

CHANGES IN JONES ACT INTERPRETATIONS WILL AFFECT US OFFSHORE SECTOR

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ON DECEMBER 19, 2019, THE US CUSTOMS AND BORDER PROTECTION (“CBP”) ANNOUNCED A CHANGE IN ITS INTERPRETATION OF SECTION 27 OF THE MERCHANT MARINE ACT OF 1920 (THE “JONES ACT”), WHICH WILL AFFECT US OFFSHORE INSTALLATIONS.

In general, the new interpretation leaves room for expansion of the universe of items that non-US-flagged vessels may deliver to US offshore installations. Owners, operators and other interested parties of US offshore installations and the vessels that service them should consider the expanded possibilities of the new interpretation.

Jones Act

The Jones Act regulates the transportation of “merchandise” by water between points in the United States (commonly referred to as “coastwise” trade or “cabotage”). This coastwise trade is restricted to vessels built in the US, documented under US flag, and owned legally and beneficially by “citizens of the United States.” The Jones Act by its express terms extends to three nautical miles beyond the US coast. In addition, by operation of the Outer Continental Shelf Lands Act, the Jones Act restrictions on cabotage extend 200 miles offshore, to the Outer Continental Shelf, including to offshore installations and structures. Accordingly, any vessels that are not Jones Act-compliant may not transport merchandise from the US to a US offshore installation.

Merchandise vs. Vessel Equipment

However, under longstanding guidance, “merchandise” does not include “vessel equipment,” meaning that non-Jones Act vessels may transport “vessel equipment” from a US port to an offshore installation. Vessel equipment generally is defined to include “portable articles necessary and appropriate for the navigation, operation or maintenance of the vessel and for the comfort and safety of the persons on board.”

On its face, there is no requirement that the vessel equipment item in question possess a nexus to the “mission of the vessel” in order to qualify for the exception from the definition of “merchandise.” However, in the past several decades, CBP has issued various rulings adopting a purposive analysis, examining how the item relates to the vessel’s mission, and whether the item is used on or from the vessel, in determining whether it qualifies as “vessel equipment.”

New Interpretation

Under CBP's new interpretation, "vessel equipment" is defined to include "all articles or physical resources serving to equip the vessel, including the implements used in the vessel's operation or activity." Furthermore, "[t]hese items may include those items that aid in the installation, inspection, repair, maintenance, surveying, positioning, modification, construction, decommissioning, drilling, completion, workover, abandonment or other similar activities or operations of wells, seafloor or subsea infrastructure, flow lines, and surface production facilities." CBP notes that "the fact that an item is returned to and departs with the vessel after an operation is completed, and is not left behind on the seabed, is a factor that weighs in favor of an item being classified as vessel equipment, but is not a sole determinative factor." In other words, even an item that is permanently installed on the seabed *may* be vessel equipment.

The new interpretation does not include specific examples or safe harbors, meaning that non-Jones Act vessel operators wishing to transport items from a US port to an offshore installation will still need to apply for a ruling if they wish to obtain comfort that such installations will not violate the Jones Act. But the new interpretation implies that CBP rulings in the future will expand the universe of items that can be transported by non-Jones Act vessels from a US port to offshore installations ranging from drilling platforms to wind farms.

The new interpretation is effective for merchandise transported on or after February 17, 2020.

Implications for Offshore

Non-Jones Act vessel owners and operators, as well as operators of US offshore projects, may seek opportunities for an expansion of permitted activities and a concomitant reduction in costs, respectively. Anyone wishing to engage non-Jones Act vessels in trade to US offshore installations should consider contacting CBP for a ruling that such trade is permitted.

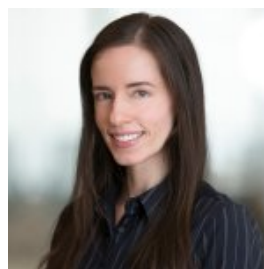
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