



K&L GATES

**THE ESSENTIAL GUIDE
TO THE JONES ACT**

A ROAD MAP TO COMPLIANCE WITH
AMERICA'S FOUNDATIONAL MARITIME LAW

SECOND EDITION

CONTENTS

INTRODUCTION	3
THE OTHER JONES ACTS	4
A FAMILY OF LAWS KNOWN AS THE JONES ACT	5
THE JONES ACT: HOW IT WORKS	8
QUESTIONS ABOUT THE JONES ACT	14
COMPLIANCE WITH THE JONES ACT/PENALTIES FOR NONCOMPLIANCE	16
JONES ACT WAIVERS	18
CONCLUSION	20
ENDNOTES	21
CONTACTS	22



HALF A CENTURY OF MARITIME POLICY

The K&L Gates Maritime group dates its founding by Emanuel “Manny” Rouvelas to 1973, making it among the **LONGEST CONTINUOUSLY OPERATING MARITIME POLICY GROUPS IN THE UNITED STATES**. Today it remains one of the largest and continues to be ranked in the highest tier of US maritime policy groups by *Chambers USA*.

Learn more about our Maritime practice at klgates.com/maritime-practices.

INTRODUCTION

One of America’s most consequential maritime laws is the Jones Act, a fundamental law that regulates American vessels on domestic voyages. Adopted as Section 27 of the Merchant Marine Act of 1920 and now codified in primary part at 46 U.S.C. § 55102,¹ the Jones Act was signed into law by President Woodrow Wilson on 5 June 1920. Pub. L. 66-261. Named for its chief sponsor, Republican Senator Wesley Jones of the state of Washington, the law was enacted a century ago with relatively little fanfare given its far-reaching impact. Its purpose then remains its purpose today: to have for our nation’s national defense and commercial needs in times of peace, war, or national emergency the “best equipped, safest and most suitable types of vessels” that are owned and operated by US citizens, crewed by skilled Americans, and built and repaired in the United States.

While the specific law known today as the Jones Act was adopted in 1920, the principles on which it is based were in place long before. Generally, the laws governing domestic maritime transportation are referred to as “coastwise” or “cabotage” laws.² These laws provide advantages to the country’s domestic maritime industry and date back to the earliest days of the nation. The third law of the first American Congress, “An Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for other purposes,” was enacted more than a century before the Jones Act. That law, championed by Alexander Hamilton and signed by President George Washington, provided substantially lower duties on merchandise transported domestically on vessels built in the United States and owned by US citizens. 1 Stat. 27 (July 20, 1789). Similarly, the Passenger Vessel Services Act, the coastwise law for passengers, was enacted in 1886—again, decades before the Jones Act.

Although it has been revised, amended, or altered dozens of times since its enactment in 1920, the basic structure of the Jones Act remains relatively intact. The law only applies to the movement of domestic cargo, not international cargo. With respect to merchandise, the law requires that when transported on vessels between two points in the United States, merchandise moves on vessels that are built in the United States, registered in the United States, crewed by Americans, and owned by US citizens. And while the basic contours of the law are relatively simple, the applications and nuances of it are far less so. Over the course of 100 years, a body of amendments, provisos, regulations, interpretations, caselaw, policy, and practice have helped shape its application.

According to US Customs and Border Protection (CBP) within the Department of Homeland Security (DHS), the coastwise transportation of merchandise, within the meaning of the coastwise laws, takes place when:

...merchandise laden at a point embraced within the coastwise laws (“coastwise point”) is unladen at another coastwise point, regardless of the origin or the ultimate destination of the merchandise.

19 C.F.R. § 4.80(b). In its recent study for the International Transport Workers Federation, the legal analysis organization Seafarers Rights International found that cabotage laws “exist in every region of the world,” including “91 member states of the United Nations.” *Cabotage Laws of the World*, Executive Summary at p.10 (2018). Coastwise laws have been enacted into law by nations governing “a majority of the world’s coastlines.”

THE OTHER JONES ACTS

There are several Jones Acts, but this guide is mainly about the coastwise law that requires merchandise transported by water between two points in the United States to be transported on US-flag vessels.

Sometimes the coastwise Jones Act described in this guide is confused with a different Jones Act, the one that gives mariners the right to sue their employers for injuries. Known as the “Personal Injury Jones Act,” it was also adopted as part of the Merchant Marine Act of 1920, and it is codified at 46 U.S.C. § 30104, which is titled “Personal injury to or death of seamen.” This guide will not address that Jones Act.

Finally, there is the law sometimes referred to as the Jones Act of Puerto Rico, which impacts the Commonwealth of Puerto Rico in a number of ways, including by designating Puerto Rican citizens born after 11 April 1899 as American citizens. Pub. L. 64-368, 39 Stat 951 (Mar. 2, 1917). Again, this guide will focus solely on the coastwise Jones Act.

A FAMILY OF LAWS KNOWN AS THE JONES ACT

The primary Jones Act law involves the waterborne transportation of merchandise between two points and is discussed in more detail below. Before analyzing the main portion of the Jones Act, there are several other different but similar sections of Title 46 of the US Code that are generally classified in the family of laws known as the Jones Act, encompassed in Chapter 551 of Title 46. These include the following:

Dredging

46 U.S.C. § 55109 allows a vessel to engage in dredging in the navigable waters of the United States only if, (1) the vessel is wholly owned by citizens of the United States for purposes of engaging in coastwise trade; (2) the charterer, if any, is a citizen of the United States for purposes of engaging in the coastwise trade; and (3) the vessel has been issued a certificate of documentation with a coastwise endorsement ... or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement.

As such, the dredging provisions of the Jones Act are very similar to the principal provision governing the transportation of merchandise. The Jones Act applies to the transportation of dredged materials whether or not they have commercial value. 46 U.S.C. § 55010. The dredging provisions date back to 1906, even before the Jones Act itself was enacted.

Towing

46 U.S.C. § 55111 permits domestic towing only by a vessel that is “wholly owned by citizens of the United States for the purposes of engaging in the coastwise trade” and that has been documented with a coastwise endorsement or is “exempt from documentation but would otherwise be eligible for such a certificate and endorsement.” This section applies to the towing of vessels “between ports and places in the United States to which the coastwise laws apply, either directly or via a foreign port or place” and “from point to point within the harbors of ports or places to which the coastwise laws apply.” *Id.* § 55111(b). There is a narrow exception that permits the towing of a vessel that is in distress, but otherwise, the towing Jones Act is similar in principle to the Jones Act governing the transportation of merchandise.

Vessel Escort Operations and Towing Assistance

46 U.S.C. § 55112 limits specific escort vessel operations within the navigable waters of the United States (except in the case of a vessel in distress) to US-flag vessels. An escort vessel is defined as one:

that is assigned and dedicated to assist another vessel, whether or not tethered to that vessel, solely as a safety precaution to assist in controlling the speed or course of the assisted vessel in the event of a steering or propulsion equipment failure, or any other similar emergency circumstance, or in restricted waters where additional assistance in maneuvering the vessel is required to ensure its safe operation.

Id. § 55112(b). Escort operations are defined as those that (1) commence or terminate at a port or place in the United States, (2) are required by US law or regulation, and (3) include operations provided in whole or part within or through navigation facilities owned, maintained, or operated by the US

government or the approaches to those facilities (other than those facilities operated by the St. Lawrence Seaway Development Corporation on the St. Lawrence River part of the seaway). *Id.* § 55112(a).

Transportation of Passengers

Like other provisions of the coastwise laws, 46 U.S.C. § 55103 generally requires the use of a coastwise documented US-flag vessel to transport passengers between ports or places in the United States to which the coastwise laws apply, either directly or via a foreign port. This law, however, established by the Passenger Vessel Services Act of 1886, has been implemented with some important differences from the other coastwise laws that are attributable to how passengers travel on vessels today. For example, a foreign-flag cruise ship can transport passengers on a round-trip cruise beginning and ending at the same US port provided the itinerary includes at least one foreign port of call. To the extent the itinerary includes an intermediate port call at a “distant foreign port” (i.e., outside of North America) the foreign-flag cruise ship is permitted to transport passengers between any two US ports. Also, foreign-flag ships are permitted to transport passengers between the US mainland and Puerto Rico but only in the absence of US-flag passenger vessels. *Id.* § 55104.

Salvage Operations

Salvage operations by foreign vessels generally are not permitted “on the Atlantic or Pacific coast of the United States, in any portion of the Great Lakes or their connecting or tributary waters [including the St. Lawrence River] or in territorial waters of the United States on the Gulf of Mexico.” *Id.* § 80104(a). There are several limited exceptions, including upon a finding that no coastwise-qualified salvage vessel is available. *Id.* § 80104 (b), (c).

Oil Spill Response

Oil spill response activities in the waters of the United States that include unloading recovered oil in a US port are limited to US-flag documented vessels as long as there exists “an adequate number and type of oil spill response vessels documented under the laws of the United States” that can be “engaged to recover oil from an oil spill in or near those waters in a timely matter, as determined by the Federal On-Scene Coordinator....” *Id.* § 55113 (1). A foreign vessel can be used only if it is registered in a country that has accorded similar privileges to vessels of the United States. *Id.* § 55113 (2).

Fisheries

Vessels operating in US fisheries are subject to US build and ownership requirements even if they are not transporting merchandise between US points under Chapter 551. Operation in US fisheries is broadly defined to include processing, storing, transporting (except in foreign commerce), planting, cultivating, catching, taking, or harvesting fish, shellfish, marine animals, pearls, shells, or marine vegetation in US navigable waters or in the 200-mile Exclusive Economic Zone. *Id.* § 108. Such operation requires the vessel to be US-flag documented with a fishery endorsement, which in turn requires the vessel to be built in the United States and never rebuilt abroad. The owning entity must also meet a 75% US citizen ownership and control test similar to that required for coastwise operations, but more stringent in some respects, including applying the 75% test at each tier and in the aggregate and a detailed annual citizenship review and certification by the Maritime Administration (MarAd) for vessels of 100 feet or more in registered length. *Id.* § 12113.

Related Laws

Chapter 551 includes a number of other provisions that implicate coastwise trade in various more narrowly tailored circumstances, including the transportation of hazardous waste (§ 55105), certain barges and cargo containers (§§ 55106, 55107), and platform jackets (§ 55108), as well as activities involving unloading fish and fish-processing supplies (§§ 55114, 55115), Canadian rail lines (§§ 55116, 55119), and Great Lakes rail routes and certain foreign railroads (§§ 55117, 55118).

THE JONES ACT: HOW IT WORKS

The Jones Act is a fundamental law of the American maritime industry that impacts the activities of approximately 40,000 vessels, more than 360 seaports, and more than 3,000 seaport facilities in the United States.³ Under the Jones Act, vessels may transport merchandise between two points in the United States only if those vessels are:

- documented under the laws of the United States;
- owned by US citizens; and
- built in the United States.

These core requirements of the Jones Act are set forth in 46 U.S.C. § 55102(b):

...[a vessel] may not provide any part of the transportation merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via a foreign port, unless the vessel:

- (1) is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade; and
- (2) has been issued a certificate of documentation with a coastwise endorsement under chapter 121 or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement.

Accordingly, foreign vessels that fail to meet the requirements of the Jones Act cannot transport cargo between two points in the United States.

The following discussion provides more detailed information about these requirements and conditions for lawfully documenting a vessel in the United States, ensuring citizen ownership, and building a vessel in the United States.

US Documented

The US Coast Guard (USCG) regulates most US commercial vessels through a system of vessel documentation administered by the National Vessel Documentation Center (NVDC). Each eligible vessel is issued a certificate of documentation (COD) and assigned an official number that is unique to the particular vessel, a system that has been analogized to social security numbers for American individuals or vehicle identification numbers for automobiles. So important is this system that our nation's vessel registration structure dates back to the 11th Act of the First US Congress enacted on 1 September 1789, titled "An Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for other purposes." Vessel numbers are so central to the system that they are literally painted on vessels for all to see.

An important part of this system of documentation is the authority of the USCG to issue a specific "endorsement" on the vessel's COD, which indicates the trade in which that vessel is qualified to engage. Understanding CODs and endorsements is necessary to understand the requirements for operating under the Jones Act. 46 C.F.R. § 67.19.

The USCG issues a COD based on certifications by the vessel owner set forth in the application for documentation (USCG form CG-1258) that the vessel and the owning entity comply with the applicable requirements. These certifications are renewed annually in the renewal form for the vessels' COD (USCG form CG-1280), which states that there has been no change in the

information previously provided in the initial CG-1258 application. These certifications are made under penalties that include civil, monetary, vessel forfeiture, fine, and imprisonment, with the more severe penalties reserved for knowingly falsifying or concealing material facts. 46 U.S.C. § 12151.

Qualified vessels operating under the Jones Act are those that have a COD with a coastwise endorsement.⁴ These vessels are frequently referred to as “coastwise-qualified vessels.” The COD with a coastwise endorsement provides evidence that the vessel has met the core requirements to engage in the coastwise trade, including the US ownership and US build requirements described in more detail below.

US Crewed

There is a major misconception that the Jones Act imposes a US-citizen crewing requirement. The American crewing requirements, however, are actually tied to the US vessel documentation laws, i.e., a vessel documented under the laws of the United States must meet the crewing requirements set forth in 46 U.S.C. § 8103 regardless of whether the vessel has a coastwise endorsement. For licensed officers on a ship, § 8103(a) requires that, in general, “only a citizen of the United States may serve as master, chief engineer, radio officer, or officer in charge of deck watch or engineering watch on a documented vessel.” For unlicensed crew, seaman on the ship must be either a US citizen, an alien “lawfully admitted to the United States for permanent residence,” or a foreign national enrolled at the US Merchant Marine Academy at Kings Point. *Id.* § 8103(b). Importantly, “not more than 25% of the total number of unlicensed seamen on the vessel may be aliens lawfully admitted to the United States for permanent residence.” *Id.* § 8103(b)(1)(B).

There are a number of special requirements and exceptions and a certain waiver authority in § 8103 for crew members on specific types of vessels, including certain yachts, fishing vessels, large coastwise passenger vessels, offshore supply vessels or similar vessels, offshore drilling and exploration vessels, and riding gang members.

US Owned and Controlled

In order to be issued a COD with a coastwise endorsement, a vessel must be wholly owned by US citizens. *Id.* § 12103(a); 46 C.F.R. § 67.30–.43. In the context of vessel documentation and eligibility to engage in particular trades, the term “US citizen” has several different meanings and different requirements, two of which are relevant for present purposes. The first, and most general requirement, is that the owner must be a “Documentation Act Citizen” meeting the following requirements:

DOCUMENTATION ACT CITIZEN 46 U.S.C. § 12103(b)

NATURE OF ENTITY HOLDING TITLE	FOR ENTITY TO BE A US CITIZEN
INDIVIDUAL	Must be a US citizen (as defined by Immigration and Nationality Act, 8 U.S.C. § 1101(a)(22)(“owing permanent allegiance to the United States”). 46 U.S.C. § 104.
CORPORATION (AND MANAGEMENT COMMITTEE-MANAGED LIMITED LIABILITY COMPANY (LLC))	<ul style="list-style-type: none"> • Incorporated/Established under the laws of the United States or of a state. • Chief executive officer (CEO), by whatever title, is a US citizen. • Chairman of the board or management committee is a US citizen. • No more directors or management committee members are noncitizens than a minority of the number necessary to constitute a quorum.
JOINT VENTURE, ASSOCIATION, OR OTHER GROUP (MEMBER-MANAGED LLC)	Each member of the group is a US citizen capable of documenting the vessel for the intended trade (e.g., coastwise trade).
PARTNERSHIP	All general partners are US citizens; there is no limitation on the citizenship of limited partners, provided that for coastwise trade the equity ownership and control tests discussed below are met.
TRUST	Each trustee and each beneficiary with an enforceable interest in the trust is a US citizen.

Thus, if the owning entity is a corporation, for example, it must be incorporated under the laws of the United States or a state; its CEO, by whatever title, must be a US citizen; its board or management committee chairman must be a US citizen; and the board of directors must be controlled by US citizens. A vessel owned by an entity meeting these requirements is considered to be “wholly owned” by US citizens and is eligible for US-flag documentation.

In addition, for vessels operating in coastwise trade, the owner must qualify as a Documentation Act Citizen and also meet certain equity ownership and control requirements. Specifically, the owning entity itself and a parent entity at each tier of ownership must be at least 75% owned and controlled by US citizens.

Seventy-five percent of the interest in a corporation, for example, is owned and controlled by citizens of the United States if all of the following statements in 46 U.S.C. § 50501(d) are true:

- (1) Title to at least 75% of the stock in the corporation is vested in citizens of the United States, free from any trust or fiduciary obligation in favor of a person not a citizen of the United States.

- (2) At least 75% of the voting power in the corporation is vested in citizens of the United States.
- (3) There is no contract or understanding by which more than 25% of the voting power in the corporation may be exercised, directly or indirectly, on behalf of a person not a citizen of the United States.
- (4) There is no other means by which control of more than 25% of any interest in the corporation is given to or permitted to be exercised by a person not a citizen of the United States.
- (5) The above requirements apply separately and must be met by each class of stock or equity in the owning entity. They do not apply to other forms of corporate securities, however, such as debt or warrants, which do not share the characteristics of equity.

Publicly traded companies present a particular challenge in demonstrating compliance with the citizen ownership restrictions given the fact that the precise citizenship of their stockholders is constantly shifting and can be difficult to track. The USCG has recognized these challenges and has accepted a variety of good-faith measures to monitor and determine compliance with the stock ownership requirements for publicly traded companies.⁵

For entities other than corporations or management committee-managed LLCs, the 75% equity ownership rules are applied as follows:

JOINT VENTURE, ASSOCIATION, OR OTHER GROUP	At least 75% of the equity interest in each member or joint venturer is owned by US citizens.
GENERAL PARTNERSHIP	At least 75% of the equity interest in each general partner is owned by US citizens.
LIMITED PARTNERSHIP	All general partners are US citizens (i.e., at least 75% of the equity interest is owned by US citizens); limited partners need not be US citizens provided that at least 75% of the equity interest in the partnership is owned by US citizens.
TRUST	At least 75% of the equity interest in the trustees and each beneficiary with an enforceable interest is owned by US citizens.

The ownership, voting, and control analyses are separate, and an entity that meets the Documentation Act Citizen requirements and the 75% equity test will nevertheless fail to qualify to own a vessel with a coastwise endorsement if more than 25% of any interest in the entity is controlled by any means by a person who is not a US citizen. *Id.* §50501(d)(4).

For purposes of analyzing compliance with these citizenship requirements, any entity that does not meet all of the above requirements is considered to be a “noncitizen.” Thus, for example, an entity with a CEO who is not a US citizen is considered a “noncitizen,” even if it meets the other requirements and more than 75% of the equity is owned by US citizens.

The USCG looks at the totality of circumstances in determining whether a particular arrangement complies with the statutory requirements. Thus, a transaction or arrangement may have several features, each of which is permissible on its own but taken as a whole result in “other means” by which noncitizen control exists, causing the overall arrangement to fail to meet the statutory requirements. The USCG also looks to the “incidents of ownership” and has found in a few circumstances in the past that where sufficient incidents of ownership have been relinquished to a noncitizen, the vessel can no longer be said to be “wholly owned” by US citizens and is thus ineligible for US-flag documentation.

Due to the subjectivity inherent in making control determinations and resulting uncertainties, parties to a potential transaction may seek written confirmation of the citizenship status of the resulting arrangements from the USCG and condition the legal effectiveness of agreements on obtaining such confirmation.

Ownership Exceptions

The vessel documentation laws in Chapter 121 of Title 46 also provide for several variations of the ownership requirements in limited circumstances, including for certain owners of oil spill response vessels (§ 12117), certain owners known as “Bowaters corporations” engaged primarily in a manufacturing or mineral industry in the United States (§ 12118), and certain owners engaged primarily in leasing or financing transactions, provided the vessels are bareboat chartered to a fully qualified coastwise citizen (§ 12119).

US Built

Generally speaking, a coastwise-qualified vessel must be built in the United States. *Id.* § 12112(a)(2)(A); 46 C.F.R. § 67, subpt. F. In order to be considered built in the United States, the vessel must meet both of the following criteria under 46 C.F.R. § 67.97:

- (1) All major components of its hull and superstructure are fabricated in the United States.
- (2) The vessel is assembled entirely in the United States.

USCG regulations define the term “hull” to mean the shell, or outer casing, and internal structure below the main deck that provides both the flotation envelope and structural integrity of the vessel in its normal operations. The term “superstructure” means the main deck and any other structural part above the main deck. 46 C.F.R. § 67.3.

A component is considered to be “major” if it is 1.5% or more of the vessel’s steel weight. The basic test as to whether the component is an integral part of the hull or superstructure is whether it is considered essential to the vessel’s structural integrity and/or flotation envelope. The USCG’s Naval Architecture Division (CG-ENG-2) has issued specific review criteria to assist in making that determination.⁶ Raw steel acquired from a foreign mill is not considered to be a foreign component provided that (1) the steel is delivered from the mill in original (unworked) stock sizes, shapes, and lengths; and (2) all subsequent work on the steel (including marking, cutting, drilling, beveling, bending, shaping, etc.) is done by a US shipyard or fabricator.

With respect to the second requirement of a US-built vessel, i.e., that it be “assembled entirely” in the United States, the USCG has determined as a general rule that the term “assembly” refers to the assembly of the whole of the structure of the vessel itself. That being said, it is not necessary that the assembly, or pre-assembly, of each and every single component, appliance, appurtenance, or element

of outfit that goes into the final assembly of a vessel occur in the United States unless each such item is essential to the vessel's structural integrity and/or flotation envelope.

Before construction of the vessel commences, if there are questions as to the inclusion of foreign steel or components or the assembly of the vessel, it is important for either the shipyard or the vessel owner to obtain a "US Build Determination Letter" from the USCG confirming that, upon completion of construction, the vessel will be considered to have been built in the United States and eligible to be documented with a coastwise endorsement. The request for such a determination should be accompanied by an explanation of the project and the proposed construction accompanied by the vessel specifications, general arrangement and profile drawings, and steel weight estimates for the completed vessel and any foreign components, as well as a detailed description of any equipment or systems of foreign manufacture to be included in the construction of the vessel. Examples of such letters are available on the USCG website.⁷ The processing time for those letters is typically not less than 30 days and, depending on the complexity of the project and the USCG workload, could take up to 90 days or more.

The vessel could lose its coastwise eligibility were it to be subsequently rebuilt outside of the United States. 46 U.S.C. § 12132(b). A vessel is deemed rebuilt foreign when any considerable part of its hull or superstructure is built upon or substantially altered outside of the United States. A vessel is not considered rebuilt when work performed on its hull or superstructure outside of the United States constitutes 7.5% or less of the vessel's steelweight prior to the work. 46 C.F.R. § 67.177(b)(3). This is a cumulative test that applies over the life of the vessel.

It is also worth noting that there is a potential 50% ad valorem duty on foreign repair and equipment purchases for certain US-flag vessels depending on the particular country in which the work is performed. 19 U.S.C. § 1466; 19 C.F.R. § 4.14. The duty is administered by CBP, which will issue rulings upon request in order to determine applicable duties, if any, in advance.

QUESTIONS ABOUT THE JONES ACT

Certain questions come up regularly in interpreting the Jones Act. While this list is not comprehensive, here are several of the most common questions:

What is a point in the United States? Is that different than a port?

A common mistake is to describe the Jones Act as regulating waterborne commerce between two ports in the United States, but the statute itself and associated regulations use the term “points” rather than “ports” so as to include domestic transportation of merchandise regardless of whether or not the loading or discharge of the cargo takes place within a conventional port facility.

Where does the Jones Act apply?

The points referred to in the statute include all places in the United States, including its “island territories and possessions,” except for American Samoa and the Commonwealth of the Northern Mariana Islands (unless provided otherwise in the commonwealth’s covenant with the United States). 46 U.S.C. § 55101. In an unusual provision, the US Virgin Islands are also exempt from the coastwise laws unless the president declares by proclamation that they do apply. *Id.* § 55101(b)(3). Vessels that do not have a coastwise endorsement but are documented with a registry endorsement and are owned by a Documentation Act Citizen⁸ are permitted to engage in trade with Guam, American Samoa, Wake, Midway, or Kingman Reef under 46 U.S.C. § 12111(b).

What is “merchandise” under the Jones Act?

The definition of “merchandise” under the Jones Act is broad and expansive and encompasses not only “goods, wares and chattels of every description ... [including] merchandise the import of which is prohibited” but even includes “valueless material” as well as “merchandise owned by the United States government, a state, or a subdivision of a state.” *Id.* § 55102(a); 19 U.S.C. § 1401(c).

One narrow and rare exception is when the merchandise is manufactured or otherwise processed into a “new and different product” at an “intermediate port or place” such that what would otherwise have been a coastwise movement is sufficiently interrupted whereby the coastwise laws do not apply. 19 C.F.R. § 4.80b (a). For example, the transportation of headed and gutted whole fish from a point in the United States to a foreign location where the fish were thawed, skinned, boned, filleted, graded as to size, and frozen and boxed according to grade has been determined to result in the transportation of a new and different product such that the transportation back to the United States was not considered to be a coastwise movement. CBP Ruling HQ 112423 (Sept. 1, 1992).

It is also worth noting that certain equipment of the transporting vessel is not considered merchandise, and therefore, a noncoastwise-qualified vessel can carry such equipment between two points in the United States. Equipment of the vessel includes items that are “necessary and appropriate for the navigation, operation and maintenance of the vessel and for the comfort and safety of the passengers on board.” T.D. 49815(4) (1939).

The interpretation of “equipment of a vessel” was recently modified by CBP in a December 2019 decision (53 Customs Bull. 84 (Dec. 11, 2019)). This decision took effect on 17 February 2020. CBP modified several rulings that expanded upon the language in T.D. 49815(4). These rulings relied on several standards, including whether the equipment had a nexus to the “mission of the vessel,” whether the use was unforeseen, whether the equipment was used “on or from” the transporting vessel, or whether the equipment was of *de minimis* value. CBP clarified that equipment of the vessel are items

“necessary and appropriate for the navigation, operation and maintenance of the vessel and for the comfort and safety of the passengers on board,” which is the language found in T.D. 49815(4). This includes “those items that are integral to the function of the vessel and are carried by the vessel.” CBP also specifically noted that prior rulings related to the “paid out, not unladen” principle as related to pipe laying and cable laying are unaffected by the decision.

Can a *de minimis* part of the coastwise voyage occur on a non-Jones Act vessel?

Section 55102 is clear. A noncoastwise-qualified vessel “may not provide any part of the merchandise by water, or by land and water, by points in the United States to which the coastwise laws apply...” (emphasis added). In short, no part of a domestic maritime movement can take place using a noncoastwise-qualified vessel.

Can a vessel lose its coastwise status?

Absolutely. A vessel’s coastwise endorsement must be renewed by the USCG annually upon a determination of continued eligibility. That eligibility can be lost under a variety of circumstances. A vessel initially eligible to engage in the coastwise trade and later rebuilt outside the United States may not thereafter engage in the coastwise trade, absent a congressional legislative waiver. 46 U.S.C. § 12132(b).

Similarly, a coastwise-qualified vessel of more than 200 gross tons can permanently lose its coastwise eligibility to the extent that it is “later sold foreign in whole or in part, or placed under foreign registry.” *Id.* § 12132(a). Such a loss can occur inadvertently if, for example, the vessel-owning entity fails to meet the requirements to be a Documentation Act Citizen, such as, for example, with the appointment of a noncitizen as its CEO or board chair. The risk arising from such an action can be mitigated in the constituent documents of the vessel-owning company by including an express provision with respect to the required citizenship of the officers and directors.

A permanent loss of coastwise privileges could also potentially occur were a noncitizen to exercise control of the vessel beyond the terms of what is normal for a time charter or if subsequent facts were to result in a finding by the USCG or a court to constitute a transfer of control to the noncitizen. Although a rare occurrence, there have been certain limited circumstances where, for example, the parties have over time failed to maintain the intended separation, allowing the noncitizen to exercise control over the vessel operations in a manner not originally contemplated. An impermissible transfer of control could also occur where the same noncitizen is involved in various other aspects of the enterprise, such as an equity participant in the vessel-owning company, or has other business arrangements with the vessel owner such that the cumulative impact could be deemed to constitute impermissible control by the noncitizen.

What about time charters to noncitizens?

In addition to the Jones Act, another federal statute that is sometimes conflated with the Jones Act imposes certain limitations on the transfer of US-flag vessels to noncitizens. *Id.* § 561. This statute is implemented by MarAd within the Department of Transportation and prohibits the sale, lease, charter, delivery, or, in any other manner, the transfer or agreement to do any of the foregoing (collectively, Transfers) to a person not a citizen of the United States of an interest in or control of a documented vessel owned by a citizen of the United States or a vessel last documented under the laws of the United States or placing such a vessel under foreign registry without, in each case, obtaining prior MarAd approval.

COMPLIANCE WITH THE JONES ACT/PENALTIES FOR NONCOMPLIANCE

Enforcement of transportation under the Jones Act is the responsibility of CBP and has been for more than two centuries (including predecessor agencies). 19 C.F.R. § 4.80–.93. Compliance is important because penalties for violations of the Jones Act can be considerable. These penalties include seizure of the vessel’s merchandise by and forfeiture to the US government or a fine equal to the value of the merchandise or the cost of transportation, “whichever is greater.” Fines may be recovered from “any person transporting the merchandise or causing the merchandise to be transported.” 46 U.S.C. § 55102(c); 19 C.F.R. § 4.80(b).

The largest known Jones Act fine in history was rendered against Furie Operating Alaska, which entered into a settlement in 2017 to pay US\$10 million for the unlawful coastwise transport of a jack-up rig on a foreign-flag vessel from the Gulf of Mexico to Alaska. The case was notable because the owners of the transporting vessel proceeded with the transport of the jack-up rig on a foreign vessel after being explicitly told by CBP that transport of the vessel would represent a coastwise violation.

One way to ensure compliance is to request an advisory ruling before undertaking any particular transportation. Interested parties may request such a ruling from CBP headquarters, to the attention of the Cargo Security, Carriers & Restricted Merchandise Branch, Office of Trade. Procedures for submission of an advance ruling request can be found at 46 C.F.R. § 177.2. Generally, the party seeking the ruling will set forth the specific facts of a planned transportation, including the vessel’s country where built, country of registration, area of operation, particular itinerary, and other specific details in support of the ruling request regarding whether that movement is permissible under existing law. The actual CBP rulings are often detailed—restating the key facts, identifying the issues, outlining the applicable law, and concluding with a specific holding. Typically, the rulings address interpretive questions and provide more granular interpretations of the coastwise laws.

It is important to remember that while each letter represents a legal interpretation from CBP, the decisions are fact-specific and laid out in detail (often in great detail) in the request letter. Therefore, any deviation in practice from the facts laid out in the requesting letter could undermine and even nullify the holding in the decision letter. As such, any CBP ruling only applies to the specific facts laid out in the requesting letter, although broad interpretations of the application of the coastwise laws are found in these rulings.

The ruling letters are available and searchable online through the Customs Rulings Online Search System (“CROSS”) at <https://rulings.cbp.gov/home> and are also published in the Customs Bulletin and Decisions at <https://www.cbp.gov/trade/rulings/bulletin-decisions>. Although the underlying request letter is not published, it may be available under the Freedom of Information Act (FOIA). The parties requesting a ruling typically ask that confidential commercial, financial, and proprietary business information that is set forth in the request letter be withheld from disclosure under FOIA, in which case both the request letter and the subsequent ruling letter are redacted of such information before being released. 5 U.S.C. § 552(b)(4); 19 C.F.R. § 177.2 (b)(7).

The actual enforcement of the Jones Act is the responsibility of the individual CBP port directors. In order to help coordinate and unify the overall enforcement efforts, in 2016, CBP established the national Jones Act Division of Enforcement (JADE), which is based in New Orleans, with a principal education and enforcement role for the Jones Act. JADE manages an “e-allegation” portal at <https://eallegations.cbp.gov> where interested parties can report suspected violations of the coastwise laws. Questions about the application of the coastwise laws, including the Jones Act, can be directed to jonesact@cbp.dhs.gov.

Enforcement of the US build requirement with respect to the coastwise qualification of a particular vessel is the responsibility of the NVDC, which requires evidence of the vessel's original US construction prior to documentation, as well as with respect to the impact of any rebuilding outside of the United States. 46 C.F.R. § 67.95, .177. Vessel owners are required to certify continued compliance as part of the annual renewal of the vessel's COD. As discussed above, the USCG issues advance rulings with respect to compliance with the US build requirement, which are publicly available online.⁹

JONES ACT WAIVERS

In the century since enactment of the Jones Act, there have been very limited circumstances in which vessels that are not otherwise eligible for a coastwise endorsement have nonetheless been allowed to operate in coastwise trade. Congress has occasionally enacted special legislation on a case-by-case basis and in unique circumstances in order to allow for the coastwise operation of vessels that would not otherwise be eligible. Other waivers are authorized administratively (i.e., by executive branch action), usually in emergency situations pursuant to 46 U.S.C. § 501. These two waiver tracks are described in more detail below.

Legislative Waivers

Legislative waivers are rare and generally involve unique situations that require a change in law to accommodate a specific circumstance. For example, Congress enacted the “America’s Cup Act of 2011” when the United States was to host the 34th America’s Cup in San Francisco in response to an international challenge to the defending US team. It was necessary to narrowly waive the coastwise laws so that eligible competing and supporting vessels from other countries could participate and transport individuals, equipment, and supplies for the competition. Although previous sailing competitions had been held off the US coast, they were conducted outside of the three-mile territorial sea, whereas this particular competition was to be held entirely within San Francisco Bay. Pub. L. 112-61 (2011).

Administrative Waivers in the Interest of National Defense

Congress also has provided limited authority for the general waiver of navigation and vessel inspection laws by certain federal agencies when necessary in the interest of national defense. Administrative waivers of the Jones Act under this authority are “rare”¹⁰ and are usually invoked only in unusual circumstances. The principal statute for these administrative waivers is 46 U.S.C. § 501, which authorizes two types of waivers, both based on national defense:

46 U.S.C. § 501(a) waivers

These waivers can occur “[o]n the request of the Secretary of Defense ... to the extent the Secretary [of Defense] considers necessary in the interest of national defense to address an immediate adverse impact on military operations.”

46 U.S.C § 501(b) waivers

The more common of the two kinds of waivers, although still extremely rare, these must meet two key requirements. They must be “necessary in the interest of national defense” and can only be granted if no qualified US-flag vessel is available for the transportation. A waiver request under § 501(b) sets off a federal administrative process that involves MarAd, CBP, DHS, the White House Made in America Office, and often other federal departments and agencies. A request for a § 501(b) waiver may come from another federal agency or directly from an individual seeking a waiver.

Coordination of the waiver process is the responsibility of the Cargo Security, Customs and Border Protection Branch within the CBP Office of Trade. DHS traditionally seeks the advice of the Department of Defense as to whether a waiver is “necessary in the interest of national defense.” A request for a Jones Act waiver request must include a detailed information as set forth at <https://www.cbp.gov/trade/jones-act-waiver-request>.¹¹

The ultimate decision on whether a waiver request is “necessary in the interest of national defense” must be made by the president of the United States. Before that, any waiver request must be

published on the CBP website for at least 48 hours, a period designed ensure a meaningful search for available US-flag vessels, according to Congress. Waivers can only occur on a single vessel basis and only for a time-limited period: 10 days, with a possible extension for another 10 days if all conditions are met. Other more nuanced requirements are included in the statute.

DHS administrative waivers, when granted, are often narrowly drawn and limited to certain time periods in certain shipping trades. For example, on 8 September 2017, acting DHS Secretary Elaine Duke issued an official Jones Act waiver for seven days “for refined petroleum products, including gasoline, diesel and jet fuel, to be shipped from New York, Pennsylvania, Texas and Louisiana to South Carolina, Georgia, Florida and Puerto Rico” in the wake of Hurricane Harvey. The waiver came after a recommendation from the US Department of Energy regarding a request for a waiver from a private foreign shipping company, SeaRiver Marine Inc. The waiver was later extended to 22 September. Similarly, on 28 September, a 10-day waiver was granted for “all products to be shipped to Puerto Rico” after Hurricane Maria. Section 501 only provides DHS the authority to waive US navigation and inspection laws.

Administrative Waivers for Small Passenger Vessels

Congress amended the vessel documentation laws in 1998 to provide for the administrative waiver of the US build requirement for certain small passenger vessels operating in coastwise trade. Under the Small Vessel Waiver program, MarAd may waive the US build requirement for small passenger vessels that are at least three years old, were built or rebuilt outside of the United States, and carry no more than 12 passengers for hire, provided the waiver will not adversely affect US vessel builders or the coastwise trade business of anyone employing US-built vessels in that business. The waiver can be granted only after notice in the *Federal Register* and the opportunity for public comment. 46 U.S.C. § 12121; 46 C.F.R. § 388. More information about the administrative waiver program, including the application process, is available on the MarAd website.¹²

CONCLUSION

While the Jones Act has been in place for more than 100 years, its underlying principles have been in place in the United States for more than 230 years, and its British ancestry extends even further back. Simple on their face, the Jones Act and the related coastwise laws are often not simple in practice. Like many laws, the statute itself sets out broad parameters and a body of regulations, court decisions, interpretations, and policy decisions fill out the details. Even today, a century after enactment, new interpretive issues arise on a regular basis.

ENDNOTES

¹ The Jones Act was originally codified at 46 U.S.C. App. 883. However, in the recodification of Title 46 in 2006, the Jones Act was re-designated as 46 U.S.C. § 55102.

² This guide uses the coastwise terminology, although the two terms are synonymous.

³ U.S. Customs & Border Prot., Coastwise Trade: Navigating Through the Jones Act, <https://www.api.org/~media/Files/Policy/17-March-Customs-Conference/US-Cus-www.api.org/~media/files/policy/17-march-customs-conference/us-customs-coastwise-trade-jones-act.pdf> (last visited Sept. 2023).

⁴ Vessels of less than 5 net tons are excluded from documentation. Also, non-self-propelled vessels that are qualified to engage in coastwise trade are exempt from coastwise documentation when engaged in such trade within a harbor, on US rivers or lakes (excluding the Great Lakes), and on the internal waters or canals of any state. 46 C.F.R. § 67.9.

⁵ Mechanisms of Compliance With United States Citizenship Requirements for the Ownership of Vessels Eligible to Engage in Restricted Trades by Publicly Traded Companies, 47 Fed. Reg. 70,452 (Nov. 26, 2012).

⁶ U.S. Coast Guard, Review Criteria for Steel Weight Components WRT U.S. Build and Foreign Rebuild Determinations (June 11, 2013, as revised Aug. 19, 2021), <https://www.dco.uscg.mil/Portals/9/DCO%20Documents/NVDC/USCG%20Review%20Criteria%20for%20Steel%20Weight%20Components.2021-08-19.pdf?ver=jNvPN5FAyfWA9eevBGzoXw%3D%3D>.

⁷ U.S. Coast Guard, Assistant Commandant for Prevention Policy (CG-5P), <https://www.dco.uscg.mil/Our-Organization/Assistant-Commandant-for-Prevention-Policy-CG-5P/Inspections-Compliance-CG-5PC-/National-Vessel-Documentation-Center/National-Vessel-Docum-entation-Center-Determination-Letters/National-Vessel-Documentation-Center-US-Build-Determi-nation-Letters/>.

⁸ As discussed at pp. 14–15 above, a Documentation Act Citizen must be organized under the laws of the United States and meet certain US citizen officer and director requirements even though all of the equity can be foreign owned.

⁹ U.S. Coast Guard, *supra* note 7.

¹⁰ U.S. Dep't of Transp., Maritime Admin., Domestic Shipping, <https://www.maritime.dot.gov/ports/domestic-shipping/domestic-shipping> (last visited Sept. 2023).

¹¹ See U.S. Customs & Border Prot., Requests to Waive the Navigation Laws, <https://www.cbp.gov/trade/jones-act-waiver-request> (last visited Sept. 2023).

¹² U.S. Dep't of Transp., Maritime Admin., Small Vessel Waiver Program, <https://www.maritime.dot.gov/ports/domestic-shipping/small-vessel-waiver-program> (last visited Sept. 2023).

CONTACTS

For more information about the Jones Act, US coastwise laws, or any US maritime law, send an email to JonesAct@klgates.com or contact a member of the K&L Gates Maritime group, including the following.



Darrell L. Conner
Government Affairs Counselor
Washington, D.C.
+1.202.661.6220
darrell.conner@klgates.com



Brody Garland
Government Affairs Analyst
Washington, D.C.
+1.202.778.9189
brody.garland@klgates.com



Brian J. Hopkins
Associate
Washington, D.C.
+1.202.778.9052
brian.hopkins@klgates.com



Mariah P. Leffingwell
Associate
New York
+1.212.536.3957
mariah.leffingwell@klgates.com



John Longstreth
Partner
Washington, D.C.
+1.202.661.6271
john.longstreth@klgates.com



William N. Myhre
Partner
Washington, D.C.
+1.202.661.6222
william.myhre@klgates.com



Luke M. Reid
Partner
Boston
+1.617.951.9108
luke.reid@klgates.com



Jorge Romero
Of Counsel
Washington, D.C.
+1.202.661.3815
jorge.romero@klgates.com



Emanuel L. Rouvelas
Partner
Washington, D.C.
+1.202.661.6262
emanuel.rouvelas@klgates.com



Mark Ruge
Partner
Washington, D.C.
+1.202.494.2256
mark.ruge@klgates.com



Felisa E. Sanchez
Of Counsel
Houston
+1.713.815.7336
felisa.sanchez@klgates.com



James A. Sartucci
Government Affairs Counselor
Washington, D.C.
+1.202.778.9374
jim.sartucci@klgates.com



Michael F. Scanlon
*Lead Practice Area Leader -
Policy and Regulatory*
Washington, D.C.
+1.202.661.3764
michael.scanlon@klgates.com



Elle Stuart
Associate
Washington, D.C.
+1.202.778.9081
elle.stuart@klgates.com

K&L Gates is a fully integrated global law firm with lawyers and policy professionals located across five continents. For more information about K&L Gates or its locations, practices and registrations, visit [klgates.com](https://www.klgates.com).

This publication is for informational purposes only and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

©2023 K&L Gates LLP. All Rights Reserved.