



## Maritime & Admiralty Practice

October 2009

### Maritime Provisions Enacted in U.S. Defense Legislation

On Oct. 8, 2009, the U.S. House of Representatives passed the National Defense Authorization Act for Fiscal Year 2010. The Senate is expected to follow suit and, although it is possible that President Obama will veto the legislation, the FY 10 Defense Authorization is likely to become law in any event.

As in prior years, the FY 10 Defense Authorization contains a number of commercial or other maritime measures in addition to the huge number of provisions dealing with every aspect of the U.S. defense posture. Those provisions are summarized below, as well as the couple of measures that were proposed but wound up on the “cutting room floor.”

#### Title XI Government Guarantee Ship Construction Program

The U.S. Maritime Administration administers a guarantee financing program authorized by Title XI of the Merchant Marine Act, 1936. Under the program, the U.S. government provides full faith and credit guarantees for the qualified financing of the construction or reconstruction of vessels in U.S. shipyards.

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The Title XI program has had considerable success over many years in promoting the construction of vessels, although it has not been without its critics. As a result of widely publicized defaults in 2001, the program came under scrutiny by the U.S. Government Accountability Office, Congress, and other agencies. A number of measures intended to protect the government were adopted as part of the National Defense Authorization Act for Fiscal Year 2004.

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The program nevertheless continues to have strong support particularly during periods, such as now, when commercial financing is difficult to obtain. The Transportation Appropriations bill for fiscal year 2010, which passed the Senate on Sep. 17, 2009, contains \$14 million for the program of which \$10 million is reserved for guarantees (versus program costs). The accompanying Senate report indicates that the \$10 million will support \$170 million in guarantees apparently based on an average risk ratio of 17 to 1.

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The accompanying Senate report also indicates that “affordable financing opportunities that these loans allow are critical to ensuring that small and medium ship owners can build ships in the United States.” The report admonishes the Maritime Administration to “move quickly to approve the loan guarantees, which are critical to our domestic shipbuilding industry.” As of the writing of this briefing, the Congress has not completed its work on the FY 2010 Transportation Appropriations bill.

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The FY 10 Defense Authorization makes no amendment to Title XI. But, the FY 10 Defense Authorization does make several findings supporting the Title XI program which are apparently designed to give the program some momentum. Among other things, the FY 10 Defense

Authorization finds that Title XI “has a long and successful history,” “strengthens our Nation’s industrial base,” “enhances the commercial sealift capability of the Department of Defense,” and that “a revitalized and effective Maritime Loan Guarantee Program would result in construction of a more modern and larger fleet of commercial vessels.”

## Piracy

Ever since the pirate attacks on the MAERSK ALABAMA and LIBERTY SUN in April 2009, Congress has had under consideration various measures to improve security for U.S.-flag vessels. The FY 10 Defense Authorization contains two of such provisions.

The first measure requires that a report be submitted to Congress within 60 days after enactment from the Secretary of Defense and the Secretary of State. The report must set forth what actions the Departments have taken to:— (1) “eliminate or reduce restrictions under any regulation or provision of law on the carriage of arms and use of armed security teams on United States-flagged commercial vessels for purpose of self-defense;” (2) “negotiate bilateral agreements” to permit U.S.-flag vessels to enter foreign ports while carrying fire arms for self protection; and (3) “establish common standards” for “the training and professional qualifications of armed security teams.”

The foregoing report requirement was included in lieu of an amendment passed by the House of Representatives offered by Rep. Elijah Cummings of Maryland that would have required the Department of Defense to “embark military personnel on board a United States-flag vessel carrying Government-impelled cargoes” which is determined to be at risk of pirate attack.

The second measure affects U.S.-flag vessels enrolled in the Maritime Security Fleet Program. The provision will require such MSP-enrolled vessels, beginning with Emergency Preparedness Agreements that first take effect after enactment, to be “equipped with, at a minimum, appropriate non-lethal defense measures” to protect against piracy, as determined by the Secretary of Defense and the U.S. Coast Guard.

## Port Infrastructure Development Program

The FY 10 Defense Authorization authorizes a new Port Infrastructure Development Program to be administered by the Maritime Administration. The new measure expands on long-standing Maritime Administration port development reporting and investigative authority. Although the authorization is less than clear, it appears to authorize the Maritime Administration to facilitate port infrastructure programs and coordinate funding for such projects.

## Short Sea Transportation Grants

The coastwise marine transportation of goods around the United States, often referred to as “short sea shipping,” has been frequently cited as one solution to highway and rail congestion. Almost two years ago, Congress enacted legislation in that year’s energy bill establishing a “short sea transportation” program to encourage the use of short-sea transportation and designate projects under that program. Although that legislation provided a framework for government support, it lacked grant authority.

That lack of grant authority was remedied in the FY 10 Defense Authorization, which gives to the Secretary of Transportation authority to award grants in furtherance of the short sea program. The authorization limits such grants to 80 percent of the cost of a project. At least 20 percent must be funded by the applicant.

## U.S. Vessel Construction Policy

Section 101 of the Merchant Marine Act, 1936 expresses in statute the national maritime policy of the United States. Among other things, it is the policy of the United States to maintain a merchant marine “sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States.”

When Section 101, like much in the rest of Title 46 of the U.S. Code, was codified by Congress in 2006, the policy goal of having a merchant marine composed of vessels “constructed in the United States” was dropped. The FY 10 Defense Authorization adds those words back into the law.

## Measures Proposed But Not Adopted

Aside from the Cummings Amendment regarding piracy, which Congress ultimately did not include in the FY 10 Defense Authorization, Congress also did not include a provision included in the House of Representatives-passed bill regarding two Hawaii ferries. According to the provision, which was dropped, the Maritime Administration would have been required to notify the Navy before taking any action to dispose of any financial interest it obtained by virtue of foreclosing on Title XI guaranteed loans.

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