

provision of an advertised product or service, whether sold or offered by the organization or by another party, is substantially related to the qualifying purposes of an organization.

(Advertisements in Standard Mail (A) material that meet the content requirements for a periodical publication need not meet the substantially related standard to be mailable at the Nonprofit Standard Mail rates. See 5.4d(2) and 5.8.)

b. To be substantially related, the sale of the product or the provision of the service must contribute importantly to the accomplishment of one or more of the qualifying purposes of the organization. This means that the sale of the product or providing of the service must be directly related to accomplishing one or more of the purposes on which the organization's authorization to mail at the Nonprofit Standard Mail rates is based. The sale of the product or providing of the service must have a causal relationship to the achievement of the exempt purposes (other than the production of income) of the authorized organization. (Income produced from selling an advertised product or providing a service does not make such action a substantially related activity, even if the income will be used to accomplish the purpose or purposes of the authorized organization.) See 26 CFR section 1.513-1(d).

(1) If an organization pays Unrelated Business Income Tax (UBIT) on the income from the sale of a product or the provision of a service, that activity is by IRS definition not substantially related. See 26 U.S.C. section 512. The fact that an organization does not pay such tax, however, does not establish that the activity is substantially related because other criteria may exempt the organization from payment. See 26 CFR section 1.513-1(e).

(2) Third-party paid advertisements may be included in material mailed at the Nonprofit Standard Mail rates if the products or services advertised are substantially related to one or more of the purposes for which the organization is authorized to mail at the Nonprofit Standard Mail rates. However, if the material contains one or more advertisements that are not substantially related, the material is not eligible for the Nonprofit Standard Mail rates, unless it is part of material that meets the content requirements described in 5.8 and is not disqualified from using the Nonprofit Standard Mail rates under another provision.

c. Announcements of activities (e.g., bake sale, car wash, charity auction, oratorical contest) are considered substantially related if substantially all

the work is conducted by the members or supporters of an authorized organization without compensation. See 26 U.S.C. section 513(a)(1); 26 CFR section 1.513-1(e)(1).

d. Advertisements for products and services, including products and services offered as prizes or premiums, are considered substantially related if the products and services are received by an authorized organization as gifts or contribution. See 26 U.S.C. section 513(a)(3); 26 CFR section 1.513-1(e)(3).

e. An advertisement, promotion, offer, or subscription order form for a periodical publication meeting the eligibility criteria in E211 and published by one of the types of nonprofit organizations listed in 2.0 is mailable at the Nonprofit Standard Mail rates.

f. Unless the mailing is ineligible for the Nonprofit Standard Mail rates for other reasons, mailings will be accepted at the Nonprofit Standard Mail rates upon certification that income derived from the sale of products or services advertised in the mailing is not subject to the Unrelated Business Income Tax (UBIT) described at 26 U.S.C. section 512, and that each of the products or services is substantially related to the nonprofit organization's qualifying purpose.

A transmittal letter making these changes in the pages of the Domestic Mail Manual will be published and will be transmitted to subscribers automatically. Notice of issuance will be published in the **Federal Register** as provided by 39 CFR 111.3.

**Stanley F. Mires,**

*Chief Counsel, Legislative.*

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## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

#### 46 CFR Part 388

[Docket No. MARAD-1999-5915]

RIN 2133-AB39

#### Administrative Waivers of the Coastwise Trade Laws for Eligible Vessels

**AGENCY:** Maritime Administration, Department of Transportation.

**ACTION:** Final rule.

**SUMMARY:** The Maritime Administration (MARAD, we, our, or us) is publishing this final rule to implement Title V of the Coast Guard Authorization Act of 1998. This final rule implements

regulations that, under certain circumstances, will waive the U.S.-build and other requirements of the Passenger Services Act and section 27 of the Merchant Marine Act, 1920, for eligible vessels to be documented with appropriate endorsement for employment in the coastwise trade as small passenger vessels or uninspected passenger vessels authorized to carry no more than 12 passengers for hire. This administrative process will improve the responsiveness of the Federal Government in meeting the needs of many vessel-operating small businesses.

**DATES:** The effective date of the final rule is February 11, 2000.

**FOR FURTHER INFORMATION CONTACT:** You may call Michael Hokana, Office of Ports and Domestic Shipping, Maritime Administration, at (202) 366-0760, or you may write to him at the following address: Maritime Administration, MAR-832, Room 7201, 400 Seventh Street, SW, Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:** Title V of the Coast Guard Authorization Act of 1998 authorizes the Secretary of Transportation to grant waivers of certain requirements for the smallest of passenger vessels (those carrying 12 or fewer passengers) to operate in the coastwise trade. In order to carry out the provisions of the law, MARAD developed a procedure (i.e., this rule) for: accepting applications from the public, providing public notice of the intent to issue waivers to foreign built vessels for use in the coastwise passenger trade, a set of criteria to test the merits of the applications, a decision process, and a review and revocation process. The application process requires a \$300 non-refundable fee, an "adverse affect" assessment on the U.S.-flag shipping and vessel building community, and a requirement that the vessel must meet U.S. Coast Guard documentation standards. After the decision process is completed and the waiver is approved, MARAD will issue a waiver document that becomes a permanent part of the vessel's coastwise endorsement. The document will set limits on the vessel's geographic use and will require MARAD's prior approval for all significant changes in the vessel's operation. With regard to overall processing, MARAD has also prepared a revocation procedure for use if necessary and a review process where the Maritime Administrator may review the waiver granting and revocation decisions of the MARAD staff.

One portion of the law requires public notice prior to rulemaking. Accordingly, on July 8, 1999 MARAD published a 60-day notice in the **Federal Register** (64

FR 36831) soliciting comments on a proposed rule and information collection to administer a program implementing the above law. In response to our notice, we received three letters expressing opinions and recommending changes. MARAD has considered these comments and has made changes to the regulation as necessary. The comments and our responses follow.

MARAD, at its own initiative, made several changes to the proposed text. None of these changes are substantive. By way of examples: definitions of "Administrator" and "MARAD" are added to reduce the length of the regulation (Sec. 388.2); the wording of the Act is followed more closely, such as "certification" being replaced with "certificate of documentation with appropriate endorsement" (Sec. 388.2 (c) (2)); corrections are made, as in making singular "Applications; fees" (Sec. 388.3 Title) and "origins" (Sec. 388.3 (a) (4)); changed the organization that the check should be made out to (Sec. 388.3 (c)); and the wording "vessel builders" has been used instead of "shipbuilders" in several places.

#### Comments on the Proposed Rule

##### *"3 Mates' MIMI Connection Inc."*

The first letter, from "3 Mates" MIMI Connection Inc., was an affirmation that MARAD was serving all interests. No further action on the part of MARAD is required with regard to this input.

##### *Classic Sailing Adventures*

The second letter, from the president of Classic Sailing Adventures, contained three recommendations. In summary, the recommendations were that MARAD: (1) Should not place geographic restrictions on where a waived vessel can operate; (2) should eliminate the "adverse assessment" consideration on U.S.-flag industries, and, (3) should not require an application fee. MARAD's response is that because of the requirements of the law, and previously enacted legislation, we will not implement any of these recommendations. The reasons for keeping these provisions in the regulation are threefold. The geographic restriction allows MARAD to more closely focus on who might be affected by a waiver. To eliminate the "adverse affect" assessment on U.S. operators and shipbuilders would violate enabling legislation, which specifically requires an "adverse affect" determination. Lastly, the application fee is necessary to recoup estimated direct costs incurred in the processing of each application as required by law.

#### *Passenger Vessel Association*

The third letter, containing 20 specific recommendations, was received from the Passenger Vessel Association (PVA), which represents U.S.-flag passenger vessel owners, operators and builders. In order to present the recommendations and MARAD's decisions in a clear and concise manner, we have set up our response in the following format:

Each recommendation is provided a number, followed by the section where the rule has been (or might have been) changed. "Proposed" means the text as originally proposed in MARAD's notice of proposed rulemaking. "Recommendation" means the recommendation of the Passenger Vessel Association, and "Decision" is the action taken by MARAD. Specific word changes are underlined in the recommendation for clarity.

#### *1. Section 388.2 Definitions*

**Proposed:** In paragraph (2) of the definition of eligible vessel "If rebuilt, was rebuilt outside of the United States at least 3 years before the certificate of documentation with appropriate endorsement would become effective."

**Recommendation:** The PVA requests the inclusion of "*if granted*" in the sentence: "If rebuilt, was rebuilt outside of the United States at least 3 years before the certificate of documentation with appropriate endorsement, *if granted*, would become effective." The words "*if granted*" ensure applicants know that waivers are not guaranteed.

**Decision:** MARAD accepts the requested recommendation.

#### *2. Section 388.3 Application; Fee*

**Proposed:** In paragraph (a) "(a) *You* may apply in writing to the Secretary, Maritime Administration\* \* \*"

**Recommendation:** Change "*You*" in paragraph (a) to read: "(a) *An owner of a vessel* may apply in writing to the Secretary, Maritime Administration\* \* \*"

The recommendation would insert the new words "*an owner of a vessel*" in place of the word "*you*" in order to ensure only vessel owners apply for waivers. The PVA could not see any other rationale for a person other than an owner applying for a waiver.

**Decision:** MARAD accepts the requested recommendation.

#### *3. Section 388.3 Application; Fee*

**Proposed:** Paragraph (a), question number (5) on the application: "Name, address, and telephone number of the applicant and vessel owner if different from the applicant."

**Recommendation:** Change paragraph (a), question number (5) on the application to read: "Name, address, and telephone number of the *vessel owner*."

The recommendation would delete the words "*applicant*" and "*vessel owner if different than applicant*" in order to accept applications only from owners.

**Decision:** MARAD accepts the recommendation.

#### *4. Section 388.3 Application; Fee*

**Proposed:** This requirement was not covered in the proposed rule.

**Recommendation:** The PVA recommends a new requirement to the waiver application that would read as a new question (8):

(8) A statement explaining the duration of the applicant's ownership of the vessel, his cost of purchasing or otherwise obtaining the vessel, the person or source from whom he obtained the vessel, and the uses to which he has put the vessel since obtaining it.

The PVA justifies this requirement as better enabling the government to determine if the waiver will have an effect on an industry.

**Decision:** MARAD believes this question to be intrusive and unnecessary to carry out MARAD's responsibilities and does not accept the change recommendation.

#### *5. Section 388.4 Criteria for Grant of a Waiver*

**Proposed:** In paragraph (a) General criteria:

(1) A waiver of the foreign build and/or foreign rebuild prohibition in the coastwise trade laws will be granted for an eligible vessel if we determine that the employment of the vessel in the coastwise trade will not unduly adversely affect—

- (i) United States vessel builders; or
- (ii) The coastwise trade business of any person who employs vessels built in the United States in that business.

**Recommendation:** It is recommended that the words "*only if*" be inserted in paragraph (a) General criteria, (1):

(1) A waiver of the foreign build and/or foreign rebuild prohibition in the coastwise trade laws will be granted for an eligible vessel *only if* we determine that the employment of the vessel in the coastwise trade will not unduly adversely affect—

- (i) United States vessel builders; or
- (ii) The coastwise trade business of any person who employs vessels built in the United States in that business.

The PVA would like to ensure that MARAD would interpret the two industry areas of consideration for adverse impact separately such that an adverse impact on operators *or* vessel builders would be seen to be an adverse impact subject to rejection.

*Decision:* MARAD agrees with this logic and will follow this interpretation. The words "only if" are added in the final rule.

#### 6. Section 388.4 Criteria for Grant of a Waiver

*Proposed:* In paragraph (a) General criteria, (1):

(1) A waiver of the foreign build and/or foreign rebuild prohibition in the coastwise trade laws will be granted for an eligible vessel only if we determine that the employment of the vessel in the coastwise trade will not *unduly* adversely affect—

- (i) United States vessel builders; or
- (ii) The coastwise trade business of any person who employs vessels built in the United States in that business.

*Recommendation:* In paragraph (a) General criteria, (1) The PVA recommends the deletion of the word *unduly* from the phrase as this sets too high of a standard for adverse impact.

*Decision:* MARAD believes that to remove the word "unduly" would require the rejection of a waiver request for the smallest and most frivolous of adverse conditions. The recommendation is not accepted.

#### 7. Section 388.4 Criteria for Grant of a Waiver

*Proposed:* This issue was not covered in the proposed rule.

*Recommendation:* At the end of paragraph (a) General criteria (1), the PVA requests the following statement be inserted to allow larger passenger cruise vessel operators to claim adverse affect.

*The determination of unduly adverse affect on a coastwise operator or a U.S. shipbuilder should not be limited to operators or builders of vessels carrying 12 or fewer passengers.*

*Decision:* MARAD will use the following sentence instead:

We may not limit the determination of 'unduly adverse affect' on a coastwise operator or an U.S. vessel builder to operators or builders of vessels carrying 12 or fewer passengers.

This is a reasonable recommendation, as it will allow MARAD to gauge impact on U.S.-flag vessels of all sizes. MARAD accepts the recommendation with the changed language.

#### 8. Section 388.4 Criteria for Grant of a Waiver

*Proposed:* In paragraph (a) General criteria, (2) "We may evaluate the expected impact of the proposed waiver on the basis of information received from all sources, including public comment, internal investigation and analysis, and any other sources of information deemed appropriate."

*Recommendation:* In paragraph (a) General criteria, (2) The PVA

recommends that the word "may" be replaced with the word "will" in the sentence; and that the evaluation will take into account "all" the information received from all sources.

We will evaluate the expected impact of the proposed waiver on the basis of *all* the information received \* \* \*

*Decision:* MARAD accepts the premise and changes the wording from "may" to "will" and from "and" to "or" in order to maintain flexibility as to the information needed to make a decision.

We will evaluate the expected impact of the proposed waiver on the basis of *all* the information received from all sources, including public comment, internal investigation and analysis, or any other sources of information deemed appropriate.

#### 9. Section 388.4 Criteria for Grant of a Waiver

*Proposed:* In paragraph (b) Impact on U.S. vessel builders:

We may use the following criteria to determine the effect on U.S. vessel builders.

*Recommendation:* The recommended change is to delete the word "may" and replace it with the word "will" in the sentence:

We will use the following criteria to determine the effect on U.S. vessel builders.

*Decision:* MARAD prefers to maintain the flexibility that "may" provides in as much as there may need to be more than one criteria weighed in making a decision.

#### 10. Section 388.4 Criteria for Grant of a Waiver

*Proposed:* In paragraph (c) Impact on coastwise trade operators:

We may use the following criteria to determine the effect on existing operators of U.S.-built vessels in coastwise trade:

- (1) Whether the proposed vessel of the applicant and the vessel(s) of an existing operator(s) (or the vessel(s) of an operator that can demonstrate it has taken definite steps to begin operation):
  - (i) Are of similar size;
  - (ii) Are of similar characteristics;
  - (iii) Would provide similar commercial service; and
  - (iv) Would operate in the same geographic area.

*Recommendation:* In paragraph (c) Impact on coastwise trade operators, the PVA commented that the original phrasing was too narrow. MARAD's original phrasing would not allow a vessel owner to claim adverse effect if the U.S.-built vessel was a different size, although employed in similar commercial service as a foreign proposed vessel.

*Decision:* MARAD agrees with the premise of the comment and has changed the final rule to read:

We may use the following criteria to determine the effect on existing operators of U.S.-built vessels in coastwise trade:

(1) Whether the proposed vessel of the applicant and a vessel of an existing operator (or the vessel of an operator that can demonstrate it has taken definite steps to begin operation) would provide similar commercial service and would operate in the same geographic area.

This new language eliminates the previous criterion that in order to be adversely affected, the impacted vessel must be of similar size and similar characteristics.

#### 11. Section 388.4 Criteria for Grant of a Waiver

*Proposed:* This issue was not covered in the proposed rule.

*Recommendation:* PVA proposes a new paragraph (d) as follows:

(d) Advance notice and approval needed for changes.

When we approve a waiver application, we will notify the applicant that no substantial change in the employment of the vessel in the coastwise trade may be made without prior notice to MARAD. Failure to provide advance notice of a proposed change in employment creates a presumption that the waiver should be revoked under section 388.5.

*Decision:* MARAD has reviewed this proposal and has added the following in the final rule:

(d) *Advance notice and approval needed for changes.*

When we approve a waiver application, we will notify the applicant that the applicant may not make substantial changes in the employment of the vessel in the coastwise trade without prior notice to MARAD. If the applicant fails to provide advance notice of substantial changes to MARAD, we may immediately revoke the waiver under section 388.5.

The change is accepted with MARAD's modifications.

#### 12. Section 388.5 Criteria for Revocation of a Waiver

*Proposed:* In paragraph (a):

(a) We may revoke a waiver previously granted under this part if we determine that the employment of the vessel in the coastwise trade has substantially changed since the issuance of the endorsement, and—

*Recommendation:* In paragraph (a), the PVA recommends changing the first sentence to read as follows, deleting the word "may" and replacing it with "will".

(a) We will revoke a waiver previously granted under this paragraph if we determine

that the employment of the vessel in the coastwise trade has substantially changed since the issuance of the endorsement.

*Decision:* This recommendation is not acceptable to MARAD as "will" is mandatory and requires unconditional revocation. Since the change in employment of the vessel may be a positive impact on the merchant marine with no adverse impact, we do not want to have to automatically revoke a waiver.

#### 13. Section 388.5 Criteria for Revocation of a Waiver

*Proposed:* In paragraph (a)(3):

(3) The employment of the vessel *unduly* adversely affects—

- (i) United States vessel builders; or
- (ii) The coastwise trade business of any person who employs vessels built in the United States."

*Recommendation:* In paragraph (a)(3), the change recommendation from the PVA is to remove the word "unduly" from the phrase "unduly adversely affects" as it sets too high a standard for adverse impact on industry.

*Decision:* MARAD believes that to remove "unduly" would require the revocation of a waiver request for the smallest and most frivolous of adverse conditions. MARAD does not accept the recommendation.

#### 14. Section 388.5 Criteria for Revocation of a Waiver

*Proposed:* In paragraph (b):

(b) We *may* evaluate the effects of the employment of the waived vessel in the coastwise trade on the basis of the information received from all sources \* \* \*

*Recommendation:* In paragraph (b), similar to other recommendations, PVA requested that the word "*may*" be changed to "*will*" in the following context:

(b) We *will* evaluate the effects of the employment of the waived vessel in the coastwise trade on the basis of the information received from all sources \* \* \*

*Decision:* MARAD accepts the premise and changes the wording from "may" to "will" and from "and" to "or" in order to maintain flexibility as to the information needed to make a decision. We also made the change to indicate that we will evaluate \* \* \* on the basis of *all* the information received \* \* \*

(b) We *will* evaluate the effects of the employment of the waived vessel in the coastwise trade on the basis of all the information received from all sources, including public comment, internal investigation and analysis, or any other sources of information deemed appropriate.

#### 15. Section 388.6 Process

*Proposed:* These issues were not covered in the proposed rule.

(a) *Recommendation:* The PVA would like additional public notice of federal actions with regard to passenger vessel waivers and recommended the following three changes:

The notice of the waiver application should be printed at least once a week for three weeks in one or more newspapers of general circulation for the geographic area in which the vessel will be operated. The notice should be published by MARAD, and be of one-quarter page newspaper size.

*Decision:* Because MARAD is an agency of the Federal Government, MARAD considers the **Federal Register** the appropriate public forum for the announcement of proposed waiver actions and will not require the publication of proposed waivers in local newspapers. MARAD does not accept this recommendation.

(b) *Recommendation:* Notice of federal waiver action should be distributed by e-mail to interested parties.

*Decision:* MARAD actions will be available publicly on the electronic docket provided by DOT. MARAD does not believe that any additional electronic notification is necessary.

(c) *Recommendation:* MARAD should maintain a proposed waiver listing on its website.

*Decision:* MARAD will post its notices and all comments received on the electronic docket. This activity and the notice in the **Federal Register** will meet our public notice requirements.

#### 16. Section 388.6 Process

*Proposed:* In paragraph (a) Initial process:

In the absence of duly filed objections to an application, and in the absence of undue market impact on vessel operators or vessel builders otherwise discovered by us, we will *assume* that there will be no adverse effect.

*Recommendation:* In paragraph (a) Initial process, the PVA objects to the word "*assume*" as it implies favoritism towards an application for waiver. No specific rewording was recommended.

*Decision:* MARAD has reviewed this section and is changing the word "*assume*" to "*conclude*" in the final rule as this is how MARAD will base its adverse impact decision. The new text will read:

In the absence of duly filed objections to an application, and in the absence of undue market impact on vessel operators or vessel builders otherwise discovered by us, we will *conclude* that there will be no adverse effect.

#### 17. In Section 388.6 Process

*Proposed:* In paragraph (a):

The decision will be communicated to the applicant, those who have submitted written comments, and the Coast Guard.

This issue was not covered in paragraph (c).

*Recommendation:* In paragraph (c), The PVA recommended in paragraph (c) a revision to require notification *in writing* of MARAD actions, such as in the phrase:

Each decision to grant, deny, or revoke a waiver will be *made in writing, and a copy of the written decision* will be provided to each applicant and other parties to the decision.

*Decision:* MARAD accepts the recommendation that decisions will be in writing and has added that language to both paragraph (a) and (c).

#### 18. Section 388.6 Process

*Proposed:* In Paragraph (c): certain parties may ". . . petition the Maritime Administrator to review a waiver, waiver denial, or waiver revocation within *five (5) days* of such determination."

*Recommendation:* In paragraph (c): *Review of determinations*, PVA recommends that the time limits on petitioning should run from the date of a person's receipt of the written notice (not the date of determination). The PVA believes to do otherwise would frustrate a distant party's ability to seek a review or appeal.

*Decision:* MARAD understands this condition and changes to the following wording:

Applicants and persons who submitted comments in response to a **Federal Register** may petition the Administrator to review a waiver, waiver denial, or waiver revocation *within five (5) business days after MARAD files the decision in the docket.*

This revision by MARAD provides added flexibility for interested parties by making the time limit five business days instead of calendar days. Similarly, making the time limits effective based on when the decision is filed in the docket provides further flexibility. Further, all time references have been changed to business days in the final rule.

#### 19. Under Section 338.7 Sunset Provision

*Proposed:* In the first sentence: "We will grant no waivers after September 30, 2002 unless the statutory authority to grant waivers is extended beyond that date."

*Recommendation:* The PVA recommends the deletion of the phrase "unless the statutory authority to grant

waivers is extended beyond that date" as it implies a prediction of Congressional action.

*Decision:* MARAD accepts the recommendation and has deleted this phrase in the final rule.

#### 20. Section 338.7 Sunset Provision

*Proposed:* The second sentence reads: "Any waiver granted prior to September 30, 2002 will continue in effect until otherwise invalidated or revoked under chapter 121 of title 46, United States Code."

*Recommendation:* The PVA claims that this sentence may not have a legal basis.

*Decision:* MARAD has conducted a legal review of this remark and has decided to rephrase the statement as follows: "We will grant no waivers on or after September 30, 2002."

Therefore, with the public comments having been considered, and the appropriate changes made to the regulation a program description follows:

*Program Description:* Within the Department of Transportation there are two agencies with responsibilities related to the coastwise trade laws. The U.S. Coast Guard issues the vessel documents and endorsements that authorize vessels to engage in the coastwise trade. However, the Secretary of Transportation has delegated to MARAD the authority to process applications for waivers of the coastwise laws and to determine the effect of waivers of the coastwise trade laws on United States vessel builders and United States-built vessel coastwise trade businesses. We are outlining the procedures to be followed in processing applications for waivers, or revoking waivers previously granted. Upon grant of a waiver, MARAD will notify the applicant and the U.S. Coast Guard. Thereafter, you may register the vessel so waived with the U.S. Coast Guard under the U.S. Coast Guard's normal procedures, provided the vessel is otherwise eligible.

Vessels eligible for a waiver of the coastwise trade laws will be limited to foreign-built or foreign rebuilt small passenger vessels and uninspected passenger vessels as defined by section 2101 of Title 46, United States Code. Vessels of unknown origin will be considered foreign built. Additionally, vessels requested for consideration must be greater than three (3) years old. We will not grant waivers in instances where such waiver activity will have an unduly harmful impact on U.S. shipyards or U.S.-flag ship operators. Specifically, and in order to meet the public comment provisions of Title V, it

is our intention to publish waiver requests for comment in the **Federal Register**. After a period of time to evaluate comments and assess the impact that the proposed waivers will have on the U.S.-flag shipping and shipbuilding industry, we will issue a determination.

In assessing the adverse effect of grant of a particular waiver, we may consider sales of vessels of the same type and size and for the same trade by domestic shipbuilders. As an example, the grant of a waiver for a motor vessel might not have an adverse effect on sales by a builder of sailboats. As for adverse affects on coastwise trade businesses, we may look at the type of service and geographic location of the applicant and the objector. An intended service providing day trips for whale watching might not affect a service providing weeklong trips on a sailing ship. A charter service in Maine might not affect a charter service in California. Each decision will be made on the facts of the individual circumstances, including the degree of competition in a proposed market.

We do not have the authority to waive citizenship requirements for vessel ownership and documentation. The U.S. Coast Guard will ascertain whether the shipowner is qualified as a citizen to register a vessel. In addition, the U.S. Coast Guard, not MARAD, will determine whether a particular vessel will be considered a small passenger vessel or an uninspected passenger vessel. However, we may refuse to process an application if the vessel is not the type eligible for a waiver. Prospective applicants for a coastwise trade law waiver may wish to consult with the U.S. Coast Guard prior to initiating the waiver application process with MARAD.

Under Title V, MARAD also has the authority to revoke coastwise endorsements under the limited circumstances where a foreign-built or foreign-rebuilt passenger vessel, previously allowed into service, substantially changes that service and the vessel is employed other than as a small passenger vessel or an uninspected passenger vessel or the vessel is having an unduly harmful impact on U.S.-vessel builders or persons who employ U.S.-built vessels in the domestic trade. The procedure for revocation of a MARAD waiver will include the publication of a notice in the **Federal Register** seeking public comments on the proposed revocation. Secondly, we will determine the extent of the allegedly detrimental activity and, if an undue impact is found, we will issue a formal letter of waiver

revocation with an appropriate grace period. This determination will be sent to the U.S. Coast Guard for revocation of the vessel's coastwise endorsement.

MARAD's decisions to grant or deny a waiver and to revoke or not revoke a waiver will not be final until after time for review has expired. Applicants and persons who submitted comments in response to a **Federal Register** notice may petition the Maritime Administrator to review a waiver determination, or request the Maritime Administrator not to review a waiver determination. Relatively short time periods are provided for this review process.

#### Rulemaking Analyses and Notices

##### *Executive Order 12866 and DOT Regulatory Policies and Procedures*

This final rule is not significant under section 3(f) of Executive Order 12866, and as a consequence, OMB did not review the rule. This final rule is not significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 26, 1979). The costs and benefits associated with this rulemaking are considered to be so minimal that no further analysis is necessary. Vessels eligible for a waiver of the coastwise trade laws will be limited to foreign built or foreign re-built small passenger vessels and uninspected passenger vessels as defined by section 2101 of Title 46, United States Code. Additionally, vessels requested for consideration must be greater than (3) years old. We will not grant waivers in instances where such waiver activity will have an unduly adverse affect on U.S. vessel builders or U.S. businesses that use U.S. flag vessels. Under Title V, MARAD also has the authority to revoke coastwise endorsements under the limited circumstances where a foreign-built or foreign-rebuilt passenger vessel, previously allowed into service, substantially changes that service and the vessel is employed other than as a small passenger vessel or an uninspected passenger vessel or the vessel is having an unduly adverse affect on U.S. vessel builders or persons who employ U.S.-built vessels in the domestic trade.

##### *Executive Order 13132*

We analyzed this rulemaking in accordance with the principles and criteria contained in E.O. 13132 ("Federalism") and have determined that it does not have sufficient Federalism implications to warrant the preparation of a Federalism summary impact statement. The regulations

herein have no substantial effects on the States, or on the current Federal-State relationship, or on the current distribution of power and responsibilities among the various local officials. Therefore, MARAD did not consult with State and local officials because it was not necessary.

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act requires MARAD to assess the impact that regulations will have on small entities. After analysis of this final rule MARAD certifies that this final rule will not have a significant economic impact on a substantial number of small businesses. Although we expect many applicants for vessel waivers to be small businesses, we do not believe that the economic impact will be significant. This regulation allows MARAD to waive the U.S.-build and other requirements for eligible vessels and adds a small economic benefit to applicants. This regulation will only allow vessels to carry the statutory maximum of 12 passengers. As a consequence, MARAD estimates that a vessel applicant who receives a waiver may earn a few hundred dollars per year for localized operations (geographic restrictions apply) such as whale watching and personalized fishing expeditions. Also, the economic impact of this rule is limited because it precludes vessel operators from participating in other economic activities such as carrying cargo and commercial fishing.

#### *Environmental Assessment*

This rule would not significantly affect the environment because the small number and small size of vessels admitted to U.S. registry under this waiver program would have little or no effect on the environment. Accordingly, an Environmental Impact Statement is not required under the National Environmental Policy Act of 1969.

#### *Paperwork Reduction Act*

This rulemaking establishes a new requirement for the collection of information. The Office of Management and Budget (OMB) has reviewed and approved the information collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) Comments received on this information collection are discussed in the "Comments on the Proposed Rule" section of this notice of final rule. The OMB approval number is 2133-0529.

#### *Unfunded Mandates Reform Act*

This rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does

not result in costs of \$100 million or more to either State, local, or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objectives of the rule.

#### *Consultation and Coordination With Indian Tribal Governments*

MARAD believes that regulations in this final rule will have no significant or unique effect on the communities of Indian tribal governments when analyzed under the principles and criteria contained in Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments). Therefore, the funding and consultation requirements of this Executive Order would not apply.

#### *Regulation Identifier Number (RIN)*

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

#### **List of Subjects in 46 CFR Part 388**

Administrative practice and procedure, Maritime carriers, Passenger vessels, Reporting and record keeping requirements.

Accordingly, the Maritime Administration adds a new part 388 to 46 CFR chapter II, subchapter J, to read as follows:

#### **PART 388—ADMINISTRATIVE WAIVERS OF THE COASTWISE TRADE LAWS FOR ELIGIBLE VESSELS**

Sec.

- 388.1 Purpose.
- 388.2 Definitions.
- 388.3 Application; fee.
- 388.4 Criteria for grant of a waiver.
- 388.5 Criteria for revocation of a waiver.
- 388.6 Process.
- 388.7 Sunset provision.

**Authority:** 46 App. U.S.C. 1114(b); 49 U.S.C. 322; Public Law 105-383, 112 Stat. 3445 (46 U.S.C. 12106 note); 49 CFR 1.66(cc).

##### **§ 388.1 Purpose.**

This part prescribes regulations implementing the provisions of Title V of Public Law 105-383, 112 Stat. 3445, which grants the Secretary of Transportation authority to review and approve applications for waiver of the coastwise trade laws to allow the carriage of no more than 12 passengers for hire on vessels, which are three years old or more, built or rebuilt

outside the United States, and grants authority for revocation of those waivers.

##### **§ 388.2 Definitions.**

For the purposes of this part:

(a) Administrator means the Maritime Administrator.

(b) Coastwise Trade Laws include:

(1) The Coastwise Endorsement Provision of the Vessel Documentation Laws, (46 U.S.C. 12106);

(2) The Passenger Services Act, section 8 of the Act of June 19, 1886 (46 App. U.S.C. 289); and

(3) The Jones Act, section 27 of the Merchant Marine Act, 1920 (46 App. U.S.C. 883).

(c) Eligible Vessel means a vessel otherwise eligible for a U.S. Coast Guard certificate of documentation (i.e. of five or more tons) that is either a small passenger vessel or an uninspected passenger vessel that—

(1) Was not built in the United States and is at least 3 years of age; or

(2) If rebuilt, was rebuilt outside the United States at least 3 years before the certificate of documentation with appropriate endorsement, if granted, would become effective.

(d) MARAD means the Maritime Administration, U.S. Department of Transportation.

(e) Secretary means the Secretary of Transportation.

(f) The terms, small passenger vessel, uninspected passenger vessel, and passenger for hire have the meaning given such terms by 46 2102 U.S.C.

##### **§ 388.3 Application; fee.**

(a) An owner of the vessel may apply in writing to the Secretary, MARAD, MAR-120, Room 7210, 400 7th St., SW., Washington, DC 20590, for an administrative waiver of the coastwise trade laws of the United States for an eligible vessel to carry no more than 12 passengers for hire. The application need not be in any particular format, but must be signed and contain the following information:

(1) Name of vessel and owner for which waiver is requested.

(2) Size, capacity and tonnage of vessel (state whether tonnage is measured pursuant to 46 U.S.C. 14502, or otherwise, and if otherwise, how measured).

(3) Intended use for vessel, including geographic region of intended operation and trade.

(4) Date and place of construction and (if applicable) rebuilding. (If applicant is unable to determine the origin of the vessel, foreign construction will be assumed).

(5) Name, address, and telephone number of vessel owner.

(6) A statement on the impact this waiver will have on other commercial passenger vessel operators, including a statement describing the operations of existing operators.

(7) A statement on the impact this waiver will have on U.S. shipyards.

(b) MARAD may ask additional questions of the applicant as part of the application review.

(c) You must enclose a non-refundable application fee for each waiver requested, in the form of a check or money order for \$300, made out to the order of "Maritime Administration—Transportation."

#### **§ 388.4 Criteria for grant of a waiver.**

(a) General criteria. (1) We will waive the foreign build and/or foreign rebuild prohibition in the coastwise trade laws for an eligible vessel only if we determine that the employment of the vessel in the coastwise trade will not unduly adversely affect—

(i) United States vessel builders; or

(ii) The coastwise trade business of any person who employs vessels built in the United States in that business.

(2) We may not limit the determination of "unduly adverse affect" on a coastwise operator or an U.S. vessel builder to operators or builders of vessels carrying 12 or fewer passengers.

(3) We will evaluate the expected impact of the proposed waiver on the basis of all the information received from all sources, including public comment, internal investigation and analysis, or any other sources or information deemed appropriate.

(b) Impact on U.S. vessel builders. We may use the following criteria to determine the effect on U.S. vessel builders: Whether a potentially impacted U.S. vessel builder has a history of construction of similar vessels, or can demonstrate the capability and capacity to build a similar vessel, for use in the same geographic region of the United States, as the proposed vessel of the applicant.

(c) Impact on coastwise trade operators. We may use the following criteria to determine the effect on existing operators of U.S.-built vessels in coastwise trade:

(1) Whether the proposed vessel of the applicant and a vessel of an existing operator (or the vessel of an operator that can demonstrate it has taken definite steps to begin operation) would provide similar commercial service and would operate in the same geographic area.

(2) The number of similar vessels operating or proposed to operate in the same market with the same or similar

itinerary, relative to the size of the market.

(d) Advance notice and approval needed for changes. When we approve a waiver application, we will notify the applicant that the applicant may not make substantial changes in the employment of the vessel in the coastwise trade without prior notice to MARAD. If the applicant fails to provide advance notice of substantial changes to MARAD, we may immediately revoke the waiver under § 388.5.

#### **§ 388.5 Criteria for revocation of a waiver.**

(a) We may revoke a waiver previously granted under this part if we determine that the employment of the vessel in the coastwise trade has substantially changed since the issuance of the endorsement, and—

(1) The vessel is employed other than as a small passenger vessel or an uninspected passenger vessel; or

(2) The employment of the vessel unduly adversely affects—

(i) United States vessel builders; or

(ii) The coastwise trade business of any person who employs vessels built in the United States.

(b) We will evaluate the effects of the employment of the waived vessel in the coastwise trade on the basis of the information received from all sources, including public comment, internal investigation and analysis, or any other sources of information deemed appropriate.

#### **§ 388.6 Process.**

(a) Initial process. We will review each application for completeness as received. We will notify the applicant if additional information is necessary or if the application does not meet the initial eligibility requirements for a waiver. All applications that pass the initial screening will be available for public inspection in the Department of Transportation Docket Room following publication in the **Federal Register**. We will publish a notice of such applications in the **Federal Register**. Interested parties will be given an opportunity to comment on whether introduction of any of the proposed vessels would adversely affect them. In the absence of duly filed objections to an application, and in the absence of undue market impact on vessel operators or vessel builders otherwise discovered by us, we will conclude that there will be no adverse effect. If an objection to an application is received, additional information may be sought from the objector. The applicant will be given a sufficient amount of time to respond. The Director, Office of Ports and Domestic Shipping, will then either

make a decision based on the written submissions and all available information or may, as a matter of discretion, hold a hearing on the application. The decision will be communicated in writing to the applicant, those who have submitted written comments, and the Coast Guard. If MARAD grants a waiver, the applicant must thereafter contact the Coast Guard to obtain the necessary documentation for domestic operation, provided the vessel and its owner, otherwise qualify.

(b) Revocation. We may, upon the motion of an interested party, or upon our own motion, publish a notice in the **Federal Register**, proposing to revoke a waiver granted under this part. We may request additional information from any respondent to the notice. The Director, Office of Ports and Domestic Shipping, will then either make a decision based on the written submissions and additional publicly available information or may, as a matter of discretion, refer the request for the revocation to a hearing. MARAD will communicate its decision in writing to the waiver recipient, the requestor (if any), each respondent to the proposed revocation notice; and the Coast Guard. If MARAD revokes a waiver, the Coast Guard shall revoke the vessel's coastwise endorsement.

(c) Review of determinations. (1) The decisions by the Director, Office of Ports and Domestic Shipping, to grant a waiver, deny a waiver, or revoke a waiver will not be final until after time for discretionary review by the Administrator has expired. Applicants and persons who submitted comments in response to a **Federal Register** notice may petition the Administrator to review a waiver, waiver denial, or waiver revocation within five (5) business days after MARAD files the decision in the docket. Each petition for review should state the petitioner's interest and the reasons review is being sought, clearly pointing out any alleged errors of fact or misapplied points of law. Within three (3) business days of submission of a petition for review, applicants for a waiver and persons who submitted comments in response to a **Federal Register** notice may request the Administrator not to review a waiver, waiver denial, or waiver revocation.

(2) Such petitions and responses may be sent by facsimile to the Secretary, Maritime Administration, at (202) 366-9206. To the extent possible, each petitioner or respondent should send a copy of their petition or response to other interested parties by facsimile at the same time the submission is made to MARAD. The Administrator will decide whether to take review within



two (2) business days following the time for submission of a request that the Administrator not take review. If the Administrator takes review, the determination by the Director, Office of Ports and Domestic Shipping, will be stayed until final disposition. If review is not taken, the determination by the Director, Office of Ports and Domestic Shipping, will become final two (2) business days after the time for submission of requests that the Administrator not take review. If the last day of a time limit falls on a Saturday, Sunday, or Federal holiday, the time is extended to the next business day. In the absence of any petition for review, the determination by the Director, Office of Ports and Domestic Shipping will become final within ten (10) business days. Each decision to grant, deny, or revoke a waiver will be made in writing, and a copy of the written decision will be provided to each applicant and other parties to the decision. The Secretary, MARAD, may extend any of the time limits for good cause shown.

#### **§ 388.7 Sunset provision.**

We will grant no waivers on or after September 30, 2002.

Dated: February 7, 2000.

By Order of the Maritime Administrator.

**Joel C. Richard,**

*Secretary.*

[FR Doc. 00-3176 Filed 2-10-00; 8:45 am]

BILLING CODE 4910-81-P

## **FEDERAL COMMUNICATIONS COMMISSION**

### **47 CFR Part 51**

[CC Docket No. 98-147; FCC 99-330]

#### **Deployment of Wireline Services Offering Advanced Telecommunications Capability**

**AGENCY:** Federal Communications Commission

**ACTION:** Final rule.

**SUMMARY:** This document addresses whether the discounted resale obligation of section 251(c)(4) applies to incumbent LEC provision of advanced services without regard to their classification as telephone exchange or exchange access. The Commission determines that analysis of section 251(c)(4) requires a fact-specific evaluation of the features and characteristics of a particular transaction, and concludes that advanced services sold at retail by incumbent LECs to residential and business end-users are subject to the

section 251(c)(4) discounted resale obligation, without regard to their classification as telephone exchange service or exchange access service. The Commission, however, reaches a different result as to advanced services sold to Internet Service Providers for inclusion in a high-speed Internet service offering, concluding that these advanced services are inherently different from advanced services made available directly to business and residential end-users, and as such, are not subject to the discounted resale obligations of section 251(c)(4).

**DATES:** Effective March 13, 2000.

**FOR FURTHER INFORMATION CONTACT:** Staci Pies, Attorney Advisor, Common Carrier Bureau, Policy and Program Planning Division, 202-418-1580.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Second Report and Order (Second R&O), in CC Docket No. 98-147, adopted November 2, 1999, and released November 9, 1999. This Second Report and Order addresses the issue raised in the Notice of Proposed Rulemaking in this docket (*Advanced Services Order and NPRM*), 63 FR 45246, August 25, 1998. On December 22, 1999, the Commission released an Errata correcting various ministerial errors in the Second R&O. The complete text of the Second R&O and the Errata is available for inspection and copying during normal business hours in the FCC Reference Information Center, Courtyard Level, 445 12th Street, S.W., Washington, D.C. and also may be purchased from the Commission's copy contractor, International Transcription Services (ITS Inc.), CY-B400, 445 12th Street, SW, Washington, DC.

#### **Synopsis of the Second Report and Order**

##### *I. Introduction*

1. The Second R&O concludes, based on an examination of the statutory language, the Act's purpose, and the specific facts, that advanced services sold to residential and business end-users are subject to the section 251(c)(4) discounted resale obligation, without regard to their classification as telephone exchange service or exchange access service. Moreover, the Second R&O concludes that advanced services sold to Internet Service Providers under volume and term discount plans are inherently and substantially different from advanced services made available directly to business and residential end-users, and as such, are not retail services and are not subject to the discounted resale obligations of section 251(c)(4).

##### *II. Discussion*

2. The Second R&O finds that advanced services are telecommunications services that predominantly are offered to residential and business end-users and to Internet Service Providers—all subscribers that are not telecommunications carriers. Moreover, advanced services made available directly to business and residential end-users are provided "at retail."

3. The Second R&O finds that although Congress used the term "at retail" to identify the types of transactions that are subject to a wholesale discount, it is not clear how the Commission should interpret the term. The Act does not define the term "at retail," and the legislative history on section 251(c)(4) provides only minimal clarification of Congress' intentions with regard to the appropriate definition and application of the term. Although the legislative history suggests that the Commission should interpret section 251(c)(4) in such a way so as to create affordable resale opportunities in order to stimulate the development of local competition, while still allowing incumbents to recover their costs for providing these services, there is no indication in the legislative history that Congress considered how "at retail" should be construed in the context of the sale of data services to Internet Service Providers as an input component to their information service offerings to the ultimate end-user.

4. Webster's Unabridged Dictionary defines the term "retail" as "the sale of commodities, goods, articles, etc. individually or in small quantities or parcels directly to the consumer." Similarly, Black's Law Dictionary defines retail as "[a] sale for final consumption in contrast to a sale for further sale or processing (*i.e.*, wholesale) \* \* \* to the ultimate consumer." Based on these definitions, the Second R&O finds that retail transactions necessarily involve direct sales of a product or service to the ultimate consumer for her own personal use or consumption.

5. The Second R&O concludes that an Internet Service Provider is purchasing the DSL service for the sole purpose of combining the telecommunications service with its own information service and offering a new retail service, *i.e.*, high-speed Internet service, to the ultimate end-user. In this process, the Internet Service Provider adds value to the bulk DSL telecommunications service by dividing that service for individual consumer use and adding the Internet service, thus enabling the