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And the Hearing on:

The State of the U.S. Flag Maritime Industry

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America's Lifeline to Offshore Energy

Chairman Hunter, Ranking Member Garamendi, and Members of the Subcommittee, thank you for allowing me to speak at this important hearing. My name is Aaron Smith, and I have the pleasure of serving as the President and CEO of the Offshore Marine Service Association (OMSA).

OMSA is a strong supporter of the Jones Act because of its national, homeland, and economic security benefits.

364 days ago, Customs and Border Protection (CBP) took an important step to correct decades of inadequate enforcement of the Jones Act. Unfortunately, for misguided reasons, the Trump Administration halted that effort on May 10, 2017. As such, OMSA urges Congress and the Administration to improve the enforcement of this quintessentially "Buy American, Hire American" Act.

Who We Are.

OMSA is the association for the domestic offshore marine transportation service industry. Many of our members own and operate U.S.-flag vessels engaged in constructing, maintaining, and servicing oil and gas infrastructure on the Outer Continental Shelf (OCS). In addition to this work, some OMSA members also lease their vessels to or operate vessels on behalf of numerous Federal agencies, including but not limited to the National Oceanographic and Atmospheric Administration (NOAA) and the U.S. Navy's Military Sealift Command (MSC).

OMSA's members also include many shipyards that construct, maintain, repair, and modernize both privately and government-owned U.S. fleets. In addition, we represent associated suppliers and allied companies that provide supplies, services, and training to these vessel operators and shipyards.

In total, OMSA represents approximately 170 companies and their approximately 12,000 employees. While these companies and employees are primarily based in the Gulf Coast, OMSA member employees can be found in every state in the nation.

We represent large publicly traded companies and small family-owned businesses. Some of our members have dozens and hundreds of vessels while others operate only one or two. In fact, more than half of OMSA vessel owners have a fleet of six or fewer vessels.

Those differences aside, OMSA vessel operators have one important commonality: they are all American-owned companies that employ American mariners and build vessels in U.S. shipyards.

That common bond has existed since the first days of offshore energy development. The first offshore well ever was drilled 11 miles off the coast of Louisiana in approximately 18 feet of water.

At that time, we utilized out-of-work shrimping boats and mothballed WWII vessels to take the men and materials out to the first oil platforms. In 1955, the first vessel specifically built to supply materials to offshore energy operations was constructed about four miles from Bourbon Street. That vessel, the EBB TIDE, was approximately 115 feet long and 97 tons. However, its design set the standard which has now been replicated around the globe.

The Benefits Provided by the Offshore Service Industry.

Today, offshore energy production has moved from 11 miles to 100 miles from shore and from 18 feet of water to 10,000 feet of water. As a result, the vessels owned and constructed by OMSA members have gotten bigger, more expensive, and more complex.

The largest vessels in the fleets of OMSA members are now 400 feet long, have cranes that can lift hundreds of tons through thousands of feet of water and specialized systems that can hold the vessel's position within a meter in rough weather.

As these vessels have grown and matured so have the U.S. shipyards that build for this market. In turn, these shipyards have improved their ability to construct state-of-the-art vessels for the Jones Act market, the U.S. Navy, U.S. Coast Guard, and other government agencies.

In addition to supporting our industrial base, OMSA members support our maritime labor force. OMSA members employ thousands of competent and safe mariners who must hold a valid U.S. Coast Guard mariner license or certification.

Again, as the size and complexity of vessels have grown, so have the required licenses. In the past, offshore supply vessels only required limited tonnage licenses of 500-1,600 gross tons. Today, the largest of the vessels in OMSA member fleets require their mariners to have unlimited tonnage licenses.

With steady work for a new class of vessels called Multi-Purpose Support Vessels (MPSVs) OMSA members would create 1,000 new unlimited tonnage mariners. This is important not only for our industry but for the nation because an unlimited tonnage license is required to serve as a mariner on a Ready Reserve Force vessel.

As this Subcommittee knows, the Ready Reserve Force (RRF) is charged with providing rapid worldwide deployment of U.S. military forces. The 46 government-owned RRF ships are expected to be fully operational within five to 10 days.

Most RRF ships have maintenance crews of about 10 mariners that are supplemented by commercial mariners during the vessel's activation. One or more RRF vessels are activated, on average, 27 times per year. RRF ships, when activated, require 17 to 62 mariners, meaning the full fleet activation requires 1,605 mariners (plus relief crew personnel if the activation exceeds 90-days).

As such, if we are able to find steady work for the U.S.-built, U.S.-owned, and U.S.-crewed MPSVs, we can satisfy almost half of the mariners required for the RRF. Without OMSA's member fleet, it is not realistic to believe 1,600 mariners with the required USCG-issued credentials would be currently employed and would be available when called. The supply of mariners is approximately equal to the current full-time work available. As such, if the U.S. wants to staff the RRF, we need to constantly be seeking ways to create and employ unlimited tonnage mariners.

These technological and human capital benefits are evidence that the Jones Act working as intended by Congress as expressed in 46 U.S.C. § 50101(a), which states it "is necessary for the national defense and the development of the domestic and foreign commerce of the United States" to "have a merchant marine." Specifically, one "composed of the best-equipped, safest, and most suitable types of vessels constructed in the United States and manned with trained and efficient citizen personnel."

State of the Domestic Offshore Service Industry.

Despite the above-listed benefits, the state of the domestic offshore service industry is perilous; the deep and prolonged downturn in the global energy markets has caused the suspension, delay, or cancelation of many offshore energy production and exploration projects.

As a result, more than half of the OMSA-member fleet has been tied up. If we look at anchor handlers and offshore supply vessels (OSVs) as two types of vessels, we see that according to IHS Markit data, of the total 411 vessels, 248 are out of work. Those vessels that are working are yielding day rates that probably don't even cover operation costs. Again, if we look at the IHS Markit data as an example, we see that one class of vessels that yielded a day rates as high as $40,000 in 2012 now earn a day rate of only $9,500 to $15,000 per day.

We understand these forces are a result of working in a cyclical industry and know the downturn will make for a stronger industry in the end.

Lack of Jones Act Enforcement.

The challenges that my members cannot understand is why the government fails to follow the straightforward requirements of the Jones Act. More than the market downturn, this failure to enforce the Jones Act undercuts our industry. Specifically, for the last three decades, the Federal Government has allowed foreign vessels to do work the Jones Act reserves for U.S.-flagged vessels. This allowance benefits foreign companies, foreign ships, and foreign mariners to the detriment of OMSA vessel owners, shipyards, the industrial base that supports our shipyards, U.S. mariners, and (in turn) our nation's ability to provide for our national and homeland security.

As members of the subcommittee know, under the Jones Act "a vessel may not provide any part of the transportation of merchandise . . . unless the vessel" "is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade" and has been built in the U.S. 46 U.S.C. § 55102(b).

Also important, the Outer Continental Shelf Lands Act ("OCSLA") establishes that the subsoil and seabed of the Outer Continental Shelf (OCS) must be treated as "points in the United States" for Jones Act purposes:

> The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State (43 U.S.C. § 1333(a)(1)).

In sum, the Jones Act, combined with the OCSLA, makes the subsoil and seabed of the OCS, as well as installations permanently or temporarily attached to the seabed, coastwise points under the Jones Act. As such, foreign vessels are legally prohibited from picking up cargo at U.S. ports and transporting that cargo to topside or underwater points on the U.S. OCS.

Unfortunately, CBP confused and degraded that clear standard by issuing interpretations of the Jones Act that are directly contrary to the Jones Act's text, structure, and purpose.

Specifically, between 1976 and 2009, CBP issued several letter rulings which allowed foreign flag vessels to transport offshore energy cargos (called "merchandise" under the Jones Act) from U.S. ports to locations on the U.S. OCS. These letter rulings are CBP's responses to private correspondence. They were issued without any notice or comment before their publication; in fact, the CBP Letter Rulings were not even easily available until the formation of the Customs Reporting Search System (CROSS).

Without any basis in law, CBP's letter rulings have green lit proposals by foreign vessel operators to transport merchandise to and from U.S. points on the OCS, using foreign labor on foreign ships that often pay little or no U.S. taxes. In doing so, CBP has diverted business away from U.S. companies, the shipyards that build them, and the mariners and other personnel responsible for their operation.

Specifically, the problem started in Letter Ruling HQ 101925 (also known as T.D. 78-387 Oct. 7, 1976). In this letter, CBP permitted the foreign-built vessel to transport pipeline connectors, pipe and repair materials, wellhead equipment, and other materials from the U.S. mainland to a point on the OCS. CBP has applied—and extended—the flawed reasoning of that letter ruling dozens of times.

Furthermore, CBP has issued letter rulings that improperly narrow the definition of "merchandise" that must be transported by Jones Act qualified vessels. By its plain language, the Jones Act applies to the transportation of "merchandise," and defines that term with broad, sweeping language in 46 U.S.C. § 55102(b), and specifically

including "valueless material." Despite this binding law by Congress, CBP has mis-interpreted "merchandise" in an unlawfully narrow fashion, labeling as "vessel equipment" exempt from the Jones Act large categories of articles, such as oilfield equipment, that are transported by a vessel from a port and installed on the OCS. This interpretation is not only contrary to law, but also to CBP's own long-standing interpretation of the term "vessel equipment." Specifically, T.D. 49815(4) issued in 1939 sets forth this interpretation:

> The term 'equipment,' as used in section 309, as amended, includes 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.* It does not comprehend consumable supplies either for the vessel and its appurtenances or for the passengers and the crew. The following articles, for example, have been held to constitute equipment: rope, sail, table linens, bedding, china, table silverware, cutlery, bolts and nuts.

Cargo that is taken from a port and left on the sea floor is not "necessary and appropriate for the navigation, operation, or maintenance of the vessel" and is not helping "the comfort and safety of persons on board." Despite that fact, CBP used this overly broad definition in no less than a dozen letter rulings, all of which give foreign vessels CBP's blessing to take cargo from one location and leave it in another location.

2009 Revocation Effort.

CBP realized its errors and in 2009 issued a notice that it intended to revoke many of these flawed letter rulings. That notice was very candid when it admitted that the agency had not been following the law:

> CBP recognizes that allowing a foreign-flagged vessel to transport articles that are not needed to navigate, operate, or maintain that vessel or for the safety and comfort of the persons on board that vessel, but rather to accomplish a[n] activity for which that vessel would be engaged, would be contrary to the legislative intent of [the Jones Act] (Proposed Modification and Revocation of Ruling Letters Relating to the Customs Position on the Application of the Jones Act to the Transportation of Certain Merchandise and Equipment between Coastwise Points, 43 Cust. B. & Dec. No. 28, at 61 (July 17, 2009)) (2009 Notice).

The Notice also stated:

> CBP recognizes that allowing foreign-flagged vessels to transport merchandise from one U.S. point and install that merchandise at another point on the OCS on the condition that it merely be accomplished 'on or from that vessel' would be contrary to the legislative intent of [the Jones Act] (2009 Notice).

CBP failed, however, to revoke the unlawful letter rulings. On September 15, 2009, at the urging of foreign vessel owners and charterers of vessels who were benefiting from CBP's unlawful opinions, CBP withdrew its proposed action at the urging of many owners and charterers of foreign vessels and announced that a "new notice … will be published in the *Customs Bulletin* in the near future."

In addition to promising additional actions "in the near future," CBP did not reverse its determination that its letter rulings were inconsistent with the Jones Act. Relying on CBP's promise to act "in the near future," OMSA members invested $2 billion in U.S. shipyards to construct dozens of the state-of-the-art vessels required to do the work covered by the Revocation notice.

This investment not only ensured the U.S. has the newest, most capable fleet of MPSVs of any nation on the earth it also infused numerous U.S. shipyards with billions in capital.

2017 Notice of Revocation.

Finally, after eight years of investment, meetings, documenting violations, and disappointment, the "near future" came on January 18, 2017 with CBP issuing another notice of revocation. The 2017 Notice proposed the revocation or modification of 25 letter rulings which allow foreign-flagged vessels to move energy related merchandise from U.S. ports to locations on the U.S. OCS.

Like the 2009 notice, the 2017 Notice demonstrated remarkable and laudable honesty, stating that it had created wholesale exceptions to the Jones Act that were not found in the statute. It also stated that the CBP-created loopholes were not found in statute and should be withdrawn. (See "Proposed Modification and Revocation of Ruling Letters Relating to Customs Application of the Jones Act to the Transportation of Certain Merchandise and Equipment between Coastwise Points," 51 Cust. B. & Dec. No. 3, at 4 (Jan. 18, 2017)) (2017 Notice).

OMSA and numerous OMSA members submitted comments in support of the 2017 Notice. In addition to these comments, 34 U.S. Representatives—including half of the members of this Subcommittee—and 10 U.S. Senators sent letters in support of CBP's 2017 Notice.

Despite this second acknowledgement that they were not enforcing the laws that Congress had passed and the widespread support this Notice received, on May 10, CBP once again withdrew their revocation notice stating, "[b]ased on the many substantive comments [it] received," it needed "further research on the issue" and was therefore "reconsider[ing]" whether to withdraw and/or revoke the letter rulings identified in the 2017 Notice (Withdrawal of Proposed Modification and Revocation of Ruling Letters Relating to Customs Application of the Jones Act to the Transportation of Certain Merchandise and Equipment between Coastwise Points, 51 Cust. B. & Dec. No. 19, at 11 (May 10, 2017)).

In announcing the withdrawal of the 2017 Notice to congressional staff, CBP staff said:

> CBP has received over 3000 comments, both in support of and in opposition to the proposed action. Many of these comments raised, among other items, opposing views about the operational impact of the proposed changes. Given the unique and broad potential implications of CBP's proposal, the Office of Management and Budget has advised that the [revocation process] is not the appropriate vehicle for this type of action. The Secretary of the U.S. Department of Homeland Security has determined that CBP should reconsider the procedural vehicle to address a topic of this operational scope, including potential rulemaking options under the Administrative Procedure Act or legislative changes. This approach will allow CBP and interagency participants to more comprehensively assess the potentially wide array of impacts of such a proposal in a fully transparent process.

These comments have been repeated by government officials before congressional committees. These comments are unfortunate because they seem to indicate that CBP's sustained acknowledgment that its letter rulings flouting the Jones Act do not matter. Further, the comments by CBP imply that the Administration is allowed to discuss and study if it wants to comply with the laws passed by Congress. This is even more alarming considering the immediate harm caused to U.S. companies and workers.

Put bluntly, the Executive Branch does not get to decide whether it will enforce a law Congress passes based upon public comment. It simply must enforce the law.

After Withdrawal of the 2017 Notice.

It is clear who benefited from the withdrawal of the notice. Foreign vessel owners and their trade associations claimed victory. One email I received from a London-based trade association for the international competitors of OMSA members called it a "fantastic result" and that everyone should "celebrate a positive result."

OMSA members were not in a celebratory mood. In fact, 12 days after CBP withdrew the 2017 Notice, one of my members lost a lucrative job to a foreign flag vessel. The job in question was work that was covered by the revocation notice. The foreign vessel that took this contract was able to do so by not complying with U.S. regulations, or with its tax and labor benefits, and was able to underbid the OMSA member by 25 percent. As previously indicated, the offshore energy market is very weak right now so every contract is vital and every contract is bid as tight as it can be. As such, the loss of this contract was a defeating blow to all OMSA members.

While OMSA members have now been waiting over a year for CBP to take action to ensure that the Jones Act will be enforced, CBP used the time differently. In the fall of 2017, CBP reversed a $22 million OCS Jones Act penalty. We believe that this strong signal by CBP that the OCS is open to foreign Jones Act violators, was based upon ruling letters that months earlier CBP said are contrary to the text of the statute and should be reversed.

Conclusion.

For all of the reasons stated above, OMSA is a strong supporter of the Jones Act. This act has proven time and again to promote U.S. national, homeland, and economic security. Despite these clear advantages, CBP has failed to enforce the Jones Act within our industry for the past 30 years. Changing these CBP interpretations will preserve and strengthen the Jones Act, thereby increasing the benefits that the Jones Act provides. Specifically, we found that carrying out CBP's 2017 Notice would create no less than 3,200 jobs. On behalf of these potential jobs and my members, I ask that Congress continue to support the Jones Act.

Thank you for the opportunity to testify before the committee on such an important matter. I look forward to your questions.