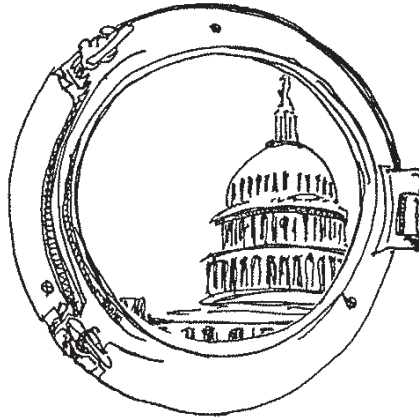


WINDOW ON WASHINGTON



Adrift: The 2013 Government Shutdown

By Bryant E. Gardner

The 2013 Federal government shutdown is old news, and many have hailed the Murray-Ryan budget compromise reached at the end of 2012 as the beginning of a new era of cooperation and bipartisanship. But looking closely at the budget compromise, the only real agreement is to keep the government open, if only temporarily, and many of the fundamental disagreements remain unresolved and simmering. Considering the continued divide in the electorate, particularly the enormous pressure from the right that continues to confront moderate Republicans, and the looming debt ceiling, it's worth taking a look at how the shutdown impacted the maritime industry during the last round, and where stakeholders might be vulnerable the next time congressional stalemate hits.

Import and Export Clearances

Key Customs and Border Protection Port of Entry Operations, including Cargo Security and Revenue Collections and Border Security, were deemed essential law enforcement during the shutdown, avoiding the need for agents to curtail port service hours. Therefore, the clearance of cargo at ocean ports remained, for the most part, uninterrupted.

The Federal patchwork of agencies required for smooth clearance of cargo extends beyond Customs

and Border Protection ("CBP"), and not all of these inspectors were at work during the shutdown. Of the 40 Federal agencies involved in trade shipments, 14 of them have "release and hold" authority which can trump CBP clearance. The Environmental Protection Agency, which furloughed more than 90% of its staff, was reportedly unable to approve pesticide imports, blocking their entry to the U.S. Similarly, wood imports were reported detained at ports pending clearance by the U.S. Department of Agriculture's Animal Plant Health Inspection Service ("APHIS"). At the start of the shutdown, APHIS notified stakeholders that it would continue import/export work to the extent such work is funded by user fees. The Food and Drug Administration continued import work, but with 18% of its staff on furlough, processing slowed considerably. Steel imports to the U.S. were also hung-up by the suspension of the International Trade Administration steel import licensing system. Consumer Product Safety Commission ("CPSC") port inspectors in the field were furloughed, preventing CPSC from screening potentially dangerous products at ports of entry. However, shipments were generally not stopped from entering the country due to CPSC unavailability.

Export controls agencies, however, were impacted by the shutdown. The Department of Commerce's Bureau

of Industry and Security ("BIS") furloughed about 60% of its workers and ceased accepting export license applications, classification requests, encryption reviews, encryption registrations, advisory opinion requests, or final determinations. The BIS website, which advises importers and exporters on compliance issues, shut down. All pending applications were put on hold until BIS reopened. However, a window was left open for exporters requiring emergency processing of export applications supported by "national security" reasons. Technology exporters, such as Applied Materials, Inc., which makes equipment and software used in semiconductor manufacture, began to complain in the press that their export applications had been put on hold indefinitely. The export control agency shutdown was made particularly awkward by the fact that October 15th, two weeks into the shutdown, was the implementation date for a significant revision of the export control regulations and reshuffling of responsibilities among the agencies, transferring 30,000 licenses per year from the State Department to BIS.

The shutdown also interfered with the operations of the Export-Import Bank of the United States, which provides credit financing to U.S. exporters. As a result, numerous export shipments were delayed and projects suspended due to the unavailability of Ex-Im Bank funding. Ironically, Ex-Im is one of the few U.S. Government institutions that is fully self-funded.

Coast Guard Functions

The Coast Guard remained on station, for the most part, maintaining all emergency response, maritime safety, and search and rescue activities "necessary for safety of life and protection of property." However, the Coast Guard's National Maritime Center ("NMC"), which issues merchant mariner credentials, pared down to a skeleton crew focused on "national security emergent issues." All NMC regional exam centers were closed and exam appointments cancelled. To accommodate mariners with credentials expiring between October 1 and November 30, the Coast Guard extended those expiration dates to December 31, providing instructions on how to print from the Coast Guard's website the amended documents noting the granted extension. In contrast, Transportation Security Administration ("TSA") enrollment centers remained open and continued issuing Transportation Worker Identification Cards ("TWICs"). The Coast Guard National Vessel

Documentation Center ("NVDC") in Falling Waters, West Virginia, suspended operations for commercial vessels. The result was that filings of mortgage liens and issuances of essential vessel documentation certificates were unavailable, complicating financing transactions, vessel purchases, and other transactions.

MARAD and U.S.-Flag Promotional Programs

Going into the shutdown, the U.S. Maritime Administration ("MARAD") announced that it planned to furlough 451 of its 830 staff, negatively affecting many of its core programs including Cargo Preference enforcement and monitoring. The shutdown also impacted the Maritime Security Program ("MSP"), which provides payments to 60 militarily useful vessels in order to provide a core fleet of privately owned U.S.-flag vessels available to satisfy national defense sealift requirements. MARAD initially estimated that MSP, which was already suffering a \$12 million shortfall under sequestration, would be required to cut as many as 10 vessels from the program, with four vessels expected to be removed immediately. In one of the few recent bright spots for the U.S. flag international fleet, the October 17th legislation that reopened the Federal government corrected a \$12 million shortfall in the program guaranteeing full funding for all 60 vessels through January 15, 2014. The Murray-Ryan deal only addresses appropriations at the macro level, and, therefore, does not explicitly address the continued funding of MSP or other promotional programs, but provides a continuing rate of appropriations that should satisfy the program requirements.

Federal Government Contracts & Bid Protests

As in past shutdowns, many Federal government contracts were either curtailed or suspended during the shutdown, with impacts varying from agency to agency, and contract to contract in many cases. The Coast Guard, for example, suspended much of the work to renew the service's air and surface assets. Moreover, allocation of the supplemental appropriations under the Disaster Relief Appropriations Act 2013, Pub. L. No. 112-2 (Jan. 29, 2013), to the Coast Guard for the repair of facilities and infrastructure damaged by Hurricane Sandy ceased, impacting large contracts for building and seawall repairs.

The Government Accountability Office ("GAO"), which is the launching point for many contract award bid protests, suspended its bid protest function altogether. Protests before the GAO normally have a very tight turnaround, requiring quick notice to the awardee, an agency report and record within 30 days, and full resolution by GAO within 100 days. Party comments and any supplemental protest are due in response to the agency record within 10 days. Part of the reason that GAO protests are popular is because they come with an automatic stay of contract performance, and continued work for the incumbent, pending resolution by GAO. Once the shutdown hit, GAO reserved the right to extend its 100 day timeline for each day of the shutdown; all deadlines for private party filings were extended to the day the shutdown ended, and agency record filings were extended for each day of the shutdown. So, many contractors had awarded contracts fall into uncertainty, as protests were filed but not served upon them, and confusion spread about the length of continued performance under the existing contracts or supplemental bridge amendments. Even following opening of the GAO, because of the backlog, contractors' counsel did not receive protests filings for days or weeks, threatening their ability to comply with the briefing deadlines absent relief from the overseeing attorney.

National Marine Fisheries Service

National Marine Fisheries Service ("NMFS") determinations of fishing quotas and permit approvals are prerequisites for the commencement of various fishing seasons around the U.S. Furloughs of NMFS biologists performing these functions reportedly threatened to delay fishing seasons, many of which have a very narrow window during which fisherman must make their catch for the year. For example, the lucrative king crab fisheries season in Alaska and Washington was scheduled to start on October 15 and typically only lasts several months. Moreover, the industry was under pressure to get crab to the Japanese market before the January 1st New Year's holiday or risk significant revenue loss. These risks prompted Rep. Suzan DelBene (D-WA), to take to the House Floor the Saturday before the shutdown, stating that "We are facing a 'fishing cliff' in the Bering Sea unless Congress acts." The fishery management councils were determined exempt from furlough, as were the quota monitoring, fisheries observers, and other law enforcement agents and seafood inspectors serving the industry.

Federal Maritime Commission

The Federal Maritime Commission (the "Commission") furloughed all of its employees, save the Commissioners themselves who remained on as skeleton crew. Disputes and complaints pending before the Commission were suspended until further notice, with deadlines suspended accordingly. Moreover, the Commission was unable to accept a variety of filings required under the Shipping Act of 1984. For example, space charters among ocean common carriers are required to be filed and cannot take effect until filed, and in some cases, approved by the Commission. Similarly, rate discussion agreements, cooperative working agreements, vessel sharing agreements, and others could not be undertaken without exposing carriers to violation of the Act and related civil penalties. Furthermore, the Commission ceased accepting Ocean Transportation Intermediary applications, further frustrating maritime commerce.

U.S. Merchant Marine Academy

Twenty-four hours after celebrating King's Point's 70th anniversary on September 30th, the U.S. Merchant Marine Academy became a victim of the shutdown and remained closed until the 21st of October. From the outset, many expressed concern that a prolonged shutdown would impact the school's accreditation, and the shutdown also wreaked havoc on athletic schedules. To grapple with the disruption, the Academy moved fall vacation forward in order to keep graduation on track for June 21st, 2014. During the first week of the shutdown, President Obama signed the Pay Our Military Act, Pub. L. No. 113-39, which included continuing funding for the Air Force, Naval, Coast Guard, and Military Academies, but not King's Point. Senator John Boozman (D-AR), who sits on the Academy's board, introduced the Pay Our Military Corrections Act, S. 1568, to correct the disparity. However, the bill did not move forward out of the Senate Appropriations Committee.

Looking Ahead

Hopefully the 2013 shutdown will not be repeated when we reach the next debt ceiling, or upon the expiration of the next extension. Polls show that Americans overwhelmingly blame Republicans for the 2013 shutdown, and the new class of Republican lawmakers who stood on principle is probably getting more of the blame for it than most. While some observers have opined that the freshman class of Republicans may shy away from the

next debt standoff, it seems far from certain they will relent considering the clear mandate to reign-in government spending that came from their constituents. Nor are these freshmen alone: Many long-serving moderate Republicans face new and intense challenges from the right, compelling them to take a harder stance on government spending or risk losing their seat. Part of the problem for Republicans in the 2013 shutdown is that they let the debate be framed as one about sour grapes over an Obamacare legislative battle that many voters thought was in the rearview mirror for the time being. However, if reframed as big government versus fiscal discipline, the Tea Party and others will be on much better footing. Maritime industry observers should take a close look at how the 2013 shutdown impacted or may have impacted their operations had it lasted longer, and prepare for the next shutdown as best they can.

Fracking Update

Last quarter's *Window on Washington* discussed the impact of new domestic onshore petroleum operations upon the U.S. maritime industry. The area continues to evolve and present emerging business opportunities for U.S. carriers and industry participants, even as it threatens old markets such as coal shipments. In addition to the internal shipment and possible export of new supplies of U.S. crude and gas, the shipment for disposal of "frack water" or the waste water that is a byproduct of hydraulic fracturing, presents another new opportunity. In the short run, movements are expected to be most significant transporting frack water from Marcellus shale operations in Pennsylvania, Ohio, and West Virginia to disposal sites in Texas, Louisiana, and Ohio.

On October 30, 2013, the U.S. Coast Guard announced a proposed policy letter concerning the carriage of frack water in bulk. Carriage of Conditionally Permitted Shale Gas Extraction Waste Water in Bulk, 78 Fed. Reg. 64,905 (Oct. 30, 2013); *see also* <http://www.regulations.gov> (Docket USCG-2013-0915). The Coast Guard notice explains that although bulk hazardous material may be transported by tank vessel if it is

a "listed cargo" in the agency's regulations, frack water falls without the treatment of "listed cargoes" because the chemical composition of each load differs depending upon the peculiarities of the drill site as well as the drilling fluid used.

The comment period for the proposed policy closed at the end of November, and the Coast Guard is currently evaluating comments received before approving or modifying the proposed rule. On one side of the debate are environmental interests, who have expressed concern with a spill of frack water into waterways that supply drinking water to millions of people. On the other side, production interests and the American Waterways Operators point to a 2011 Government Accountability Office study highlighting that fatality, injury, and air pollution rates for barge transportation rates are far lower for barge than for competing road and rail transport. *See* Government Accountability Office, Surface Freight Transportation: A Comparison of the Costs of Road, Rail, and Waterways Freight Shipments That Are Not Passed on to Consumers, GAO-11-134 (Jan. 2011). Moreover, the Marcellus Shale Coalition has applauded the Coast Guard initiative, but objects that thresholds are too low for naturally occurring radiation, effectively preventing barge shipment of the wastes. Although not without its regulatory and logistical challenges, the enormous potential economic opportunities spread across a multitude of congressional districts and industries portend continued expansion of domestic onshore production using fracking and other new techniques to make the most of U.S. supplies.

There is no deadline for a decision by the Coast Guard, and the Environmental Protection Agency has not at this time taken a position on the barge wastewater issue.

Bryant E. Garnder is a Partner at Winston & Strawn, LLP, Washington, D.C. B.A., summa cum laude 1996, Tulane University of Louisiana; J.D. cum laude 2000, Tulane Law School.