FY23 DEFENSE AUTHORIZATION BILL MAKES CHANGES TO ADDRESS "NOVEL AND PROBLEMATIC" JONES ACT WAIVERS

Date: 5 January 2023

U.S. Policy and Regulatory Alert

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When Congress enacted H.R.7776, the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (FY23 NDAA), it included several provisions that addressed the requirements for so-called discretionary waivers of the navigation and vessel-inspection laws under 46 U.S.C. § 501(b), which includes the Jones Act. Some of these changes were included in the original defense authorization bill, H.R. 7900, reported by the Armed Services Committee of the U.S. House of Representatives in July 2022, and other provisions were included in the Maritime Administration Authorization Act for Fiscal Year 2023, S. 4357, passed by the Senate Committee on Commerce, Science, and Technology in June 2022. The final FY23 NDAA (Pub. L. 117-263) modified 46 U.S.C. § 501(b), and made other changes to address waiver requests that the Maritime Administration called “novel and problematic” in recent vessel availability determination letters. We review those changes.

WHAT ARE THE MAIN CHANGES TO THE JONES ACT WAIVER RULES IN THE FY23 NDAA?

The existing waiver statute, 46 U.S.C. § 501(b)[1], requires a U.S. vessel availability survey before any waiver can be granted. Even before these most recent amendments, the statute was designed to encourage the use of U.S. vessels and to avoid waivers whenever possible. A primary emphasis of the new amendments is making sure that the U.S. vessel availability survey is meaningful. To that end, the new law affirmatively prohibits **retroactive** U.S. vessel availability surveys. For example, the new law prohibits waivers once the vessel proposed to receive a waiver is already underway, because after that, a prospective U.S. vessel availability survey is meaningless. Similarly, the new amendments require at least 48 hours before a waiver can be granted, because a meaningful U.S. vessel availability survey takes time to complete and review. These changes represent a re-emphasis on the importance of the long-standing practice of conducting **prospective** U.S. vessel availability surveys to give qualified U.S.-flag vessels an opportunity to carry the cargoes contemplated by the waiver request.

WHAT ABOUT THE “NECESSARY IN THE INTEREST OF NATIONAL DEFENSE” STANDARD FOR A TYPICAL WAIVER?

The “necessary in the interest of national defense” standard has not changed. The statute, dating back to its inception in 1950, provided that waivers are only allowed when they are found to be “necessary in the interest of national defense.” That remains the rule after the recent changes. What has changed is that the determination of

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whether a waiver is “necessary in the interest of national defense” must now be made by the president, not the secretary of the Department of Homeland Security. That determination language in the newly amended waiver statute is the same as the language in a federal statute, 15 U.S.C. § 2621, relating to national defense waivers issued by the administrator of the Environmental Protection Agency (EPA). Congress concluded that a national defense determination for a Jones Act waiver should come from the commander in chief, in the same manner as for environmental waivers issued by the EPA.

ANY OTHER CHANGES?

There are also a number of changes designed to increase transparency of waiver requests. For example, the waiver request must be published and publicly available for 48 hours before a waiver can be granted. The new amendments require certain additional information to be supplied in any waiver request, including the name of the individual requesting the waiver if they are not the owner/operator of the vessel, and an explanation of the national defense justification. Also, if a waiver is denied, an explanation of the denial rationale must be published.

CONCLUSION

Following consideration of the waiver process amendments throughout 2022 as part of the defense authorization legislative process, Congress determined that the waiver statute needed clarification to address the potential for additional “novel and problematic” waiver requests in the future. The final changes are designed to ensure U.S.-flag vessels are given adequate opportunities to carry domestic trade cargoes and to ensure that waivers are only issued on the rare occasions when U.S.-flag vessels are not available to meet the needs of national defense.

FOOTNOTES

[1] A related provision, 46 U.S.C. § 501(a), requires waivers as requested by the Secretary of Defense when the waiver is “necessary in the interest of national defense to address an immediate adverse effect on military operations.” That provision was not amended by the FY23 NDAA.

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