliance and enforcement. The Subcommittee will hear testimony from the U.S. Maritime Administration (MARAD), the Government Accountability Office (GAO), the Hudson Institute, USA Maritime, and the International Organization of Masters, Mates & Pilots.

BACKGROUND

Cargo preference is the general term used to describe the U.S. laws, regulations and policies that require the use of U.S. flag vessels in the movement of cargo that is owned, procured, furnished, or financed by the U.S. government.¹ It also includes cargo that is being shipped under an agreement of the U.S. government, or as part of a government program.

Cargo preference has been an effective shipping strategy in maintaining the U.S. presence and economic viability in the international shipping market.² U.S. law requires that certain percentages of cargo be carried on vessels registered in the United States when the cargo is supported by U.S. federal funding.³ Such cargo is commonly referred to as “government-impelled” and typically moves:

¹ Maritime Administration. *Cargo Preference*. <https://www.maritime.dot.gov/ports/cargo-preference/cargo-preference>

² *Id.*

³ *Id.*

- as a direct result of federal government involvement, such as military transportation of supplies by sea;
- indirectly through financial sponsorship of a federal program, such as food aid supported by the U.S. Agency for International Development (USAID); or
- in connection with a loan, grant, loan guarantee, or other financing provided by the federal government.⁴

Any department, agency, contractor, or sub-contractor of the federal government administering a program that directly or indirectly involves the transportation of cargoes on ocean vessels is subject to cargo preference requirements. Additionally, all members of the supply chain of said cargoes must comply with cargo preference.⁵

The U.S. uses federal laws and regulations to regulate and protect its own cargo interests. Three primary pieces of legislation guide Cargo Preference requirements in the United States: Section 2631 of title 10, United States Code, popularly known as the *Cargo Preference Act of 1904*; Section 55305 of title 46, United State code, popularly known as the *Cargo Preference Act of 1954*; and Section 55304 of title 46, United States Code, popularly known as *Public Resolution 17 (PR-17)*.

The *Cargo Preference Act of 1904* requires 100 percent of military cargo carried by sea by the Department of Defense to be shipped via a U.S.-flagged vessel.⁶

The *Cargo Preference Act of 1954* currently requires that at least 50 percent of the gross tonnage of civilian agencies cargo and agricultural cargo be transported on privately owned U.S.-flag commercial vessels.⁷ This can include cargo from the Department of Agriculture (USDA), USAID, and the transportation of all U.S. government personnel and their personal effects (household goods) and all private vehicles transported at the U.S. government's expense.⁸ At first passage, this act set civilian and agricultural requirements at 50 percent.⁹ These were increased to 75 percent by the Food Security Act of 1985 (P.L. 99-198, subtitle C) but were subsequently lowered back to 50 percent when subtitle C was repealed by the *Moving Ahead for Progress in the 21st Century Act* in 2012.

PR-17 was enacted in 1934 to address U.S.-flag shipping requirements for the U.S. Export-Import (EXIM) Bank of the United States and requires shipping on U.S.-flag vessels for the following EXIM Bank transactions: Direct loans regardless of term or amount, and Guarantees valued over \$20,000,000 USD (excluding EXIM Bank exposure fees) or with repayment terms greater than seven years, unless the export qualifies for a longer repayment term under EXIM's Medical Equipment Initiative, Environmental Exports Program, or Transportation Security Program. Furthermore, foreign countries that are recipients of U.S. assistance through foreign military financed programs are also required by law to use U.S.-flag vessels.¹⁰

⁴ *Id.*

⁵ *Id.*

⁶ 10 U.S.C. § 2631

⁷ 46 U.S.C. § 55305

⁸ *Id.*

⁹ Congressional Research Service. *Cargo Preferences for U.S.-Flag Shipping*. October 29, 2015.

¹⁰ 46 U.S.C. § 55304

MARAD holds the responsibility of monitoring federal agencies' cargo volumes to ensure compliance with cargo preference laws and regulations.¹¹ MARAD's Office of Cargo and Commercial Sealift manages all MARAD Cargo Preference activities.¹² Data regarding compliance by agencies was previously published by MARAD and publicly available up until 2013, when MARAD stopped publishing this information because they were no longer required to do so by Congress.¹³ Section 3502(b) of H.R. 7900, the *National Defense Authorization Act for Fiscal Year 2023* which passed the House on July 14, 2022, reinstates the reporting requirement.

Current regulations make one entity, the prime contractor, the responsible party for ensuring that U.S.-flag vessels are used throughout the supply chain. The prime contractor is deemed to have violated its U.S.-flag requirements if any person or entity in its supply chain—including sub-contractors, vendors, suppliers, freight forwarders, and shipping companies—does not meet the requirements. The Federal Contracting Officer is the official enforcement authority and can impose financial assessments against the prime contractor if the U.S.-flag vessel use requirements are not met by any member of the supply chain.¹⁴

I. The Purpose of Cargo Preference

Cargo preference, the reservation of certain cargoes to U.S.-flag ships, is necessary for our national defense and a key driver of domestic and foreign commerce. This helps maintain a U.S.-flag commercial merchant marine that can be called upon in times of war or national emergencies.¹⁵ Section 50101 of title 46, U.S.C., dictates that the United States must have a merchant marine —

- sufficient to carry the waterborne domestic commerce and a substantial part of the waterborne export and import foreign commerce of the United States,
- capable of serving as a naval and military auxiliary in times of war or national emergency;
- owned and operated as vessels of the United States by citizens of the United States;
- composed of the best-equipped, safest, and most suitable types of vessels constructed in the United States and manned with a trained and efficient citizen personnel; and
- supplemented by efficient facilities for building and repairing vessels.

It is the United States' policy to encourage and aid in the development of a merchant marine satisfying the above objectives.¹⁶ Cargo preference coupled with other programs such as the

¹¹ Maritime Administration. *Cargo Preference*. <https://www.maritime.dot.gov/ports/cargo-preference/cargo-preference>

¹² *Id.*

¹³ Government Accountability Office. *Maritime Administration Actions Needed to Enhance Cargo Preference Oversight*. GAO-22-105160. September 12, 2022.

¹⁴ Maritime Administration. *Cargo Preference*. <https://www.maritime.dot.gov/ports/cargo-preference/cargo-preference>

¹⁵ *Id.*

¹⁶ 46 U.S.C. § 550101

Maritime Security Program¹⁷ (MSP) and Voluntary Intermodal Sealift Agreement¹⁸ (VISA), are intended to support the U.S.-flag shipping industry so that the United States has a fleet capable of supplementing the capacity of the U.S. military with U.S.-flagged vessels and trained mariners during times of war or national emergency, while also providing transportation for the nation's maritime commerce.¹⁹ Despite this objective, the number of oceangoing vessels in the U.S.-flag fleet has fallen over time.²⁰ According to MARAD data, the fleet of U.S.-flagged vessels engaged in international trade has declined from approximately 199 vessels at the end of 1990 to 84 vessels in 2021.²¹ This is in part due to the increased costs associated with operating a U.S.-flagged vessel in comparison to foreign-flagged vessels and the continued practice of using flags of convenience.²² Cargo preference requirements ensure a baseline of cargo for vessel operators which guarantees at least a portion of the defense capability needed for United States national sealift capability.²³ The figure below demonstrates the decline of the number of vessels in the U.S.-flag fleet since 1990.

¹⁷ The Maritime Security Program (MSP) maintains a fleet of commercially viable, militarily useful merchant ships active in international trade. The MSP fleet is available to support U.S. Department of Defense (DoD) sustainment sealift requirements during times of conflict or in other national emergencies. The program also provides DoD access to MSP participants' global intermodal transportation network of terminals, facilities, logistic management services, and U.S. citizen merchant mariners. In return, vessel operators receive a federal stipend. Maritime Administration. <https://www.maritime.dot.gov/national-security/strategic-sealift/maritime-security-program-msp>

¹⁸ MARAD's Voluntary Intermodal Sealift Agreement (VISA) program is a partnership between the U.S. Government and the maritime industry to provide the Department of Defense (DoD) with assured access to state-of-the-art commercial sealift and intermodal equipment when DoD deploys military forces during a national emergency or wartime operations. Maritime Administration. <https://www.maritime.dot.gov/national-security/strategic-sealift/voluntary-intermodal-sealift-agreement-visa>

¹⁹ Government Accountability Office. *Maritime Administration Actions Needed to Enhance Cargo Preference Oversight*. GAO-22-105160. September 12, 2022.

²⁰ Maritime Administration. U.S. Department of Transportation. *U.S. Flag Vessels*. <https://www.maritime.dot.gov/national-security/us-flag-vessels>.

²¹ *Id.*

²² Maritime Administration. U.S. Department of Transportation. *Comparison of U.S. and Foreign-Flag Operating Costs*. September 2011. <https://www.maritime.dot.gov/sites/marad.dot.gov/files/docs/resources/3651/comparisonofusandforeignflagoperatingcosts.pdf>

²³ *Id.*

²³ Maritime Administration. *Cargo Preference*. <https://www.maritime.dot.gov/ports/cargo-preference/cargo-preference>

Figure 1: Number of Internationally Trading U.S.-Flag Vessels, 1990 to 2021



Source: GAO analysis of Maritime Administration data on non-Jones Act eligible ocean-going vessels. | GAO-22-105160

Figure 1: Number of Internationally trading U.S.-Flag vessels from 1990 to 2021. Government Accountability Office. Maritime Administration Actions Needed to Enhance Cargo Preference Oversight. GAO-22-105160. September 12, 2022.

In testimony to the subcommittee earlier this year, MARAD Deputy Administrator Lucinda Lessley stated that:

“Critical to the operation of both Government-owned and commercial U.S.-flag vessels is an adequate supply of qualified U.S. mariners to crew them. Access to a pool of qualified mariners from a robust, commercial maritime fleet is essential to maintaining sufficient sealift readiness capacity for contingencies. Due to the declining number of ships in the U.S.-flag oceangoing fleet, MARAD is concerned about our ability to quickly assemble an adequate number of qualified mariners to operate large ships for surge and sustainment sealift operations if an extended mobilization were to occur.”²⁴

A 2020 report by the Center for Strategic and Budgetary Assessments emphasized the importance of not only recapitalizing the U.S.-flagged fleet but also the need for cargo preference and enforcement of cargo preference laws.²⁵

II. Recent Legislative Changes

A. The Duncan Hunter National Defense Authorization Act for Fiscal Year 2009

²⁴ U.S. House of Representatives Committee on Transportation and Infrastructure. Statement of Lucinda Lessley, Acting Administrator, Maritime Administration, U.S. Department of Transportation, Before the Committee on Transportation and Infrastructure, Subcommittee on Coast Guard and Maritime Transportation, U.S. House of Representatives, Hearing on “Review of Fiscal Year 2023 Budget Request for the Coast Guard and Maritime Transportation Programs.” April 27, 2022. <https://transportation.house.gov/imo/media/doc/Lessley%20Testimony1.pdf>

²⁵ Clark, Bryan; Walton, Tim; Lemon, Adam. Center for Strategic and Budgetary Assessments. Page 55 https://csbaonline.org/uploads/documents/CSBA8199_Maritime_Industrial_FINAL.pdf

In 2008, MARAD was granted new authorities to take certain cargo preference-related enforcement actions through amendments made by the *Duncan Hunter National Defense Authorization Act for Fiscal Year 2009* (P.L. 110-417) (2009 NDAA) to section 55305(d) of title 46. Those authorities include assessing civil penalties “against any person” for noncompliance with cargo preference requirements. The Secretary of Transportation was also given discretion to prescribe rules if deemed necessary to carry out the authorities granted. To date, MARAD has not issued any regulations implementing those authorities nor has MARAD taken any enforcement action.²⁶ Section 3502(a) of the *National Defense Authorization Act for Fiscal Year 2023* which passed the House on July 14, 2022, directed MARAD to issue such rules within 90 days of enactment.

B. Moving Ahead for Progress in the 21st Century Act

Cargo preference laws were further amended by the *Moving Ahead for Progress in the 21st Century Act* (P.L. 112-141) (also known as *MAP-21*). As mentioned above, *MAP-21* repealed the *Food Security Act of 1985* (P.L. 99-198, subtitle C), which had increased the cargo preference requirement from 50 percent to 75 percent of food aid tonnage. Section 100124 of *MAP-21* reduced the percentage of U.S. food aid that must be shipped on U.S.-flagged ships (which must be owned and crewed by U.S. citizens) from 75 percent to 50 percent and repealed the requirement that 25 percent of bagged or processed food aid be shipped through Great Lakes ports.²⁷ These repeals weakened current cargo preference laws by lowering cargo levels and reducing government impelled cargo set aside for carriage on U.S.-flagged ships.

In a 2015 joint hearing before the Subcommittee on Livestock and Foreign Agriculture, Committee on Agriculture, and the Subcommittee on Coast Guard and Maritime Transportation, Committee on Transportation and Infrastructure, testimony was provided by Brian Shoeneman, with the Seafarers International Union, highlighting the impacts *MAP-21* has had on the U.S.-flag fleet including a reduction of the overall size and cargo volumes.²⁸ He stated:

“There is no denying that the loss of food aid cargo resulting from reductions in appropriations, and the cuts to cargo preference in *MAP-21*, has cost this industry ships and jobs. Over the last 10 years food aid has made up a considerable portion of the preference cargo carried by American carriers, if not the majority. From 2000 to 2013 cargo volumes in the food aid program have dropped 77 percent. In 1999 there were 106 American ships carrying approximately 6 million tons of food aid. In 2013 the fleet had dropped in size to 75 ships, carrying slightly more than 1 million tons of food aid. According to MARAD, since 2010 the size of the U.S.-flag fleet has dropped 23 percent, from 99 ships to the 78 ships mentioned today. And that has resulted in the loss of nearly 1,000 mariner jobs.”²⁹

²⁶ Government Accountability Office. *Maritime Administration Actions Needed to Enhance Cargo Preference Oversight*. GAO-22-105160. September 12, 2022.

²⁷ Congressional Research Service. *Surface Transportation Funding and Programs Under MAP-21: Moving Ahead for Progress in the 21st Century Act* (P.L. 112-141). <https://sgp.fas.org/crs/misc/R42762.pdf>

²⁸ Joint hearing before the Subcommittee on Livestock and Foreign Agriculture Committee on Agriculture and the Subcommittee on Coast Guard and Maritime Transportation Committee on Transportation and Infrastructure, U.S. House of Representatives. “U.S. *International Food Aid Programs: Transportation Perspectives*” November 17, 2015. <https://www.govinfo.gov/content/pkg/CHRG-114hhrg97713/pdf/CHRG-114hhrg97713.pdf>

²⁹ *Id.*

C. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021

Included in the *William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021* was an amendment to section 2631 of title 10, United States Code which aimed to increase DOD compliance with military cargo preference requirements.³⁰ Another part of the bill required a GAO study regarding federal compliance with existing civilian and military cargo preference rules.³¹

III. Agency Compliance with Cargo Preference Laws

Despite the enhanced enforcement capabilities provided to MARAD by the 2009 *NDAA*, the degree to which agencies comply remains unclear due to a lack of transparency from MARAD and obligated agencies. Government cargoes have decreased in volume by more than half since 2004, which has placed downward pressure on the profitability and viability of the U.S.-flagged international trading fleet and, by extension, contributed to a decline in its size, raising national security concerns.³² As mentioned above, Section 8404 of the *William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021* included a provision for GAO to examine federal agencies' actions to monitor and ensure compliance with cargo preference requirements and to review MARAD's enforcement activities.³³ In the report released September 12, 2022, GAO looked at seven agencies covered under cargo preference requirements: DOD, USAID, USDA, EXIM Bank, the Department of Energy, Department of Transportation, and the Department of State.³⁴

Data received from most agencies is typically through the review of bills of lading that agencies' ocean transportation contractors are required to submit to MARAD following completion of transportation services. DOD typically provides additional data beyond the bills of lading on cargo shipments. As mentioned previously, prior to 2013, data on cargo preference compliance had been publicly reported by MARAD.³⁵ This practice ceased following the 2012 removal of said reporting requirement by *MAP-21*.³⁶ GAO was able to obtain compliance data from MARAD for years after 2013 and found that U.S.-flagged cargo volumes decreased 36 percent from fiscal year 2012 through 2020.³⁷ The lack of published data obstructs outside oversight by industry or Congress on compliance with cargo preference laws. Without public reporting, federal agencies lack the incentive to demonstrate to the public that they are meeting cargo preference requirements.³⁸

MARAD also has the authority to issue waivers for situations where U.S.-flagged vessels are not readily available for use. DOD has statutory authority to make its own determination about the real-time availability of eligible U.S.-flagged vessels.³⁹ DOD shares this information with, MARAD

³⁰ *William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021*. Public Law 116-283.

³¹ *Id.*

³² Government Accountability Office. *Maritime Administration Actions Needed to Enhance Cargo Preference Oversight*. GAO-22-105160. September 12, 2022.

³³ *William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021*. Public Law 116-283.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Government Accountability Office. *Maritime Administration Actions Needed to Enhance Cargo Preference Oversight*. GAO-22-105160. September 12, 2022.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

but is not required to do so.⁴⁰ Other agencies vary on their procedures for determining availability and compliance. While some agencies make these determinations on their own or leave it to their contractors, others go to MARAD for guidance. A lack of guidance from MARAD on how to determine the availability of U.S.-flagged vessels and calculate the percentage of cargo shipped on U.S.-flagged ships has led to varying interpretations of cargo preference laws and calculations of compliance.⁴¹ Without conducting a rulemaking and issuing these regulations, MARAD is unable to consistently assess cargo preference compliance rates across agencies and utilize enforcement capabilities that were provided in the 2009 *NDAA*, despite MARAD-identified instances of noncompliance.⁴²

GAO's findings resulted in two recommendations:

1. The Administrator of MARAD should publicly report, on an annual basis, the cargo preference data it receives to provide information on total cargo volumes and amounts shipped on U.S.- and foreign-flag vessels for each federal agency.
2. The Administrator of MARAD should take steps to develop regulations to oversee and enforce compliance with cargo preference requirements. These steps should include evaluating options for overcoming challenges to develop such regulations, such as (1) using a negotiated rulemaking to address challenges achieving consensus on how to implement cargo preference requirements and (2) developing and communicating a legislative proposal to address statutory challenges MARAD has identified.⁴³

MARAD has identified barriers to completing a rulemaking outlined in recommendation two. Due to varying stances, agencies have failed to reach a consensus with MARAD on a final rule. Without an agreement, MARAD cannot proceed forward with regulations and enforcement.⁴⁴ MARAD has also identified three barriers in statutory language that prevent full implementation of cargo preference laws.⁴⁵ These barriers include a failure to acknowledge containerized shipping, which became popular after the passage of the 1954 Act; a lack of definition for "geographic areas" in determining compliance, and a three-year waiting period that limits the entrance of new foreign-flagged bulk vessels from entering the U.S.-flagged fleet.⁴⁶ Section 3524 (a) of the *National Defense Authorization Act* for Fiscal Year 2023 passed by the House on July 14, 2022, waives the three-year waiting period. Despite these barriers, MARAD has concurred with the recommendations from GAO's report.⁴⁷ This hearing will closely examine the results of this report by GAO and provide insight from both MARAD and maritime industry representatives.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

WITNESS LIST

Panel 1

Rear Admiral Ann C. Phillips
Administrator
Maritime Administration

Mr. Andrew Von Ah
Director, Physical Infrastructure
Government Accountability Office

Panel 2

Mr. Bryan Clark
Senior Fellow and Director of the Center for Defense Concepts and Technology
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Mr. Eric Ebeling
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