

Congress Considers Substantial Changes to Jones Act Ruling Process

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An amendment was recently offered by Sen. Bill Cassidy (R-LA) to the pending National Defense Authorization Act legislation which would substantially change the way the U.S. Government provides Jones Act compliance guidance. The proposed changes are appended to proposed foreign manning legislation [which we wrote about in March](#).

The “Jones Act” is the popular name for a set of laws which generally restrict U.S. domestic commerce to qualified U.S.-flag vessels. Since the U.S. has had some preference for vessels owned by U.S. citizens in the U.S. domestic trade since 1789, it has almost from the beginning maintained a process by which some government agency would opine on the contours of the preference. If these domestic trading restrictions were clear, such a process would have been unnecessary for the last 200-plus years.

For example, in 1843, the U.S. Attorney General issued an opinion to the Secretary of the Treasury that a U.S.-owned, foreign-flag vessel could participate in the U.S. domestic trade upon the payment of a high tonnage duty. In other words, the Attorney General ruled that the domestic trading restriction, at that time, did not limit U.S. domestic trade to U.S.-flag vessels.

The current U.S. Customs and Border Protection (CBP) regulations date from 1975. Those regulations provide that any private person may seek a ruling on customs matters including with respect to foreign vessels operating in U.S. waters to ensure that the proposed conduct is lawful. The purpose of the process is to provide regulatory predictability and certainty.

Pursuant to that voluntary process, CBP issues rulings on real-life situations, not hypotheticals, to anyone seeking assurance that they will not be violating the law. Rulings are posted on the publicly available CBP website at <https://rulings.cbp.gov/home> after they are issued.

All offshore industries—including the oil and gas, telecommunications, and offshore renewable energy industries—have utilized this process. A number of rulings, for example, have been issued in the last few years with respect to the U.S. offshore wind industry.

CBP can modify its rulings on its volition or based on industry input under current law. CBP has 60 days to reverse any ruling without providing for public notice and comment and has in fact reversed Jones Act rulings in the past because of industry complaints during that 60-day period.

For example, CBP issued a ruling dated July 15, 2020, to the effect that the Jones Act applies to the entire U.S. outer continental shelf as if all that area is physical U.S. territory—something it had never said before. On August 3, after industry weighed in, CBP revoked that ruling and issued a revised ruling on February 4, 2021.

Sen. Cassidy’s proposed amendment would add several administrative layers to this long-standing ruling process. The amendment would give anyone involved in providing a Jones Act-related service—although, notably, not any cargo shipper who utilizes Jones Act vessels—the right to challenge a CBP ruling within 60 days of a ruling being issued. The Secretary of Homeland Security would have to decide whether the ruling resulted in the “proper outcome.” The Cassidy amendment does not set forth that standard in any greater detail. Any such person could also appeal the Secretary’s decision, apparently to the same Secretary, and simultaneously file a judicial action challenging the original ruling.

The amendment would also introduce a new requirement to require any operator of a foreign vessel to provide notice to the U.S. Government if intends to operate in U.S. waters and identify “applicable ruling letters” approving such operation and for those to be posted publicly. There is no such requirement currently.

Finally, current law does not require CBP to post any public information about Jones Act fines or penalties it has assessed or collected. CBP also currently has authority to mitigate penalties for various reasons such in the case of an emergency where lives are threatened or for first time offenses. The Cassidy amendment would require public posting of penalty actions and eliminate any leniency in the law for Jones Act violations.

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